No. 20-35012
[NO. 2:16-cv-01874-RSL, USDC, W.D. Washington]

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, et al.,

Plaintiff-Appellee,

v.

RAJU A. T. DAHLSTROM,

Defendant-Appellant.

ANSWERING BRIEF OF UNITED STATES

Appeal from the United States District Court
for the Western District of Washington at Seattle
The Honorable Robert S. Lasnik
United States District Judge

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Plaintiff Raju Dahlstrom sued the United States under the Federal Tort Claims Act for the decision of the Suak-Suiattle Tribal Council to terminate his employment with the Tribe. The United States has consented to be sued under the FTCA for certain torts committed by an Indian Tribe or a tribal employee. But a plaintiff who wants to bring an FTCA action for a tort committed by a tribe or a tribal employee must show that the alleged tortfeasor was carrying out a contract between the Tribe and the Bureau of Indian Affairs or the Indian Health Service transferring programs from the federal government to the Tribe under Indian Self-Determination and Education Assistance Act. The district court held that it lacked jurisdiction to hear Dahlstrom's claim because Dahlstrom failed to identify a provision of an ISDEAA contract that the Tribal Council was carrying out when it fired him. The district court correctly concluded that Dahlstrom failed to meet his burden and that his failure meant that it lacked jurisdiction to hear his claim against the United States, and its judgment should be affirmed.

Additionally, the discretionary function exception to the FTCA independently bars Dahlstrom's suit. Although the district court did not need to reach the discretionary function exception because it granted

summary judgment to the United States on the ground just described, this Court could affirm its judgment on that alternative basis, which was briefed in the district court.

ISSUES PRESENTED

I. Whether the district court correctly concluded that it lacked jurisdiction to hear Dahlstrom's claim against the United States under the FTCA that his discharge by the Sauk-Suiattle Indian Tribe was contrary to public policy.

II. Whether the discretionary function exception to the Federal Tort Claims Act bars jurisdiction over Dahlstrom's claim.

STATEMENT OF JURISDICTION

Dahlstrom invoked the jurisdiction of the district court under 28 U.S.C. §§ 1331, 1346(b). 3-ER-294. On November 4, 2019, the district court concluded that Dahlstrom's remaining claim against the United States was barred by sovereign immunity and entered judgment for the United States. 1-ER-5. On December 2, 2019 Dahlstrom moved to alter or amend the judgment. 1-ER-3. On December 4, 2019, the district court denied Dahlstrom's motion. 1-ER-3. On January 3, 2020, Dahlstrom filed a timely notice of appeal. 3-ER-320. This Court has jurisdiction to review the district court's conclusion that sovereign immunity bars Dahlstrom's suit under 28 U.S.C. § 1291.

STATEMENT OF FACTS AND PROCEDURE

I. Statutory background

A. The Federal Tort Claims Act

"Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *FDIC* v. *Meyer*, 510 U.S. 471, 475 (1994). The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b)(1), 2671-2680 ("FTCA"), provides a limited waiver of this immunity for suits by individuals "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b)(1).

B. The Westfall Act

The Federal Employees Liability Reform and Tort Compensation Act of 1988, Pub. L. No. 100-694, § 6, 102 Stat. 4563 (commonly known as the "Westfall Act"), amended the FTCA to provide that, if a federal employee is sued for a negligent or wrongful act or omission, and the Attorney General certifies that the employee was acting within the scope of office or employment, the United States shall be substituted as the defendant. 28 U.S.C. § 2679(d).

The provision applies on certification by the Attorney General or his designee "that the defendant employee was acting within the scope of his office or employment at the time of the incident out of which the claim arose." 28 U.S.C. § 2679(d)(1). The Attorney General has delegated to United States Attorneys the authority to certify that an employee was acting within the scope of his or her employment.

C. The Indian Self-Determination and Education Assistance Act

In 1975, Congress enacted the Indian Self-Determination and Education Assistance Act (ISDEAA), Pub. L. No. 93-638, 88 Stat. 2203. The Act directs the Secretary of the Department of the Interior and the Secretary of the Department of Health and Human Services, on the request of an Indian Tribe by tribal resolution, to enter into "self-determination contracts" with the Tribe to "plan, conduct, and administer" programs that would otherwise have been run by the federal government. *See* 25 U.S.C. § 5321 (formerly codified at 25 U.S.C. § 450f(1)); *Shirk* v. *U.S. ex rel. Dept. of Interior*, 773, F.3d 999, 1003 (9th

Cir. 2014).[1] These contracts are sometimes referred to as 638 contracts, after the public law section that authorized them.

D. FTCA coverage for tribes and tribal employees carrying out an ISDEAA contract

As originally enacted, the ISDEAA authorized the federal government to require Indian tribes to obtain liability insurance before entering into self-determination contracts. *See* 25 U.S.C. 450g(c), repealed by Pub. L. No. 100-472, § 201(b)(1), Oct. 5, 1988, 102 Stat. 2289. In 1990, however, Congress extended FTCA coverage to tribal employees carrying out responsibilities under a 638 contract similar to the FTCA coverage extended to federal employees under the Westfall Act. The statute, referred to here as Section 314, provides that tribes and tribal organizations should be "deemed" to be part of the Bureau of Indian Affairs of the Department of the Interior ("BIA") or the Indian Health Service of the Department of Health and Human Services ("IHS") while "carrying out" a contract or agreement entered into under the ISDEAA. Pub. L. No. 101-512, Title III, § 314, 104 Stat. 1959 (Nov. 5, 1990),

[1] The relevant provisions of the Indian Self-Determination and Education Assistance Act were originally codified at 25 U.S.C. § 450 *et. seq*. and were recently recodified at 25 U.S.C. § 5301 *et seq*.

codified as amended at 25 U.S.C. 450f note; *see generally* 136 Cong. Rec. H13444 (Oct. 27, 1990) (Conf. Rep. No. 101-971); H.R. Rep. No. 101-789, 101st Cong., 2d Sess. 72 (1990).[2]

Section 314 provides that (1) an Indian Tribe, tribal organization, or Indian contractor is "deemed" to be a federal agency while carrying out an ISDEAA contract, and that an employee of one of those entities is "deemed" to be a federal employee while carrying out an ISDEAA contract and acting within the scope of his or her employment; and (2) any common law tort action against any such entity or individual must be treated as an action against the United States under the Federal Tort Claims Act:

> With respect to claims resulting from the performance of functions ... under a contract, grant agreement, or any other agreement or compact authorized by the [ISDEAA], ... an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior or the Indian Health Service in the Department of Health and Human Services while carrying out any such contract or agreement and its employees are deemed employees of the Bureau or Service

[2] The extension of FTCA coverage to tribal employees performing functions under a 638 contract has never been codified and is often cited as 25 U.S.C. § 450f note. In the recodification described in footnote 1, the note was moved to 25 U.S.C. § 5321 note. This brief refers to the extension of FTCA coverage as Section 314 because it was first adopted as Section 314 of Pub. L. No. 101-512.

> while acting within the scope of their employment in carrying out the contract or agreement. * * * [A]ny civil action or proceeding involving such claims brought hereafter against any tribe, tribal organization, Indian contractor or tribal employee covered by this provision shall be deemed to be an action against the United States and will be defended by the Attorney General and be afforded the full protection and coverage of the [FTCA].

Pub. L. No. 101-512, Title III, § 314, 104 Stat. 1959 (Nov. 5, 1990), 25 U.S.C. § 5321 note.

Under Section 314 and implementing regulations, when a tribe or one of its employees is served with a summons and/or complaint alleging a tort claim under the FTCA, the Tribe or employee is required to forward the claim to the Department of the Interior or the Department of Health, depending on which agency was a party to the contract at issue. 25 C.F.R. § 900.209, 210 (Joint Interior Department and Health and Human Services (HHS) regulations implementing Section 314). The relevant agency then notifies the Attorney General of the claim, and the Attorney General (acting through the U.S. Attorney) decides whether to certify that the claim falls within the scope of Section 314. *See generally* 28 U.S.C. 2679(c), (d) (FTCA certification provisions).

E. The Tribal Self-Governance Act

The Tribal Self-Governance Act of 1994, Pub. L. No. 103-413, 108 Stat. 4250, Title II, § 204, added Title IV to the ISDEAA. The 1994 Act made permanent the Tribal Self-Governance Demonstration Project authorized by Title III of the Indian Self-Determination and Education Assistance Act Amendments of 1988, Pub. L. No. 100-472, 102 Stat. 2285. Under the Self-Governance Program, tribal contractors enter into self-governance contracts and annual funding agreements to plan, consolidate, and administer programs, services, and functions previously administered by the federal government. Congress thereafter amended Section 314 to make FTCA coverage applicable to claims arising from the performance of functions under a contract, compact, or funding agreement. Pub. L. 103-138, 107 Stat 1379 § 308 (Nov. 11, 1993); *see also* 25 U.S.C. § 5321 note.

II. Factual background

A. The Sauk-Suiattle Tribe's self-determination agreements

The Sauk-Suiattle Tribe is a federally recognized Tribe. *Indian Entities Recognized and Eligible to Receive Services From the United States Bureau of Indian Affairs*, 81 Fed. Reg. 5022 (Jan. 29, 2016). The

Sauk-Suiattle Tribal Council is the governing body for the Tribe. 2-ER-119, 131-132.

In 1996, the Tribe entered into an ISDEAA contract with the IHS. 2-ER-89. The contract and the annual-funding agreements under it, transfer the funding and the functions, services, activities, and programs for hospitals and clinics, mental health, alcohol, public health nursing, and contract health services from IHS to the Tribe. 2-ER-95. Neither the contract nor the annual funding and scope of work agreements under the contract contain any provisions governing the Tribal Council's human resources decisions. 2-ER-90.

In 2005, the Tribe entered into an ISDEAA contract with the BIA. 1-SER-27, 1-SER-30. That contract conveyed certain additional federal programs, services, functions, and activities from the BIA to the Tribe, including Indian Child Welfare, education, wildlife/fish, tribal culture/enrollment, and rights protection. 1-SER-33. The agreement was later amended to add law enforcement. 1-SER-49. Like the IHS contract, the BIA contract and the annual-funding agreements under it

contain no provision for programs, functions, services or activities relating to human resources actions taken by the Tribal Council. 1-SER-28.

B. Dahlstrom's employment with the Tribe

Dahlstrom worked for the Tribe from 2010 to 2015. 3-ER-180. He first started working for the Tribe as a social worker in 2010. 2-ER-29; 2-SER-219. In April 2015, the Tribal Council named him the Interim Director of the Health and Social Services Department, and in September 2015, the Tribal Council named him the Director of that department. 2-SER-221-222.

In October 2015, Dahlstrom was placed on administrative leave, and in December 2015, the Tribal Council terminated his employment. 2-ER-132, 2-SER-224, 226, 228. The managing director of the Tribe recommended to the Tribal Council that it terminate Dahlstrom's employment for lack of productivity and failure to work cooperatively with his colleagues. 2-ER-132. The Tribal Council voted on the termination decision. 2-SER-226. During the full period of his employment, Dahlstrom was an at-will employee of the Tribe. 2-ER-132; 2-SER-236-239.

C. Dahlstrom's claims

Dahlstrom alleges that shortly after he was named Interim Director of the Health and Social Services Department, he began a formal investigation into fraud, waste, and abuse. 3-ER-186. His investigation covered alleged mishandling and misuse of childhood vaccines by a doctor at the Tribe's health clinic; alleged violations of laws governing patient privacy at the health clinic; alleged abuse of the Indian Health Service Loan Repayment program; and alleged "double-dipping" into federal health-care funds. 3-ER-186-187. Dahlstrom alleges that he was placed on administrative leave and then removed from his position in retaliation for his investigation, his complaints to tribal officials, his written reports concerning these allegations, and formal grievances he filed including a grievance filed with the Tribal Council concerning alleged mishandling and misuse of childhood vaccines. 3-ER-187-203

1. Dahlstrom's suit

Dahlstrom filed a federal complaint bringing constitutional tort, *Bivens*, and common-law tort claims against a number of individuals including the chairman of the Tribal Council, the directors of human resources for the Tribe during the relevant period, the chief of tribal

police, and several health care providers who worked for the Tribe. 3-ER-181-183. The Attorney General certified that the chief of tribal police was acting within the scope of his employment and carrying out a contract between the Tribe and BIA at all times relevant to Dahlstrom's complaint and substituted the United States as defendant for the claims against the chief of police. 2-SER-353, 357.[3] The Attorney General did not certify that any of other individual defendants were acting within the scope of employment and carrying out an ISDEAA contract when they took the allegedly tortious acts described in the complaint.[4]

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[3] Dahlstrom alleged that the chief of tribal police subjected him to various intentional torts on the day of his termination. 2-ER 254.

[4] Dahlstrom also brought a separate suit under the False Claims Act against some of the same defendants and the Tribe. The United States did not intervene, and the district court dismissed the claim against the Tribe as barred by sovereign immunity. *United States of America ex rel. Raju Dahlstrom* v. *Sauk-Suiattle Indian Tribe of Washington, et al.*, No. 16-0052JLR (W.D. WA.), Docket Entry 8, June 27, 2016 *Notice of Election of Non-Intervention*; *Id.* at Docket Entry 39, March 21, 2017 *Order Granting in Part and Denying in Part Defendants' Motion to Dismiss* at 6-7. The court later granted summary judgment to the individual defendants, concluding that Dahlstrom's claims were "frivolous," "vexatious," and "brought for the primary purpose of harassing and embarrassing Individual Defendants." *Id.* at Docket Entry 79, August 29, 2019 *Order Granting Defendants' Motion for Summary Judgment and Denying Defendants' Motions in Limine as Moot* at 36. The court subsequently ordered Dahlstrom's counsel to pay attorney's fees, concluding that he had recklessly filed papers making

(continued . . .)

Although the Attorney General declined to certify that any other individual defendant was acting within the scope of employment in carrying out the contract during the events complaint of, and the United States accordingly was not substituted as a defendant to any of Dahlstrom's claims against other individual defendants, Dahlstrom also named the United States as a defendant to his suit. 2-ER-242-246. His first amended complaint contended that the United States was liable to him under the Federal Tort Claims Act for a variety of acts including the tribal council's decision to terminate his employment, which Dahlstrom alleged was a decision made in retaliation for protected activity. 2-ER-242-246, 311-319.

2. The United States moves to dismiss

The United States moved to dismiss Dahlstrom's first amended complaint. 3-ER-211. The motion argued that the complaint should be dismissed as barred by sovereign immunity because the Tribal Council

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"scurrilous statements" about the defendants. *Id*. at Docket Entry 105, *Order Regarding the Plaintiff's Notice of Bankruptcy, the Parties' Responses to the Court's Order to Show Cause, and Certain Motions* at 17-21. On April 9, 2021, Dahlstrom dismissed his appeal from the judgment in that case. *See Dahlstrom* v. *Community Natural Medicine PL, et al.*, No. 20-35368 (9th Cir.) (April 9, 2021 Docket Entry).

that fired Dahlstrom was not carrying out an ISDEAA contract when it fired him and thus could not be deemed part of the BIA or the IHS under Section 314. 3-ER-218-221. The district court declined to dismiss on that basis, concluding that Dahlstrom should be allowed to conduct discovery to clarify the scope of the relevant federal contracts. 1-ER-16-17, 2-SER-351-352.

The motion also argued that Dahlstrom's employment claims were barred by the discretionary function exception to the FTCA, 28 U.S.C. § 2680(a), and that his intentional tort claims for acts by the chief of tribal police were barred by the intentional tort exception to the FTCA, 28 U.S.C. § 2680(h). 3-ER-221, 228. The district court dismissed Dahlstrom's employment claim as barred by the discretionary-exception function except to the extent that he alleged termination in contravention to public policy, concluding that "violations of the First, Fifth, and/or Fourteenth Amendments could be used to show that defendants exceeded their discretion and are therefore not protected by the discretionary function exception." 1-ER-21. The court agreed that Dahlstrom's intentional tort claims were barred and dismissed those claims. 1-ER-21-22.

3. The United States moves to dismiss again

Dahlstrom subsequently filed a second amended complaint, and the United States again moved to dismiss. 2-ER-158, 3-ER-177. The second motion to dismiss argued that Dahlstrom's claims did not come within the FTCA's waiver of sovereign immunity and failed to state claims upon which relief could be granted. 2-ER-167-174.

The district court granted the motion in part. 1-ER-8. It dismissed Dahlstrom's constitutional tort claims against the United States, concluding that "the FTCA does not waive the United States' sovereign immunity for federal constitutional tort claims" and the "ISDEAA does not alter that analysis." 1-ER-10. But the court also concluded that Dahlstrom's claim for wrongful discharge in violation of public policy—that is, his claim that he was fired for "alleged whistle-blowing activities regarding the medical services provided to the Sauk-Suiattle Indian Tribe and fraud, waste, and abuse under the tribe's ISDEAA contract"—"may fall within the FTCA's waiver of sovereign immunity." 1-ER-11.

The court accordingly denied the motion to dismiss as to that claim. 1-ER-15.[5]

4. The district court dismisses the claims against the individual defendants

The district court subsequently granted the individual defendants' motion for summary judgment. 2-SER-346. The court dismissed Dahlstrom's wrongful discharge claim on the ground that such a claim cannot be asserted against any entity other than the plaintiff's employer—that is, the Tribe—and accordingly Dahlstrom could not sue the individual defendants for that tort. 2-SER-348-349. The court also concluded that Dahlstrom's "claims arising under the United States Constitution, whether pursued under 42 U.S.C. § 1983 or through some other avenue, and the Affordable Care Act" should be dismissed because Dahlstrom's response to the defendants' motion did not specifically

[5] Washington's common-law tort of wrongful discharge in violation of public policy is a narrow exception to its general at-will employment regime. *Danny* v. *Laidlaw Transit Svcs., Inc.*, 165 Wash. 2d 200, 207 (2008). To sustain the tort of wrongful discharge in violation of public policy, an employee must establish: (1) the existence of a clear public policy; (2) that discouraging the conduct in which she or he engaged would jeopardize the public policy; (3) that the public-policy-linked conduct caused the dismissal; and (4) the employer must not be able to offer an overriding justification for the dismissal. *Id.* at 207 (internal citations omitted).

oppose dismissal of those claims. 2-SER-348. Finally, the court concluded that "[to] the extent that there are other claims hidden within the Second Amended Complaint," those claims should be dismissed for "failure to comply with Fed. R. Civ. P. 8 and the Court's prior order." 2-SER-348.

5. The United States moves for summary judgment

After these decisions, only one claim remained: Dahlstrom's claim against the United States that the Tribal Council discharged him in contravention of public policy. After discovery, the United States moved for summary judgment on that claim. 2-ER-136. The motion for summary judgment renewed the argument that the Tribal Council should not be deemed part of the BIA or the IHS for purposes of Dahlstrom's wrongful termination claim because the Tribal Council's decision to terminate Dahlstrom's employment did not constitute carrying out either the IHS contracts or the BIA contracts and accordingly the United States was immune from suit on Dahlstrom's claims. 2-ER-137, 145-147.

In support of the motion, the United States submitted the relevant ISDEAA contracts and agreements and declarations from two federal

officials regarding the scope of the contracts. 2-ER-92-115, 119-120, 1-SER-26, 30. Rena Macy, the Chief Proposal Liaison Officer for the Portland Area Indian Health Service with the United States Department of Health and Human Services, stated that the "programs, functions, services, and activities identified in the [Annual Funding Agreement] and [Scope of Work for that agreement] do not provide for an administration, oversight, or human resource actions taken by the Tribal Council." 2-ER-90. Cheryl Barnaby, an Indian Self-Determination Specialist for the Bureau of Indian Affairs Office of Indian Services, Spokane Agency, likewise averred that no provision of the contracts between the Sauk-Suiattle Tribe and the BIA relate to human resources actions taken by the Tribal Council. 1-SER-28.

Relying on these declarations and the contracts themselves, the motion argued that the Tribal Council's decision to terminate Dahlstrom's employment did not constitute carrying out a federal contract, and accordingly that Dahlstrom's claim was not a claim that could be treated as a claim against the United States under Section 314. 2-ER-145. The motion argued that "no provision of any self-determination contract between the Tribe and the United States covers

the Tribe's human resources actions of terminating Plaintiff's employment," 2-ER-145-146, and instead the Tribal Council had the power to terminate Dahlstrom's employment under the Tribe's own law and policies, 2-ER-147.

The United States also renewed the argument that Dahlstrom's claim was barred by the discretionary function exception to the FTCA. 2-ER-148-153. And it argued that Dahlstrom could not prove wrongful discharge on the merits because the record showed that he was terminated for unproductivity and failure to work cooperatively, not for whistleblowing. 2-ER-153.

Dahlstrom opposed the motion. He argued that "in the scope of his employment as Health & Social Service Director, he was carrying out work authorized by an ISDEAA contract." 1-ER-6. Dahlstrom relied on his own role under the contract and did not offer any theory that the Tribal Council was carrying out an ISDEAA contract when it terminated his employment. 1-SER-14.

6. The district court grants summary judgment on the last remaining claim

The district court granted summary judgment to the United States. 1-ER-5. In the written order, the court noted that a plaintiff who brings

an FTCA suit alleging torts resulting from functions under an ISDEAA contract has the burden of establishing jurisdiction and accordingly the burden of "identify[ing] which contractual provision the alleged tortfeasor was carrying out at the time of the tort." 1-ER-6. The court explained that Dahlstrom's contention that he was himself carrying out work authorized by an ISDEAA contract was not a basis for concluding that the Tribal Council was carrying out the contract when it fired him. 1-ER-6. Because Dahlstrom failed to identify any provision of a contract that the Tribal Council was carrying out when it fired him, he failed to show that the Tribe should be deemed part of the BIA or the IHS under Section 314, and Dahlstrom's retaliation claim was accordingly barred by sovereign immunity. 1-ER-6. As such, the court entered judgment for the United States. 1-ER-6.

7. The district court denies reconsideration

Dahlstrom moved for reconsideration, renewing his argument that his termination constituted carrying out the contract because his role as the Tribe's Health and Social Services Director involved carrying out the contract. 1-ER-2. The district court denied his motion, concluding again that the fact that the tribal employee filling the role of the Health and

Social Service Director "could be deemed an employee of the Bureau of Indian Affairs ("BIA") for purposes of the FTCA is irrelevant." 1-ER-2. The court explained that "for purposes of the sovereign immunity analysis," the issue "is whether the alleged tortfeasor—not the injured party—was carrying out the contract when it decided to terminate plaintiff's employment." 1-ER-2. Because Dahlstrom did not show that the Tribal Council "was performing functions under an ISDEAA contract when it terminated [his] employment," the Tribal Council "is not 'deemed' to be an employee of the BIA and the FTCA's waiver of sovereign immunity does not apply." 1-ER-3.

SUMMARY OF ARGUMENT

The district court correctly concluded that Dahlstrom failed to show that the Tribal Council was carrying out an ISDEAA contract when it terminated Dahlstrom. The Tribal Council was acting under tribal authority when it fired Dahlstrom, it cannot be deemed part of the BIA or the IHS under Section 314 for purposes of Dahlstrom's suit, and sovereign immunity accordingly bars Dahlstrom's claim. Whether Dahlstrom or any other actor he identifies might have themselves been

acting within the scope of employment and carrying out an ISDEAA contract is beside the point.

Additionally, while the district court did not reach the question when ruling on the motion for summary judgment, this Court could dismiss on the alternative ground that Dahlstrom's wrongful discharge claim is barred by the discretionary function exception to the FTCA's waiver of immunity to suit. The Tribal Council's decision to terminate Dahlstrom was not constrained by any federal law or policy, and it implicated policy concerns because deciding who serves as director of a tribal program affects the efficacy of the program, tribal self-determination, and the well-being of the Tribe.

ARGUMENT

I. The district court correctly concluded that Dahlstrom failed to meet his burden of showing that the act he complained of was within Section 314's coverage

While Dahlstrom's brief sets out extensive, difficult to follow factual allegations—including factual allegations that are new on appeal—his argument is a narrow one. He challenges (Br. 55-59) only the district court's conclusion that he had not shown that the Tribal Council should be deemed to have been part of the BIA or the IHS when it fired him such

that he could sue the United States under the FTCA for the Tribal Council's decision. His challenge lacks merit.

A. Dahlstrom failed to show that the Tribal Council was carrying out a provision of an ISDEAA contract when it terminated his employment

The United States' consent to suit under the FTCA for the acts of a tribe is limited. *Shirk* v. *U.S. ex rel. Dept. of Interior*, 773 F.3d 999, 1003 (9th Cir. 2014). A plaintiff who seeks to sue the United States under the FTCA for the acts of a tribe must show that the Tribe should be "deemed" part of the BIA or the IHS under Section 314 for purposes of the suit. *Id.* at 1003-1004.

Section 314 has slightly different provisions governing suits asserting claims for the acts of a tribe and the acts of a tribal employee. It provides that "an Indian tribe, tribal organization or Indian contractor is deemed hereafter to be part of the Bureau of Indian Affairs in the Department of the Interior or the Indian Health Service in the Department of Health and Human Services while carrying out any such contract or agreement" and that tribal employees "are deemed employees of the Bureau or Service while acting within the scope of their

employment in carrying out the contract or agreement." 25 U.S.C. § 5321 note.

In *Shirk*, the allegedly tortious act was committed by a tribal employee, not a tribe or tribal organization, so the Court focused on the provision of Section 314 that applies to tribal employees and concluded that the key question for determining whether a tribal employee can be deemed an employee of the BIA or the IHS is whether the employee was acting within the scope of his employment in carrying out the contract. *Shirk*, 773 F.3d at 1004. Where the plaintiff's claim concerns an act of a tribe, not a tribal employee, the "scope of employment" component does not apply. 25 U.S.C. § 5321 note. The key question in such a case is accordingly whether the Tribe was "carrying out" an ISDEAA contract or agreement.

Because the "'party asserting jurisdiction bears the burden of establishing subject matter jurisdiction,'" a plaintiff who brings suit against the United States for the act of a tribe or a tribal employee must "identify which contractual provisions the alleged tortfeasor was carrying out at the time of the tort." *Shirk,* 773 F.3d at 1006 (quoting *In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 546 F.3d 981,

984 (9th Cir. 2008)). To "'carr[y] out' a 'contract or agreement' is to 'to put [it] into execution.'" *Shirk*, 773 F.3d at 1005.

1. Dahlstrom did not satisfy his burden in district court

In district court, Dahlstrom tried to meet his burden of identifying a contractual provision that the alleged tortfeasor was carrying out at the time of the tort by showing that he himself was carrying out provisions of a contract between the Tribe and the IHS when he was fired—that is, he argued that his tort claim was covered by Section 314 because *he* was employed in a program transferred from the IHS to the Tribe in an ISDEAA contract. The district court rejected that argument, explaining that Dahlstrom's contention that he could be deemed an employee of the BIA or the IHS under Section 314 if he were sued for an act within the scope of his employment in carrying out an ISDEAA contract was "irrelevant" because the issue was "whether the *alleged tortfeasor*—not the injured party—was carrying out the contract when it decided to terminate plaintiff's employment." 1-ER-2 (emphasis added).

The district court's conclusion was correct. The "allegedly tortious act" in this case is the Tribal Council's decision to terminate Dahlstrom's employment. To satisfy *Shirk* and Section 314, Dahlstrom must show

that the *Tribal Council* was carrying out a contract when it fired him. *Shirk*, 773 F.3d at 1007.

Dahlstrom does not even attempt to meet that burden. As in district court, Dahlstrom's opening brief lists portions of the ISDEAA contract between the Tribe and IHS that "his position was responsible for 'carrying out,'" but no provisions that the Tribal Council was carrying out when it fired him. Br. 59-60, citing ER 2-ER-54-57, 2-ER-57-62. If it were enough to satisfy the *Shirk* test that an employee of the Tribe was terminated from a job in which he had some responsibility for carrying out an ISDEAA contract, then no one could be fired from a program under an ISDEAA contract without turning the decision into one of potential FTCA liability. Section 314 provides coverage for torts committed by a tribe or a tribal employee during the operation—the putting into execution—of programs that were previously federal. *Shirk*, 773 F.3d at 1005. It does not make the United States liable for a tribe's employment decisions simply because the decision concerned someone working in one of these programs.

2. Dahlstrom has forfeited any argument that the Tribal Council was carrying out a provision of an ISDEAA contract, and the Council was not in any event

In the district court, Dahlstrom did not even attempt to identify a provision of an ISDEAA contract that the Tribal Council was carrying out when it fired him. His opening brief on appeal also fails to identify any specific contract provision that the Tribal Council was carrying out. Any effort by Dahlstrom to argue in reply that the Tribal Council was carrying out a specific provision of one of the ISDEAA contracts would come too late. This Court should hold Dahlstrom to his double forfeiture and affirm the district court's conclusion that Dahlstrom failed to carry his burden under *Shirk*. *Greenwood* v. *FAA*, 28 F.3d 971, 977 (9th Cir. 1994).

There is in any event no such provision. Rena Macy, the Chief Proposal Liaison Officer for the Portland Area Indian Health Service with the United States Department of Health and Human Services, averred that the "programs, functions, services, and activities identified in the [Annual Funding Agreement] and its [Scope of Work] do not provide for any administration, oversight, or human resources actions taken by the Tribal Council." 2-ER-90. Cheryl Barnaby, an Indian Self-

Determination Specialist for the Bureau of Indian Affairs Office of Indian Services, Spokane Agency, of the Department of the Interior, likewise averred that the relevant BIA contracts include "no provision for [programs, functions, services, and activities] relating to human resources actions taken by the Tribal Council." 1-SER-28. These declarations and the contracts themselves make clear that the programs transferred from the federal government to the Tribe under the ISDEAA do not include a human resources program.

The absence of any contract provision relating to hiring, firing, and other personnel decisions makes sense. ISDEAA contracts transfer specific *programs* from the federal government to Indian tribes. But the tribes do not derive their authority to make personnel decisions from these contracts, even when those personnel decisions impact a person working in a transferred program. Instead, the Tribe's authority to fire Dahlstrom was based on tribal law, 2-SER-226, and the Tribe's authority to hire, promote, and fire tribal employees is independent of the contracts and the transferred programs. 2-ER-90, 2-ER-132, 2-SER-28. That is especially true for personnel decisions made by the Tribe's governing body.

Moreover, even if it might be possible to imagine a tribal employee whose role was so closely tied to a specific program that an employment decision regarding that employee could not be separated from carrying out the contract transferring that program from the BIA or the IHS to a tribe, Dahlstrom's role was not so closely tied to any transferred program. The Department that Dahlstrom headed, the Department of Health and Social Services, is not a program transferred by IHS to the Tribe under an ISDEAA contract. 2-ER-112. While the department includes some transferred programs, for example dental services and public health nursing, the department also includes other programs, such as medical transportation and safeguarding traditional healing practices. 2-ER-84 (job description), 2-ER-112 (provision of ISDEAA contract between IHS and Tribe listing transferred programs), 2-ER-123 (Tribe's description of the Department of Health and Social Services), 2-ER-125 (same). And the general manager of the Tribe explained in a declaration that the decision to terminate Dahlstrom belonged to the Tribal Council because Dahlstrom was a director of a tribal department, and "the termination of directors" is "susceptible to policy concerns" of the Tribe, some of which, such as the "needs of the Tribe" and "executive placements," have at best

only an indirect connection to carrying out or putting into execution a provision of an ISDEAA contract. 2-ER-132.

The United States' decisions on substitution also support the conclusion that the Tribal Council was not carrying out an ISDEAA contract when it terminated Dahlstrom. The United States substituted itself for the chief of tribal police based on the U.S. Attorney's certification that the Sauk-Suiattle Tribal Police Department is "a grantee under the Indian Self-Determination and Education Assistance Act" and the chief of police was carrying out law-enforcement duties under an ISDEAA contract between the Tribe and the BIA during the events alleged in the complaint. 2-SER-357. But the U.S. Attorney did not make a similar certification for any of the other individual defendants who Dahlstrom sued, including the head of the Tribal Council, and the head of the Tribal Council did not challenge the U.S. Attorney's decision not to certify. The United States' determination not to substitute, while not conclusive, is prima facie evidence of that the Tribe was not carrying out a contract when it terminated Dahlstrom's employment. *Cf. Billings* v. *United States*, 57 F.3d 797, 800 (9th Cir. 1995) (treating certification under the Westfall Act as prima facie evidence that employee was acting within the

scope of employment). And the Tribe's decision not to challenge the United States' non-certification similarly confirms that the Tribe did not believe that it was carrying out an ISDEAA contract when it terminated Dahlstrom.

B. This Court should reject Dahlstrom's new theory based on the Tribal Council's supervisory role

On appeal, Dahlstrom makes a new argument. He contends (Br. 58) that the district court overlooked "that the tribal council is the supervisor for all the employees that are responsible [for] carrying out the tribe's responsibilities under the contract" and argues (Br. 59) that the Tribal Council "were clearly to be considered employees of the United States of America under the straightforward terms of the FTCA" for that reason.

This Court should reject that argument because it is new on appeal, and Dahlstrom has accordingly forfeited it. 2-SER-2, 14 (Dahlstrom's opposition to Summary Judgment); *Bolker* v. *Comm'r*, 760 F.2d 1039, 1042 (9th Cir. 1985) (argument not made below is forfeited on appeal).

The Court should also reject the argument because it is fundamentally inconsistent with Section 314 and the *Shirk* test. The argument ignores the requirement that the alleged tortfeasor—in this

case, the Tribal Council—must be carrying out a specific provision of an ISDEAA contract. *Shirk*, 773 F.3d at 1005. The Tribal Council's supervisory authority over employees who have responsibility for carrying out ISDEAA contracts does not mean that the Tribal Council's decision to fire one of those employees constitutes carrying out an ISDEAA contract. Also, Dahlstrom does not even attempt to establish that the employees he lists—Metcalf, Morlock, and Waszak (Br. at 59)—were carrying out an ISDEAA contract during various events that he says influenced the Tribal Council's decision to fire him.

The United States has not waived immunity for claims arising out of the decisions of an Indian tribe whenever those decisions have some arguable connection to a program funded under an ISDEAA contract. Instead, it has waived immunity only for torts committed by a tribe or tribal employees for acts that, inter alia, actually involve carrying out an ISDEAA contract. *Colbert* v *United States*, 785 F.3d 1384 (11th Cir. 2015), on which Dahlstrom relies, is not to the contrary: it specifically recognizes that a tribe may be deemed "to be part" of the BIA or the IHS only "while carrying out [an] ISDEAA contract." *Id*. at 1390.

For all these reasons, this Court should reject Dahlstrom's bare assertion that the Tribal Council's supervisory role over tribal employees who work in ISDEAA programs means that the Tribal Council should be deemed part of the BIA or the IHS under Section 314 whenever it makes a personnel decision that affects one of those employees.

II. This Court could affirm on the alternative ground that the discretionary function exception bars Dahlstrom's claim

Although the district court did not reach the question, this Court could also affirm on the alternative theory that Dahlstrom's claim for wrongful discharge in violation of public policy is barred by the discretionary function exception.

The discretionary function exception is an exception of the FTCA's waiver of sovereign immunity for claims "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); *see also Chadd* v. *United States*, 794 F.3d 1104, 1108 (9th Cir. 2015) (explaining that the exception is designed 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.").

The United States bears the burden of showing that the discretionary function exception applies, and it satisfied that burden below. *Bailey* v. *United States*, 623 F.3d 855, 859 (9th Cir. 2010).

The discretionary function exception "marks the boundary between Congress' willingness to impose tort liability upon the United States and its desire to protect certain governmental activities from exposure to suit by private individuals." *United States* v. *Empresa de Viacao Aerea Rio Grandense (Varig Airlines*), 467 U.S. 797, 808 (1984). Recognizing that tort actions challenging the government's discretionary policy judgments could "seriously handicap efficient government operations," Congress enacted the discretionary function exception 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*. at 814.

The Supreme Court has established a two-part inquiry to guide application of the discretionary function exception. *United States* v. *Gaubert*, 499 U.S. 315, 322-23 (1991). First, a court must determine whether the conduct at issue was in fact "discretionary in nature," that is, whether it involved "an element of judgment or choice." *Id*. at 322. No

relevant discretion exists when a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow," because, in such cases, "the employee has no rightful option but to adhere to the directive." *Id*. (quoting *Berkovitz by Berkovitz* v. *United States*, 486 U.S. 531, 536 (1988)).

Second, a court must determine whether the discretion exercised was "of the kind that the discretionary function exception was designed to shield." *Gaubert*, 499 U.S. at 322-23 (internal quotations omitted). "The focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by the statute, but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Id*. at 325. The government need show only that the action giving rise to the claim is of the type grounded in social, economic, or political policy; it need not "prove that it considered these factors and made a conscious decision on the basis of them." *Kennewick Irr. Dist*. v. *United States*, 880 F.2d 1018, 1028 (9th Cir. 1989).

Dahlstrom specific tort claim is that his discharge violated public policy because the decision to discharge him was taken in retaliation for whistleblowing. A recent decision of this Court forecloses that claim.

See Miller v. *United States*, 2021 WL 1152310, 992 F.3d 878, (9th Cir. 2021).

In *Miller*, this Court considered a claim by a tribal police officer who was discharged by the Reno-Sparks Indian Colony, a federally recognized Indian Tribe, allegedly in retaliation for complaining about discrimination and workplace harassment.[6] Applying *Gaubert*, this Court explained that the Tribe had discretion to fire the police officer

[6] In *Miller*, the United States argued in the district court that the police officer's complaint should also be dismissed because he had failed to satisfy the *Shirk* test by identifying a provision of the contract between the Tribe and the BIA that the Tribe was carrying out when it discharged him, but the district court dismissed the officer's claim as barred by the discretionary function exception without reaching the carrying-out-the-contract question. *See Miller* v. *United States*, 17-cv-00121-MMD-WGC (D. Nev), Docket Entry 39, May 2, 2018 *Motion to Dismiss* at 12-13 (arguing that dismissal was warranted because "Plaintiff fails to identify what contractual provisions the Tribe was 'carrying out' when it extended Plaintiff's probation and terminated him."); Docket Entry 64, November 26, 2018 *Order* at 6-7 (noting that it had reviewed the parties' other arguments and concluded that they did not warrant discussion because they would not affect the outcome). On appeal, the United States did not renew the *Shirk* argument, and this Court concluded that the police officer "properly invoke[d] the FTCA, because the Tribe's Contract with the BIA specifies that, "[f]or the purpose of Federal Tort Claims Act Coverage," the Tribe and its employees "are deemed to be employees of the Federal government while performing work under this contract." *See Miller*, 2021 WL 1152310 at *4. Because the point was not contested and the Court did not explain why or how it concluded that the Tribe was "performing work under [the] contract" when it fired the officer, the decision is dicta on this point.

because the "decision to fire an employee is . . . one that, as a general matter, quintessentially involves a choice among options," and because the police officer failed to meet his "burden to identify a '*federal* statute, regulation, or policy' that constrained the Tribe's substantive discretion in a way that precludes applying the discretionary function exception." 2021 WL 1152310 at *5 (quoting *Berkovitz*, 486 U.S. at 536, *Sydnes* v. *United States*, 523 F.3d 1179, 1184 (10th Cir. 2008) (Gorsuch, J.)) (emphasis added by *Miller*).

In *Miller*, the Court explained that because "Tribes are expressly excluded from coverage under the relevant laws that would preclude a private employer or a federal agency from doing what the Tribe allegedly did here," federal anti-discrimination laws did not constrain the Tribe's discretion. 2021 WL 1152310 at *6. It also rejected the police officer's effort to show that procedural rights afforded in the contract between the Tribe and the BIA or in federal regulations constrained the "*substance* of the Tribe's decision to terminate him," explaining that to "defeat the discretionary function exception as to [his] retaliation-based claims," the police officer had to, "inter alia, point to some applicable federal statute, regulation, or policy that specifically proscribes such a retaliatory action

by the Tribe," and the "rules governing the procedure for making the termination decision does not establish such a proscription." *Id.*

The same conclusion applies here. Dahlstrom argued in district court that the Tribal Council lacked discretion to fire him in retaliation for whistleblowing because doing so violated his rights under the First, Fifth, and Fourteenth Amendment to the U.S. Constitution.[7] But the Sauk-Suiattle Tribe is a separate sovereign from the United States and is not regulated by the First, Fifth, or Fourteenth Amendments. Because those provisions of the Constitution did not constrain the Tribe's discretion to fire Dahlstrom, Dahlstrom's argument fails to show that any federal statute, regulation, or policy limited the Tribal Council's discretion. His claim is accordingly barred by the discretionary function exception.

[7] Dahlstrom also relied on "twelve federal statutes, the Sauk-Suiattle Indian Tribe's employee handbook, and a tribal code provision." 1-ER-19. In ruling on the United States' first motion to dismiss, the district court rejected Dahlstrom's suggested that any of these provisions limited the Tribe's discretion to fire Dahlstrom, explaining that the Tribe's "internal codes and policies do not represent federal law and cannot, therefore, waive the federal government's immunity from suit" and "[n]one of the federal statutes prescribes the circumstances in which plaintiff could be fired." 1-ER-19.

It is no answer that Dahlstrom's specific state-law tort claim alleges discharge in violation of public policy. At the motion-to-dismiss stage, the district court held that "violations of the First, Fifth, and/or Fourteenth Amendments could be used to show that defendants exceeded their discretion and are therefore not protected by the discretionary function exception." 1-ER-21. But that conclusion overlooks the fact that those provisions of the U.S. Constitution do not regulate the Tribe's decision-making. It is mistaken for the reason explained in *Miller* and *Syndes:* a state common-law claim for termination in violation of public policy cannot override the discretionary function exception to the FTCA's waiver of immunity. As the *Miller* court explained, "[u]nder the FTCA, state tort law is applied to the employee's conduct only after the federal discretionary function exception has been determined not to apply;" "there would be little, if anything, left to the discretionary function exception if it could be defeated by the very state tort law sought to be applied under the FTCA." *Miller*, 2021 WL 1152310 at * n. 3 (citing *Syndes*, 523 F.3d at 1184). And as the *Syndes* court explained, "[c]onsidering state tort law as a limit on the federal government's discretion at the jurisdictional stage impermissibly conflates the merits

of plaintiffs' claims with the question whether the United States has conferred jurisdiction on the courts to hear those claims in the first place." *Syndes*, 523 F.3d at 1184.

The discretionary function exception applies and bars Dahlstrom's claim. If this Court were to conclude that the United States can be sued under Section 314 and the FTCA for the Tribal Council's decision to fire Dahlstrom, it should affirm the district court's decision that it lacked jurisdiction on the alternative ground that the claim is barred by the discretionary function exception.

CONCLUSION

This Court should affirm the district court's judgment.

Respectfully submitted,

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STATEMENT OF RELATED CASES

Counsel for the United States is not aware of any related cases that should be considered with this matter.

CERTIFICATE OF COMPLIANCE

I am the attorney of record in this case.

This brief contains 7,941 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief complies with the word limit of Cir. R. 32-1.

Dated: April 26, 2021.

s/Teal Luthy Miller
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