UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

TERESSA MESTEK, Plaintiff, v. LAC COURTE OREILLES COMMUNITY HEALTH CENTER, LOUIS TAYLOR, (in both his personal and official capacity) JACQUELINE BAE, Ph.D., (in both her personal and official capacity) SHANNON STARR, M.D., (in both his personal and official capacity) SARA KLECAN, (in both her personal and official capacity) DAVID FRANZ, (in both his personal and official capacity) and MICHAEL POPP, in his personal capacity, Defendants.	)	Civil No. 21-cv-541

DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS

Introduction

Defendants move this Court to dismiss this action for lack of subject-matter jurisdiction and failure to state a claim upon which relief can be granted. Plaintiff, a former employee of the Lac Courte Oreilles Community Health Center ("LCO-CHC"), seeks remedies for an alleged retaliatory termination. But the federal False Claims Act ("FCA") does not allow Plaintiff's claims against Indian tribes. Instead, tribal sovereign immunity affirmatively blocks Plaintiff's

suit. Therefore, the Court must dismiss this case. In the alternative, Plaintiff failed to exhaust her tribal court remedies, as conditioned by the LCO-CHC policies controlling her employment, before she initiated this action in federal court. If the Court does not grant Defendants' motion to dismiss, the Court–out of comity to the Lac Courte Oreilles Tribal Court ("Tribal Court")–should hold this case in abeyance until Plaintiff properly exhausts her tribal court remedies.

Statement of the Facts and Case

Plaintiff brought this action after alleging Defendants terminated her from her position as LCO-CHC Director of Health Information for retaliation. Plaintiff claims Defendants terminated her because of her whistleblowing and other activities protected by law, including the FCA. Plaintiff filed this suit against Lac Courte Oreilles Band of Lake Superior Chippewa Indians (the "Tribe") Chairman Louis Taylor, the LCO-CHC, and LCO-CHC officials and employees including Health Director Jacqueline Bae, Medical Director Shannon Starr, Human Resources Director Sara Klecan, I.T. Director David Franz, and Consultant Michael Popp.

On August 24 2018, LCO-CHC terminated Plaintiff's employment at LCO-CHC. Ex. 1 – August 24, 2018 *Termination Letter*. On August 28, 2018, Plaintiff sent a letter to LCO-CHC officials and employees to appeal her termination. Ex. 2 – August 28, 2018 *Plaintiff's Appeal Letter*. On August 29, 2018, Defendant Jacqueline Bae denied Plaintiff's appeal, because the reason for Plaintiff's termination was not an appealable disciplinary action. Ex. 3 – August 29, 2018 *Appeal Denial Letter*.

The Tribe is a federally recognized Indian tribe. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 86 Fed. Reg. 7554, 7555 (Jan. 29, 2021). The Tribe established the LCO-CHC as a tribal governmental subdivision. Shuman Dec. ¶ 5. The Tribe operates the LCO-CHC in Hayward, Wisconsin within the exterior

boundaries of the Tribe's reservation. Shuman Dec. ¶ 6. The LCO-CHC provides health programs and services to Tribal members and other eligible individuals. Shuman Dec. ¶ 5-8.

As a condition of Plaintiff's employment, she signed a *Consent to Grievance and Appeal Process* on September 5, 2013. Ex. 4 – September 5, 2013 *Consent to Grievance and Appeal Process*. Through the *Consent to Grievance and Appeal Process*, Plaintiff consented to "the exclusive jurisdiction of the [LCO-CHC's] Grievance and Appeal Procedure sent forth in Article 12, and the jurisdiction of the [Lac Courte Oreilles] Tribal Court for all disputes in connection with [her] employment with the [LCO-CHC]." *Id*. She further waived "any right [she] may have to litigate in another court of law claims arising out of my employment." *Id.*

Argument

Under Federal Rule of Civil Procedure 12(b)(6), a defendant may motion the court to dismiss the case for the plaintiff's failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). In the Seventh Circuit, sovereign immunity is not a jurisdictional issue. *Meyers v. Oneida Tribe of Indians of Wis.*, 836 F.3d 818, 822 (7th Cir. 2016) (citations omitted). A sovereign's ability to waive sovereign immunity "demonstrates that the doctrine is non-jurisdictional." *Blagojevich v. Gates*, 519 F.3d 370, 371 (7th Cir. 2008) (citing *Lapides v. University of* Georgia, 535 U.S. 613 (2002)).[1] The question of jurisdiction "is only vital if the court proposes to issue a judgment on the merits." *Meyers*, 836 F.3d at 823 (citing *Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) (citation omitted)). Thus, the issue of sovereign immunity is construed as a motion to dismiss for failure to state a claim. *See Bruguier v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 237 F.Supp.3d 867, 871 (W.D. Wis. 2017). To survive a motion to dismiss, the "complaint must 'state a claim to

[1] "Sovereign immunity concerns the remedy rather than adjudicatory competence." *Blagojevich*, 519 F.3d at 371.

relief that is plausible on its face.'" *Jackson v. Blitt & Gaines, P.C.*, 833 F.3d 860, 862 (7th Cir. 2016) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). Federal court abstention in cases involving the exhaustion of tribal court remedies is a matter of comity and not a jurisdictional issue. *Stifel, Nicolaus & Co., Inc. v. Lac du Flambeau Band of Lake Superior Chippewa Indians*, 807 F.3d 184, 196 (7th Cir. 2015) (citing *Altheimer & Gray v. Sioux Manufacturing Corp*., 983 F.2d 803, 812-813 (7th Cir. 1993)).

I. The Court Must Dismiss All of Plaintiff's Claims for Failure to State a Claim and Lack of Subject Matter Jurisdiction

To sustain this action, Plaintiff must demonstrate that "person" includes the Tribe and the LCO-CHC. Plaintiff cannot do so. The text of the FCA and judicial precedent indicate that an Indian tribe or a tribal governmental subdivision is not a "person" under the FCA. Further, the failure of Plaintiff's FCA claim divests this Court of subject-matter jurisdiction over Plaintiff's Wisconsin law claims. The absence of a federal question in this case strips supplemental jurisdiction over any state claims under 28 U.S.C. § 1367. *Mains v. Citibank, N.A.*, 852 F.3d 669, 679 (7th Cir. 2017).

a. A Tribe is not a "person" under the FCA

Congress enacted the FCA in 1863 to address widespread fraud by "[private] contractors during the Civil War." *Vermont Agency of Natural Resources v. U.S. ex rel. Stevens*, 529 U.S. 765, 781 (2000) (citations omitted). The FCA prohibits "any person" from "knowingly presenting a false or fraudulent claim for payment or approval by the federal government." *Pfingston v. Ronan Eng'g Co.*, 284 F.3d 999, 1002-03 (9th Cir. 2002); 31 U.S.C. § 3729(a). Under the FCA, a private individual may bring a civil action for violations of the Act on their own behalf and on behalf of the United States. 31 U.S.C. § 3730(b)(1).

The FCA does not define "person." *See* 31 U.S.C. §§ 3729-3733. The term "person" has remained unchanged since the FCA's enactment despite amendments to the Act. *Stevens*, 529 U.S. at 783 n.12. In *Stevens*, the Supreme Court applied its "interpretative presumption" that "person" does not include a sovereign when it held states do not fall under the FCA definition of "person." *Stevens*, 529 U.S. at 780, 787-788. While the Supreme Court has not considered if the FCA applies to Indian tribes, other federal courts have scrutinized the application of the FCA to Indian tribes.

In *United States ex rel. Cain v. Salish Kootenai College, Inc* ("*Cain*"), former employees of a tribal college alleged the college, the college foundation, and college board members knowingly provided fraudulent information to the federal government in violation of the FCA. *United States ex rel. Cain v. Salish Kootenai College, Inc.*, 862 F.3d 939, 940-941 (9th Cir. 2017). The court first addressed whether an Indian tribe was a "person" under the FCA before determining if the tribal college and the other defendants were entitled to sovereign immunity. *Cain*, 862 F.3d at 941. The applicability of sovereign immunity is only necessary if a tribe could even exercise its sovereign immunity under the FCA.[2] The court relied on *Stevens* to hold a tribe is not a "person" subject to suit under the FCA. *Id*. at 943. *Cain* reasoned the presumption that "'person' does not include the sovereign" also extends to tribes. *Id*. at 942 (citing *Stevens*, 529 U.S. at 780). Further, the FCA does not mention tribes and does not indicate the mandatory, "affirmative showing" that Congress intended to include tribes in the term "person." *Id*. at 943.

Previously, in *U.S. v. Menominee Tribal Enterprises*, the United States brought a FCA action against a tribal economic agency and two of its employees alleging the tribal defendants

[2] "If the [tribal college] is a sovereign entity to which Congress didn't intend the FCA to apply, the College cannot make the FCA apply to itself by voluntarily waiving its sovereign immunity; if the [tribal college] is not a sovereign entity and therefore is a "person" under the FCA, it has no sovereign immunity to waive." *Cain*, 862 F.3d at 941.

submitted fraudulent invoices to the Bureau of Indian Affairs for forestry and road management services. *U.S. v. Menominee Tribal Enterprises*, 601 F.Supp.2d 1061, 1064-1065 (E.D. Wis. 2009). The court held the rationale of *Stevens* equally applied to Indian tribes as it did to states. *Menominee Tribal Enterprises*, 601 F.Supp.2d at 1068; *cf. Cook County, Ill. V. U.S. ex rel. Chandler*, 538 U.S. 119 (2003) (municipalities fell under the FCA definition of "person" because municipalities can be sued). The court reasoned the FCA lacked affirmative evidence that Congress intended to abrogate tribal sovereign immunity. *Menominee Tribal Enterprises*, 601 F.Supp.2d at 1068. Thus, the court held tribes were not "persons" under § 3729(a) of the FCA. *Id*. at 1068.

Other federal courts have similarly held an Indian tribe is not a "person" under the FCA. *See e.g., Kendall v. Chief Leschi School, Inc.*, No. C07-5220, 2008 WL 4104021, at *1 (W.D. Wash. 2008) (citing *Stevens*, 529 U.S. at 779) ("As a sovereign, the Puyallup, like the State of Vermont, are free from suit under this act."); *Howard v. Shoshone-Paiute Tribes of the Duck Valley Indian Reservation*, No. 13-16118, 608 Fed.Appx. 468 (9th Cir. 2015) (citing *Stevens*, 529 U.S. at 778-87) (former tribal health facility employees brought a FCA action against a Tribe for Medicare/Medicaid fraud); *Dahlstrom v. Sauk-Suiattle Indian Tribe*, No. C16-0052JLR, 2017 WL 1064399, at *3 (W.D. Wash. 2017) (citing *Howard*, 608 Fed.Appx. 468) (a former tribal health director filed a FCA action against a tribe and others).

Here, the Court should extend *Stevens* to the Tribe and hold the Tribe is not a "person" under the FCA. *Cain*, 862 F.3d at 942 ("Thus, the Tribe, like other federally recognized Indian tribes, is presumptively excluded for the term "person."). When determining if a federal statute applies to Indian tribes, federal statutes "are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit." *County of Yakima v. Confederated Bands of*

the Yakima Indian Nation, 502 U.S. 251, 269 (1992) (quoting *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)). The FCA definition of "person" and the entire text of the FCA do not expressly include Indian tribes. 31 U.S.C. §§ 3729-3733; *Cain*, 862 F.3d at 943; *Menominee Tribal Enterprises*, 601 F.Supp.2d at 1068. Nor has any version of the FCA included sovereigns. *See Stevens*, 529 U.S. at 783 n.12. Indian tribes, like states, possess inherent sovereign authority and sovereign immunity from suit. *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014).

The presumption that "'person' does not include the sovereign" naturally extends to the Tribe in this matter. *Cain*, 862 F.3d at 942 (citing *Stevens*, 529 U.S. at 780). Like the tribal defendants in *Cain* and *Menominee Tribal Enterprises*, the Tribe's sovereignty and self-determination are threatened by Plaintiff's unsupported FCA suit. The Tribe and the LCO-CHC share the same sovereign attributes as other tribes, tribal health facilities, tribal schools, and tribal agencies. *Cain*, 862 F.3d at 942; *Menominee Tribal Enterprises*, 601 F.Supp.2d at 1068; *Kendall*, 2008 WL 4104021, at *1; *Howard*, 608 Fed.Appx. 468; *Dahlstrom*, 2017 WL 1064399, at *3. Additionally, the FCA does not mention tribes and does not indicate the mandatory, "affirmative showing" that Congress intended to include tribes in the term "person." *Cain*, 862 F.3d at 943; *Menominee Tribal Enterprises*, 601 F.Supp.2d at 1068.

Thus, the Tribe, like states, is not a "person" under the FCA. *Cain*, 862 F.3d at 942 (citing *Stevens*, 529 U.S. at 780); *Menominee Tribal Enterprises*, 601 F.Supp.2d at 1068. The Court should dismiss this action because the FCA does not allow suits against Indian tribes.

b. The Court lacks supplemental jurisdiction to hear Plaintiff's Wisconsin law claims

The Court must dismiss Plaintiff's claims for lack of subject-matter jurisdiction because Plaintiff's FCA claims are not colorable and do not support supplemental jurisdiction over the

Wisconsin law claims. If a claim falls outside this Court's jurisdiction, Rule 12(b)(1) "allows a party to move to dismiss a claim for lack of subject matter jurisdiction." *Hallinan v. Fraternal Order of Police of Chicago*, 570 F.3d 811, 820 (7th Cir. 2009). "A frivolous federal law claim cannot successfully invoke federal jurisdiction." *In re African-American Slave Descendants Litigation*, 471 F.3d 754, 757 (7th Cir. 2006). "When a district court does not have subject-matter jurisdiction over federal claims, it cannot exercise supplemental jurisdiction over any state claims under 28 U.S.C. § 1367." *Mains*, 852 F.3d at 679 (citation omitted).

Here, the failure of Plaintiff's FCA claim negates this Court's supplemental jurisdiction over Plaintiff's Wisconsin-law claims. The FCA does not permit suits against the Tribe, because an Indian tribe is not a "person" under the FCA. 31 U.S.C. § 3729(a); *see Cain*, 862 F.3d at 942 (citing *Stevens*, 529 U.S. at 780); *Menominee Tribal Enterprises*, 601 F.Supp.2d at 1068. Without the FCA claim, Plaintiff does not pose a federal question that invokes this Court's federal jurisdiction. *In re African-American Slave Descendants Litigation*, 471 F.3d at 757. Absent federal jurisdiction, the Court lacks any jurisdiction over Plaintiff's Wisconsin law causes of action. Dismissal of the FCA claim strips the Court of supplemental jurisdiction. *Mains v. Citibank, N.A.*, 852 F.3d at 679. Thus, the Court should dismiss Plaintiff's Wisconsin law claims, because the Court lacks subject matter jurisdiction under 28 U.S.C. § 1367.

II. Tribal Sovereign Immunity Blocks All of the Claims Raised Against All of the Defendants

As a sovereign, the Tribe possesses tribal sovereign immunity from suit. Here, tribal sovereign immunity shields Chairman Taylor, the LCO-CHC, and LCO-CHC officials and employees from this suit that requires dismissal of this action.

a. The LCO-CHC is immune from suit

Indian tribes are "separate sovereigns pre-existing the Constitution." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978). As sovereigns, tribes possess and continue to exercise "inherent sovereign authority." *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). "Among the core aspects of [this] sovereignty . . . is the common-law immunity from suit traditionally enjoyed by sovereign powers." *Bay Mills*, 572 U.S. at 788. Tribal sovereign immunity also extends to tribal government subdivisions. *Hagen v. Sisseton-Wahpeton Community College*, 205 F.3d 1040, 1043 (8th Cir. 2000) (holding a tribal college charted, funded, and controlled by the Tribe serves as an arm of the tribe and is entitled to tribal sovereign immunity); *see also Dillon v. Yankton Sioux Tribe Housing Auth.*, 144 F.3d 581, 583 (8th Cir. 1998) (housing authority established by tribal council is a tribal agency entitled to tribal sovereign immunity); *Pink v. Modoc Indian Health Project*, 157 F.3d 1185, 1188 (9th Cir. 1998) (nonprofit health corporation created and controlled by a Tribe is entitled to tribal sovereign immunity). A tribe's sovereign immunity extends to its government agencies and subdivisions without requiring the tribe's governing body to micromanage every agency and subdivision decision.

"The baseline position . . . is tribal immunity; and to abrogate such immunity, Congress must unequivocally express that purpose." *Bay Mills*, 572 U.S. at 790. An intent to abrogate "cannot be implied." *Martinez*, 436 U.S. at 58. "That rule of construction reflects an enduring principle of Indian law: Although Congress has plenary authority over tribes, courts will not lightly assume Congress in fact intends to undermine Indian self-government." *Bay Mils*, 572 U.S. at 790. In rare instances, Congress expressly references Indian tribes in a statute when it intends to abrogate tribal sovereign immunity. *See*, *e.g.*, Resource Conservation and Recovery Act of 1976, 42 U.S.C. §§ 6972(a)(1)(A), 6903(13), 6903(15) (authorizing suits against an

"Indian tribe"); Safe Water Drinking Act of 1974, 42 U.S.C. §§ 300j-9(i)(2)(A), 300f(10), 300f(12) (authorizing suits against an "Indian tribe"); Fair Debt Collection Procedures Act, 28 U.S.C. §§ 3002(7), 3002(10) (allowing garnishment proceedings against a "person," which includes "a natural person (including an individual Indian) . . . or an Indian tribe"). The U.S. Supreme Court has recognized that "determining the limits on the sovereign immunity held by Indians is a *grave* question." *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1654 (2018) (emphasis added). Thus, the requirement that Congress unequivocally express its intent to abrogate tribal sovereign immunity respects the graveness of this question. *See In re Greektown Holdings LLC*, 917 F.3d 451, 461 (6th Cir. 2019).

An Indian tribe can waive its sovereign immunity through a tribal resolution, a contract, or other means. *Stifel,* 807 F.3d at 202. A tribe's waiver of its immunity must be "clear." *C&L Enterprises, Inc. v. Citizen Band Potawatomi Tribe of Okla.*, 532 U.S. 411, 418 (2001). A tribal entity's waiver of sovereign immunity must constitute a "clear, unequivocal, and advertent waiver of sovereign immunity." *Harris v. Lake of the Torches Resort & Casino*, 2015 WI App 37U, ¶32. Any ambiguity of a waiver must be resolved in favor of immunity. *Meyers*, 836 F.3d at 827 (citing *F.A.A. v. Cooper*, 132 S. Ct. 1441, 1448 (2012)).

Here, the Tribe is a federally recognized Indian tribe. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 86 Fed. Reg. at 7555. The Tribe possesses sovereign immunity from suit absent congressional abrogation, or affirmative tribal waiver. *Bay Mills Indian Community*, 572 U.S. at 790; *C&L Enterprises*, 532 U.S. at 418. The Tribe has not waived its sovereign immunity to allow Plaintiff's claim in federal court. Only the Tribe's Tribal Governing Board may waive the Tribe's sovereign immunity and it must do so through an express resolution. Ex. 5 - Sovereign Immunity Code of

the Lac Courte Oreilles Band of Lake Superior Chippewa Indians, 2 LCOTCL § 5.303; *see also Stifel*, 807 F.3d at 202. The *Amended Complaint* does not allege that the Tribe expressly waived its sovereign immunity to FCA suits through a resolution as required by tribal law.

The LCO-CHC is a governmental subdivision of the Tribe entitled to tribal sovereign immunity. The Tribe established the LCO-CHC as a tribal governmental subdivision. Shuman Dec. ¶ 5.. As a "governmental subdivision" of the Tribe, the LCO-CHC must be afforded tribal sovereign immunity. *Bruguier v.*, 237 F.Supp.3d at 876 (tribal business development corporation established by Tribe's constitution and solely owned by the Tribe was protected by sovereign immunity) (citations omitted). This Court has recognized that an Indian tribe's sovereign immunity extends to tribal corporations. *Id.*; *Wells Fargo Bank, N.A. v. Lake of the Torches Econ. Dev. Corp.*, 677 F. Supp. 2d 1056, 1061 (W.D. Wis. 2010) ("in the absence of a clear waiver, suits against tribes (and tribal corporations) are barred by sovereign immunity."). The recognition of a tribal government subdivision's immunity is a natural extension of this precedent. *Id*. Additionally, the Tribe's Tribal Governing Board has not waived the LCO-CHC's immunity from suit. Ex. 5 - 2 LCOTCL § 5.303.

Plaintiff alleges the Tribe and the LCO-CHC waived their sovereign immunity by receiving federal Medicare and Medicaid funds. *Amended Complaint*, at ¶29. Further, Plaintiff alleges receipt of those federal funds required the Tribe to abide by federal laws—like the FCA—and thus constituted a waiver of sovereign immunity. *Amended Complaint*, at ¶¶27, 29. However, a tribal agreement to comply with federal laws does not equate a waiver of sovereign immunity. *Dillon*, 144 F.3d at 584 (tribal agency's agreement with the Department of Housing and Urban Development to comply with federal statutes did not amount to a waiver of sovereign immunity); *Hagen*, 205 F.3d at 1044 n.2 ("Nor did the [tribal college] waive its immunity by

executing a certificate of assurance with the Department of Health and Human Services in which it agreed to abide by Title VI of the Civil Rights Act of 1964."). Plaintiff must point to a federal law that requires the Tribe to waive its sovereign immunity to receive these federal funds. *Dillon*, 144 F.3d at 584. Plaintiff does not do so. Rather, Plaintiff broadly claims receipt of such funds amounts to a waiver without citing a federal law mandating a waiver.

Thus, the LCO-CHC is a governmental subdivision of the Tribe cloaked by tribal sovereign immunity. Without an express waiver of tribal sovereign immunity, this suit must be dismissed against the LCO-CHC.

b. The tribal employees and officials are shielded by tribal sovereign immunity

Even though Indian tribes possess sovereign immunity, in *Lewis v. Clarke*, the Supreme Court held a tribal employee may be sued in his individual capacity when "the employee, not the tribe, is the real party in interest and the tribe's sovereign immunity is not implicated." *Lewis v. Clarke*, 137 S. Ct. 1285, 1288 (2017). A court must determine whether the relief sought is truly against the sovereign and cannot rely on the characterization of the parties in the complaint. *Lewis*, 137 S. Ct. at 1290 (citations omitted). In an official-capacity suit, "the relief sought is only nominally against the official and in fact is against the official office and thus the sovereign itself." *Lewis*, 137 S. Ct. at 1291 (citing *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985)). A plaintiff cannot evade tribal sovereign immunity by suing tribal officials in their individual capacities if relief would amount to specific performance against the tribe. *Tamiami Partners v. Miccosukee Tribe of Indians*, 177 F.3d 1212, 1225-1226 (11th Cir. 1999). "The critical inquiry is who may be legally bound by the court's adverse judgment, not who will ultimately pick up the tab." *Lewis*, 137 S. Ct. at 1292-1293.

The FCA may apply to tribal employees in their individual capacities. *Menominee Tribal Enterprises*, 601 F.Supp.2d at 1070-1071; *see also.*, *Dahlstrom*, 2017 WL 1064399, at *4 (citing

Stoner v. Santa Clara Cty. Office of Educ., 502 F.3d 1116, 1125 (9th Cir. 2007)) ("[J]ust as the reasoning of *Stevens* extends to provide Tribes with sovereign immunity, so too does the reasoning in *Stoner* extend to permit suits against individual tribal employees for 'actions taken in the course of their official duties.'"); *United States ex rel. Cain v. Salish Kootenai College, Inc.*, No. CV-12-181, 2019 WL 1643634, *4 (D. Mont. 2019) (citing *Stoner*, 502 F.3d at 1125) ("A tribal government employee sued in [their] personal capacity stands . . . as a person who may be subject to liability for knowingly submitting false information to the United States for purposes of FCA liability."). In *Menominee Tribal Enterprises*, the court held the tribal employees were "persons" under the FCA, because they were sued in their individual capacities and the U.S. sought recovery from them as individuals. *U.S. v. Menominee Tribal Enterprises*, 601 F.Supp.2d at 1071. An employee is sued in their official capacity when the recovery sought against the employee is tantamount to recovery against the Tribe and would impact the Tribe's sovereignty. *Id*., 601 F.Supp.2d at 1071.

Here, Chairman Taylor and the LCO-CHC officials and employees are all sued in their official capacities, because Plaintiff seeks relief against the LCO-CHC and effectively, the Tribe. Plaintiff seeks reinstatement, front pay, back pay, interest, special and compensatory damages, award for costs and attorneys' fees, and injunctive relief prohibiting Defendants from future retaliation, blacklisting, or interference with business. Such relief is truly against the LCO-CHC. *Lewis*, 137 S. Ct. at 1290. Plaintiff's sought relief amounts to damages from and specific performance by the LCO-CHC and the Tribe. *Miccosukee*, 177 F.3d at 1225-1226.

The Defendants can not individually provide the relief Plaintiff seeks outside of their official capacities or outside their scope of employment with the LCO-CHC. Thus, the sought relief here is only nominally against the individually named Defendants and is sought against

their official positions and the LCO-CHC. *Lewis*, 137 S. Ct. at 1291 (citation omitted). If the Court were to rule in Plaintiff's favor, the LCO-CHC and the Tribe would be legally bound by the judgment and would be financially responsible for any damages. *Lewis*, 137 S. Ct. at 1292-1293. The injunctive relief Plaintiff seeks for Defendants alleged interference with her prospective employment would be meaningless, because Plaintiff broadly alleges that the Defendants interfered with her attempts to secure employment elsewhere without particularized claims of such communications with other employers. Thus, Chairman Taylor and the LCO-CHC officials and employees are all entitled to tribal sovereign immunity in this action.

III. Plaintiff Failed to Exhaust Tribal Court Remedies as Conditioned by Her Employment with LCO-CHC

Alternatively, the Court should consider abstaining from hearing this dispute, because Plaintiff consented to Tribal Court jurisdiction and has failed to bring a civil action in Tribal Court. The tribal exhaustion rule requires litigants to exhaust their remedies in tribal court before seeking redress in federal court. *Stifel*, 807 F.3d at 195 (citing *Altheimer & Gray*, 983 at 812) (quotations omitted). The U.S. Supreme Court first recognized the tribal exhaustion rule in *National Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845 (1985). The Court reasoned tribal courts should first be afforded the opportunity to determine if it possesses jurisdiction over a dispute, because Congressional policy is committed to supporting tribal sovereignty and self-determination. *National Farmers*, 471 U.S. at 856. However, *National Farmers* suggested the tribal exhaustion rule would not apply if an assertion of tribal jurisdiction "'is motivated by a desire to harass or is conducted in bad faith,'" is "patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court's jurisdiction." *National Farmers.*, 471 U.S. at 856 n.251 (citations omitted).

The rule is based in comity considerations and federal court restraint from interfering with reservation affairs and tribal court authority. *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987). The basis for federal jurisdiction cannot refute the rule. *Iowa Mut.*, 480 U.S. at 16. Presumably, a tribal court "is competent to interpret federal law as it is state law.". *Altheimer & Gray*, 983 F.2d at 814 (citing *Iowa Mut.*, 480 U.S. at 19). When applying the rule, the Seventh Circuit looks to the facts of the case to determine if the case is a "reservation affair" entitled to the rule. *Stifel*, 807 F.3d at 196 (citing *Altheimer & Gray*, 983 at 814). The Seventh Circuit also considers whether requiring exhaustion of tribal remedies would serve the Congressional policies of supporting tribal sovereignty and self-determination. *Stifel*, 807 F.3d at 196 (citations omitted).

Here, Plaintiff consented to Tribal Court jurisdiction for all disputes regarding her employment at LCO-CHC. As a condition to her employment, Plaintiff acknowledged and signed a *Consent to Grievance and Appeal Process*. Ex. 4. Plaintiff consented to the "exclusive jurisdiction of the [LCO-CHC's] Grievance and Appeal Procedure set forth in Article 12, and the jurisdiction of the Tribal Court for all disputes in connection with [her] employment with the [LCO-CHC]." *Id*. All LCO-CHC employees must comply with the cited LCO Community Health Center Personnel Policies and Procedures of the Lac Courte Oreilles Band of the Lake Superior Chippewa Indians ("LCO-CHC Personnel Policies and Procedures"). Ex. 6 -14 LCOTCL §§ 5.101 et seq. Section 5.12 of the LCO-CHC Personnel Policies and Procedures details the disciplinary actions and appeals process. §§ 5.1201-5.1204. Section 5.1202 lists an extensive list of grounds for disciplinary action. §§ 5.1202(a)-(hh). The reason for Plaintiff's termination—elimination of her position—is not listed as grounds for disciplinary action. *Id*; *see also* Ex. 1. Thus, the appeal process under Section 5.1204 is inapplicable to Plaintiff's

termination. Although Plaintiff attempted to appeal her termination under section 5.12, Plaintiff must seek relief by bringing a civil action in Tribal Court.

Due to her consent, Plaintiff must seek redress from the Tribal Court before bringing this suit in federal court. Here, none of the *National Farmers* exceptions apply in this case, in particular, the FCA does not explicitly grant exclusive federal court jurisdiction over section 3730(h) suits that would foreclose tribal court jurisdiction over this case. *National Farmers.*, 471 U.S. at 856 n.251; 31 U.S.C. §§ 3732(a)-(b). The Tribal Court is competent to adjudicate Plaintiff's FCA claims and Wisconsin common-law claim. *Altheimer & Gray*, 983 F.2d at 814 (citing *Iowa Mut.*, at 19). Further, a tribal-employment dispute constitutes a reservation affair. *Stifel*, 807 F.3d at 196 (citing *Altheimer & Gray*, 983 at 814). The Tribe's employment decision concerning a tribal government subdivision falls within the Tribe's self-determination and sovereignty. *Stifel*, 807 F.3d at 196. This Court's exercise of jurisdiction would amount to an interference of the Tribal Court's authority because the Tribal Court has not been offered the opportunity adjudicate this employment dispute as required under the *Consent to Grievance and Appeal Process* form. Ex. 4. Additionally, the Tribe mandated that Plaintiff's LCO-CHC employment disputes be heard in Tribal Court. *Cf. Stifel*, 807 F.3d at 198 (tribal entities consented to federal and state jurisdiction in Wisconsin); *Altheimer & Gray*, 983 at 815 (tribal entity consented to federal and state jurisdiction in Illinois).

From the start of Plaintiff's employment with LCO-CHC, the Tribe asserted its intention to exercise Tribal Court jurisdiction to hear any employment disputes. Plaintiff knowingly consented to Tribal Court jurisdiction and must seek redress under the proper Tribal Court procedures. Thus, the Court should abstain from exercising jurisdiction, because the dispute is a reservation issue that implicates the Tribe's self-determination.

Conclusion

For these reasons, this Court should dismiss this action for Plaintiff's failure to state a claim upon which relief can be granted, and the Court's lack of subject-matter jurisdiction. In the alternative, this Court should hold this case in abeyance until Plaintiff properly exhausts her tribal court remedies.

Dated: January 18, 2022

RESPECTFULLY SUBMITTED:

/s/ Andrew Adams III

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