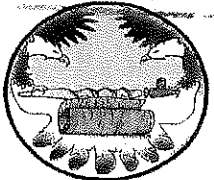


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<p>LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS</p> <p>Tribal Court</p>	
<p>Court Mailing Address: 7500 Odawa Circle, Harbor Springs, MI 49740</p>	<p>Phone: 231-242-1462</p>

TRIBAL COURT

Case No: C-138-1111

<p>Winnay Wemigwase,</p>	<p>Plaintiff,</p>
<p>v.</p>	
<p>Little Traverse Bay Bands of Odawa Indians; Meredith Henry, Individually and as Gijigowi Bibskaabiimi Director of Little Traverse Bay Bands of Odawa Indians; Joanne Werner, Individually and as Human Resources Director of Little Traverse Bay Bands of Odawa Indians, and Albert Colby, Jr., Tribal Administrator,</p>	
<p>Defendants.</p>	

10-09-13P03:43 RCVD

ORDER GRANTING MOTION TO DISMISS

INTRODUCTION

The Court must determine whether to grant the defendants' *Motion to Dismiss* whereby the Defendants move to dismiss the Plaintiff's causes of action. The Plaintiff claims she was wrongfully terminated, subject to harassment and a hostile work environment, subject to defamation of character, and deprived of certain of her civil rights. As sovereign immunity bars the Plaintiff's claims against the Defendants, the Court grants the Defendants' *Motion* for the reasons stated below.

PROCEDURAL HISTORY

The Plaintiff, Winnay Wemigwase, initiated the current action by filing a *Complaint* with the Court on November 4, 2011, by and through her attorney. Consequently, the Court issued a *Summons* directing each respective Defendant to answer the *Complaint* within 28 days. The Plaintiff filed *Affidavits of Service* indicating each *Summons* had been served personally upon each Defendant. The Defendants, by and through their attorney, filed their collective *Answer* on January 11, 2012. The Court then mailed a *Notice of Hearing* to the parties, informing them of the date, time and location of the *Pre-Trial Hearing*.

The Court convened the *Pre-Trial Hearing* on January 31, 2012, with Judge Jenny Lee Kronk presiding. The Court thereafter issued an *Order Following Pretrial Meeting*, setting forth the deadlines and timelines for the Defendants' motion to dismiss and motion hearing. On February 24, 2012, the Defendants' filed their *Motion to Dismiss* and a *Notice of Hearing*. On March 13, 2012, the Court subsequently mailed a new *Notice of Hearing*, setting the *Oral Arguments* on the motion for April 4, 2012. On March 16, 2012, the Plaintiff filed her *Response to Defendants' Motion to Dismiss* and *Brief in Opposition of Defendants' Motion to Dismiss*. The Defendants then filed a *Reply Brief To Plaintiffs' Response to Defendants' Motion to Dismiss* on March 29, 2012.

On May 3, 2012, the Court issued a new *Notice of Hearing* and did the same again on May 4, 2012, re-scheduling *Oral Arguments*. The parties convened for *Oral Arguments* on May 16, 2012 before Judge James Genia, although the Court did not issue a resulting order thereafter. The Court next issued a *Notice of Hearing*, setting a *Scheduling Conference*, and then later issued a new *Notice of Hearing* adjourning the matter to January 8, 2013. Following the *Scheduling Conference* before Judge Genia, the Defendants filed *Defendants' Supplemental*

Brief Discussing Appellate Court's December 20, 2012 Decision and Order on January 18, 2013. On February 6, 2013, the Plaintiff filed *Plaintiff's Response to Defendant's Supplemental Brief Discussing Appellate Court's December 20, 2012 Decision and Order*. After assuming authority over this case, Judge Fabry held a *Status Conference* with the attorneys via telephone on July 25, 2013. After the parties notified the Court that they would not be reaching a settlement, the Court indicated it would issue an opinion on the pending *Motion to Dismiss* based upon the record before it.

FINDINGS OF FACT

1. The Plaintiff, Winnay Wemigwase, is a Tribal Citizen (#0105) of the Little Traverse Bay Bands of Odawa Indians (hereinafter "Tribe" or "LTBB"). The Plaintiff was originally hired by the Tribe on June 18, 2001. The Plaintiff served as the Archives and Records Director and Cultural Preservation Director from November 17, 2003 until her termination on October 21, 2010.
2. The Defendant, Little Traverse Bay Bands of Odawa Indians ("LTBB"), is a federally-recognized Indian tribe.
3. The Defendant, Meredith Henry, served as the Plaintiff's supervisor and is the Director of Bibskaabiimi for LTBB.
4. The Defendant, Joanne Werner, is the former Human Resources Director for LTBB.
5. The Defendant, Albert Colby, Jr., is the Tribal Administrator for LTBB.
6. On July 11, 2010, the Tribal Council passed Waganakising Odawak Statute WOS 2010-008, which effectuated a restructure within the Tribal Government and created the

Gijigowi BipSkaabiimi Department, incorporating the staff of the Language, Education and Archives and Records Departments.

7. Defendant Henry was hired as the Director of the new Department and the Plaintiff was not.
8. The Plaintiff filed a grievance against LTBB on November 4, 2010. On January 4, 2011, a Termination Dispute Hearing was held before Hearing Officer Hornberger. On January 7, 2011, Hearing Officer Hornberger sustained the decision to terminate the Plaintiff.
9. The Hearing Officer rendered a decision upholding the Plaintiff's termination on January 7, 2011.

DECISION

The Court exercises jurisdiction over "all civil and criminal cases arising under (the) Tribal Constitution, statutes, regulations, or judicial decisions of the Little Traverse Bay Bands of Odawa Indians." LTBB CONST. art. IX, § C.1 However, this grant of jurisdiction to the Court is not a waiver of the Tribe's sovereign immunity, as expressed in article IX, section C.4. Further, article XVIII, section A of the Constitution provides that "[t]he Little Traverse Bay Bands of Odawa Indians, including all subordinate entities, shall be immune from suit except to the extent that the Tribal Council clearly and expressly waives its sovereign immunity, and officials and employees of the Tribe acting within the scope of their duties or authority shall be immune from suit." Accordingly, the Council must explicitly provide a waiver of such immunity before the Court can entertain a cause of action against LTBB, its subordinate entities, or its officials and employees acting within the scope of their duties.

The Plaintiff pleads four separate counts that allege violations of law and policy, which would thereby at least arguably present a proper case or controversy – namely, wrongful termination under Waganakising Odawak Statute 2010-008 and the Fair Employment Statute, WOS 2008-011, harassment/hostile work environment under the Fair Employment Statute, defamation of character¹, and deprivation of her Constitutional rights to due process and equal protection of the law. The Plaintiff seeks compensatory and liquidated damages for all four counts stated in the *Complaint*.

In order to bring a cause of action against the Tribe and Tribal officials or employees, a plaintiff must also properly identify a waiver of the Tribe's and its officials' and employees' sovereign immunity from suit. Therefore, the Court must determine whether the Plaintiff has properly identified a waiver of the Tribe's sovereign immunity or that of its officials and employees, and whether the officials and employees named were acting outside the scope of their duties.

The Plaintiff identifies the waiver of sovereign immunity found in the Fair Employment Statute passed by the Tribal Council: “[t]he Tribe clearly and expressly waives its sovereign immunity to the Equitable Remedies as set forth in this Statute and clearly and expressly waives its sovereign immunity to Damages as set forth within this Statute for Employers and limits such waiver to remedies as set forth in this statute.” WOS 2008-011, WOTC § 14.104A. Section 14.404B of the Fair Employment Statute is substantively similar, setting forth a waiver of immunity for “officials, individual employees, and/or managers.” *Id.* However, these provisions constitute a limited waiver of the sovereign immunity of the Tribe and its employees. In order for a plaintiff to make a cause of action under this statute, the action must necessarily be filed

¹ It is unclear to the Court under what legal authority the Plaintiff brings her defamation claims. However, as the Waganakising Odawak Tribal Code of Law does not provide a statutory basis, the Court must presume that she is attempting to bring a defamation claim under common law.

within one hundred and eighty (180) days of the alleged violation.” WOS 2008-011, WOTC §§ 14.105, 14.106. The Court lacks the subject matter jurisdiction for any action brought outside of the 180-day statutory limit. In the current case, all actions giving rise to the plaintiff’s *Complaint* occurred on or before January 7, 2011. The *Complaint* was not filed until November 4, 2011, nearly 10 months later. Because the *Complaint* was filed more than 180 days after the alleged violations, the wrongful termination and harassment/hostile work environment claims brought pursuant to the Fair Employment Statute must be dismissed as barred by the statute of limitations contained within the statute.

Nor can the wrongful termination action survive pursuant to WOS 2010-008, as proffered by the Plaintiff. The Plaintiff seemingly contends that because WOS 2010-008 has no statute of limitations, there is no time bar on actions brought pursuant to WOS 2010-008. The Court is not persuaded by this argument, however, as in contrast with the Fair Employment Statute, WOS 2010-008 does not first contain a clear and express waiver of sovereign immunity as required by the Constitution. As such, Counts I and II must be dismissed in their entireties against all defendants.

In addition, the plaintiff does not identify any clear and express waiver of sovereign immunity to allow her defamation and Constitutional claims to survive against the Tribe outside of the Fair Employment Statute. *Carey v. Espinosa*, A-004-0606 (Mar. 27, 2007) (hereinafter “*Carey I*”). The Tribe is immune from suit unless the Tribal Council has clearly and expressly waived its sovereign immunity. LTBB CONST., art. XVIII, § A. “Even when parties assert rights that arise under the Constitution, the Judiciary’s jurisdiction still requires a clear and express waiver of sovereign immunity before it can review a constitutional claim.” *LTBB Gaming Regulatory Commission v. Roberts*, A-018-0811 (Dec. 20, 2012) at 13. The same would

be true as to common law claims, such as defamation: that is, the Tribe retains its immunity unless specifically waived and therefore the Court lacks subject matter jurisdiction unless there is such an applicable waiver.

The LTBB Tribal Government Waganaksing Odawa Employee Handbook (hereinafter "Employee Handbook"), does provide for limited Tribal Court review of Hearing Officer decisions and contains a corresponding waiver of sovereign immunity. This administrative process allows for the review of a determinations made by a Hearings Officer, which would include decisions on constitutional and other legal issues.

A Hearing Officer's determination must be consistent with Tribal law and federal law and Tribal personnel policies. Once a Hearing Officer's recommendation is made, it is subject to Tribal Court review only for a decision as to whether the Hearing Officer's determination was arbitrary and capricious or inconsistent with Tribal law or federal law or Tribal personnel policies, or a determination on whether the Tribe failed to follow the Hearing Officer's recommendation and then an order to do so with whatever additional remedies the Court deems just. The Tribe only waives its sovereign immunity for determinations as to whether the Hearing Officer's determination was arbitrary and capricious or inconsistent with Tribal law, federal law or Tribal personnel policies.

LTBB Employee Termination or Reduction in Pay Grievance Procedure, Section V, Employee Handbook, at p. 47

However, in this case, the Plaintiff did not present her case to the Court in this manner and failed to pursue this administrative remedy. If she had, the Court would have been permitted to provide limited judicial review of the Hearing Officer's determination provided in the Grievance Procedure above, as that constitutes the limited scope of the Tribe's sovereign immunity. *Roberts*, A-018-0811 at 12. That review could have included decisions made as to each of the Plaintiff's claims presented in this matter. Because the Plaintiff failed to pursue this prescribed appeal and avail herself of the limited waiver of immunity provided in the Employee Handbook, she may not seek the recourse requested in the Court. Any review or award of relief other than

the review permitted by the Grievance Procedure, such as that requested by the Plaintiff in this instance “would necessitate a broader waiver of the Tribe’s sovereign immunity.” *Id.* at 7. As such, each of her claims must be dismissed.

As the claims against the Tribe have been disposed of as barred by sovereign immunity, the Court must next determine whether the claims against the individual Defendants Henry, Colby, and Werner may survive. As stated above, such claims only survive in the event the individual defendants acted outside the scope of their authority, as sovereign immunity extends to those Tribal officials and employees acting within the scope of their duties or authority. LTBB CONST. art. XVIII § A. That is, claims are permissible against officials or employees of the Tribe who act beyond the scope of their duty. In *Carey v. Espinosa*, A-011-1008 (May 2, 2011) (hereinafter “*Casey III*”), the Appellate Court provided guidance in considering whether an employee’s or official’s conduct is within the scope of its duties or authority and adopted “an approach which looks to whether or not the type of action is within the scope of duties or authority, not the alleged circumstances of a particular action.” *Id.* at 5. In *Carey III*, the Court concluded that termination of the plaintiff was within the defendants’ authority as upper management employees of Victories Casino and therefore they were shielded from suit by sovereign immunity. *Id.*

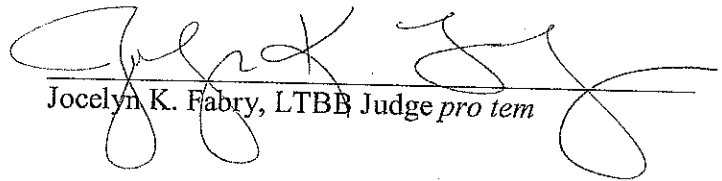
In this case, at the times relevant to the *Complaint*, the three individually-named defendants were Tribal employees. As such, they retain sovereign immunity unless they were acting outside of the scope of their duties. Employing the guidance provided by the Court in *Carey III*, the Court finds that the individual Defendants’ activity complained of by the Plaintiff was within the scope of their duties. As supervisors in the Plaintiff’s chain of command, each of the Defendants has the authority to hire and fire, discipline subordinates, and make

determinations as to Tribal resources. Therefore, the individual Defendants' immunity from suit under article XVIII, Section A applies and bars the Plaintiff's claims against them.

CONCLUSION

For the reasons articulated above, Plaintiff's cause of action is barred by the Defendants' sovereign immunity. Therefore, it is ORDERED that the Defendants' *Motion to Dismiss* is granted and the case is DISMISSED with prejudice.

10/9/13
Date


Jocelyn K. Fabry, LTBB Judge *pro tem*