UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WISCONSIN

RAYMOND DE PERRY,

Plaintiff,

v. Civil Action No. 12-CV-123-WMC

LAWRENCE DERAGON, MICHAEL BABINEAU, JEAN DEFOE, MARK DUFF, DESIREE LIVINGSTON, JEFFREY BENTON, and VERONICA WILCOX,

Defendants.

DEFENDANTS' MOTION TO DISMISS

Defendants, Lawrence Deragon, Michael Babineau, Jean Defoe, Mark Duff, Desiree Livingston, Jeffrey Benton, and Veronica Wilcox, through counsel, Ripley B. Harwood (Ripley B. Harwood P.C.), pursuant to Fed. R. Civ. P. 12(b)(1) & 12(b)(6), move the Court to dismiss Plaintiff's First Amended Complaint. As grounds for their Motion, Defendants state:

I. INTRODUCTION AND SUMMARY OF LEGAL ARGUMENT

Plaintiff's First Amended Complaint arises out of his termination from employment as the Executive Director of the Red Cliff Chippewa Housing Authority. FAC, ¶'s 10 & 11. Plaintiff's employment and termination is a matter between an Indian employer and an Indian employee which "touch[s] exclusive rights of self-governance in purely intramural matters." *Equal Employment Opportunity Commission v. Karuk Tribe Housing Authority,* 260 F.3d 1071, 1079 (9th Cir. 2002). The federal policy is one of Indian self-governance in matters of tribal employment. *Morton v. Mancari,* 417 U.S. 535, 548, 94 S.Ct. 2474, 41 L.Ed.2d 290 (1974). Unsurprisingly therefore, Plaintiff's First Amended Complaint no longer contains allusions to employment discrimination claims.

Plaintiff's First Amended Complaint instead asserts that the Court has jurisdiction under 28 U.S.C. §1343(a)(2); the federal courts' authority to redress violations of 42 U.S.C. §1985(3). Plaintiff's theory of federal court jurisdiction under 28 U.S.C. §1343(a)(2) is as follows: two of the named defendants allegedly conspired to prevent the plaintiff from enforcing certain provisions of the Native American Housing and Self-Determination Act of 1996 (hereafter ("NAHASDA"). *See e.g.*, FAC ¶'s 11, 50 (the so-called "main conspiracy"). The defendants thereafter conspired to terminate the plaintiff for his efforts to enforce NAHASDA. *See e.g.*, FAC ¶'s 11, 63, & 65 (the so-called "derivative conspiracy"). This conspiracy combo allegedly constitutes an equal protection violation. *See e.g.*, FAC ¶'s 53(c)-(f) & 65.

Plaintiff's First Amended Complaint fails to invoke the jurisdiction of this court of limited jurisdiction, and fails to state a claim as a matter of law for multiple reasons: first and foremost, plaintiff alleges no violation of any statute that this Court has jurisdiction to redress. There is no private right of action available to enforce the provisions of NAHASDA. Therefore, there is no predicate statute, the violation of which gives rise to an actionable conspiracy under 42 U.S.C. §1985(3). The Plaintiff's Complaint accordingly does not invoke the jurisdiction of this Court under 28 U.S.C. §1343(a)(2) and is properly dismissed under Fed. R. Civ. P. 12(b)(1) & (6).

Second, the First Amended Complaint fails to allege or show that the defendants' actions in terminating him were motivated by racial, or otherwise class-based, invidiously discriminatory animus. The First Amended Complaint alleges that the main conspiracy deprived a class of Native Americans of the protections NAHASDA extends them. FAC ¶'s 53(b)-(f), 54, 89(a). There is however, no evidence or allegation

that the defendants' firing the plaintiff was motivated by racial, or otherwise class-based, invidiously discriminatory animus.

Taken in the light most favorable to the plaintiff, the derivative conspiracy to fire him was motivated by hostility towards the plaintiff's efforts to enforce and implement NAHASDA. The absence of proof of a motive of discriminatory animus against the plaintiff dooms his conspiracy claim. For this additional reason, the Plaintiff's Complaint does not invoke the jurisdiction of this Court under 28 U.S.C. §1343(a)(2) and is properly dismissed under Fed. R. Civ. P. 12(b)(1) & (6).

Third, even if the two previous defects were not fatal to the First Amended Complaint, the individual defendants are immune from suit under the qualified immunity doctrine. There is no right to private enforcement of NAHASDA. At the time of the claims asserted in plaintiff's First Amended Complaint, no reasonable person in the defendants' shoes would have had reason to know that thwarting enforcement of NAHASDA would violate any rights of this plaintiff.

Finally, while tribal sovereign immunity does not shield the defendants from the individual claims asserted in plaintiff's First Amended Complaint, they may not be sued for damages. Plaintiff's remedies are limited to declaratory and injunctive relief, neither of which are requested in his First Amended Complaint.

II. STANDARD OF REVIEW

Federal courts are courts of limited jurisdiction, and may only hear matters which properly fall within their jurisdictional limits. *Marine Equipment Management Co. v. United States*, 4 F.3d 643, 646 (8th Cir. 1993) ("federal courts are not courts of general jurisdiction and have only the power that is authorized by Article III of the Constitution

and the statutes enacted by Congress pursuant thereto."), citing *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986), citing in turn, *Marbury v. Madison*, 5 U.S. [1 Cranch] 137 (1803). Consequently, the federal courts have a primordial duty in every case to inquire whether the vital prerequisite of subject matter jurisdiction has been satisfied. *Magee v. Exxon Corp.*, 135 F.3d 599, 601 (8th Cir. 1998); *Bradley v. American Postal Workers Union, AFL-CIO*, 962 F.2d 800, 802 n.3 (8th Cir. 1992).

III. ARGUMENT AND AUTHORITIES

A. PLAINTIFF HAS NO RIGHT OF ACTION UNDER NAHASDA OR STANDING TO ENFORCE THIS STATUTE

The Native American Housing and Self-Determination Act of 1996 was enacted to streamline federal low income housing assistance to Indian Tribes. It superseded fourteen separate HUD programs spawned under the Housing Act of 1937. *See Fort Peck Housing Authority v. U.S. Dept. of Housing and Urban Development*, 367 Fed. Appx. 864, 886 (10th Cir. 2010)(discussing NAHASDA history); *see also*, *Cohen's Handbook of Federal Indian Law*, §22.05[2][a] at pp. 1390-95 (2005 ed.). NAHASDA recognized "the right of Indian self-determination and tribal self-governance by making such assistance available directly to the Indian tribes or tribally designated entities ...". 25 U.S.C. § 4101(7) (1997) (Congressional findings re: NAHASDA).

The Defendants could find no reported authority recognizing any private right of action for alleged violations of NAHASDA or to enforce any of its provisions. NAHASDA permits the Attorney General of the United States to institute a civil action to enforce compliance with NAHASDA. 25 U.S.C. §4161(c). NAHASDA's implementing regulations state that the Indian Civil Rights Act applies to recipients of NAHASDA block grants. 24 C.F.R. §1000.12. This however, creates no federal cause of action. *Cohen, supra,*

§22.05[2][a] at p. 1394 (2005 ed.); *see Wilson v. Turtle Mountain Band of Chippewa Indians*, 459 F. Supp. 366, 368-69 (D. N.D. 1978).

There is a strong presumption against creation of implied rights of action. *West Alice Memorial Hospital, Inc. v. Bowen*, 852 F.2d 251 (7th Cir. 1988). Nothing in NAHASDA gives rise to an implied private cause of action or remedy; much less one in federal court. To the contrary, the rights over residents and housing conditions set forth in NAHASDA are rights vested in Tribal government and in Tribal housing authorities. *Cohen, supra,* §22.05[2][a] at p. 1394 (2005 ed.). If there are any private rights of enforcement or redress implied in NAHASDA at all (which is denied), they would be rights to redress exclusively in tribal forums, exercised by *residents* subject to the Act. *Id.* Nothing remotely suggests that this sideline Plaintiff has any right to act as a private Attorney General for vindication of any alleged obstruction to enforcement of any provision of NAHASDA. Assuming *arguendo* that the identified defendants did conspire to prevent the plaintiff from enforcing NAHASDA, this plaintiff simply has no standing or legal authority for relief of that violation in federal court (or elsewhere). That authority is vested exclusively in the United States Attorney General. See generally, *Florida Paraplegic Ass'n. v. Miccosukee Tribe,* 166 F.3d 1126, 1130 (11th Cir. 1999) ("[W]hether an Indian tribe is *subject* to a statute and whether the tribe may be *sued* for violating the statute are two entirely different questions.").

To satisfy the requirements of §1985(3) (and thus jurisdiction in this Court under 28 U.S.C. § 1343(a)(2), plaintiff must allege violations of statutory or constitutional rights that the federal courts have jurisdiction to redress. *Wheeler v. Swimmer,* 835 F.2d 259, 261 (10th Cir. 1987). Section 1985(3) "provides no substantive rights itself; it merely provides a remedy for violations of the rights it designates." *Great Am. Fed. Sav. & Loan Ass'n v.*

Novotny, 442 U.S. 366, 372, 99 S.Ct. 2345, 2349, 60 L.Ed.2d 957 (1979). This Court has no jurisdiction over plaintiff's main conspiracy claim. Stated another way, that claim fails to state a claim under federal law. Defendants cannot as a matter of law be liable under 42 U.S.C. §1985(3) for conspiring to fire the plaintiff on the basis of rights not recognized under law, and which this plaintiff has no right to enforce in the first place. For this principal reason, plaintiff's First Amended Complaint should be dismissed.

B. THERE IS NO ALLEGATION OR SHOWING THAT THE DEFENDANTS' ACTIONS IN TERMINATING PLAINTIFF WERE MOTIVATED BY RACIAL, OR OTHER CLASS-BASED, INVIDIOUSLY DISCRIMINATORY ANIMUS.

In order to prevent 42 U.S.C. §1985(3) from morphing into a fathomless federal tort claims act, the law not only requires proof of a predicate statutory or constitutional violation actionable in federal court (as discussed in the previous section), it also requires proof that the conspiracy was motivated by racial or other class-based invidiously discriminatory animus. *United Brotherhood of Carpenters & Joiners, Local 16, AFL-CIO v. Scott*, 463 U.S. 825, 829, 103 S.Ct. 3352, 3356, 29 L.Ed.2d 338 (1971); *see Graham v. Henderson*, 89 F.3d 75, 81 (2nd Cir. 1996).

Plaintiff's First Amended Complaint alleges that the main conspiracy deprived a class of Native Americans of the protections NAHASDA extends them. FAC ¶'s 53(b)-(f), 54, 89(a). There is no evidence or allegation that this main conspiracy deprived the plaintiff of the equal protections NAHASDA allegedly extends to residents. To the contrary, plaintiff is not cast in the First Amended Complaint as a member of this allegedly protected, resident class. Rather, he is portrayed as occupying the role of outside protect*or* and overlord of the rights of this protected class. FAC ¶'s 11, 26, 28, 31, 32, 39, 45, 48, 50, 53(b), 89(a). Assuming *arguendo* that evidence of any form of discriminatory animus towards the class of residents plaintiff alleges to be protected

under NAHASDA could be developed, plaintiff is not a member of that class. As a non-member of the resident class supposedly discriminated against, the Plaintiff has no standing or rights to vindication of his "main" conspiracy claim.

Moreover, there is no allegation that the defendants' firing the plaintiff was itself motivated by racial, or otherwise class-based, invidiously discriminatory animus *towards him*. To the contrary, the entire thrust of the First Amended Complaint is that the Plaintiff was fired (and his firing upheld), because he sought to enforce provisions of NAHASDA. However morally wrong this may be perceived to have been (assuming its truth for purposes of this motion only), there is simply no discriminatory component to this motive. Taken in the light most favorable to the plaintiff, the 'derivative conspiracy' to fire him was motivated by mere *in*discriminate hostility towards the plaintiff's efforts to enforce and implement NAHASDA. The absence of any allegation or evidence of a motive of discriminatory animus against the plaintiff dooms his conspiracy claim. Section 1985(3) is not a federal remedy for all tortious conspiracies that interfere with the rights of others. *Gagliardi v. Village of Pawling*, 18 F.3d 188, 194 (2nd Cir. 1994). For this additional reason, the Plaintiff's Complaint does not invoke the jurisdiction of this Court under 28 U.S.C. §1343(a)(2) and is properly dismissed under Fed. R. Civ. P. 12(b)(1) & (6).

C. QUALIFIED IMMUNITY BARS PLAINTIFF'S CLAIMS

The doctrine of qualified immunity protects public officials performing discretionary functions against suits for damages unless their conduct violates clearly established statutory or constitutional rights of which a reasonable person would have known." *Doe v. Bobbitt*, 881 F.2d 510, 511 (7th Cir. 1989); *see Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.d.2d 396 (1982). The doctrine of qualified immunity applies

to claims brought pursuant to 42 U.S.C. § 1985(3). *Auriemma v. Rice*, 910 F.2d 1449, 1458 (7TH Cir. 1990).

Qualified immunity issues should be decided as soon as possible in litigation because the doctrine protects "government officials from the costs of trial and burdens of discovery…". *Rakovich v. Wade*, 850 F.2d 1180, 1205 (7th Cir. 1988). The qualified immunity analysis "entails a purely objective inquiry to determine whether at the time of the alleged illegal act, the right asserted by the plaintiff was clearly established in the particular factual context presented." *Polenz v. Parrott*, 883 F.2d 551, 553-54 (7th Cir. 1989). The courts have also been careful to require narrow circumscription of the allegedly clearly established right to avoid thwarting the precepts of qualified immunity with broad or vague allegations. *Auriemma, supra*, 910 F.2d at 1455.

In the instant case, Plaintiff's First Amended Complaint assumes that he has the right to sue the Defendants for allegedly frustrating his efforts to enforce provisions of NAHASDA. The question thus presented is whether reasonable housing authority commissioners would have known, based upon the law as established in 2010, that interfering with the plaintiff's enforcement of NAHASDA violated a clearly established right *of the plaintiff* to enforce this statute. *Auriemma, supra*, 910 F.2d at 1454. For reasons already discussed, the answer is clearly not. No such right is recognized in law as extending to anyone under NAHASDA other than the United States Attorney General. The defendants are entitled to qualified immunity as to plaintiff's First Amended Complaint. Plaintiff's First Amended Complaint should be dismissed on this ground as well.

D. EX PARTE YOUNG AND ITS PROGENY BAR PLAINTIFF'S CLAIM FOR DAMAGES

Presumably to circumvent the bar of sovereign immunity, Plaintiff's First Amended Complaint makes clear that he sues the seven defendants only in their individual capacity. FAC at ¶ 12. Consequences flow from this election: coming full circle, it bears noting first of all that this lawsuit has its genesis in plaintiff's termination from employment. The plaintiff and all the persons he alleges participated in firing him and in ratifying that firing are members of the same Indian Tribe. The activities giving rise to plaintiff's termination were all Tribal activities involving Tribal members. No state or federal officials are involved.

This Court should accordingly gauge plaintiff's effort to invoke federal jurisdiction against the overall backdrop of caution and deference outlined in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 98 S.Ct. 1670, 56 L.Ed.2d 106 (1978). The Santa Clara Court noted that:

> subjecting a dispute arising on the reservation among reservation Indians to a forum other than the one they have established for themselves, may undermine the authority of the tribal court . . .and hence . . . infringe on the right of the indians to govern themselves.

Id., 436 U.S. at 59 (citations to supporting authority omitted). The Court went on to point out that even providing a federal forum for intra-tribal disputes which have a more public character is still unsettling to a tribal entity's right to maintain authority over its own affairs, and that the federal courts must tread lightly in the area absent clear, contrary expression of legislative intent. *Id.,* 436 U.S. at 59-60.

Santa Clara suggests that this Court should also contemplate the essence of the plaintiff's First Amended Complaint in determining whether a federal forum is available.

Plaintiff's First Amended Complaint is merely disguised in the trappings of an alleged conspiracy. In essence it is a mere suit for damages for alleged wrongful termination. It cannot be brought as such pursuant to federal anti-discrimination law because Indian Tribes are exempt from the definition of "employer" under such statutes. *See e.g., Aroostook Band of Micmacs v. Ryan*, 403 F.Supp.2d 114 (D. Me. 2004).[1]

Plaintiff's suit cannot be brought in federal court pursuant to the Indian Civil Rights Act because relief in the federal courts pursuant to that Act is limited to *habeas corpus*. *See e.g., Poodry v. Tonawanda Band*, 85 F.3d 874 (2d Cir. 1996). Plaintiff cannot sue the Red Cliff Chippewa Housing Authority or its Commissioners in their official capacity because of the bar of sovereign immunity. *See Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 29 (1st Cir. 2000); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 148, 102 S.Ct 894, 907, 71 L.Ed.2d 21 (1982). Thus, plaintiff is left with the present conspiracy masquerade against the seven individuals named in his First Amended Complaint.

The consequence of Plaintiff's election to sue the defendants in their individual capacity in an attempt to steer his lawsuit between the Scylla and Charybdis of all of the foregoing jurisdictional restraints, is that the *Ex Parte Young* doctrine applies.[2] That doctrine extends to Indian Tribes, and bars claims against these defendants except for prospective relief. *Davids v. Coyhis*, 869 F.Supp. 1401, 1409 at fn. 12 (E.D. Wis. 1994). The doctrine accordingly bars Plaintiff's claim for damages. For this last and final reason, dismissal of Plaintiff's First Amended Complaint is appropriate.

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[1] It is noteworthy in this regard that a party may not use section 1985(3) to redress the deprivation of rights created by title VII. *See Great American Fed. Sav. & Loan Ass'n. v. Novotny*, 442 U.S. 366, 372-78, 99 S.Ct. 2345, 2349-5290, 60 L.Ed.2d 957 (1979); *Keller v. Prince George's County*, 827 F.2d 952, 957 (4th Cir. 1987).

[2] *Ex parte Young,* 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908).

For all of the foregoing reasons, defendants respectfully request that the Court dismiss Plaintiff's Complaint for lack of subject matter jurisdiction and for failure to state a claim, and that it grant them such other and further relief as the Court deems appropriate under the circumstances.

Respectfully submitted,

RIPLEY B. HARWOOD, P.C.

s/

By: _____

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I HEREBY CERTIFY that on the 7th day of June, 2012, I filed the foregoing *Defendants' Motion to Dismiss* electronically through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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RIPLEY B. HARWOOD