

2018 SEP 27 PM 3:09
CHEROKEE NATIONAL
SUPREME COURT
GENERAL COUNCIL CLERK

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) **Case No. SC 2015--07**
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X PETITION IN ERROR
AMENDED OR SUPPLEMENTAL PETITION
CROSS PETITION
COUNTER-PETITION

I. TRIAL COURT HISTORY

NAME OF PARTY(IES) FILING THIS PETITION IN ERROR: Francis Unger

X Judgment, Decree or Final order of the District Court
Appeal from order granting summary judgment or motion to dismiss
Final Order of Other Tribunal, Commission, or Hearing Board
Interlocutory Order Appealable by right
Other

1. Date judgment, decree, or order appealed was filed: August 16, 2018 District Court Order Granting Defendant's Motion to Strike Plaintiff's Complaint and September 13, 2018 District

Court Order Denying Plaintiff's Motion to Reconsider or Clarify Order Dismissing Plaintiff's Complaint.

2. Does the judgment or order on appeal dispose of *all* claims by and against *all* parties?
Yes X No

3. Were any post-trial motions filed? Yes. September 13, 2018 District Court Order Denying Plaintiff's Motion to Reconsider or Clarify Order Dismissing Plaintiff's Complaint

4. This Petition is filed by: X Delivery to Clerk, or
Mailing to Clerk by U.S. Certified Mail,
Return Receipt Requested

III. RELATED OR PRIOR APPEALS

First Appeal filed July 20, 2015 and decided March 20, 2017

IV. SETTLEMENT CONFERENCE

Is the appellant willing to participate in a Settlement Conference? X Yes No

V. RECORD ON APPEAL

X A Transcript will be ordered
No Transcript will be ordered because no record was made and/or
no transcript will be necessary for this appeal
Narrative Statement will be filed

VI. JUDGMENT, DECREE OR ORDER APPEALED-- EXHIBIT "A"

Attach as Exhibit "A" to the Petition in Error a certified copy of the judgment, of June 26, 2015.

VII. SUMMARY OF CASE -- Exhibit "B"

Attach Exhibit "B" a brief summary of the case.

VIII. ISSUES TO BE RAISED ON APPEAL -- Exhibit "C"

Attach as Exhibit "C" the issues proposed to be raised.

IX. NAME OF COUNSEL OR PARTY, IF PRO SE

ATORNEY FOR APPELLANT

Name: Chad Smith

CBNA: 08

Firm: Chad Smith

Address: 22902 S 494 Road

City: Tahlequah
State: OK Zip: 74464
Phone: 918 453 1707
Email: chad@chadsmith.com

ATORNEY FOR APPELLEE
Name: John Young, Paiten Qualls
CBNA:
Firm: Cherokee Nation
Address: P. O. Box 948
City: Tahlequah
State: OK Zip: 74464
Phone: 918 453 5000
Email: John-young@cherokee.org
Paiten-qualls@cherokee.org

DATE: September 25, 2018

Verified by: 
(Signature of Attorney or Pro Se Party)

Chad Smith
CNBA: 08
Firm: Chad Smith
Address: 22902 S 494 Road
City: Tahlequah
State: OK Zip: 74464
Phone: 918 453 1707
Email: chad@chadsmith.com

X. CERTIFICATE OF MAILING TO ALL PARTIES AND COURT CLERK

I hereby certify that a true and correct copy of the Second Petition in Error, Amended or Supplemental Petition, Cross Petition, or Counter-Petition, was mailed this 25th day of September, 2018 to the following:

John C. Young, CNBA # 474
Assistant Attorney General
Cherokee Nation
P.O. Box 1533
Tahlequah OK 74465
John-young@cherokee.org

Paiten Taylor-Qualls
Assistant Attorney General
Cherokee Nation
P.O. Box 1533
Tahlequah, OK 74465

Paiten-qualls@cherokee.org

I further certify that a copy of the Petition in Error was mailed to, or filed in, the office of the Court Clerk of the Cherokee Nation Supreme Court on the 25th day of September, 2018



Chad Smith

IN THE DISTRICT COURT OF THE CHEROKEE NATION

2018 AUG 16 PM 3:40

FRANCIS UNGER,
Plaintiff,

vs.

CHEROKEE NATION COMPREHENSIVE
CARE AGENCY,
Defendant.

Case No. CV-2014-94

CHEROKEE NATION
DISTRICT COURT
KRISTI MONCOOYEA
COURT CLERK**ORDER GRANTING DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S
COMPLAINT**

NOW on this 16th day of August, 2018, this matter comes on for decision. Defendant having filed their *Motion to Strike Plaintiff's Complaint*; Plaintiff having filed her *Objection to Cherokee Nation Comprehensive Care Agency's Motion to Strike Plaintiff's Complaint* and Defendant having filed their *Reply in Support of Defendant's Motion to Strike*. After review of the pleadings, the Court finds as follows:

- 1) Plaintiff's original Complaint consisted of five (5) causes of action.
- 2) On June 26, 2015, in an Order filed by Judge Cripps, Count Two through Five were dismissed.
- 3) On appeal, only Count Two was addressed. The Supreme Court affirmed the dismissal of Count Two stating that "the second cause of action should be dismissed for the sole reason the Cherokee Nation District Court does not have jurisdiction in appeals brought pursuant to the procedures set forth in 51 CNCA § 1001 et. seq."
- 4) The dismissal of Counts Three through Five was not appealed.
- 5) Defendant argues in its *Motion to Strike Plaintiff's Complaint* that "As this Court clearly articulated in the previous Order, Plaintiff Unger's causes of action 2-5 and prayers for relief 2-7 seeking monetary damages are no longer justiciable and the remedies sought are barred by sovereign immunity."
- 6) On appeal, the Supreme Court did not affirm the dismissal of Count Two on the grounds of sovereign immunity, rather lack of jurisdiction of appeals brought pursuant to the procedures set forth in 51 CNCA § 1001, et. seq.
- 7) The remaining cause of action in Count One is an allegation of a violation of the Cherokee Nation Constitution, Article XII.

- 8) That the Courts have recognized a cause of action for a violation of Cherokee Nation Constitution, Article, XII. However, pursuant to the Supreme Court's *Opinion* previously filed in this case, this Court lacks jurisdiction to hear such cause as the procedures set out in the EAPA were not followed.

Defendant's Motion to Strike Plaintiff's Complaint is hereby **GRANTED**.

Dated this 16th day of August, 2018.



CRYSTAL R. JACKSON
JUDGE OF THE DISTRICT COURT

CERTIFICATE OF DELIVERY

I certify that on this 16th day of August, 2018, a true and correct copy of the Order Granting Defendant's Motion to Strike Plaintiff's Complaint was transmitted via email and mail, postage prepaid, to the following:

Chad Smith
chad@chadsmith.com
Attorney for Plaintiff
22902 S. 494 Rd.
Tahlequah, OK 74464

John Young
John-young@cherokee.org
Paiten Qualls
Paiten-qualls@cherokee.org
Attorney for Defendant
P.O. Box 1533
Tahlequah, OK 74465


COURT CLERK

EXHIBIT "A-1"

FILED

IN THE DISTRICT COURT OF THE CHEROKEE NATION

2018 SEP 13 PM 1:49

FRANCIS UNGER,
Plaintiff,

vs.

CHEROKEE NATION COMPREHENSIVE
CARE AGENCY,
Defendant.

Case No. CV-2014-94

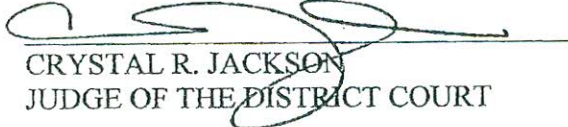
CHEROKEE NATION
DISTRICT COURT
KRISTI MONCOOYEA
COURT CLERK

**ORDER DENYING PLAINTIFF'S MOTION TO RECONSIDER OR CLARIFY ORDER
DISMISSING PLAINTIFF'S COMPLAINT**

NOW on this 13th day of September, 2018, this matter comes on for decision. Plaintiff having filed her *Motion to Reconsider or Clarify Order Dismissing Plaintiff's Complaint*; Defendant having filed their *Motion to Strike or in the Alternative Motion in Opposition to Plaintiff's Motion to Reconsider or Clarify Order Dismissing Plaintiff's Complaint*; and Plaintiff having filed her *Reply Brief in Support Motion to Reconsider or Clarify Order Dismissing Plaintiff's Complaint*. After review of the pleadings, the Court finds as follows:

Plaintiff's *Motion to Reconsider or Clarify Order Dismissing Plaintiff's Complaint* is **DENIED.**

DATED this 13th day of September, 2018.


CRYSTAL R. JACKSON
JUDGE OF THE DISTRICT COURT

CERTIFICATE OF DELIVERY

I certify that on this 13th day of September, 2018, a true and correct copy of the Order Denying Plaintiff's Motion to Reconsider or Clarify Order Dismissing Plaintiff's Complaint was transmitted via email and mail, postage prepaid, to the following:

Chad Smith
chad@chadsmith.com
Attorney for Plaintiff
22902 S. 494 Rd.
Tahlequah, OK 74464

John Young
John-young@cherokee.org
Paiten Qualls
Paiten-qualls@cherokee.org
Attorney for Defendant
P.O. Box 1533
Tahlequah, OK 74465


COURT CLERK

SUMMARY OF CASE -- Exhibit "B"

This case is about the District Court holding that it has no jurisdiction to hear wrongful discharge cases and award redress pursuant the Cherokee Nation Constitution Article XII for employees of the Cherokee Nation Comprehensive Care Agency ("Agency"), an agency of the Cherokee Nation.

On January 8, 2014, Unger, *pro se*, after her summary termination without pretermination due process requested Agency officials numerous times to advise her of her appeal rights and processes and those officials refused. See 1) Unger email to Dibble January 9, 2014, 2) Unger email to Dibble January 15, 2014, 3) Unger email to Dibble January 21, 2014, 4) January 10, 2014 Employee Exit Check off List (showing no Employee Termination Report was Complete), 5) Rhodes email to Unger January 15, 2014, 6) Unger conversation with Moore (attorney for Agency) on March 3, 2014).

On March 11, 2014, Unger filed her action for wrongful termination in the District Court including five counts – Count 1 was for being Denial of Pretermination Due Process in violation of the Cherokee Nation Constitution Article XII.

On March 27, 2014 the Cherokee Nation Attorney General ("Attorney General"), on behalf of the Agency, Answered Unger's Complaint to Count 1 and moved to dismiss Counts 2-5. On June 26, 2015, the District Court dismissed Counts 2-5. On March 20, 2017, this Court sustained the District Court dismissal of Counts 2-5 of Unger's Complaint against Agency. On January 19, 2018, the Attorney General filed its Motion to Strike *Counts 2-5*. The Attorney General did not move to dismiss Count 1.

On August 16, 2018, the District Court issued an Order Granting Defendant's Motion to Strike Plaintiff's Complaint, and on September 13, 2018 it issued its Order Denying Plaintiff's

Motion to Reconsider or Clarify Order. These Orders dismissed Appellant's Count 1- Violation of Cherokee Nation Constitutional Due Process pursuant to the Cherokee Nation Constitutional Article XII and attendant redress for wrongful termination including reinstatement, back wages less mitigation and attorney's fees on the erroneous grounds that the District Court did not have jurisdiction to hear constitutional claims because Unger did not follow procedure prescribed by the Employee Administrative Procedures Act, 51 CNCA 1001 et seq..

Unger appeals the District Court's erroneous *sua sponte*, Order dismissing Court 1 because the Attorney General on March 7, 2014 Answered Court 1, and in its Motion to Strike did not move the Court to dismiss Count 1. The District Court plainly erred because it has jurisdiction over Article XII causes of action.

ISSUES TO BE RAISED ON APPEAL -- Exhibit "C"

The central issues on appeal are did the District Court erred by:

1. Dismissing Unger's Complaint and Court 1 holding that the District Court does not have jurisdiction over Article XII constitutional claims for denial of pretermination due process because she did not following EAPA procedures.
2. Dismissing attendant claims for Article XII redress including reinstatement, back wages less mitigation and attorney fees.
3. Denial of due process by the District Court *sua sponte* dismissing Count 1 without notice to Unger.