

IN THE SUPREME COURT OF THE CHEROKEE NATION

FRANCIS UNGER

Appellant,

v.

CHEROKEE NATION COMPREHENSIVE
CARE AGENCY

Appellee.

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Case No. SC 2015- 07



BRIEF-IN-CHIEF

COMES NOW, Appellant Francis Unger (“Unger”) and submits this Brief-in-Chief in support of her appeal of the District Court dismissing her Complaint Count 1- Violation of Cherokee Nation Constitutional Due Process pursuant to the Cherokee Nation Constitution Article XII and attendant redress for wrongful termination including reinstatement, back wages less mitigation, and attorney’s fees (“Article XII claim”). The District Court erred because the fundamental and unwavering benchmark is Article XII that provides, “*the right of such employee to seek redress in the Cherokee Nation courts shall not be abridged.*”

On August 16, 2018, the District Court dismissed Count 1- Article XII claim and erroneously held,

8) That the Courts have recognized a cause of action for a violation of the Cherokee Nation Constitution, Article XII. However, pursuant to 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.
(August 16, 2018 Order at pg. 2.)

The District Court erred because it has jurisdiction over Unger’s Count 1- Article XII claim for denial of due process which is a *separate cause of action* from her Count 2-statutory right to appeal a wrongful termination according to the Employees Administrative Procedures

Act, (“EAPA”), 51 CNCA 1001 *et seq.*, 1014 that this Court affirmed the District Court’s dismissal in the first appeal. *See* March 20, 2017 *Opinion*. As this Court held in its March 20, 2017 *Opinion* in this case, “51 CNCA 1001 *et seq.* sets out an expedited and simplified procedure within which employees, who fall within the guidelines and definitions established by the council with the Act can appeal their termination.” 51 CNCA 1025 (1996) clearly recognized that an EAPA wrongful termination action is *separate and supplemental cause of action* for an expedited review of their wrongful termination. 51 CNCA 1025 provides, “This section shall not prevent resort to other means of review, redress, relief or trial de novo, available because of constitutional provisions.” In other words, Article XII and 51 CNCA 1025 are separate constitutional and statutory causes of action for wrongful discharge and denial of due process.

The District Court’s August 16, 2018 ruling that in order to establish the District Court’s jurisdiction over an Article XII claim, Unger must first follow the EAPA procedures is countervailing and contradicting this Court’s *Opinion*. This Court’s *Opinion* essentially held that to bring an a cause of action under EAPA, 51 CNCA 1011, Unger must bring it pursuant to EAPA procedures before the Employees Appeal Board (“EAB”) and that Unger could not combine an Article XII claim and EAPA claim in the same case before the District Court.

This Court should reverse the District Court’s dismissal of Unger’s Count 1 for denial of Cherokee Nation Constitutional Right of Due Process in violation of Article XII, find that District Court has jurisdiction over Unger’s Article XII claim, and if she prevails she is entitled to redress including reinstatement, back wages less mitigation and attorney fees.

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I. BACKGROUND

This Court in the first appeal in this case dismissed Unger's Count 2- a cause of action pursuant to 51 CNCA 1014 reasoning that it was not brought before the EAB and therefore the District Court had no jurisdiction. This Court did not address Count 1- Article XII claim.

The District Court has original jurisdiction for constitutional claims, but, *sua sponte*, erroneously dismissed Count 1- Article XII claim and right for redress in the Cherokee Nation Courts because Unger did not follow EAPA procedures. In effect, the District Court has left Unger with no venue to redress her constitutionally protected and guaranteed right; thus, the District Court completely and unconstitutionally abridged Unger's right to redress in the Cherokee Nation Courts.¹

II. STANDARD OF REVIEW

The Supreme Court's standard of review of the District Court rulings is *de novo* on conclusions of law and sufficiency of the record for facts. In *Cherokee Nation Entertainment, LLC, v. McInerney* case, SC-2010-01, this Court held:

Questions of law are entitled to *de novo* review, i.e. a plenary, independent, and non-deferential re-examination of the Hearing Officer's findings and the District Court's legal rulings. This Court must determine whether there is sufficient evidence from the record before the Hearing Officer to support the District Court's decision. *McInerney*, at pg. 4.

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¹ Article XII. Employee Rights

No employee, who having served in a position at least one (1) year, shall be removed from the employment of the Cherokee Nation except for cause, and only after being afforded pre-termination due process. *Provided, the right of such employee to seek redress in the Cherokee Nation courts shall not be abridged.* (Emphasis added.)

III. ARGUMENT AND AUTHORITY

Proposition One: The District Court has jurisdiction over Count 1- Article XII Wrongful Termination.

The only cause of action at issue after the first appeal of this case and this Court's *Opinion* was Count 1 - Article XII claim. The Complaint filed herein leaves no doubt that Unger brings her Article XII Constitutional cause of action.²

This Court has never held the District Court has no jurisdiction over Article XII wrongful discharge claims. The District Court has jurisdiction pursuant to the Cherokee Nation Constitution Article III, Section 1. which provides that: "The judicial process of the Cherokee Nation shall be open to every person and entity within the jurisdiction of the Cherokee Nation. Speedy and certain remedy, and equal protection, shall be afforded under the laws of the Cherokee Nation."

The Nation's statutes unquestionably set out that District Court is a court of general jurisdiction with jurisdiction over civil actions arising under the Constitution.³ 20 CNCA 24,

² III. CAUSES OF ACTION

FIRST CAUSE OF ACTION VIOLATION OF CHEROKEE NATION CONSTITUTIONAL RIGHT OF DUE PROCESS.

7) Unger makes reference to paragraphs 1 through 6 of this Complaint and incorporate them herein as set forth in full.

8) The Agency violated her right to due process by summarily terminating her employment without cause on January 8, 2014.

9) Unger alleges that by summarily terminating her employment without cause on January 8, 2014, the Agency violated the Cherokee Nation Constitution Article XII requirement that "No employee, who having served in a position at least one (1) year, shall be removed from the employment of the Cherokee Nation except for cause, and only after being afforded pre-termination due process."

10) Unger was not afforded any pre-termination due process by the Agency.

³ 20 CNCA 24, LA 11-07 (2007). "The District Court of Cherokee Nation shall have general jurisdiction and is vested with original jurisdiction, not otherwise reserved to the Supreme Court, to hear and resolve disputes arising under the laws or Constitution of Cherokee Nation in both law and equity, whether criminal or civil in nature. Such actions shall include, but are not limited to, the following: 2. Civil cause of action. All cause of action which arise within the territorial jurisdiction of the Cherokee Nation within the following categories: a. Between all parties, Indian and non-Indian, who by their action have submitted themselves to the jurisdiction of said Court."

provides the District Court has jurisdiction to, “resolve disputes arising under the laws or Constitution of Cherokee Nation in both law and equity, whether criminal or civil in nature”. This Court held the District Court was a court of general jurisdiction for actions occurring within the Nation’s territorial boundaries over persons and organizations with a nexus with the Nation. See *Gilliland v Cherokee Nation*, SC 2017-08.

In *Swinney v. CNB*, SC 17-06, this Court found a Cherokee Nation Businesses’ (“CNB”) employee was denied pretermination due process and remanded the case to CNB’s Employee Appeal Review Panel for its administrative appeal proceedings. The same principle applies here. Like Swinney, Unger had an Article XII constitutional right, her employer was required to provide pre-termination due process, her employer (a Cherokee Nation entity) denied her pre-termination and post termination due process, and her Article XII appeal lies with the District Court because the Agency provided no pre-termination or post-termination due process. Since the Agency denied Unger pre-termination or post termination due process, like in *Swinney*, she appealed to the District Court. This Court found in *Swinney*, the employee was denied pretermination due process for his Article XII cause of action. Likewise, Unger may bring her claim for an Article XII violation in the District Court. In essence, the District Court’s Orders hold that Unger has no venue to redress a wrongful discharge claim under Article XII.

However, in *CNE v. Inerney*, SC 2010-10, this Court held:

The Cherokee people, through adoption of their Constitutions, have a sound history of extending to employees of the Cherokee Nation a system of protections affording Due Process rights. These rights include policies and procedures of discipline, termination, and a right of hearing before the EARP, a right to appeal to the District Court of the Cherokee Nation, and a Constitutional right of appeal to this Court. Constitution of the Cherokee Nation (1999), Article XII; Cherokee Nation Human Resource Policy, Title 51 CNCA 1001 *et seq.*; *In Re: the Termination of William Bush*, JAT 2000-05D; *Watkins v. Cherokee Nation, et al.*, JAT 2002-01; *Cantrell v. Cherokee Nation*, JAT 1997-01; *Looney v. Cherokee Nation Bingo Outpost*, JAT 1996-05; *Standingwater v. Cherokee Nation Bingo Outpost*, JAT 1995-12.

Although Inerney was a CNB employee, Unger is entitled to some administrative pre-termination due process and an appeal to the District Court for redress of her Article XII claim

The plain language of the Constitution's Article XII, "... *Provided that the right of such employee to seek redress in the Cherokee Nation courts shall not be abridged*" means that neither can the court, nor the legislature, nor the executive branch may prevent Unger from redressing her constitutional rights of due process and termination only for cause in the Cherokee Nation courts. This proposition was affirmed by the Judicial Appeals Tribunal ("JAT", now Supreme Court) in its En Banc Reconsideration of *Watkins v. Cherokee Nation, et al.*, JAT-02-01 (2/20/04).⁴

A tenured employee's Article XII claim and access to the Cherokee Nation courts was clearly articulated by the JAT in *Webb v. Cherokee Nation of Oklahoma*, JAT-99-02:

It is clear from the Brief and more particularly from the argument of counsel for the Respondent that the claim of sovereign immunity does not extend to bar the right of the Petitioner to bring her action for wrongful termination. **This right is guaranteed by the Constitution of this Nation at Article XII of the Constitution.** Moreover, this Court in the case *In Re: The Termination of Joseph Kinnison*, JAT 93-03, has clearly interpreted Article XII **as giving unquestioned jurisdiction to this Court to finally determine issues in wrongful termination cases.** (Emphasis added.)

In at least ten cases, the JAT and the Nation's Supreme Court have affirmatively held that Cherokee Nation employees have an Article XII cause of action which may be heard by the Cherokee Nation's courts.⁵

⁴In 2004, the JAT reconsidered the 2003 Watkins case en banc and found that the Court has jurisdiction over a CNE employee's wrongful discharge case under Article XII of the 1975 Constitution. At that time, the definition of employees in the EAPA LA 12-96 as amended by 12-20, omitted "employees of any corporation or profit or business entity owned or operated by the Nation." However, the Court said that even though the Council specifically excluded CNE employees from the EAPA's procedural requirements, *it did not, remove their constitutionally protected right to receive a hearing in the JAT.* (Emphasis added) at p. 2, fn 1.

⁵ (1) *In Re: Squirrel*, No. JAT 79-1, (There is little question and certainly no dispute that under the provisions of Article XII of the Cherokee Nation Constitution, the appellant was entitled to a hearing before this court); (2) *In Re: Sunday*, JAT-81-1, (Article XII protections do not extend to employee who had not been employed one year); (3) *In*

Due to the ratification of Nation's 2003 Constitution in 2006, the Nation's Supreme Court transferred its cases of *In Re: Tobey*, SC-07-09 and *Cherokee Nation v. Rainwater*, SC-08-1 to the District Court. *In Re: Tobey* was a wrongful termination case and demonstrates that the District Court has original jurisdiction in wrongful termination cases and not the JAT, as was the case under the 1975 Cherokee Nation Constitution. After 2006, Article XII wrongful terminations claims must be brought in the District Court or EAB, rather than the Nation's Supreme Court.

Further, pursuant to the EAPA, employees may file their wrongful discharge cases in the EAB and the District Court as acknowledged by 51 CNCA 1025 (A) (2), which provides that, "This section *shall not prevent resort to other means of review, redress, relief or trial de novo, available because of constitutional provisions.*" (Emphasis added) The District Court has jurisdiction over Article XII claims without a bar of sovereign immunity, and the EAB was established in an effort to provide the wrongfully discharged employee an alternative administrative remedy that is *purportedly* designed to decrease costs and the time to resolve those claims.

The District Court erred that it had no jurisdiction over Article XII claims.

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Re: Foreman, Case No. JAT-98-12, (This is a direct appeal to this Court and the matter is properly before this Court pursuant to Article XII of the Constitution of the Cherokee Nation and Title 20, CNCA § 51 (D).); (4) *In Re: Brooks v. Cherokee Nation*, Case No. JAT 96-06, (This Court has jurisdiction to hear this case by virtue of Article XII of the Constitution of the Cherokee Nation and 20 C.N.C.A. § 51 (D)); (5) *Cantrell v. The Cherokee Nation and Cherokee Nation Enterprises, Inc.*, Case No. JAT 97-01, (This Court has jurisdiction to hear this case, pursuant to Article XII of the Constitution). (6) *McCoy v. Cherokee Nation of Oklahoma*, Case No. JAT 2000-06, (Demotion is constructive termination. "An employee of the Cherokee Nation who has served in a position at least one year acquires a property right. Article XII of the Constitution of the Cherokee Nation of Oklahoma 1975 guarantees the continued employment of employees except for cause"); (7) *In re: Wells*, Case No. JAT 01-01. (Waiver of Article XII right must be knowing); (8) *In Re: Bush*, JAT-01-09. (Article XII of the Constitution is a protected property right); (9) *Watkins v. Cherokee Nation*, Case No. JAT-02-01, (Article XII guarantees a hearing in the JAT); (10) *In re: Hannaford*, Case No. SC-2011-01, (Article XII guarantees the continued employment of employees except for cause.)

Proposition Two: There is no requirement for Unger to comply with EAPA procedures to bring her Article XII before the District Court.

The District Court erroneously dismissed Count 1- Article XII holding, “However, pursuant to 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.” However, the Attorney General did not move to dismiss Count 1 -Article XII claim, no appeal was taken on Count 1, and this Court’s *Opinion* did not address Count 1; it addressed only Count 2- Violation of 51 CNCA 1011. This Court held as to Unger’s Count 2-, “The Second Cause of Action should be dismissed for the sole reason that the Cherokee Nation District Court does not have jurisdiction in appeals brought pursuant to the procedures set forth in 51 CNCA 1001 et seq.” *Opinion* at pg 3. It is *non sequitur* for the District Court to hold it has no jurisdiction over Article XII claims because Unger did not follow the EAPA for its statutory claim. There is no provision in the EAPA to exhaust EAB remedies before bringing an Article XII claim in the District Court.

Proposition Three: Unger is entitled to redress, including Article XII and statutory remedies under the Back Pay Act.

The District Court in August 16, 2018 noted,

5) Defendant argues in its *Motion to Strike Plaintiff’s* 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.

The simple language of Article XII provides that employees may receive compensation for wrongful discharge. The Cherokee Nation 2003 Constitution Article XII (unlike like the 1975 Constitution). provides, “the right of such employee to seek *redress* in the Cherokee Nation courts *shall not be abridged*. Neither the Council nor the District Court may deny employees

redress in the District Court. Redress is not only access to the courts but it includes compensation for damages; the Oxford dictionary⁶ defines redress as:

remedy or compensation for a wrong or grievance.
synonyms: compensation · reparation · restitution · recompense · repayment -
damages · indemnity · indemnification · requital · retribution · satisfaction ·
remedy · comeback · justice · atonement · amends

In other words, 2003 Constitution Article XII provides that discharged employees are entitled to be made *whole* for their wrongful discharge in the Cherokee Nation courts. Redress includes reinstatement, back wages and attorney fees. Redress requires reinstatement, back wages and attorney fees.

In *Comingdeer v Cherokee Nation*, SC 2016-07, the Supreme Court held, “Notwithstanding, the sovereign immunity of the Tribe and its officials is waived here only for the limited purposes of fulfilling remedies provided by Cherokee law. To hold otherwise would render L.A. 13-05 and L.A. 20-16 meaningless.” For the District Court to hold Article XII does not serve to waive sovereign immunity for redress of wrongful discharge would render the Article XII meaningless.

This Court *never* addressed Article XII remedies in its *Opinion* nor did the Nation argue the issue before this Court.

In 2010, the Council enacted the “Back Pay Act”.⁷ The Back Pay Act specifically provided remedies to employees of Cherokee Nation instrumentalities, regardless of whether their actions were brought under the EAPA. The Back Pay Act extended its provisions to an employee “[w]ho has been directly employed by the *Cherokee Nation or its entities* and

⁶ https://www.bing.com/search?q=redress+definition&form=PRUSEN&pc=EUPP_&mkt=en-us&httpsmsn=1&refig=c22d52135d194b548d8f80aa3053b3e1&sp=3&ghc=1&q=ONR&pq=redress&sk=ONR2&sc=8-7&cvid=c22d52135d194b548d8f80aa3053b3e1

⁷ “An Act Relating to Employees of the Cherokee Nation or its Wholly Owned Corporations; Termination (sic) Appeals Procedures and Employee Back Pay Act of .2005; Providing For Severability And Declaring An Emergency,” LA-03-10,” January 10, 2010.

corporations on a regular full-time basis for at least one continuous year immediately prior to termination of employment. . . .”⁸ The Back Pay Act, in effect at the time of Unger’s termination, provided:

. . . the Former Employee shall be immediately restored to employment in the same or similar job position, with pay no less than the pay received at the time of termination, and with benefits and back pay retroactive to the date of the termination; and the employee’s personnel records. . .

All remedies listed herein shall be available to employees of corporations owned by the Cherokee Nation, if said employee is successful in overturning a termination as provided through the applicable termination appeals process for that corporation. (Emphasis added). See Section 5, Substantive Provisions, subsection A.

The Back Pay Act remedies were not restricted to EAPA actions brought before the EAB; it provided remedies for “overturning a termination as provided through the *applicable termination appeals process for that corporation*.” The Agency is an entity of the Nation. LA-03-4 provides, “The Cherokee Nation Comprehensive Care Agency (“Agency”) is hereby established within the “Executive Branch” of the government of the Nation.” The Back Pay Act provides Unger, as an employee of the Cherokee Nation or one of its entities, the statutory redress of back pay, reinstatement, and attorney’s fees if she overturns her wrongful discharge from the Agency’s applicable termination appeals process. The Act provides back pay in “[t]he amount of wages denied an employee from the time of discharge until reinstatement. . . .”⁹ The Act also provides for cost and attorney fees for the prevailing employee.¹⁰

It is important to note that despite Unger’s numerous requests to appeal of her termination via phone calls and email, the Agency did not advise Unger of any appeal process.¹¹

⁸ Section 4. Definitions, subsection A.

⁹ Section 4. Definitions, subsection C.

¹⁰ Section 4. Definitions, subsection D; Section 5, Substantive Provisions, subsection B.

¹¹ After her summary termination without pretermination due process on January 8, 2014, Unger requested Agency officials numerous times to advise her of her appeal rights and process and those officials refused to advise of her

See Complaint, at Par. 8.¹² Because, the Agency would not advise Unger of her administrative appeal rights or process, she appealed her Article XII claim to the District Court. Because the Agency denied her constitutional pre-termination due process, she was wrongfully discharged and entitled to appeal her Article XII denial of due process to the District Court.

Because the Nation's Constitution mandates redress for violation of Article XII and its statutes provide for statutory remedies of back pay, reinstatement, and attorney fees, and because this Court rejected the Attorney General's argument that the Nation had not waived the sovereign immunity of the Agency, then Unger is entitled to proceed with her claim for constitutional violation of wrongful discharge and denial of due process seeking the redress provided for in Article XII and the Back Pay Act.

Proposition Three: The District Court erred by *sua sponte* deciding that Count 1 should be dismissed without notice to the parties for briefing.

The District court denied Unger due process by *sua sponte* dismissing Count 1- Article XII claim without notice to Unger. The Attorney General did not move to dismiss Count 1- Article XII-Claim in his January 19, 2018 Motion to Strike at pg. 1, he moved,

"by and though the undersigned counsel, and hereby moves this Court (District Court) to strike portions of the Plaintiff's Complaint (hereinafter "Complaint") filed on March 7, 2014, by reason of the same having been adjudicated as dismissed and thereby rendered inapplicable, immaterial, and impertinent, to the Plaintiff's prosecution of this case."

In the same Motion to Strike at pg. 2, the Attorney General moved the District Court,

WHEREFORE, premises considered, Defendant CNCCA (Agency) respectfully requests that this Court grant its motion to Strike cause of action 2-5 and prayers for relief 2-7 from Plaintiff's Complaint, pursuant to Fed. R. Civ. P. 12 (f).

appeal rights and process. (Unger to Dibble January 9, 2014 email, Unger to Dibble January 15, 2014 email, Unger to Dibble January 21, 2014 email, January 10, 2014 Employee Exit Check off List (showing no Employee Termination Report was Complete). Rhodes to Unger January 15, 2014 email, Unger conversation with Moore (attorney for Agency) on March 3, 2014).

¹² Paragraph 8. The Agency violated her right to due process by summarily terminating her employment without cause on January 8, 2014.

The Attorney General answered Unger's Count 1- Article XII claim on March 27, 2014 and did not challenged the District Courts jurisdiction. *See Unger Opinion* at pg. 1

The District Court did not set for hearing or briefing its *sua sponte* consideration to dismiss Count 1 and dismissed Count 1 in its August 16, 2018 Order Granting the Cherokee Nation Comprehensive Care Motion to Strike Plaintiff's Complaint ("Orders") without any notice to the parties.

In *Day v. McDonough*, 547 U.S. 198, 199, (2006), the United States Supreme Court held, "Before acting *sua sponte*, a court must accord the parties fair notice and an opportunity to present their positions." Also, the Model code of Judicial Conduct Rule 2.6: Ensuring the Right to Be Heard provides, "(A) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law."

Therefore, the District Court erred by not providing Unger the opportunity to respond to its *sua sponte* decision before it dismissed Count 1- Article XII claim.

IV. CONCLUSION

This Court should reverse the District Court's August 16, 2018 Order and hold that it has jurisdiction over Unger's Article XII wrongful discharge claim and that if she prevails, is entitled to seek redress to make her whole, including reinstatement, back wages, adjustment of her personnel file and attorney's fees.

Respectfully submitted this 14th day of January 2019.

_____/ss/
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Certificate of Delivery

I, Chadwick Smith, do hereby certify that on this 14th day of January 2019, I emailed a true and complete copy of the foregoing Motion to the persons listed below:

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