

IN THE SUPREME COURT OF THE CHEROKEE NATION

FRANCES UNGER

Appellant,

v.

CHEROKEE NATION

COMPREHENSIVE CARE AGENCY

Appellee.

Case No. SC 2015-07

2019 OCT 25 PM 3:19
CHEROKEE NATION
SUPREME COURT
RECORDS BLDG. COURT CLERK

FILED

MOTION TO DISMISS APPELLANT'S SECOND PETITION IN ERROR

COMES NOW, the Appellee, Cherokee Nation Comprehensive Care Agency ("CNCCA"), by and through undersigned counsel and hereby moves this Court to dismiss Appellant's Second Petition in Error for lack of subject matter jurisdiction under Cherokee Nation Supreme Court Rule 43(A). In support of its motion, Appellee respectfully submits the following:

INTRODUCTION

Despite Appellant's urgings to the contrary, it is clear that the Appellant is not attempting to appeal the dismissal of Count I, a constitutional claim brought pursuant to Article XII of the Cherokee Nation Constitution. Instead, she is seeking a reversal of this Court's prior final *Opinion* in which it held the District Court lacks jurisdiction over EAPA procedures. *See* March 20, 2017 *Opinion* at 3. Appellant does so with the intent of obtaining statutory remedies for claims dismissed by this Court by attaching them to Count I, a constitutional claim brought under Article XII.

In Count II of her Complaint, the Appellant initially brought claims under 51 CNCA § 1001, *et seq.* ("EAPA") and sought statutory remedies associated therewith. This was the sole means by which the Appellant could have obtained statutory damages for her claims. However,

this claim was dismissed by the District Court in 2015 and affirmed by this Court in 2017. Thus, this Court dismissed any possible legal basis through which the Appellant could have recovered statutory damages in 2017.

Appellant has refused to accept this fact and instead continued to demand entitlement to statutory damages for her remaining Article XII constitutional claim in Count I. As a result, her Article XII claim was dismissed due to the misplaced persistence that she is entitled to statutory damages under EAPA procedures, which is clearly prohibited by this Court's March 20, 2017 *Opinion*. *Watkins v. Cherokee Nation* establishes the complete remedies available for a successful Article XII claim. JAT-02-01 (2004). If Appellant genuinely sought a ruling on a permissible Article XII claim, she would seek those remedies allowed by *Watkins*. She is not.

This Court has already affirmatively held that the Cherokee Nation District Court lacks jurisdiction over EAPA procedures, which by extension includes the ability to grant statutory damages only available through the same procedures. By appealing the dismissal of Count I and asking for an order of this Court allowing statutory damages under the procedures of the EAPA for the same, Appellant is seeking a guised appeal of this Court's March 20, 2017 *Opinion*—an attempt that is both fundamentally improper and untimely—and her Petition should be dismissed for lack of subject-matter jurisdiction.

PROCEDURAL BACKGROUND

In her original Complaint, Appellant sought five causes of action and various prayers for relief, including statutory damages. The only cause of action through which Appellant could have established her entitlement to statutory damages was the alleged violation of 51 CNCA § 1011 ("Count 2"). Upon Appellee's motion, the District Court dismissed Appellant's Counts 2-5. Appellant only appealed the dismissal of Count 2.

In its March 20, 2017 *Opinion*, this Court affirmed the dismissal of Count 2 for lack of subject-matter jurisdiction. Appellant willfully disregarded this final decision and continued demanding entitlement to statutory damages, only available through Count 2, for her remaining constitutional claim in Count I under Article XII.¹ Appellant's erroneous insistence forced the District Court to dismiss Appellant's remaining constitutional claim for want of jurisdiction, because she continued to demand statutory damages—dismissed with Count 2—which the District Court simply lacked jurisdiction to grant. Appellant then appealed to this Court, still demanding entitlement to statutory damages that have been dismissed.

ARGUMENT

APPELLANT'S PETITION IN ERROR SHOULD BE DISMISSED AS THIS COURT HAS PREVIOUSLY RULED ON THIS ISSUE.

Despite Appellant's contradictory arguments otherwise, it is clear that this appeal is a veiled attempt to request the reversal of this Court's final March 20, 2017 *Opinion*. Appellant argues that she is appealing the dismissal of her Article XII claim, yet she continues to demand long dismissed statutory damages.² This demand belies Appellant's entire appeal because if she were sincerely appealing the dismissal of her Article XII claim, she would seek the available remedies established in *Watkins v. Cherokee Nation*. JAT-02-01 (2004). Indeed, this continued demand for statutory damages, in blatant disregard for multiple court orders, is precisely what removed Appellant's remaining Article XII claim from the District Court's jurisdiction. This bizarre persistence has proved entirely insufficient thus far and any sustained effort to again argue entitlement to statutory damages should be dismissed as inappropriate because this Court issued a final decision on the matter in 2017.

¹ Prompting Appellee's January 19, 2018 *Motion to Strike Plaintiff's Complaint*.

² Appellant continues to erroneously urge "if she prevails she is entitled to redress including reinstatement, back wages less mitigation and attorney fees." *Appellant's Opening Brief* at 2.

It is a basic concept of the law that “[n]ot every right supports all possible remedies.” William M. Tabb & Rachel M. Janutis, *Remedies in a Nutshell* 12 (2013). Likewise, a waiver of sovereign immunity anywhere does not establish a waiver of sovereign immunity everywhere. It is well-established under Cherokee law “that wrongfully terminated employees are entitled to *reinstatement and retroactive benefits only*” for successful Article XII claims. *Watkins v. Cherokee Nation*, JAT-02-01 (2004) (emphasis added). Moreover, it is settled 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.*” March 20, 2017 *Opinion*. Appellant concedes that “Article XII and 51 CNCA 1025 [*sic*] are separate constitutional and statutory causes of action for wrongful discharge and denial of due process.” *Appellant’s Opening Brief* at 2. Appellant also readily admits that this Court’s March 20, 2017 *Opinion* in effect held “that Unger could not combine an Article XII claim and EAPA claim in the same case before the District Court.” *Appellant’s Opening Brief* at 2. In light of Appellant’s own admission that the District Court lacks jurisdiction over EAPA procedures, it necessarily follows that the District Court lacks jurisdiction to grant statutory damages only available through EAPA procedures.

Appellant’s contention that LA 03-10 (“Back Pay Act”) allows statutory remedies for her constitutional claim is foundationally misplaced and simply holds no weight, as the Back Pay Act *is an amendment of EAPA procedures*.³ Indeed, this contention only serves as evidence that this appeal is an attempt to request that this Court reverse its final March 20, 2017 *Opinion*, far beyond any arguably diligent deadline to do so.

³ The Back Pay Act, LA 03-10, substantively amends the “remedies for termination without cause” contained in 51 CNCA § 1029 of the Cherokee Nation Code. See LA 03-10, Section 5. 51 CNCA § 1029 of the Cherokee Nation Code is contained in Title 51, Chapter 10 cited generally as the Employee Administrative Procedures Act. See 51 CNCA § 1001. This Court clearly established that the District Court lacks jurisdiction over the procedures of the Employee Administrative Procedures Act in its March 20, 2017 *Opinion*.

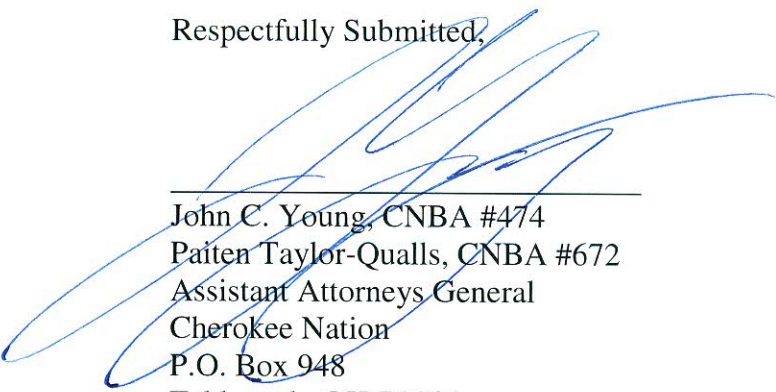
Likewise, Appellant’s argument that she was not afforded notice that her continued insistence on statutory damages, despite numerous court orders, could result in the dismissal of her remaining claim is wholly without merit. First, the District Court is well within its power to conduct its own jurisdictional analysis of a claim at any time. The Court here did just that and dismissed Appellant’s remaining claim along with her demand for statutory damages, in recognition of this Court’s March 20, 2017 *Opinion*. Second, Appellant ignored no less than three separate court decisions opining on the irrelevance of EAPA procedures—and any statutory damages connected thereto—in claims before the District Court.⁴ Appellant was certainly aware of the risk associated with demanding remedies beyond the District Court’s jurisdiction after this Court had issued its explicit prohibition. For those reasons, Appellant’s notice argument lacks merit and should not be considered by this Court.

CONCLUSION

As a result of Appellant’s willful disregard for established precedent and her continued demand for long dismissed statutory damages, the District Court properly dismissed Appellant’s Article XII claim for lack of subject-matter jurisdiction. Indeed, Appellant’s own continued urging that she was entitled to dismissed statutory damages deprived the District Court of subject-matter jurisdiction. In sum, the District Court dismissed Appellant’s claim because it demanded statutory damages plainly prohibited by this Court’s March 20, 2017 *Opinion*. Now, Appellant is asking the Court to again consider her entitlement to statutory damages under the cloak of an appeal of the dismissal of her Article XII claim. The Court should not entertain this attempt as the issue of statutory damages has previously been decided. The time to appeal that decision has expired. Therefore, this Petition should be dismissed for lack of subject matter jurisdiction.

⁴ See June 26, 2015 *Order*; March 20, 2017 *Opinion*; and August 16, 2018 *Order Granting Defendant’s Motion to Strike Plaintiff’s Complaint*.

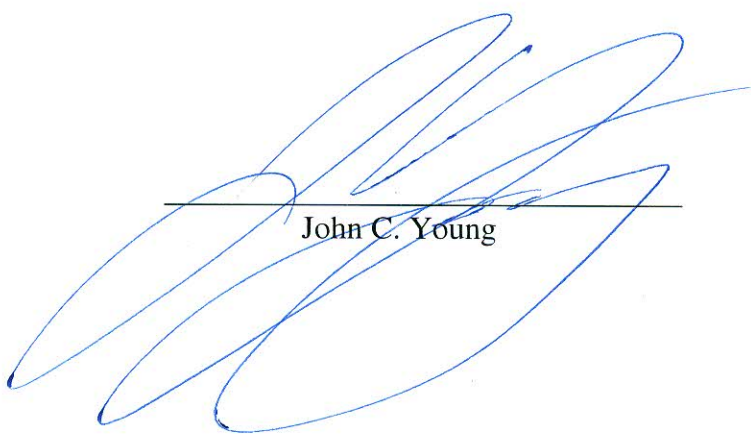
Respectfully Submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above was emailed to Counsel for Petitioner, Chad Smith, chad@chadsmith.com and by USPS at 22902 S. 494 Road, Tahlequah, OK 74464 on the October 25, 2018.



John C. Young