

Case No. SC-2015-07

IN THE SUPREME COURT OF THE CHEROKEE NATION

FRANCIS UNGER,
Appellant,

v.

THE CHEROKEE NATION,
Appellee.

BEFORE THE HONORABLE CRYSTAL JACKSON
CHEROKEE NATION DISTRICT COURT
Case No. CV-2014-94

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Statement of the Case

On March 7, 2014, Appellant Unger filed her *Complaint* in the Cherokee Nation District Court alleging five causes of action: 1) Violation of Article XII of the Cherokee Nation Constitution (Due Process); 2) Violation of 51 CNCA § 1101 (EAPA); 3) Violation of the CNCCA Organic Act; 4) Violation of Agency Policy; and 5) declaratory judgment. Appellant's *Complaint* also included various claims for relief, including monetary damages (in the form of lost wages and benefits), punitive damages, attorney's fees and litigation costs.

On March 27, 2014, the Appellee CNCCA filed its answer to Count I of the *Complaint* and a motion to dismiss Counts II through V. *See Answer as to First Cause of Action and Motions to Dismiss Causes of Action Two Through Five for Lack of Subject Matter [sic] Pursuant to District Court Rules 123(1) and (4)* (Mar. 27, 2014). Those issues were briefed at length before the District Court.

On June 26, 2015, the District Court entered its *Order* dismissing Counts II-V of the Appellant's *Complaint* and holding that all of Appellant's claims for monetary damages were barred by sovereign immunity.

On July 20, 2015, Appellant filed its *Petition in Error* with this Court. The Appellant's petition and *Opening Brief* were limited to the District Court's dismissal of Count II, concerning the applicability of 51 CNCA § 1101. *See Petition in Error* (Jul. 20, 2015); *see also Opening Brief* (Jul. 30, 2015).

On March 20, 2017, this Court entered its *Order* affirming the District Court's dismissal of Counts II-V. In its *Order*, this Court held that the District Court lacked jurisdiction over the procedures set forth in 51 CNCA § 1001, *et seq.* (the "EAPA"). *Id.* at 2-3. Therefore, because

Count II of the Appellant's *Complaint* was not brought pursuant to the EAPA, the District Court properly dismissed the same for lack of jurisdiction. *Id.* at 3.

On December 22, 2017, the District Court entered an agreed *Scheduling Order* providing Appellant until December 29, 2017, to file an amended complaint in this case.

On January 19, 2018, the Appellee filed its *Motion to Strike* for the Appellant's failure to file an amended complaint removing Counts II-V, which this Court had ruled as non-justiciable.

On August 16, 2018, the District Court entered its *Order Granting Defendant's Motion to Strike Plaintiff's Complaint* whereby Count I of the Plaintiff's *Complaint* was stricken by reason of the District Court's lack of jurisdiction over Article XII claims and the procedures of the EAPA. The Appellant appeals from this final *Order*.

Arguments and Authorities

I. The District Court Properly Dismissed Count I of the Plaintiff's *Complaint* as it Lacked Jurisdiction over the Plaintiff's Claim for Damages.

The District Court did not err when it dismissed Count I of the Appellant's *Complaint*—an Article XII constitutional claim—because her continued demand for previously dismissed statutory damages was beyond its jurisdiction to award. Under Cherokee law, the exclusive remedies available for successful Article XII constitutional claims are “reinstatement and retroactive benefits only.” *Watkins v. Cherokee Nation*, JAT-02-01 (2004) (emphasis added). This holding from *Watkins* has not been overruled, reversed, or modified in any way. In fact, this Court has reaffirmed the application of *Watkins* in employment cases as recently as 2014. *See Olaya v. Baker*, SC-2013-05 (2014). Additionally, the Appellant's Counsel continues to cite *Watkins* as binding authority in support of other pending Article XII claims.¹

¹ See *Comingdeer v. Cherokee Nation*, CV-2016-180, Plaintiff's March 9, 2018 *Motion for Leave to File Sur Reply in Opposition to Defendant's Reply Brief to Its Motion to Dismiss*.

Despite only her constitutional claim remaining, the Appellant continues to demand statutory remedies in this case. Indeed, the Appellant concedes that “this Court’s [March 20, 2017] *Opinion* essentially held that to bring an [*sic*] a cause of action under EAPA [*sic*], Unger must bring it pursuant to EAPA procedures before the Employee Appeals Board (“EAB”) **and that Unger could not combine an Article XII claim and EAPA claim in the same case before the District Court.**” *Appellant’s Brief-in-Chief*, at 2 (emphasis added). The Agency agrees with this concession. As explained above, in its June 26, 2015 *Order*, the District Court dismissed the Appellant’s causes of action II-V and the remedies attached thereto. The Appellant only appealed the dismissal of her second cause of action, a statutory claim brought pursuant to EAPA procedures. In 2017, this Court affirmed the District Court’s dismissal of the Appellant’s second cause of action, affirmatively stating that the District Court lacks jurisdiction over EAPA procedures. *See* March 20, 2017 *Opinion*, at 3.

While the Appellant will no doubt try to confuse the procedural history of this case and conflate dismissed matters, this is not a complex issue. Moreover, the Appellant herself admits that this Court held she could not combine an Article XII constitutional claim with a statutory claim under the EAPA before the District Court. The Appellant’s statutory claim and any statutory remedies attached thereto have been dismissed. Upon realizing this, the Appellant began to insist that her constitutional claim entitled her to those dismissed statutory remedies. This attempt resulted in the dismissal of her remaining claim simply because she demanded a remedy that the District Court could not grant her. The District Court did not commit error, nor did it contradict this Court’s 2017 *Opinion*. The Appellant demanded previously dismissed statutory damages with regard to her remaining Article XII constitutional claim. Such demand is beyond the jurisdiction of the District Court to award, therefore her claim was dismissed free from error.

II. The Appellant failed to meet the statutory requirements under the Employee Administrative Procedures Act (EAPA) therefore she is not entitled to the statutory remedies available through the same.

The Appellant plainly misunderstands the District Court's *Order*. The Appellant could have only proven her entitlement to statutory remedies by meeting the requirements of her statutory claim, established through EAPA procedures. Notwithstanding the resounding fact that this Court's March 20, 2017 *Opinion* dismissed the Appellant's statutory claim, the *Opinion* also held that the District Court lacks jurisdiction in appeals brought pursuant to EAPA procedures. The District Court's *Order*, and consequent dismissal of the Appellant's claim conformed directly to this Court's *Opinion*. The Appellant did not meet the requirements of the statutory claim at issue to entitle her to the available statutory damages. This is apparent by the District Court's own acknowledgement that "the procedures set out in the EAPA were not followed." If those statutory procedures were not followed, then the Appellant cannot claim entitlement to the statutory remedies attached thereto. This basic legal principle is extant. Thus, the District Court properly dismissed the Appellant's remaining claim because she demanded statutory remedies that it had no authority to award.

III. The District Court lacks jurisdiction to award damages under the Back Pay Act because it is an amendment to EAPA procedures.

It cannot be repeated enough in the briefing at bar—any legal basis through which statutory damages could have been recovered in this case has been both dismissed and affirmed and are no longer at issue here. The Appellant herself concedes that "Article XII and 51 CNCA 1025 [*sic*] are separate constitutional and statutory causes of action." *Appellant's Brief-in-Chief*, at 2. In addition, the Appellant admits that "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." *Id.* at 4. This Court has held that the District Court lacks jurisdiction over EAPA procedures. *See* March 20, 2017 *Opinion*, at 3.

The Back Pay Act, LA-30-10, is itself a substantive amendment of EAPA procedures.² The Appellant's own concessions, coupled with this Court's holding clearly show that any argument concerning the Back Pay Act is without merit. The Appellant's continued assertion of its applicability, seemingly based on a half-reading of the law, must be disregarded as wholly misplaced. Accordingly, the Back Pay Act is an amendment to EAPA procedures, over which the District Court lacks jurisdiction.

IV. The District Court has a duty to conduct its own jurisdictional analysis of a claim at any time and must dismissed where subject-jurisdiction is lacking.

Federal Rule 12(h)(3) states that, “[i]f the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.” Fed. R. Civ. P. 12(h)(3). Moreover, it is established that all courts have an “independent obligation to determine whether subject-matter jurisdiction exists, even in the absence of a challenge from any party.” *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) (citing *Ruhgras AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999)).

Here, the Appellant has received no less than three separate court decisions addressing the irrelevance of EAPA procedures in this matter.³ The Appellant's statutory claim brought pursuant to EAPA procedures—and the statutory remedies attached thereto—have been dismissed, appealed, affirmed, and stricken. Further, the Appellant herself has conceded that “the only cause of action at issue after the first appeal of this case and this Court's *Opinion* was [her] Count 1 – Article XII claim.” *Appellant's Brief-in-Chief*, at 4. Yet, she continued to assert that her Article XII constitutional claim entitles her to statutory remedies before the District Court. Indeed, the Appellant is presently launching the same argument before this Court. This assertion deprived the

² The Back Pay Act is an express substantive amendment to 51 CNCA § 1029. 51 CNCA § 1029 is a section within the EAPA.

³ See June 26, 2015 *Order*; March 20, 2017 *Opinion*; and August 16, 2018 *Order Granting Defendant's Motion to Strike Plaintiff's Complaint*.

District Court of jurisdiction to adjudicate her constitutional claim because it could not grant the statutory remedy she demanded. Therefore, the District Court properly examined its subject matter jurisdiction over the Appellant's remaining Article XII claim and found it lacked jurisdiction as it could not grant the statutory remedies she demanded.

Conclusion

Due to the Appellant's disregard for established precedent and her sustained demand for previously dismissed statutory damages, the District Court properly dismissed her remaining Article XII constitutional claim for lack of subject-matter jurisdiction. In sum, the District Court did not commit error, rather the Appellant did when she insisted that her Article XII constitutional claim entitled her to dismissed statutory damages plainly prohibited by this Court's March 20, 2017 *Opinion*. The District Court's dismissal of the same conformed entirely with this Court's *Opinion*. Indeed, the Appellant concedes this Court essentially held ". . . that Unger could not combine an Article XII claim and EAPA claim in the same case before the District Court." Despite this fact, the Appellant attempted to combine her claims anyway. The District Court did not err when it dismissed the Appellant's remaining constitutional claim because her continued demand for previously dismissed statutory damages was beyond its jurisdiction to award. Therefore, the District Court's dismissal of Count I of the Appellant's *Complaint* should be affirmed.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above was e-mailed to Counsel for the Appellant, Chad Smith, chad@chadsmith.com and by USPS at 22902 S. 494 Road, Tahlequah, OK 74464 on the February 15, 2019.

/s/ John Chapman Young
John Chapman Young