

IN THE SUPREME COURT OF THE CHEROKEE NATION

FRANCES UNGER,

Appellant,

vs.

CHEROKEE NATION

COMPREHENSIVE CARE AGENCY

Appellee.

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Case No. SC-2015-07

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FILED
CHEROKEE NATION
SUPREME COURT
JENNIFER BIRD, COURT CLERK

REPLY IN SUPPORT OF APPELLEE'S MOTION TO DISMISS

COMES NOW, the Appellee, Cherokee Nation Comprehensive Care Agency ("CNCCA"), by and through undersigned counsel, and in support of its *Motion to Dismiss Appellant's Second Petition in Error* respectfully submits the following:

INTRODUCTION

This Court dismissed any legal basis through which Appellant could have recovered statutory damages in its March 20, 2017 *Opinion*. Appellant did not timely move the Court to reconsider its dismissal and her attempt to do so now is time-barred. Accordingly, this petition should be dismissed for lack of subject-matter jurisdiction because Appellant is not attempting to appeal the dismissal of her improperly styled constitutional claim—she is asking the Court to reconsider its dismissal of statutory damages far beyond any arguably diligent deadline to do so.

ARGUMENT AND AUTHORITIES

- I. This Court has already ruled that the District Court is without jurisdiction over the procedures of 51 CNCA § 1001, *et seq.* ("the EAPA").**

This Court lacks subject-matter jurisdiction over Appellant's *Second Petition in Error* as it asks the Court to reconsider issues it has already decided. In its March 20, 2017 *Opinion*, this Court ruled that the District Court lacks jurisdiction over EAPA procedures. If the District Court

lacks jurisdiction over EAPA procedures, it certainly lacks jurisdiction to award remedies only available through the same. Notwithstanding, Appellant herself construed this Court's March 20, 2017 *Opinion* to mean essentially "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 2.¹ In *Unger v. Adair*, SC 2018-08, Appellant reiterated the Court's 2017 *Opinion* by stating "this Court held in *Unger* [v. CNCAA] that Unger's constitutional and statutory claims could not be brought together in the District Court, then she was forced to separate those claims." Petitioner's *Objection to Motion to Dismiss Petition for Writ of Mandamus* at 2, October 25, 2018.

In 2017, Appellant was free to ask the Court to reconsider its ruling on those issues, she did not. Instead, Appellant insisted she could carve out the statutory remedies associated with her dismissed statutory cause of action and attach them to her remaining constitutional cause of action. This insistence simply has no foundation in the law and Appellant has wholly failed to offer any substantive authority otherwise. As mentioned above, Appellant has conceded that this position is insufficient to support a viable argument as she admitted that her constitutional and statutory causes of action could not be combined. This Court has issued a final order on the applicability of EAPA procedures and the statutory remedies associated therewith. Appellant's failure to act diligently cannot be remedied at this late juncture and her Petition must be dismissed.

II. *Watkins v. Cherokee Nation* establishes the complete remedies available in successful Article XII claims.

Under Cherokee law, the exclusive remedies available for successful Article XII constitutional claims are reinstatement and back benefits. *Watkins v. Cherokee Nation*, JAT-02-01 (2004). Despite Appellant's urging to the contrary, the "Council's power to limit damages and

¹ Stricken for failure to comply with the appellate schedule. See October 29, 2018 *Minute Order*.

other remedies” has consistently been upheld by this Court. *Id.*. Accordingly, former employees who successfully bring suit under Article XII “are entitled to reinstatement and retroactive benefits only.” *Id.*

In an attempt to avoid binding precedent on this issue, the Appellant asserts that *Watkins* is no longer good law as it was “decided under the authority of the 1975 Constitution.” *Objection to Motion to Dismiss Petition for Writ of Mandamus* at 2. This novel assertion is simply unsupported by existing law as this Court, as recently as 2014, has reaffirmed the application of *Watkins* in employment cases. See *Olaya v. Baker*, SC-2013-05 (2014). In fact, earlier this year in *Comingdeer v. Cherokee Nation*, CV-2016-180, Appellant’s Counsel cited *Watkins* as supporting and binding precedent in Article XII claims by arguing:

The Cherokee Nation Supreme Court thirty-two years after *Gourd*, in *Cherokee Nation Entertainment, LLC, v. McInerney*, SC-2010-10 and under the 2003 Constitution, restated the law providing tenured Cherokee Nation employees an Article XII due process cause of action for wrongful termination:

Due Process. 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, 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 Resources 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.

Plaintiff’s *Motion for Leave to File Sur Reply in Opposition to Defendant’s Reply Brief to Its Motion to Dismiss*, March 9, 2018. (emphasis added).

In light of Appellant’s Counsel’s own citation to *Watkins* in support of other pending Article XII issues before the Cherokee Nation District Court, the argument that *Watkins* is no

longer good law calls into question Appellant's Counsel's duty of candor to this tribunal.² This argument is an attempt to detract from the fact that any arguably diligent deadline to request reconsideration as to the issue of statutory damages has long since expired. *Watkins* established the remedies of reinstatement and back benefits for successful Article XII constitutional claims and Appellant's contradictory arguments otherwise are wholly unfounded in the law.

III. The Back Pay Act is an amendment to EAPA procedures, over which the District Court lacks jurisdiction.

Notwithstanding the fact that all of the Appellant's statutory damages were dismissed by this Court in 2017, the Back Pay Act, LA-03-10, substantively amends 51 CNCA § 1029 of the Cherokee Nation Code. 51 CNCA § 1029 of the Cherokee Nation Code is contained in Title 51, Chapter 10, cited generally as the Employee Administrative Procedures Act ("EAPA"). See 51 CNCA § 1001. By its own words, the Back Pay Act is an amendment to EAPA Procedures contained in Title 51³. This Court clearly stated that the District Court lacks jurisdiction over EAPA procedures in its March 20, 2017 *Opinion*. Because the Back Pay Act is an amendment of EAPA procedures, the District Court lacks jurisdiction to award statutory remedies pursuant to it. What is more, Appellant's argument that the Back Pay Act provides statutory remedies for her constitutional claim has previously been decided. Appellant's attempts to further belabor this point should be ignored, if not admonished by this Court.

² Fed. R. Civ. P. 11(b)(2): By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law [...]

³ See LA-03-10, § 5 (amending Title 51 § 1029 of Cherokee Nation Code Annotated).

CONCLUSION

This Court dismissed any legal basis through which Appellant could have received statutory remedies in 2017 when it dismissed Count II of her complaint.⁴ Appellant insisted on an entitlement to statutory remedies only available through EAPA procedures, which the District Court lacked jurisdiction to provide. On remand, the District Court dismissed Appellant's remaining claim because it demanded statutory damages plainly prohibited by this Court's March 20, 2017 *Opinion*. Again, Appellant herself construed this Court's March 20, 2017 *Opinion* to mean essentially "that Unger's constitutional and statutory claims could not be brought together in the District Court, then she was forced to separate those claims." Petitioner's *Objection to Motion to Dismiss Petition for Writ of Mandamus* at 2. Yet Appellant is here, still attempting to combine an Article XII claim and statutory remedies, only available through EAPA procedures, in the same case. Appellant is dressing up the dismissal of her Article XII claim in an attempt to ask this Court to again consider her entitlement to statutory damages. The time to request reconsideration of this issue has expired. Therefore, this Petition should be dismissed for lack of subject-matter jurisdiction.

⁴ At Count II of her Complaint, Appellant alleged a violation of 51 CNCA § 1011.

Respectfully submitted,

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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 November 16, 2018.

/s/ John Chapman Young
John Chapman Young