

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

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CHEROKEE NATION
SUPREME COURT
GENERAL BLDG. COURT CLERK

FILED

**REPLY BRIEF AND MOTION TO EXHIBIT
WITH REPRESENTATIONS OF THE ATTORNEY GENERAL'S OFFICE**

COMES NOW, Appellant Francis Unger ("Unger") and submits this Reply Brief 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"). Unger further moves the Court to grant Unger leave to file Exhibit "A," "Partial Transcript of Cherokee Nation Health Committee on February 18, 2019" to her Reply Brief which are pertinent representations on February 18, 2019 by the Cherokee Nation Attorney General's Office regarding this case.

I. BACKGROUND

What is the relationship between this case and the related Petition for Mandamus in *Unger v. Adair, SC 2018*?

It appears the Attorney General's Office representing the Agency and the Nation has used the proverbial "Wewoka switch" strategy to deny Unger her day in court to redress the Agency's

wrongful discharge of her.¹ In this and its related case, *Unger v. Adair*, SC 2018-08, the Attorney General's Office has attempted to create "an unreconcilable conundrum" and "shell game" between the District Court and the Employees Appeals Board ("EAB"). First, the Attorney General's Office argued Unger has no Article XII cause of action in the District Court because she sought redress as provided by an amendment (Back Pay Act²) to the Employee Administrative Procedures Act, 51 CNCA 1001 et seq., ("EAPA"). Then, the Attorney General argued Unger has no cause of action in the EAB because she did not timely file in the EAB, although the Agency and Nation failed provide her pre and post termination due process, and failed to statutorily advise her she could appeal to the EAB pursuant to the EAPA. Both arguments are mounted to achieve one purpose- deny Unger her day in court and the remedies provided in the Constitution and Back Pay Act.

However, the law is simple. Unger has two wrongful discharge causes of action: 1) constitution Article XII, and 2) EAPA (51 CNCA § 1012, 1013). Unger may bring either or both. In the first appeal of this case, this Court held both causes of actions may not be brought in the District Court. The District Court may hear the Article XII claim and the EAB may hear the EAPA claim. Both causes of action lead to the same remedies under the Back Pay Act of back pay, reinstatement, and attorney's fees, if she can show she was denied pre termination due process, post termination due process, or denial of "for cause" termination.

The District Court erroneously held that to prosecute her Article XII claim, Unger had to follow EAPA procedure although the District Court gave no clue which procedures of the EAPA

¹ "The term "Wewoka Switch" describes an unreconcilable conundrum and is derived from the description of missing goods shipped by rail during the 1920s oil boom as probably being caught in the railroad switching area located in Wewoka, Oklahoma, *i.e.*, the Wewoka Switch. See *King v. King*, 2005 OK 4, ¶ 20, 107 P.3d 570, 579 (Raven Res. LLC v. Legacy Bank, 229 P.3d 1273, 2009 OK CIV APP 101 (Okla. Civ. App., 2009)); "Wewoka switch" is "shell game" (Carpenter v. State, 929 P.2d 988, 1996 OK CR 56 footnote 12 (Okla. Crim. App., 1996)).

² "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.

that she did not follow. The Agency and Nation argued Unger was not entitled to bring an EAPA claim before the EAB; however, the Agency did not give her the required statutory notice of her appeal rights. Although initially the Agency and the Nation argued the Agency was not an entity of the Nation and Unger was not an employee of the Nation, on February 18, 2019, Deputy Attorney General Chrissi Nimmo (“Nimmo”)³ belied those arguments by stating to the Cherokee Nation Health Committee that Unger was a Cherokee Nation employee, the Agency was an entity of the Nation, and the Nation’s Human Resource and Attorney General’s Office superintended the Agency’s termination decisions. *See* Exhibit “A.”

The posture of Unger’s cases spring from the fact that in 2014 after terminating her Unger, *pro se*, made numerous requests regarding her appeal rights, that neither the Agency, Cherokee Nation’s Human Resource Director, nor the Attorney General responded and advised Unger of her right of appeal and process. *Instead*, the Agency, Nation and Attorney General’s Office mislead Unger by failing to disclose the material information that the Nation’s Human Resources Director reviewed and approved or overturned Agency employees’ appeals thereby subjecting her termination to the EAPA.

The Agency and the Nation took the position that Unger was not an employee of the Cherokee Nation, its entities or its corporations, and that she was not entitled to protections of the EAPA, however this Court in the first appeal of this case held her that her EAPA claim should be dismissed for the “sole” reason it was brought in the District Court not in the EAB. This Court did not hold that EAPA did not apply to Unger. *See, Unger v CNCCA*, SC 2015-07, Opinion.

³ “Chrissi Ross Nimmo, Cherokee Nation citizen, is the Deputy Attorney General for Cherokee Nation. Chrissi is the managing attorney for the staff of 9 attorneys.” <https://attorneygeneral.cherokee.org/Meet-The-General-Staff/Nimmo>

II. ISSUE ON APPEAL

On appeal is the District Court August 16, 2018 Order erroneously dismissed Count 1:

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 EAPA⁴ were not followed. See August 16, 2018 Order at pg. 2.

The District Court did not state what EAPA procedures were not followed. To the contrary, the Agency did not follow the EAPA requirements. The Agency did not get policy concurrence from the Cherokee Nation Human Resources Department as required by 51 CNCA § 1011. Unger requested numerous times review and reconsideration of her termination by the Human Resources Director as required by 51 CNCA § 1012 (A) but he refused. The Human Resources Director did not respond in ten (10) days as required by 51 CNCA 1012 (B). The Human Resources Director did not provide Unger a written Notice of Dismissal describing the factual reasons for termination or a Notice of Appeal required by 51 CNCA § 1011.

This Court will quickly note that nothing in its March 20, 2017 *Opinion* addressed any requirement of exhaustion of EAPA procedures prior to the District Court asserting jurisdiction over an Article XII claim. This Court, the District Court, the Agency, and the Nation all recognize Unger has an Article XII cause of action. So why can't Unger bring it in the Nation's court of general jurisdiction- the District Court?

On February 18, 2019, Deputy Attorney General Chrissi Nimmo ("Nimmo") told the Cherokee Nation Health Committee that Unger was a PACE (Agency) terminated employee, and "PACE employees are Cherokee Nation employees" for the purpose of constitutional protections of "for cause" status and the requirement for pre and post termination due process. See Exhibit

⁴ Employee Appeals Procedure Act, 51 CNCA § 1001 et seq. (1996) ("EAPA")

“A.” In this case, the Agency and the Nation do not dispute that Unger was denied pre and post termination due process and adjudication of constitutional protections of “for cause” status.

The Agency is correct in its assertion that the issues in this case are not complex. *See* Answer Brief at page 6. First, as Nimmo acknowledged on February 18, 2019, Unger has a Constitution Article XII constitutional right of “for cause” employment and pre and post termination due process. In *Swinney v CNB*, SC 17-06, (May 16, 2018), this Court held that “it is well settled that an employee who has been employed by the Cherokee Nation for a period of more than one (1) year is entitled to pre-termination hearing.” *Opinion* at page 2.

The Agency cannot show (because it did not happen) that it provided Unger pre and post termination due process or it terminated her “for cause.” All the Agency had to do was provide this Court a citation or a copy of the notice of her pre and post termination due process hearing to show it complied with Article XII requirements. The Agency has not and cannot produce that documentation because it did not provide Unger the requisite due process despite her numerous requests for an appeal of her termination. *See* “Brief In Support of Petition for Writ of Mandamus,” (10/15/2018) *Unger v. Adair*, SC 2018-08, pages 2-3

Second, Article XII provides that “*the right of such employee to seek redress in the Cherokee Nation courts shall not be abridged.*” This applies to the Agency and the Nation.

In other words, the two issues are: 1) does Unger have right to pre and post termination for the Agency to show “for cause” termination, and 2) what is her redress?

The Agency’s silence in its Answer Brief in regarding rebuttal of the following issues is deafening.

1. The Agency did not address that the District Court erred dismissing Count 1 because the fundamental and unwavering mandate of Article XII is that, “*the right of such employee to seek redress in the Cherokee Nation courts shall not be abridged.*”

2. The Agency did not address that the District Court erred by Dismissing Count 1 in light of 51 CNCA § 1024 (A) (1) (EAPA) which provides, “This section shall not prevent resort to other means of review, redress, relief or trial de novo, available because of constitutional provisions.”

3. The Agency did not address that the terms of the “Back Pay Act” applies *not only* to Cherokee Nation employees who bring their wrongful discharge claims before the EAB pursuant to the EAPA but also to *employees of corporations owned by the Cherokee Nation. . . through the applicable termination appeals process for that corporation.*”

4. The Agency did not address or dispute that it and the Nation wholly failed to give Unger notice of her rights to appeal, pre and post termination and termination “for cause,” therefore violating Article XII requirements.

5. The Agency did not address what EAPA procedures that Unger failed to comply as a predicate before filing an Article XII claim in the District Court.

III. ARGUMENT

Proposition One. The District Court erred dismissing Count 1 because the fundamental and unwavering mandate of Article XII is that, “*the right of such employee to seek redress in the Cherokee Nation courts shall not be abridged.*”

The Agency’s recitation of the procedural history in this case is telling because it shows that it has never moved to dismiss Count 1- Unger’s Constitutional Claim. See Answer Brief page 4-5. The Agency answered the Petition’s Count 1 and did not dispute the District Court’s jurisdiction. On January 18, 2018, the Agency moved to strike Counts 2-5 to conform to this

Court's March 20, 2017 *Opinion*, but did not argue that Count 1 should be dismissed. On August 16, 2018, *out of the blue*, the District Court, *sua sponte* dismissed Unger's Count 1 constitutional claim. In effect, the District Court has left Unger with no venue to redress her constitutionally protected and guaranteed Article XII right; thus, the District Court completely and unconstitutionally abridged Unger's right to redress in the Cherokee Nation Courts.⁵ It should be noted that Article XII is an express waiver of sovereign immunity by creating a cause of action providing for unabridged redress for wrongfully discharged employees.

On February 18, 2019 Nimmo correctly belied the Agency's arguments in this case by stating, "for the purposes of employee protection if they (PACE employees) have been here for one year under the constitution they can only be terminated for cause. They are currently Cherokee Nation employees." *See* Exhibit "A".

This Court has never held the District Court has no jurisdiction over Article XII wrongful discharge claims. The Agency makes the rather lame argument that the District Court was justified in dismissing Unger's Article XII claim because it was beyond its jurisdiction to award for damages under the Back Pay Act. *See* Answer at page 5. Where is the law that holds the District Court cannot award statutory damages? Perhaps the Agency is really arguing that Unger is not eligible for damages under the Back Pay Act; however that does not deny the District Court jurisdiction over her Article XII claim.

Furthermore, the District Court did not dismiss Count 1 on ground of available remedies, it ruled, "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."

⁵ 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.)

See District Court's August 16, 2018 *Order* at pg. 2. The District Court did not cite nor has the Agency provided any authority for the proposition that an employee must exhaust EAPA procedures before filing an Article XII claim in the District Court. The Agency must be reminded that an Article XII cause of action is not conditioned on application of the Back Pay Act, the EAPA, or any other statute.

Even if the Court found the Back Pay Act did not apply (which it is does), by the Agency's own argument under *Watkins v CNE*, JAT 02-01 (2004), Unger would still be entitled to reinstatement and retroactive benefits. The Agency argues, "Under Cherokee law, the exclusive remedies available for successful Article XII constitutional claims are "reinstatement and retroactive benefits only." See Answer Brief at page 5. This is true for actions occurring *before* 2010.

In *Watkins v. Cherokee Nation, et al.*, JAT-02-01, "Order of Clarification (7/30/04), the JAT held that 51 CNCA § 1029 (now codified as 51 CNCA § 1028) limited CNE employees' remedies to reinstatement and retroactive benefits only. See *Order* at page 4, attached as Exhibit "B." However, the JAT found that:

With no legislative history to support a broad reading, it would be inappropriate for the Court to expand the statute (EAPA-1996) through a more liberal reading. Should the Council intend the remedy of back wages or salary to be available to wrongfully terminated employees, the Court will defer to future legislative enactments. (Order at page 3).

In 2010, six years after *Watkins*, the Council did exactly what the JAT recommended and passed the Back Pay Act which, as the Agency points out, amended 51 CNCA § 1028 (EAPA) to expand remedies to employees of Cherokee Nation entities and corporations including back pay and attorney's fees. As the JAT noted, this Court must defer to these "future legislative enactments." Unger was terminated in 2014, four years after passage of the Back Pay Act.

Regardless, there is no lawful justification for dismissing a constitutional right if there is a prayer for statutory damages. 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 denial of her constitutional rights of due process and "for cause" termination in the Cherokee Nation courts. This proposition was affirmed by the JAT in its En Banc Reconsideration of *Watkins v. Cherokee Nation, et al.*, JAT-02-01 (2/20/04).⁶

In this case, the District Court abridged Unger's Article XII right with the unconstitutional requirement to exhaust EAPA procedures (which are unknown because the District Court did not specify). The Agency asks this Court to abridge Unger's Article XII right with the unconstitutional requirement that she must qualify for remedies under the Back Pay Act. Both the District Court's Order and the Agency's argument are constitutionally infirm.

Proposition Two: Cherokee statutory provisions acknowledge Unger has a viable Article XII claim.

The Agency has wholly failed to rebut the argument that an EAPA cause of action is independent of an Article XII cause of action. 51 CNCA § 1024 (A)(2) provides, "This section shall not prevent resort to other means of review, redress, relief or trial de novo, available because of constitutional provisions." Therefore, the existence of a statutory claim for wrongful discharge claim does not affect the efficacy of a constitutional wrongful discharge claim. There is nothing in the EAPA that requires Unger to comply with EAPA procedures to prosecute her Article XII claim and, in fact, 51 CNCA § 1024 (A)(2) provides just the opposite. Therefore,

⁶In 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.

regardless of the status of Unger's EAPA claim, she may bring her 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 Agency chooses to ignore the *black letter law* of the Back Pay Act when it argues its remedies apply only to appeals brought under the EAPA. Unger is entitled to the remedies specified in the Back Pay Act because she is an employee who falls within its definition of "been directly employed by the Cherokee Nation or its wholly owned entities and corporations on a regular full-time basis for at least one continuous year immediately prior to termination of employment,"⁷ and as an "employee (who) is successful in overturning a termination as provided through the applicable termination appeals process for that corporation."⁸ See Exhibit "B," Back Pay Act, LA-03-10. Unger is entitled to the Back Pay Act remedies *either* as an employee of the Cherokee Nation, or of one of its entities or corporations.

First, the Back Pay Act applies to Unger because she is a Cherokee Nation employee. Nimmo advised the Health Committee that Unger, as an employee of PACE (the Agency), was a Cherokee Nation employee and the Agency was an entity of the Nation. See Exhibit "A". Because the Agency is an entity of the Cherokee Nation, Unger falls within EAPA and the Back Pay Act definition of an "employee." The Back Pay Act provides:

. . . 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

⁷ Employee Appeal Act of "2009" (Back Pay Act,) LA 03-10,(Jan. 15, 2010) Section 4 (A).

⁸ "51 CNCA 1028 (B); LA-03-10, (5) (A)," (Jan. 10, 2010.)

that corporation. (Emphasis added). See LA 03-10, Section 5, Substantive Provisions, subsection A.

As noted, the 2010 Back Pay Act expansion of remedies was in response to the JAT's 2004 decision in *Watkins* Order of Clarification denying a CNE employee back pay and attorney's fees.

Second, the Agency's persistent and incorrect argument to the contrary, the remedies of the Back Pay Act applies if the "employee is successful in overturning a termination as provided through the applicable termination appeals process for that corporation." Unger followed the Agency's policy by repeatedly asking the Board and its attorneys for an appeal of her termination. Agency policy CEC-HR-300.13 (2) (1/08/2009) provides, "Employees involuntarily terminated for reasons other than inability to meet job requirements have the right to appeal per the Employee Problem Solving process." The Agency's Problem Resolution policy CEC-HR-500.05 (5) (1/08/2009) provides:

A problem is considered resolved if the employee fails to meet the ten (10) work day limit or the problem is resolved at any level of management. The decision of the Program Director is final and binding, unless the problem is directed at the Program Director. In that case, the Chairperson of the CNCCA Board is the final authority.

Unger repeatedly sought an appeal with the Agency's Chairperson, who did not provide her an appeal.⁹ The Agency failed to provide Unger with any Notice of Appeal required by 51 CNCA § 1012 (A). Therefore, Unger exhausted the Agency's "applicable termination appeals process."

The next step after the Agency Chairman refused to provide Unger an appeal was that she contacted the Cherokee Nation's Human Resource Director Nason Morton who denied he reviewed the Agency's employment decisions and advised her to get an attorney.

⁹ 1) Unger email to Dibble (Agency Chairman) 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).

However, Nimmo affirmed to the Cherokee Nation Health Committee that Unger was an employee of the Cherokee Nation, that the Agency was an entity of the Cherokee Nation, and the Nation's Human Resources Department and Attorney General's Office reviewed the Agency's termination decisions. Therefore, Unger falls within the class of employees protected by the Back Pay Act and is entitled to its remedies.

CNB employees are examples of Cherokee Nation entity and corporation employees, who did not appeal through EAPA procedures, that were entitled to the remedies of the Back Pay Act if they prevailed in CNB's Employee Appeals Review Panel, ("EARP"). The same principle applies to the Agency. Since Agency employees are employees of the Nation or one of its entities or corporations, they are entitled to remedies of the Back Pay Act, if they prevail in the applicable termination appeals process.

There is no merit to the Agency's argument that only cases heard by the EAB are entitled to the Back Pay Act remedies because it amended the EAPA. The legislative history shows the contrary. In response to *Watkins*, the Back Pay Act was passed to expand employee remedies of back pay and attorney's fees to the Nation's entities and corporations who prevailed in their "applicable termination appeals process."

The black letter language of the Back Pay Act provides reinstatement, back pay, back fringe benefits and award of attorney's fees available to Cherokee Nation, its entity, or its corporation employees who prevail in the applicable termination appeals process. Unger is one of them.

The Agency argues that "Appellant's statutory . . . remedies attached there to have been dismissed." This Court did not address the issue of application of statutory remedies to Unger's

Article XII cause of cause in the first appeal. This Court has not addressed the issue of damages for constitutional violations since the passage of the Back Pay Act.

Proposition Four: The District Court's *sua sponte* dismissal of Count 1 violates due process.

Although, the District Court has the duty to determine its jurisdiction at any point of the litigation, it also has the duty mandated by due process to advise the parties of the issues and allow them to respond. The District Court did not and erred by dismissing Count 1 without notice and opportunity for the parties to respond.

IV. CONCLUSION

This Court should reverse the District Court's August 16, 2018 *Order* and hold that the District Court has jurisdiction over Unger's Article XII Count 1 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. In the words of Deputy Attorney General Nimmo, "because of this court case, it says their employees (PACE) are entitled to constitutional employee protection before they fire someone, they work with our HR office and our AG office to review that termination packet before they administer it. The way we do it for any other Cherokee Nation employee. . . ." But the Agency and Nation failed to do that in Unger's case.

Nimmo in her February 18, 2019 statement to the Health Committee outlined the duty of the Nation and the Attorney General's Office to Unger. The Nation's Attorney General's role is not to win for the sake of winning but as Nimmo stated the Attorney General has the duty to enforce the law that "employees are entitled to constitutional employee protection before they fire someone." The Nation's Attorney General's role is similar to the United States Attorney

General, that “The Attorney General is the head of the U.S. Department of Justice, and in that capacity “is not a counsel giving advice to the Government as his client, but a public officer, acting judicially, under all the solemn responsibilities of conscience and of legal obligation.” *See* Office & Duties of Att’y Gen., 6 Op. Att’y Gen. 326, 334 (1854). In other words, the Attorney General’s Office has the duty to see that Unger gets pre and post termination due process and a hearing for termination only for cause. On February 18, 2019, Nimmo told the Health Committee, “So our office, like we do for any other termination to ensure that the rules are being followed and there is sufficient proof there, we review those prior to their administration.” *See* Exhibit “A.” The Attorney General Office may dispute the facts of whether Unger was terminated for cause but it has a duty to ensure Unger receives due process.

However, in this case the Attorney General’s Office with its Wewoka switch arguments has done everything in its power to thwart Unger’s constitutional employee protection. The Agency and Nation: 1) did not provide Unger pre and post termination due process, 2) did not give her notice of termination with written factual reasons for her termination, 3) did not terminate her “for cause” 4) did not provide her notice of appeal, 5) refused to provide her an appeal, 6) argued she was not a Cherokee Nation employee and could not appeal to the EAB, 7) argued she is not entitled to an Article XII claim in the District Court, 8) argued she is not entitled to an EAPA claim in the EAB, and 9) argued that she is not entitled to remedies under the Back Pay Act. How exactly is the Attorney General’s Office discharging its duties to ensure, “we looking at it from an employee protection and constitutional protection stand point”? *See* Exhibit “A.”

Even Deputy Attorney General Nimmo who supervises the Assistant Attorney Generals representing the Agency in this case, agrees that Unger is entitled to constitutional due process

employment protections. This Court should reverse the District Court's error of dismissing Count 1 and find that if Unger prevails, she is entitled to redress of reinstatement, back wages, adjustment of her personnel file, and attorney's fees as provided by the Back Pay Act.

Respectfully submitted this 27th day of February 2019.

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Certificate of Delivery

I, Chadwick Smith, do hereby certify that on this 27th day of February 2019, I emailed a true and complete copy of the foregoing Brief to the persons listed below:

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EXHIBIT "A"

Partial Transcript of Cherokee Nation Health Committee- February 18, 2019
<https://www.youtube.com/watch?v=qTRAxCIUnGE>

At minute 18:

Councilmember: Are they Cherokee Nation employees (PACE program), the lady mentioned there.

Assistant Attorney General Chrissi Nimmo: So it depends, for the purposes of employee protection if they (PACE employees) have been here for one year under the constitution they can only be terminated for cause. They are currently Cherokee Nation employees. There is a long standing appeal where there was an employee who was terminated there and she said she should have been covered under the employee protections statutes of the Cherokee Nation. That case is actually ongoing. But for those purposes, they are considered (for) constitutional purposes they are considered employees. I believe they benefit share with us like with insurance and 401 k and some of that but they have their own HR department and their own board of directors. They are a statutorily created entity, for lack of a better term, of the Cherokee Nation. . . .

19.50: Nimmo: ... Our office represents them in legal matters.

32.26: Councilman Walkingstick: I have one more question. Hey, Chrissi. So the employees that's under PACE so you said their benefits and 401k and employment personnel fall under Cherokee Nation.

Nimmo: So I believe they benefit share with us. So does the housing authority which isn't us at all. Because we have the number of employees we can allow other organizations to participate in our health care and 401k and I think PACE does that though I am not sure. They then have their own set of HR policies and procedures. And because of this court. . .

Walkingstick: They have their own HR department and they hire and fire and the Cherokee Nation does not do anything with that.

Nimmo: They, because of this court case that says. ..they are not contracted. But because of this court case, it says their employees are entitled to constitutional employee protection before they fire someone. They work with our HR office and our AG office to review that termination packet before they administer it. The way we do it for any other Cherokee Nation employee - did they violate the policy they are alleged to violate, is the proof there and that's a standard across the nation. So because of this court case they . . .

Walkingstick: Which court case are you referring to?

Nimmo: The case is named Younger (Unger). And it was an employee fired from PACE. She sued and said, "Hey I am a Cherokee Nation employee, I can only be fired for cause, and I have to have pretermination due process." And the court said for the purposes of constitutional protections. And then there was another question of whether she fell under the EAB process and could go to them. But for the purposes of you have to have for cause and you to have pre termination due process if you have been here for a year, the court said yes for that constitutional purpose, PACE employees are Cherokee Nation employees. So our office, like we do for any other termination to ensure that the rules are being followed and there is sufficient proof there, we review those prior to their administration. But it is still their policies and their HR files and everything else that leads up to that, so we looking at it from an employee protection and constitutional protection stand point.

Exhibit "B"

Watkins v. Cherokee Nation, et al., JAT-02-01, "Order of Clarification
(7/30/04)

An Act

Legislative Act 03 – 10

AN ACT RELATING TO EMPLOYEES OF THE CHEROKEE NATION OR ITS WHOLLY OWNED CORPORATIONS; TERMINATION APPEALS PROCEDURES AND EMPLOYEE BACK PAY ACT OF 2005; PROVIDING FOR SEVERABILITY AND DECLARING AN EMERGENCY

BE IT ENACTED BY THE CHEROKEE NATION:

Section 1. Title and Codification

This act shall be known as the “Employee Appeal Act of 2009” and codified in Title _____ Section _____ of the Cherokee Nation Code Annotated (CNCA).

Section 2. Purpose

The purpose of this Act is to provide legislative authority for the award of back pay, costs and attorney fees to employees who are reinstated to their positions after administrative and/or judicial procedures are followed.

Section 3. Legislative History

Title 51 of the Cherokee Nation Code Annotated, Article V, Section 7 of the Cherokee Legislative Act 12-96, 20-96.

Section 4. Definitions

For the Purposes of this Act:

- A. “Employee” shall mean a person who has been directly employed by the Cherokee Nation or its entities and corporations on a regular full-time basis for at least one continuous year immediately prior to termination of employment, but shall not include employees who have limited term contracts, employment agreements, or are considered independent contractors. For purposes of employee termination appeals under this Act this term shall not include employees of specialized authorities and entities created by the legislature, such as, but not limited to, the Arkansas Riverbed Trust Authority.
- B. The “Nation” means the Cherokee Nation.
- C. “Back Pay,” means the amount of wages denied an employee from the time of discharge until reinstatement in accordance with administrative and/or judicial procedures available to employees under Cherokee Nation laws and Constitution.

D. "Cost and Attorney Fees" means the costs associated with the filing and maintaining the cause of action which includes reasonable attorney fees.

Section 5. Substantive Provisions

Amend Title 51 § 1029 of the Cherokee Nation Code Annotated:

Remedies for termination without cause:

- A. If the termination is overturned based on a finding that the termination was without cause by unappealed decision of the Cherokee Nation Appeals Review Board or by a final decision of the Judicial Appeals Tribunal, 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 adjusted as may be consistent with the action of the Cherokee Nation Administrative Appeals Board or Cherokee Nation Courts. The remedies provided herein shall be exclusive, and the Cherokee Nation expressly declines to waive sovereign immunity as to suit for the recovery of any form of damages or other type or relief other than the relief set forth herein. 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.
- B. Prevailing parties may be awarded costs and reasonable attorney fees as determined by the appropriate Board or Court.

Section 6. Provisions as cumulative

The provisions of this act shall be cumulative to existing law.

Section 7. Severability

The provisions of this act are severable and if any part of provision hereof shall be held void the decision of the court so holding shall not affect or impair any of the remaining parts or provisions of this act.

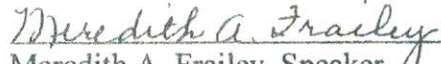
Section 8. Emergency Declared

It being immediately necessary for the welfare of the Cherokee Nation, the Council hereby declares that an emergency exists, by reason whereof this Act shall take effect and be in full force upon its approval and signatures.

Section 9. Effective Date

This act shall become effective _____, 2010, in accordance with the Cherokee Nation Constitution.

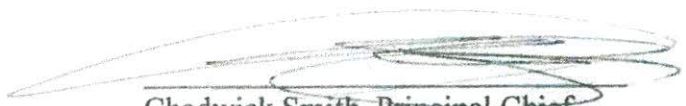
Enacted by the Council of the Cherokee Nation on the 11th day of January, 2010.


Meredith A. Frailey, Speaker
Council of the Cherokee Nation

ATTEST:


Don Garvin, Secretary
Council of the Cherokee Nation

Approved and signed by the Principal Chief this 15th day of JANUARY, 2010.


Chadwick Smith, Principal Chief
Cherokee Nation

ATTEST:


Melanie Knight, Secretary of State
Cherokee Nation

YEAS AND NAYS AS RECORDED:

Tina Glory Jordan	<u>Yea</u>	Meredith A. Frailey	<u>Yea</u>
Bill John Baker	<u>Yea</u>	Chris Soap	<u>Yea</u>
Joe Crittenden	<u>Yea</u>	Cara Cowan Watts	<u>Yea</u>
Jodie Fishinghawk	<u>Yea</u>	Buel Anglen	<u>Yea</u>
Janelle Lattimore Fullbright	<u>Yea</u>	Bradley Cobb	<u>Nay</u>
David W. Thornton, Sr.	<u>Yea</u>	Charles Hoskin, Jr.	<u>Yea</u>
Don Garvin	<u>Yea</u>	Julia Coates	<u>Yea</u>
Harley L. Buzzard	<u>Yea</u>	Jack D. Baker	<u>Yea</u>
Curtis G. Snell	<u>Yea</u>		