

4. John and Jane Does 1-3 are Cherokee Nation supervisors whose identities are unknown at this time, but they acted in concert with Kelley to retaliate against Comingdeer.

II. JURISDICTION

5. This 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 entity with the jurisdiction of the Cherokee Nation speedy and certain remedy, an equal protection, shall be afforded under the laws of the Cherokee Nation."

6. The Act provides a cause of action against the Cherokee Nation and its employees.

7. The acts and omissions alleged herein giving rise to Plaintiff's claims occurred within the boundaries of the Cherokee Nation and all parties reside within the territorial boundaries of Cherokee Nation.

III. FACTS

8. The Nation hired Comingdeer on August 17, 1992.

9. In July 2014, the United States Forest Services ("USFS") entered into a renewal agreement and/or grant with the Nation to supply Heritage Resource Technicians ("HRT"), which included training and logistics staff to perform controlled forest and wildland burns, forest restoration and archeological surveys. The amount of the grant was over \$400,000. Comingdeer worked under the grant.

10. Despite Comingdeer's repeated requests for compliance, the Career Services Department failed to perform and comply with grant deliverables.

11. On September 15, 2015, Comingdeer received his annual performance appraisal that was prepared by his supervisors, Willard Mounce and Jon Smith. It reflects an "Outstanding" rating of 4.8 out of a total of 5. Comingdeer's supervisors stated,

He (Comingdeer) does an excellent job. He fully know (sic) and understands what needs to be done without help with the assigned project. He works long hours and is a good worker. See Cherokee Nation Performance Appraisal 10/1/2014 to 9/30/2015.

12. On October 27, 2015, Comingdeer was employed as a Wildland Firefight Coordinator and was contacted by Forest Service employee Teresa Williamson (“Williamson”) who had processed the Nation’s grant for deliverables under the HRT program. On that day, he received an email from Williamson that the Nation was in jeopardy of losing the grant. She wrote to Comingdeer, “Well, ok. Do you think losing almost half million dollars will bother them.” Later on the same day, she emailed Comingdeer, “We may have a solution Otoes may take it and all work under them.” See Exhibit “1”, Williamson Emails Oct. 27, 2015.

13. On October 27, 2016, Comingdeer consulted Tammie Beaver, Administrative Assistant in the Career Services Department with the news that the Nation would be losing this grant and she advised he should let the group of Nation employees and staff who dealt with the grant (“work group”¹) know about the eminent loss.

14. On October 27, 2016, in response to the Williamson’s email, Comingdeer sent an email to the work group addressed to Chrissi Nimmo (“Nimmo”) and copied to others. Comingdeer stated in his email that, “The USFS representative has been in contact with the Otoe Tribe today, and will be giving the grant to them. USFS will use the same agreement we had, and will quickly get the manpower on the ground to accomplish the work, which currently behind schedule.” See Exhibit “ 2.” Comingdeer Oct. 27, 2015 email (“Grant Loss email”).

15. On October 27, 2015 Nimmo sent an email in response by Comingdeer’s email:

¹ Chrissi Nimmo, David Comingdeer, Jon Smith, Tammy Beaver, Willard Mounce, Diane Kelley, Tanya Johnson, Christina Carroll, Debra Lack, Stephanie Isaacs, Alana Casteel, Amy Brill, Michelle Downing, John C. Young, Chad Harsha, Chuck Hoskin, Jr. Todd Hembree, Sara Hill, Amanda Clinton and Nason Morton. All are Cherokee Nation employees, except Amanda Clinton who works for Cherokee Nation Businesses.

David, That is disappointing to hear. It is unfortunate that your program was not able to establish employment for these individuals after being advised to do so more than a year and half ago by the AG's Office (emails attached). . . . It was not until the grant funds were frozen and the issue reached a critical point that there was any follow-up from Career Services on the decisions that were made more than a year ago with input from everyone. Hopefully if we seek this type of funding in the future we will be able to comply with the grant requirements.

16. The eminent loss of the Forest Service grant was because of lack of performance and compliance with the terms of the grant managed by Career Services.

17. On November 13, 2015, the Nation disciplined Comingdeer with five (5) days suspension without pay for "discourteous behavior, unauthorized use of equipment, willful refusal and other acts."² Prior to this date, Comingdeer had not been disciplined in his twenty-four (24) year career with the Nation and his personnel record shows outstanding performance with multiple performance awards for firefighting.

18. One of the grounds the Nation alleged for its November 13, 2015 disciplinary action of Comingdeer was that on October 27, 2015, "Mr. Comingdeer utilized his Cherokee Nation cell phone in an unauthorized manner when he sent an email titled "Grant Loss" to various individuals, including Cherokee Nation administration, legal staff, accounting staff, and human resources staff as well as fellow Career services staff." Comingdeer was on annual leave that day. See Disciplinary Action Notice November 13, 2015 Narrative pg. 3.

19. Another ground the Nation alleges for its November 13, 2015 disciplinary action of Comingdeer was that he texted the Cherokee Nation Phoenix newspaper that "I just lost half a million dollars which would have paid my firefighters to conduct Forest Restoration and Archaeology work for the Forest Service. The Sec of State, AG's office, Debra Lack, Tanya

² Disciplinary Action Form dated November 13, 2015 signed by Darrel Legg, Supervisor; Diane Kelly, Program Manager; and Julie Justice, Human Resources Representative.

Johnson are responsible for this tremendous loss. Forest Service is taking the money back, and giving to the Otoes.” See Disciplinary Action Notice November 13, 2015 Narrative pg. 3.

20. Another ground the Nation alleges for its November 13, 2015 disciplinary action of Comingdeer was that after Kelley received the Grant Loss email on October 27, 2105, Comingdeer “exhibited disrespectful behavior when he verbalized disappointment with the Executive Director of Career Services. . . .” during a conference telephone call. The Nation alleges:

Mrs. Kelley commented that she was “very upset” concerning this matter in which Mr. Comingdeer stated, I am very upset with you.” referring to Mrs. Kelley. See Disciplinary Action Notice November 13, 2015 Narrative pg. 1.

21. On November 18, 2015, Kelley administratively transferred Comingdeer from Wildland Firefighter Coordinator to Special Projects Officer. The job description had vague job duties without any responsibilities for firefighting. He signed off on the duties the same day.

22. On February 17, 2016, Kelley and other career services staff meet with Comingdeer in her office to “discuss actions taken by Mr. Comingdeer that involved this February 2016 postings of negative, deceptive comments on social media about various aspects including the Cherokee Nation and the Firefighter program.” See Disciplinary Action Notice March 17, 2016 Narrative pg. 3, 7.

23. On February 22, 2016, Kelley placed Comingdeer on administrative leave with pay. She advised him not to return to work and gave him no work to do at home.

24. On March 10, 2016, through this attorney, Comingdeer requested Nason Morton, Executive Director of Human Resources, to review the Nation’s November 13, 2015 suspension without pay and claim of constructive discharge. As of April 6, 2016, Morton had not responded.

25. On or about March 16, 2016, Comingdeer was advised that Cherokee Nation Security was instructed by the Cherokee Nation Marshal to arrest Comingdeer if he came on Cherokee Nation property.

26. On March 22, 2016, Kelley met Comingdeer at the Talking Leaves Job Corp. offices. At that meeting, Kelley suspended Comingdeer eight (8) business days without pay, because he allegedly “. . . violated Chapter III, Section L-2, Participation in Social Media, when he posted negative, derogatory and deprecating comments on social media.” See Disciplinary Action Notice March 17, 2016 Narrative pg. 7.

27. Comingdeer’s “Grant Loss” email and social media posts were true.

28. On March 29, 2016, through this attorney, Comingdeer requested Nason Morton, Executive Director of Human Resources, to review the Nation’s March 22 suspension without pay. As April 6, 2016, Morton had not responded.

III. CAUSES OF ACTION

A. CONSTRUCTIVE DISCHARGE

29. Comingdeer alleges that the Defendants retaliated against him, without cause or due process, by constructively terminating him when they transferred him to another job on November 18, 2015, reduced the compensation available to him as a firefighter, and then on February 22, 2016 placed him on administrative leave without any assignment of work and instructions not to return to the Cherokee Nation premises.

B. RETALIATION FOR WHISTLE BLOWING

30. Comingdeer disclosed on October 27, 2015 to a supervisor and to a public body, an activity, policy or practice of the employer, a co-employee or another employee, that he

reasonably believed was incompatible with a clear mandate of public policy concerning the public health, safety, welfare or protection of the environment- the eminent loss of the Forest Service grant that would provide \$500,000 of protection of the environment and provide employment to a number of Cherokee citizens. See Public Integrity and Whistleblower Protection Act of 2004, LA 13-04. 28 CNCA ___, LAS 13-04 (4) (c)

31. Defendants retaliated against Comingdeer for reporting to the employer, a co-employee or another employee, the eminent loss of the Forest Service grant of almost \$500,000 after numerous requests to provide necessary compliance. The eminent loss of the Forest Service grant was due to repeated mismanagement by the Nation, particularly Career Services led by Kelley.

32. The Nation suspended Comingdeer without pay on November 13, 2015, suspended him with pay from February 22, 2016 through March 23, 2016, and suspended him without pay on March 23, 2016 for reporting and commenting on the Nation's gross mismanagement of the Forest Service grant in violation of the Act.

33. The Nation's November 13, 2015, discipline of Comingdeer with five days suspension without pay for "discourteous behavior, unauthorized use of equipment, willful refusal and other acts" is based on false allegations and subterfuge because Comingdeer was punished:

a) for using the Cherokee Nation's cell phone on October 27, 2015 to report by email to Cherokee Nation staff the eminent loss of a \$500,000 Cherokee Nation grant which served and protect Cherokee people. The Nation punished Comingdeer for using the Cherokee Nation cell to send the "Grant Loss" email while he was on annual leave. The *lunacy* of this allegation suggests that Comingdeer should have waited until he was no longer on annual leave to report the eminent loss of a \$500,000 grant.

- b) for “discourteous behavior” on October 27, 2015 because after Kelley expressed her disappointment with Comingdeer when she was upset; he expressed his disappointment with her. This allegation is hypocritical and a subterfuge because the Nation punished Comingdeer for the same behavior first exhibited by Kelley.
- c) for Comingdeer reporting to the work group by email on October 27, 2015 that the Forest Service grant was in eminent threat of being lost, even though it was true as confirmed by the response email of Chrissi Nimmo on the same day.

34. The administration of Principal Chief Bill John Baker, particularly Kelley retaliated against Comingdeer for reporting the eminent loss of the \$500,000 Forest Service grant to Cherokee Nation staff, which exposed their gross mismanagement of the grant.

35. Defendants further retaliated against Comingdeer for discussing the Nation’s failure to support its historical commitment to firefighting, particularly critical during a very active fire season on social media. Defendants retaliated against Comingdeer by suspending him without pay for eight (8) business days for expressing his opinion in person on February 17, 2016 and on social media regarding the mismanagement of the Forest Service grant and discussion of the lack of the Nation’s support for firefighting on social media.

C. VIOLATION OF FREEDOM OF SPEECH

36. Defendants denied Comingdeer his Cherokee Nation Constitutional right of freedom of speech of participating on social media regarding the Nation’s mismanagement of the Forest Service grant and discussion of the lack of the Nation’s support for firefighting. The Nation retaliated against him by suspending him without pay for eight (8) business days for expressing his opinion in person on February 17, 2016 and on social media.

V. PRAYER FOR RELIEF

WHEREFORE, PREMISES CONSIDERED, Plaintiff prays for relief from this Honorable Court as set forth below:

- 1) For Compensatory or exemplary damages;
- 2) Reinstatement of position and back wages;
- 3) For cost of suit and reasonable attorney's fees;
- 4) For such other relief and further relief as the Court may deem proper.

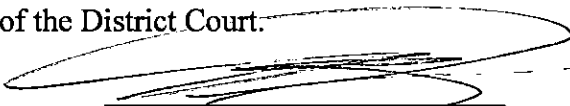
Respectfully submitted this 6 day of April 2016.



Chadwick Smith
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918 453 1707
Attorney for Plaintiff:
David Comingdeer
Stilwell, OK

CERTIFICATION OF JURISDICTION

Pursuant to District Court Rule 1, the undersigned attorney certifies that the foregoing Complaint demonstrates the subject matter jurisdiction of the District Court.



Chad Smith
Attorney for Plaintiff

EXHIBIT "1"

From: Willard Mounce
Sent: Monday, November 02, 2015 3:40 PM
To: Stephanie Isaacs
Subject: Fwd: Grant Loss.

Sent from my iPhone

Begin forwarded message:

From: David Comingdeer <david-rabon@cherokee.org>
Date: November 2, 2015 at 3:09:03 PM CST
To: Willard Mounce <willard-mounce@cherokee.org>
Subject: Fwd: Grant Loss.

Sent from my iPhone

Begin forwarded message:

From: "Williamson, Teresa -FS" <twilliamson@fs.fed.us>
Date: October 27, 2015 at 11:26:50 AM CDT
To: David Comingdeer <david-rabon@cherokee.org>
Subject: Re: Grant Loss.

We may have a solution Otoes may take it and all work under them.

Sent from my iPhone

On Oct 27, 2015, at 11:07 AM, Williamson, Teresa -FS <twilliamson@fs.fed.us> wrote:

Well ok. Do you think losing almost a half million dollars will bother them

Sent from my iPhone

On Oct 27, 2015, at 11:00, David Comingdeer <david-rabon@cherokee.org> wrote:

From: David Comingdeer <david-rabon@cherokee.org<mailto:david-rabon@cherokee.org>>
Date: October 27, 2015 at 10:58:34 AM CDT
To: Chrissi Nimmo <chrissi-nimmo@cherokee.org<mailto:chrissi-nimmo@cherokee.org>>

EXHIBIT
A1 pg 13/13

EXHIBIT
D pg 1/1

Stephanie Isaacs

EXHIBIT

From: David Comingdeer
Sent: Tuesday, October 27, 2015 2:29 PM
To: Chrissi Nimmo
Cc: David Comingdeer; Jon Smith; Tammy Beaver; Willard Mounce; Diane Kelley; Tanya Johnson; Christina Carroll; Debra Lack; Stephanie Isaacs; Alana Casteel; Amy Brill; Michelle Downing; John C. Young; Chad Harsha; Chuck Hoskin Jr.; Todd Hembree; Sara Hill; amanda.clinton@cn-bus.com; Nason Morton
Subject: Re: Grant Loss.

It is disappointing. I am extremely disappointed, after getting my firefighters trained and qualified to perform this work, and negotiating nearly half a million dollars from Forest Service to keep them working and serving the needs of the United States Forest Service, this is a great loss. I was not included in the this process until it was already off track from the agreement, so it was too late to get things right. I have been in contact with several of my firefighters and they are also very disappointed. They feel that all the training and qualifications they have earned has been for nothing. This grant was going to be a major income source for these Tribal Citizens, and assist the USFS to reach its project objectives.

The USFS representative has been in contact with the Otoe Tribe today, and will be giving the grant to them. USFS will use the same agreement we had, and will quickly get the manpower on the ground to accomplish the work, which is currently behind schedule. The Otoes will not employ their firefighters to the Otoe Tribe, and neither has any other tribe in the last 20 years, under this same agreement.

Sent from my iPhone

On Oct 27, 2015, at 2:00 PM, Chrissi Nimmo <chrissi-nimmo@cherokee.org> wrote:

David,

That is disappointing to hear. It is unfortunate that your program was not able to establish employment for these individuals after being advised to do so more than a year and half ago by the AG's Office (emails attached). After a meeting and multiple emails and conversations, the AG's Office, Human Resources and Finance all agreed that these individuals should be employed before we could send them out on assignment and all departments involved offered to be as flexible as possible within current policies to make that happen. It was not until the grant funds were frozen and the issue reached a critical point that there was any follow-up from Career Services on the decisions that were made more than a year ago with input from everyone. Hopefully if we seek this type of funding in the future we will be able to comply with the grant requirements.

Chrissi

Chrissi Ross Nimmo

Assistant Attorney General

Cherokee Nation

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