

IN THE DISTRICT COURT OF THE CHEROKEE NATION

DAVID COMINGDEER,)
)
Plaintiff,)
)
vs.)
)
CHEROKEE NATION,)
)
Defendant.)

CV-2016-180

2016 JUN 19 PM 3:40

FILED

MOTION TO DISMISS

COMES NOW the Cherokee Nation and pursuant to the Court Rules of the District Court 123(1) and 123(2) moves this court to dismiss Counts I and III of the above-styled action for lack of jurisdiction and failure to state a claim upon which relief can be granted. In support thereof the Defendant offers the following:

Introduction

In his Complaint, the Plaintiff brings claims for constructive discharge, retaliation for whistleblowing, and violation of freedom of speech pursuant to the Public Integrity and Whistleblower Protection Act of 2004, LA 13-04 ("the Act"). In Count I of the Complaint, the Plaintiff alleges that he was constructively discharged when he was administratively transferred and disciplined for violation of Cherokee Nation Human Resources policy.¹ Pl.'s Compl. 6 (Apr. 6, 2016). However, the Plaintiff cites to no provision of the Act, or any other provision of Cherokee law, which waives the sovereign immunity of the Nation for claims of constructive discharge. Therefore, Count I of the Complaint should be dismissed for lack of jurisdiction.

Assuming *arguendo* that the Nation has waived sovereign immunity for claims of constructive discharge, which it has not, the Plaintiff has failed to plead allegations in support of

¹ The Plaintiff is a former, full-time employee of the Cherokee Nation having voluntarily resigned on August 8, 2016.

such a claim. Therefore, in the alternative, Count I of the Complaint should be dismissed for failure to state a claim upon which relief may be granted.

In Count III of the Complaint, the Plaintiff alleges that the Defendants denied the Plaintiff his Cherokee Nation Constitutional right of free speech for “participating on social media regarding the Nation’s mismanagement of a Forest Service grant and discussion of the lack of the Nation’s support for firefighting”. Pl.’s Compl. 8. Again, the Plaintiff cites to no provision of the Act, or any other provision of Cherokee law, which would define “participating on social media” as protected activity. Therefore, Count III of the Complaint should be dismissed for lack of jurisdiction.

Argument and Authorities

I. Count I of the Plaintiff’s Complaint should be dismissed for a lack of jurisdiction as the Tribal Council has not waived sovereign immunity for claims of constructive termination under the Act.

As a foundational principal, Indian tribes are immune from lawsuits in both state and federal court unless “Congress has authorized the suit or the tribe has waived its immunity.” Kiowa Tribe v. Mfg. Techs., Inc., 523 U.S. 751, 754 (1998). The doctrine of tribal sovereign immunity is rooted in federal common law and reflects the federal Constitution’s treatment of Indian tribes as governments in the Indian commerce clause. U.S. Const. Art. 1 § 8. Absent a waiver of a tribe’s sovereign immunity by Congress, Indian tribes can waive immunity by tribal law as long as it is “clearly” done. Oklahoma Tax Comm’n v. Citizen Band of Potawatomi Indian Tribe, 498 U.S. 505, 509-510 (1991). “It is settled that a waiver of sovereign immunity ‘cannot be implied but must be unequivocally expressed.’” Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58, 98 S. Ct. 1670, 1677, 56 L. Ed. 2d 106 (1978) (citing United States v. King, 395 U.S. 1, 4, 89 S.Ct. 1501, 1502, 23 L.Ed.2d 52 (1969)). “The Court is not permitted to imply waivers of

sovereign immunity. Only when it is express and clear from a statute will the Court find that the Council intended to permit a complaint to be brought against the Cherokee Nation.” In re Sanders, JAT-99-26, 11 (2002). “If the District Court concludes that a waiver exists, the Court should set forth the legislation or other documents that constitute such a waiver. If the District Court concludes there is no waiver, the case shall be dismissed for lack of jurisdiction.” Littlejohn v. Smith, JAT-03-18 (2004) (citing Rorex v. Cherokee Nation, JAT-93-05 (1995)).

The Tribal Council reserves the inherent authority set “limitations as to time, place, manner, subject, and any other restrictions desired” when waiving the sovereign immunity of the Nation. LA 23-04 § 5. In waiving sovereign immunity through the Act, the Tribal Council has defined the conduct amounting to retaliatory action. The Act, in relevant part, provides as follows:

“Retaliatory action” means the discharge, suspension, demotion, harassment, blacklisting or refusal to hire an employee, or other adverse employment action taken against an employee in the terms and conditions of employment, or other actions which interfere with an employee’s ability to engage in protected activity set forth in § 4, as a result of the employee’s engagement in a protected activity.

LA 13-04 § 3.

In Count I of the Complaint, the Plaintiff alleges that the Defendants retaliated against him by “constructively terminating” him by transferring him and placing him on administrative leave. Pl.’s Compl. 6. However, in waiving the sovereign immunity of the Nation in the Act, the Tribal Council has not included constructive termination in the definition of retaliatory action. Absent clear and unambiguous language including such conduct within this definition such claims cannot be inferred or implied. Therefore, Count I of the Plaintiff’s Complaint should be dismissed for lack of jurisdiction.

II. In the alternative, Count I of the Plaintiff's Complaint should be dismissed for failure to state a claim upon which relief can be granted as the Plaintiff has failed to allege facts demonstrating constructive termination.

Assuming *arguendo* that the Nation has waived sovereign immunity for claims of constructive termination, which it has not, the Plaintiff has failed to state a claim upon which relief can be granted. Generally, in order to prove constructive termination or constructive discharge, an employee must demonstrate that the employer's discriminatory conduct produced working conditions that a reasonable person would view as intolerable. 45B Am. Jur. 2d Job Discrimination § 967; see also Collier v. Insignia Financial Group, 1999 OK 49, ¶ 10 (requiring the trial court to inquire (1) whether the employer either knew or should have known of the "intolerable" work conditions and (2) if the permitted conditions were so intolerable that a reasonable person subject to them would resign). In bringing his claim for constructive termination, the Plaintiff makes no allegation that the Defendants created working conditions that a reasonable person would find intolerable. Nor does the Plaintiff does not allege that he suffered any reduction in compensation or benefits from the Cherokee Nation, a property right protected by Cherokee law.² Instead, the Plaintiff alleges that the transfer "reduced the compensation available to him as a firefighter". Pl.'s Compl. 6. The Plaintiff omits that this compensation was not part of his salary or benefits with the Cherokee Nation but from federal grant sources. Therefore, in the alternative, Count I of the Complaint should be dismissed for failure to state a claim upon which relief may be granted.

III. Count III of the Plaintiff's Complaint should be dismissed for lack of jurisdiction as the Tribal Council has not defined participation on social media as a protected activity within the meaning of the Act.

In Count III of the Complaint, the Plaintiff alleges that the Defendants denied the Plaintiff his Cherokee Nation Constitutional right of free speech for "participating on social

² The Plaintiff received equal pay and benefits upon being administratively transferred.

media regarding the Nation's mismanagement of a Forest Service grant and discussion of the lack of the Nation's support for firefighting". Pl.'s Compl. 8. In defining protected activity, the Act provides as follows:

An employer shall not take any retaliatory action against an employee because the employee does any of the following:

- (a) Discloses, threatens to disclose or is about to disclose to a supervisor or to a public body, an activity, policy or practice of the employer, a co-employer or another employer, that the employee reasonably believes is in violation of a law, or a rule or regulation promulgated pursuant to law
- (b) Provides information to, or testifies before, any public body conducting an investigation, hearing or inquiry into any violation of law, or a rule or regulation promulgated pursuant to law by the employer or another employer;
- (c) Discloses, threatens to disclose or is about to disclose to a supervisor or to a public body or any law enforcement agency, an activity, policy or practice of the employer, a co-employee or another employer, that the employee reasonably believes is incompatible with a clear mandate of public policy concerning the public health, safety welfare or protection of the environment;
- (d) Assists, or participates in a proceeding to enforce the provisions of this law; or
- (e) Objects to, opposes or refuses to participate in any activity, policy or practice which the employee reasonably believes:
 - (1) is in violation of a law, or a rule or regulation promulgated pursuant to law;
 - (2) is fraudulent or criminal; or
 - (3) is incompatible with a clear mandate of public policy concerning the public health, safety, or welfare or protection of the environment.

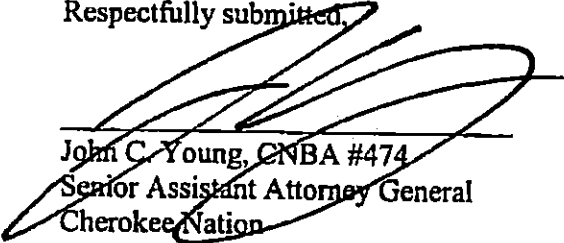
LA 13-04 §4.

Again, the Plaintiff cites to no provision of the Act, or any other provision of Cherokee law, which would define "participating on social media" as protected activity. And absent clear and unambiguous language indicating as much, it cannot be inferred or implied that the Tribal Council intended to protect such activity. Therefore, Count III of the Complaint should be dismissed for lack of jurisdiction.

Conclusion

In drafting the Act, the Tribal Council has not waived the sovereign immunity of the Cherokee Nation for claims of constructive termination. Therefore, Count I of the Plaintiff's Complaint should be dismissed for a lack of jurisdiction. In the alternative, Count I should be dismissed for failure to state a claim upon which relief may be granted. Likewise, the Plaintiff has failed to cite to any authority which would define "participating on social media" as protected activity within the meaning of the Act. Therefore, Count III of the Plaintiff's Complaint should be dismissed for a lack of jurisdiction.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above was mailed to Counsel for the Plaintiff, Chad Smith, at 22902 S. 494 Road, Tahlequah, OK 74464 on the 19th day of January, 2018.



John C. Young

John C. Young

From: Chad Harsha
Sent: Friday, January 19, 2018 4:58 PM
To: chad@chadsmith.com
Cc: John C. Young
Subject: Comingdeer v. Cherokee Nation (CV-2016-180)
Attachments: Coming Deer Answer 1-19-2018.pdf; Comingdeer MTD 1-19-18.pdf

Mr. Smith –

Please find attached pleadings filed today in the above captioned case. A file stamped copy has also been mailed to your address of record.

Have a good weekend.

Respectfully,

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