

cognizable claim unless the allegations indicate beyond any doubt that the litigant can prove no set of facts that would entitle relief. *Fanning v. Brown*, 2004 OK 7, ¶ 4, 85 P.3d 841, 844. The party moving for dismissal bears the burden of proof. *Tuffy's, Inc. v. City of Oklahoma City*, 2009 OK 4, ¶ 6, 212 P.3d 1158, 1163.

The North Carolina Court of Appeals in *Vereen v. Holden*, 121 N.C. App. 779, 783, 468 S.E.2d 471, 474 (1996) review allowed and remanded, 345 N.C. 646, 483 S.E.2d 719 (1997), held:

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint by determining “whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some legal theory.” *Lynn v. Overlook Development*, 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991). A Rule 12(b)(6) motion to dismiss for failure to state a claim should not be granted unless it “*appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*” *Sutton v. Duke*, 277 N.C. 94, 103, 176 S.E.2d 161, 166 (1970).

Therefore, the factual allegations of Comingdeer’s Amended Complaint must be taken as true.

Comingdeer has stated legally cognizable claims. His Complaint’s averments are deemed admitted by the Nation for purposes of challenging it with a Motion to Dismiss. Comingdeer stated viable claims against the Nation, and it provides no meritorious arguments that justify granting its Motion to Dismiss.

II. ARGUMENT

Proposition One: The Cherokee Nation Supreme Court has recognized a cause of action for constructive discharge under Article XII.

The Nation argues that LA 13-04 section 3 does not specify constructive discharge as “retaliatory action.” The Nation misses the point. Constructive discharge is the result of retaliatory action.

Comingdeer plead in Count One of his Petition:

Comingdeer alleges that the Defendants retaliated against him by constructively terminating him when they transferred him to another job on November 18, 2015, reduced the compensation available to him as a firefighter without cause or due process, and then on February 22, 2016 they placed him on administrative leave without any assignment of work and instructions not to return to the Cherokee Nation premises. (Paragraph 31.)

In *McCoy v. Cherokee Nation*, JAT 2000-06, the JAT held, “By reason of “constructive termination” the employee should have been advised of his rights to appeal, which includes an appeal to the Employee Appeals Board. . . .” *Opinion* at pg. 4. The JAT (now the Cherokee Nation Supreme Court) acknowledged a cause of action for constructive discharge.

This dispositive issues before the Judicial Appeals Tribunal are (1) whether a disciplinary demotion is an employment position to a lesser position with reduction in pay is a taking of property rights, and, (2) whether the aggrieved employee is denied due process by the procedure set forth in the Cherokee Nation Human Resources Policies and Procedures, and, (3) whether an employee aggrieved by demotion rather than removed from employment of the Cherokee Nation has an absolute right to invoke the jurisdiction of the Judicial Appeals Tribunal. The Court answers questions one and two in the affirmative and the third in the negative. *Opinion* at Page 3.

Also see *In Ragsdale*, SC 2012-12. The Nation’s argument that there is no authority for Comingdeer to bring his constructive discharge claim is without merit.

The Nation argues that Comingdeer does not alleged he suffered any reduction in compensation or benefits from the Cherokee Nation to establish “intolerable” work conditions justifying him to resign. The above quotation from Comingdeer’s Complaint clearly alleges the Nation “transferred him to another job on November 18, 2015, reduced the compensation available to him as a firefighter.” The Nation argues without any facts to support its assertion that part of Comingdeer’s compensation came from federal grant resources. *Motion* at page 4. Regardless, Comingdeer was not employed by the federal government; he was employed by the Nation. Probably 80% of the Nation’s employee’s compensation comes from federal grant sources. In fact, the Assistant Attorney Generals’ compensation comes from a federal grant sources placed into an indirect cost pool. The source of Comingdeer’ s compensation as federal funds is irrelevant.

Further, the Nation argues a factual question which not appropriately addressed by a Motion to Dismiss- whether Comingdeer was constructively discharged by reduction in compensation is an issue for the fact finder which in this case is the jury.

Proposition Two: Comingdeer has the right to freedom of speech which includes publishing Facebook comments.

First, the Nation argues the Whistle Blower act does not protect participation in social media. However, this argument is belied by the statutory provisions the Nation cites in its Motion at page 5. *See* LA 13-04 section 4. Protected activity includes if an employee “(a) Discloses . . . to a public body, an activity. . . of the employer, that the employee reasonable believes is in violation of a law, or rule or regulation promulgate pursuant to law, and (c) Discloses. . . to a public body, an activity. . . of the employer, that the employee reasonable believes is incompatible with a clear mandate of public policy concerning the public health, safety welfare or protection of the environment.” Again, this is a question of fact reserved for the jury, but reporting to the public via a social media the Nation’s “mismanagement of the Forest Service grant and discussion of the lack of the Nation’s support for firefighting” is disclosing the Nation’s action incompatible with “public health, safety welfare or protection of the environment.” *See* Complaint, paragraph 38. That is exactly the disclosure and actions the Whistleblower’s Act was designed to protect.

Further, the Constitution prohibits the Nation from preventing Comingdeer from exercising his freedom of speech.¹

¹ Article III. Bill of Rights

The People of the Cherokee Nation shall have and do affirm the following rights:

Section 1. The judicial process of the Cherokee Nation shall be open to every person and entity within the jurisdiction of the Cherokee Nation. Speedy and certain remedy, and equal protection, shall be afforded under the laws of the Cherokee Nation.

Section 2. In all criminal proceedings, the accused shall have the right to: counsel; confront all adverse witnesses; have compulsory process for obtaining witnesses in favor of the accused; and, to a speedy public trial by an impartial jury. The accused shall have the privilege against self-incrimination; and the Cherokee Nation shall not

The cases decided under the 1975 Cherokee Nation Constitution Article VII remain an instructive body of law interpreting the Cherokee Nation Supreme Court's jurisdiction over civil causes of action and whether sovereign immunity is a bar to jurisdiction and remedies. These JAT cases provide a minimum threshold for asserting jurisdiction and providing remedies for violation of civil rights.² The 2003 Constitution reduces that threshold and permits enhanced and expanded jurisdiction and greater remedies without the bar of sovereign immunity.

It is very clear that the Cherokee people have retained and affirmed their right to seek relief for wrongs committed by the Nation's elected officials and other employees.

twice try or punish an accused for the same offense. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

Section 3. The right of trial by jury shall remain inviolate, and the Cherokee Nation shall not deprive any person of life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation.

Section 4. The Council shall make no law prohibiting the free exercise of religion or abridging the freedom of speech, or the press, or the right of the People to peaceably assemble, or to petition the Nation for a redress of grievances.

<http://www.cherokee.org/Portals/0/Documents/2011/4/308011999-2003-CN-CONSTITUTION.pdf>

² In the following cases, the JAT has provided a forum without a sovereign immunity bar for violation of civil and property rights: (1) *In Re: Squirrel*, No. JAT 79-1 (Wrongful termination, "This Tribunal has authority to proceed also according to the provisions of article XII of the Cherokee Nation Constitution when article XII so provides."); (2) *Pritchett and Scott et al, v. Cherokee Nation and Tribal Election Commission*, Case No. JAT 95-06 (Civil right of voting. "The Court finds that Jurisdiction of The Judicial Appeals Tribunal to hear this case is based upon Article VII of the Constitution of the Cherokee Nation"); (3) *Mayes, v. Thompson, DeWayne Couch, Don Vaughan, Troy Wayne Poteete, Charles Head and Cherokee Nation*, JAT 95-15, (Council budget violations, "According to Article VII, the Tribunal has jurisdiction to "hear and resolve any disagreements" arising under the law or constitution of the Cherokee Nation); (4) *Scott v. Jordan and Joe Byrd, Intervenor*, Case No. JAT 96-17, (Constitutional violation by tribal council, "jurisdiction of this Court comes directly from Article VII of the Constitution of the Cherokee Nation"); (5) *Riggs v. Ummerteskee, Acting Registrar of the Cherokee Nation*, JAT 97-03-K (Regarding civil right of citizenship, "This Court has original jurisdiction of the parties and subject matter pursuant to the articles III and VII of the Constitution of the Cherokee Nation of Oklahoma, and II CNCA § 21-23"); (6) *Wilcoxon, v. Joe Byrd, in his capacity as Principal Chief of the Cherokee Nation, and individually*, Case No. JAT 98-16-B; (Jurisdiction over claim for money due Judge); (7) *In The Matter Of the Indirect Contempt of Court of Joe Byrd, JAT-1999-20*, (Contempt action, "The Judicial Appeals Tribunal being a constitutional body under Article VII of the Constitution of the Cherokee Nation of Oklahoma of 1975 has the supreme authority over decisions of the judicial process of the Cherokee Nation"); (8) *DeMoss, et. al. v. Smith*, Case No. JAT-2001-03, (Control of employee pension plan, "This matter is properly before this Court pursuant to Article VII of the Constitution of the Cherokee Nation"); (9) *Mayes and Hatton, v. Smith, in his individual and official capacity, and Unnamed agents I-X*, JAT 2001-12, (Principal Chief filed state suit against Mayes for illegal car tag sales, "This Court assumes jurisdiction of this matter pursuant to Article VII of the Constitution of the Cherokee Nation"); (10) *In Re: Acts 2-96, 11-96 and 17-96, For the Petitioner Members of the Cherokee Nation, For the Respondent Cherokee Nation*, Case No. JAT 02-19, (Council control over Non-Profit Funds, "Article VII of the 1975 Constitution, however, created this Court to 'hear and resolve disagreements' arising under the 'constitution or any enactments of the Council.'")

The Cherokee Nation Courts have established that people may bring civil rights claims for violations of their fundamental rights pursuant to Article VII of the 1975 Constitution and Article VIII of the 2003 Constitution. Those adjudicated rights included citizenship, voting, wrongful termination, and contempt actions; likewise, this Court may assert jurisdiction over and order remedies for civil rights violation of freedom of speech and association.

The proposed introductory language of the Cherokee Nation Constiition Article VIII, Section III, Bill of Rights by 1999 Constitutional Convention Delegates was, "The people of the Cherokee Nation reserve unto themselves." However, after a discussion the Delegates amended Section III's introductory language to ensure that the Nation was subject to the Bill of Rights.

MR. HANNAH: "The people of the Cherokee Nation reserve unto themselves"?

MR. MULLON: Right. It was pointed out to me that the language "reserve unto themselves" is possibly confusing and may be interpreted to have an affect with these are not mandated on the Nation itself. But somehow they are reserving these rights and they've got to take care of these rights themselves. And I wonder if the amendment would actually serve us just as well if we were to delete the words "reserve unto themselves and," so that it read, "the people of the Cherokee Nation affirm the following rights." That would be a suggestion."³ (Emphasis added.)

³ Transcript of Constitutional Convention, Vol. 2, 2/27/1999 regarding Bill of Rights

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MR. GOURD: I make a motion that we approve amendments of Article II, Bill of Rights. This was the group that met over lunch; and since that time, has been both in discussion and out of discussion in writing. And we have brought forward a number of items that were contained in the 1839 Constitution and clarified those for the present, and it shall read as follows:

"The people of the Cherokee Nation reserve unto themselves and affirm the following rights:

...

"Section 3. The right of trial by jury shall remain inviolate and the Cherokee Nation shall not deprive any person of life, liberty or property, without due process of law, nor shall private property be taken for public use without just compensation.

"Section 4. The Council shall make no law prohibiting the free exercise of religion or abridging the freedom of speech or the press or the right of the people to peaceably assemble and to petition the Nation for redress of grievances."

MR. HANNAH: The motion is before us at this time. Is there a second?

DELEGATE: Second.

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MR. HANNAH: "The people of the Cherokee Nation reserve unto themselves"?

MR. MULLON: Right. It was pointed out to me that the language "reserve unto themselves" is possibly confusing and may be interpreted to have an affect with these are not mandated on the Nation itself. But somehow they are reserving these rights and they've got to take care of these rights themselves.

The Cherokee people ratified the Delegate's Section III introductory language, "The People of the Cherokee Nation shall have and do affirm the following rights:"

This section creates a cause of action against the Cherokee Nation for its constitutional violations because the Cherokee people have said in their Constitution that the government shall not take their life, liberty or property without due process or abridge their freedom of speech. Those who violate these rights are liable. The bill is rights is "mandated on the Nation." By their ratification of the 2003 Constitution, the people of the Cherokee Nation consented to actions against the Nation when the Nation deprives them of their lives, liberties, property and fundamental freedoms.

Freedom of speech is a valuable and precious right to Cherokees; they did not intend the Nation to hide behind sovereign immunity when it harms an employee for exercising that right.

Proposition Three: The Cherokee people have not authorized the government to invoke sovereign immunity against its citizens.

States under the U.S. Constitution were subject to suit until they passed the Eleventh Amendment which was adopted after the Supreme Court ruled in *Chisholm v Georgia*, 2 US 419 (1793) they had no sovereign immunity. The Cherokee Nation's Constitution Article III Bill of Rights provides that, "The People of the Cherokee Nation shall have and do affirm the following rights" which includes the freedom of speech. According to the language of the Constitution and the intent of the framers the Cherokee people *affirmed* the right of freedom of speech and were to

And I wonder if the amendment would actually serve us just as well if we were to delete the words "reserve unto themselves and," so that it read, "the people of the Cherokee Nation affirm the following rights." That would be a suggestion.

MR. HANNAH: Mr. Gourd.

MR. GOURD: Yes, I would accept that.

MR. HANNAH: Hearing no opposition, the friendly amendment will stand.

MR. RUTLEDGE: I believe the point of reserving unto themselves was that the people themselves are reserving certain rights to themselves that the government cannot violate. And that where the term comes from, I understand what he's saying.

be protected in those rights from the Cherokee government. The Cherokee people did not give the government the right to assert sovereign immunity from their claims for the government's violation of those rights. The Council's effort to invoke sovereign immunity is infirm as unconstitutional to the extent it interferes with the Constitutional bill of rights because the people affirmed the bill of rights and did not grant the Council the right to invoke sovereign immunity.

If the Nation wants to assert sovereign immunity as a defense to its citizens' claims for the Nation's violation of the bill of rights, then the constitution must be amended just like the U.S. Constitution was amended by the 11th Eleventh Amendment so states could assert sovereign immunity from their citizens.

III. Conclusion

This court should deny the Nation's motion to dismiss counts 1 and 3 because the Nation's law and Constitution protects its employees from the Nation retaliating against them for speaking and publishing disclosures of the Nation's misdeeds and mismanagement.

Respectfully submitted this 9th day February, 2018.

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Certificate of Delivery

I, Chad Smith, hereby certify that on the 9th day of February, 2018, a copy of the above document was emailed pursuant to SC Rule 7 to the following:

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