

MISSISSIPPI BAND OF CHOCTAW INDIANS  
TRIBAL COURT

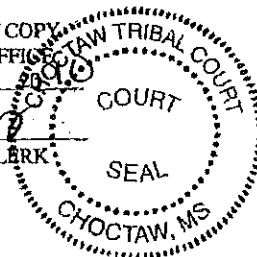
I, VERONICA THOMAS, TRIBAL COURT CLERK,  
HEREBY CERTIFY THAT THE ABOVE

AND FOREGOING IS A TRUE AND CORRECT COPY

GIVEN UNDER MY HAND AND SEAL OF OFFICE

THIS THE 21 DAY OF April 2010

BY Veronica Thomas  
VERONICA THOMAS, TRIBAL COURT CLERK



EXHIBIT

C

Jan 04 10 01:57p

Ha 's Auto Sales

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Attorney:

TO: Jeff Webb  
 Fr: Dawn Copeland

Thank you  
 for speaking to my husband this  
 morning. He explained to me that you  
 cannot talk about my case, but he stopped  
 and he has a meeting with Don Kilgore  
 at 1:30 this afternoon. Don does not know  
 what the meeting is about.

I have one question to ask you:  
 I'm gonna rent a billboard on Highway  
 16, stating something like this: I know of  
 many employees that were treated  
 like me. We are gonna post a website  
 on the billboard. If as many people  
 come forward, as I think they will,  
 will that change the Courts decision  
 and let me tell my story?

Thank you  
 Dawn Copeland

FILED

JAN 06 2010

CHOCTAW TRIBAL COURT  
 BY: *[Signature]*  
 COURT CLERK  
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TO: Judge Jeff Webb  
 FR: Michelle Dawn Copeland

**FILED**

NOV 05 2009

CHOCTAW TRIBAL COURT  
 BY: *[Signature]*  
 COURT CLERK

Judge Webb,

I'm Sending You a letter And a Copy of My Original Complaint Against the tribe. I would Appreciate You looking at this and explain to Me In language I Can understand, why I Do Not have the right to Comfort the tribe In Court. I Do not feel, you had all the facts to rule on my Case. I Do not wish to Make You Mad, I Just Need Someone to help Me! Explain to Me how the Casino Can have Mandatory Sexual harassment Meetings, Every 2 Months, and if you Complain Against them, there is Nothing You Can Do According to the Court. I worked 7 long years for them and all I asked for was for help, and I was fired. Let Me Explain why I was fired. On September 23, 2007, Casino Security allowed two Men to Drug Me, and Carry Me to their Room and Rape Me? I am Sending you a Picture of the two Men. There are Currently two Warrants Issued for their Arrest Out of Neshoba County. If you will Please Read My Complaint, It has Details of the Rape, and

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This is Just a Small Sample of All the  
stuff that has been going on over the last  
two years! I am Fed up with lawyers!

I was Raped and Sexually harrased !!!

And no one ~~sees~~ Cares !!!

would you Please help Me? I Do not

want to appeal this to the State Supreme  
Court, and I Do not want to try this in  
the Media, But I've Been Done wrong, and  
I Deserve My time In Court. If I  
Said anything out of order, I'm sorry.  
But you can see I've Been Done wrong!

Thank you  
Dawn Copeland

P.S. everyone who has been involved at  
the Casino, Besides the two Indian Men,  
have Been fired. So If they Done NO  
Wrong why were they fired?

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all I want is a Day to tell My Side.  
I feel the only Reason that I am not  
allowed to go to Court, IS for all the  
Dirty Secerts to Come out.

I want you to know, that the District  
Attorney, Don Kirkore, has Made Statements  
that are inapropriate In my opinion, about  
Me and My husband. I want you to know  
what happened about a year ago, One of the  
People that's involved, that we will Call a  
high roller, Came to My husband's Place of  
business, he asked My husband to get me to  
Drop this lawsuit. he said it would hurt  
the town of Philadelphia, and would hurt  
his business. He owns a large Equipment  
Auction In Philadelphia, and Several of  
his Buyers will be Suspended. He asked  
My husband if he Mind, if he went and  
spoke to Don Kirkore to work out a Solution  
he Called Back a few hours later, and I'm  
Quitting, what he said MR. Kirkore told  
him. "For him and his friends not to worry,  
that this Shit would never go to Court."

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# **CHOCTAW POLICE DEPARTMENT** **INCIDENT NUMBER: 2008010373**

Page 1

DATE: 02/23/2009

Signal: 10-78

Received: 01/14/2008 11:42 Incident No: 2008010373  
 Dispatched: 01/14/2008 11:42 Location: JUSTICE COMPLEX CHOCTAW  
 Enroute: Occurrence: 01/14/2008 11:42

Arrived: 01/14/2008 11:42  
 Completed: 01/14/2008 11:42

Status Date/Time: 01/23/2008 15:08 Status: PENDING Clearance Reason/Date:

Dispatch Notes: 2006070040 01/14/2008 11:44:42: 1142 - 117 ADVISED DAWN COPLAND WANTED TO FILE A REPORT

## **\*\*\*\*\* COMPLAINANT(S) \*\*\*\*\***

ID # PT4875

COPELAND, DAWN

0 1140 ST. FRANCES DRIVE , PHILADELPHIA MS 393500000

TYPE OF INDIVIDUAL I

Home/Business

(000) 000-0000

(000) 000-0000

(000) 000-0000

## **\*\*\*\*\* OFFENDER \*\*\*\*\***

ID # AGST33.00

ISAAC, CHRISTOPHER

0 , 0000

TYPE OF INDIVIDUAL I

Home/Business

(000) 000-0000

(601) 656-5711

(000) 000-0000

DOB: / / AGE: 0 +/-00 RACE: I SEX: M Height: 0-0 Weight: 0 SSN: PRIVATE  
 OLN: State: Class: Commercial: Birth City/State:  
 Appearance: U Build: U Complexion: U Ethnicity: NATIVE AME Eyes: U  
 Hair: U Hair Length: U Hair Style: U Resident: U M.O.:  
 EMPLOYER:

HATE/BIAS MOTIVATED:

CLOTHING: CONVERTED CODE

OFFENDER USED: NOT APPLICABLE

**OFFENSE 1** OFFENSE (RS #) 200104-3-3-1 ATT/COMP C  
 Harassment, Class C

## **\*\*\*\*\* SUSPECT(S) \*\*\*\*\***

ID # PT531

HENRY, JEROME

365 W. TUCKER CIRCLE , PHILADELPHIA MS 393500000

TYPE OF INDIVIDUAL I

Home/Business

(601) 389-0265

(601) 663-0011

(000) 000-0000

DOB: 11/09/1966 AGE: 0 +/-00 RACE: I SEX: M Height: 0-0 Weight: 0 SSN: PRIVATE  
 OLN: State: Class: Commercial: Birth City/State:  
 Appearance: U Build: U Complexion: U Ethnicity: U Eyes:  
 Hair: Hair Length: U Hair Style: U Resident: U M.O.:  
 EMPLOYER: DANCING RABBIT GOLF CLUB

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**CHOCTAW POLICE DEPARTMENT  
INCIDENT NUMBER: 2008010373**

DATE: 02/23/2009

Page 3

Agency: CPD

Author: GOODSELL, JULIAH

Incident No: 2008010373

Title: HARASSMENT

Report Type: I

I Officer Julia J. Goodsell did take a complaint from Mrs. Michelle Dawn Copeland and her husband. Mrs. Copeland stated that there have been several incidents that have occurred in past several years at the casino and she is tired of it. She stated that she just wanted to file a report and not charges. She then name several male persons only two were Choctaw/Indian, Jerome Henry and Chris Isaac. Mr. Copeland stated that Dawn has been getting several text messages from Chris Isaac and he wouldn't quit. She did give an example of Mr. Isaac requesting Mrs. Copeland to meet him after work for sex. They did state that there are alot of things that go on at the casino and it needs to stop. I did receive a letter from Mrs. Copeland, she stated that she tried to write it all down. Mr. Copelane stress for me to read the letter and it will explain it self. I did advise them that they would have to go to county for any charges against non-indians. They did state that they had cell phone records and letters given to the personnel management, and yet nothing is being done. Mrs. copeland did not want to file charges but stated that they were going to come back, if things don't change. nothing further  
Letter is going to be refered to investigations.

Officer Julia J. Goodsell  
CHoctaw Police Department

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MICHELLE DAWN COPELAND  
10270 ROAD 321  
UNION, MISSISSIPPI 39365

September 17, 2008

**VIA HAND DELIVERY**

Honorable Donald L. Kilgore  
Attorney General  
MBCI Attorney General's Office  
P. O. Box 6258  
Choctaw, MS 39350

**re: Notice of Claim**

Dear Mr. Kilgore:

This letter is to notify you that I was employed by the Silver Star Hotel & Casino from approximately August of 2001 through October of 2007, as a cocktail server. The Silver Star Hotel & Casino, and its affiliates will be referred to hereinafter collectively as "Silver Star". I am exploring several potential claims against Silver Star, as discussed in more detail below. Please note that it is my primary intention to file these claims in U. S. District Court, as I do not concede to the jurisdiction of Choctaw Tribal Court; however, I respectfully request that you accept this letter to serve as Notice of Claim, in the event the U. S. District Court later directs this dispute to the Choctaw Tribal Court.

Continuing Sexual Harassment and Hostile Work Environment

Beginning in or about June of 2007, I was told by employee, Steve Armour, that I was to entertain certain patrons during my shift that night considered to be "high-rollers" by the Silver Star. In fact, Mr. Armour informed me that part of my job description included making the patrons, particularly those considered to be "high-rollers" to feel "comfortable" by whatever means requested. On several occasions, Mr. Armour directed me to allow a particular patron to stack poker chips on and between my breasts in the presence of other employees and patrons of the Silver Star. Additionally, Mr. Armour directed me to allow the



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patron to personally touch/rub my buttocks, again in the presence of numerous individuals. Mr. Armour, as well as other employees, were present and witnessed these un-welcomed harassing actions, and I felt that my employment would have been at risk had I not conceded to these acts. I took the appropriate steps in reporting this behavior to my then supervisor, Shelley Steele, who assured me that she would remedy the situation. No action was taken to promptly correct the harassing behavior. Further, these actions created a hostile and/or offensive work environment that has seriously affected my psychological well-being.

In or about September of 2007, I was verbally insulted and harassed by employee Greg Norris who continually made lewd comments about having sexual intercourse with me, and explicitly described his private body parts to me. I reported this incident to my then supervisor, Shelley Steele, who assured me that the problem would be corrected; however, no action was taken to promptly correct the harassing behavior.

It is my belief that because the Silver Star, by and through its employees/agents who themselves held supervisory positions over me, encouraged such harassing behavior and/or failed to remedy the same upon proper notice by me, that these entities are liable at the very least for sexual harassment in a hostile work environment pursuant to Title VII of the Civil Rights Act as amended 42 U.S.C. Section 2000(e) and other authority.

#### Negligent/Intentional Infliction of Emotional Distress

It is my position that Steve Armour, in his official capacity with the Silver Star, did willfully, unlawfully and intentionally inflict emotional distress upon me by directing me to allow certain patrons to, among other acts, stack poker chips on and between my breasts in the presence of Mr. Armour, other employees and patrons of the Silver Star. Additionally, Mr. Armour directed me to allow the patron to personally touch/rub my buttocks, again in the presence of numerous individuals. This conduct happened on numerous occasions (both prior to and subsequent to June of 2007) and was promptly reported to Shelley Steele. Mr. Armour was never reprimanded by Silver Star for this conduct. The conduct of Silver Star, by and through Mr. Armour, is so outrageous and extreme in degree that it goes beyond all possible bounds of decency. My emotional distress is a foreseeable result of the extreme and outrageous actions/omissions of Mr. Armour, which amount to willful, wanton, grossly careless, indifferent and/or reckless conduct. thus

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warranting an award of punitive damages.

Please be advised that my investigation is not complete and that claims for Failure to Train, Negligent Supervision, and or Negligent Retention certainly seem plausible, and notice is hereby given to those types of claims.

Negligence

On or about September 23, 2007, on the property of the Silver Star, I was brutally assaulted, battered, raped and sodomized by musician/performer John Miscow a/k/a "Rikki Rocket", who was an employee/agent of the Silver Star. Security employee, Jerome Henry, and my supervisor on this particular night, Donna Hare, witnessed Mr. Miscow "dominating" me and being physically aggressive in the area of the Starlight Lounge. Also, Mr. Henry witnessed Mr. Miscow leading me in a helpless state to his hotel room, but took no action to help me. It is my position that the Silver Star, by and through its employees/agents, had constructive notice that I was in eminent danger of harm by the aggressive actions of Mr. Miscow, and took absolutely no action to stop this. Silver Star had an affirmative duty to keep the premises reasonably safe and secure for all employees and patrons. Further, that according to Silver Star's employment policy, all employees have a duty, by virtue of their employment handbook and training, to immediately come to the aid of another in the event a patron seems to be "preying" on or threatening an employee. Rather than acting in accordance with this duty, there exists documented evidence that a group of Silver Star employees breached this duty by encouraging me to sit with this particular patron, who continued to engage in bodily contact with me.

The brutal rape was the direct and proximate cause of the aforementioned breaches and was certainly foreseeable given the circumstances. Because of the assault, battery, rape and sodomy, I must undergo surgery to correct problems which have been caused by this violent act. I am currently attending counseling, and it is expected that continuing treatments will be required. Additionally, I have suffered medically documented mental distress and pain as a direct result of my injuries, and am now attending counseling sessions with my husband, the cost of which is a financial distress. I am also advised by my counselor that my young children also need to attend counseling, but I am unable to go forward with the counseling sessions for my children due to the cost of same. Finally, this act has rendered me and my husband unable to consummate the marriage, thereby resulting in a

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claim for loss of consortium on my husband's behalf.

Wrongful Termination and Whistle-blowing

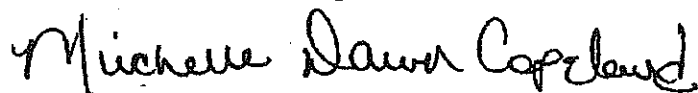
Subsequent to the act of September 23, 2007, I requested medical leave because of my injuries by giving notice to Shelley Steele. This medical leave was initially approved, along with temporary disability, and I assumed that I would be allowed time to heal from this obviously serious medical condition. A few days later, I received a notice of termination, allegedly citing some sort of inadequate notice. I allege this reason for termination is a pretext for unlawful retaliation for taking medical leave for a serious medical condition. I have suffered a loss in wages, both present and future, for this act.

In short, the aforementioned acts/omissions of the Silver Star (vicariously through its agents/employees) have proximately caused the following damages to me: severe and permanent personal injuries; past, present and future pain and suffering; past, present and future mental anguish and other emotional damages; temporary and/or permanent disability; past, present and future medical and/or psychological/psychiatric expenses and costs; past and present lost wages; lost wage earning capacity; loss of consortium; punitive damages.

While not conceding to the exclusive jurisdiction of the Tribal Court to these claims, I will allow six (6) months time for you to investigate this matter consistent with Section 25-1-6(2) of the Tribal Code in order to avoid any future bar, should it be held that the Tribal Court does enjoy exclusive jurisdiction. I am further considering whether to file claims with the Equal Employment Opportunity Commission in the very near future regardless of Section 25-1-6(2) in order to comply with Title VII's notice requirement. If you desire to settle this matter without the necessity of my filing suit, I am prepared to settle this matter for \$750,000.00.

Sincerely,

Michelle Dawn Copeland



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**FILED**

OCT 14 2009

IN THE CHOCTAW TRIBAL COURT  
MISSISSIPPI BAND OF CHOCTAW INDIANS

CHOCTAW TRIBAL COURT  
BY *[Signature]*  
COURT CLERK

MICHELLE DAWN COPELAND

PLAINTIFF

V.

CAUSE NO. 2009-426-CV

MISSISSIPPI BAND OF CHOCTAW INDIANS D/B/A  
CHOCTAW RESORT DEVELOPMENT ENTERPRISE

DEFENDENT

**MEMORANDUM OPINION AND ORDER**

This case is before the Court on the Defendant's Motion to Dismiss asserting that Plaintiff's claims are barred by the doctrine of Tribal sovereign immunity.

By Order dated July 2, 2009, this Court ruled that Plaintiff had failed to exhaust her administrative remedies as set forth in Choctaw Tribal Code §1-5-10. The Complaint was dismissed without prejudice as required by the referenced statute.

The Plaintiff refiled her complaint on July 9, 2009. By Agreed Order, the parties agreed to submit the other issue contained in Defendant's Motion to Dismiss, being the issue of Tribal sovereign immunity, to the Court on the same briefs as previously filed.

The Plaintiff alleges that the Tribe and its employees were negligent as a result of continued sexual harassment of Plaintiff and exposing her to a hostile work environment. She further alleges negligent and intentional infliction of emotion distress. Plaintiff also claims she was wrongfully terminated for bringing to her supervisors' attention the hostile work environment.

Plaintiff contends that, while employed as a cocktail waitress at the Silver Star Casino, she was instructed to perform certain activities which were inappropriate. As a result, Plaintiff asserts that these actions created a hostile and/or offensive work environment that seriously affected her psychological wellbeing. Thereafter, Plaintiff alleges that she was brutally assaulted and raped by a patron of the Silver Star Casino

posing as a musician/performer. Plaintiff contends that she was later wrongfully terminated when she was advised by the Defendant that she did not return to work at the appropriate time.

The Defendant, Choctaw Resort and Development Enterprise, was established pursuant to Ordinance 56 as a business enterprise of the Mississippi Band of Choctaw Indians. Section 13 of Ordinance 56 provides that the Mississippi Band of Choctaw Indians retains sovereign immunity when establishing a business enterprise that operates under a separate board pursuant to the ordinance. The Tribe established Choctaw Resort Development Enterprise to operate various businesses as an unincorporated division of the Tribe.

As a general rule, a recognized Indian tribe's sovereign immunity may be lost in two separate manners. The first is by a specific action of the United States Congress and the second is the tribe itself can waive its own immunity. In this context, a waiver of sovereign immunity cannot be implied but must be unequivocally expressed. *United States v. Testan*, 424 U.S. 392 (1976). Also, any waivers of sovereign immunity must be strictly construed. *Seneca-Cayuga Tribe of Okla. v State of Oklahoma*, 874 F.2d 709 (10<sup>th</sup> Cir. 1989).

An initial issue presented is whether the unincorporated division of the Tribe is entitled to sovereign immunity. In *Kiowa Tribe of Okla. v Manufacturing Techs.*, 523 U.S. 751 (1998), the Court held that the doctrine of tribal sovereign immunity applies in the context where a tribal enterprise seeks protection for its commercial businesses such as ski resorts, gambling establishments or the sale of cigarettes to non-Indians. The *Kiowa* Court held that "a tribe is not stripped of sovereign immunity merely because it engages in commercial activities." Thus, Choctaw Resort and Development Enterprise is



entitled to sovereign immunity. The question then becomes whether the Tribe unequivocally expressed its desire to waive that immunity.

Choctaw Tribal Code §1-5-4 refers to sovereign immunity and states as follows:

Except as expressly abrogated by act of Congress, or as specifically waived by resolution or ordinance of the Tribal Council, specifically referring to such, the Choctaw tribe shall be immune from suit in any civil action, and its officers and employees immune from suit for any liability arising from the performance of their official duties.

The burden is upon the Plaintiff to show an express and unequivocal waiver of this pronounced sovereign immunity, either by Congress or the Tribe. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978).

The Plaintiff does not challenge the general doctrine of Tribal sovereign immunity and does not assert that there has been any Congressional abrogation of sovereign immunity that apply to the facts of this case. Plaintiff's contention is that this case is controlled by the Choctaw Tort Claims Act, and that the Tribe has waived immunity for the claims filed in this proceeding.

The sole issue presented, therefore, is whether there has been a 'clear waiver' by the Tribe of its sovereign immunity. See *Oklahoma Tax Commission v. Citizen Band Potawatami Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991). As noted, Plaintiff's claims are based upon (1) sexual harassment and/or hostile work environment; (2) negligent/intention and infliction of emotional distress; and (3) wrongful termination.

The Choctaw Tort Claims Act provides in part:

§25-1-2: Declaration of Legislative Intent

1. The Tribal Council of the Mississippi Band of Choctaw Indians hereby find and determines as a matter of public policy and does hereby declare, provide, and enact, and re-enact that the Tribe, is not now, has never been, and shall not be liable, and is, always has been, and shall continue to be immune from suit at law or in equity on account of any wrongful or tortuous act or omission or breach of an implied or express

term or condition of any warranty or contract, including but not limited to liable, slander, defamation, or any other tort, or any other claims sounding in contract, or any such act, omission, or break by any employee of the Tribe, notwithstanding that any such act, omission or breach constitutes or may be considered as the exercise or failure to exercise any duty, obligation or function of a governmental, proprietary, discretionary, or ministerial nature, or of a business nature, and notwithstanding that such act, omission or breach may or may not arise out of any activity, transaction or service for which any fee, charge, cost or other consideration was received or expected to receive in exchange therefore.

2. The Tribal Council likewise finds and determines as a matter of public policy, and does hereby disclose, provide, and enact, and re-enact, that employees acting in their official capacity have always, and shall continue to be immune from suit at law or equity to the same extent as the Tribe. The Tribal Council further hereby provides and enacts that a tribal employee is acting in his official capacity if his acts are within the course and scope of his employment, as defined by law.

§25-1-3: Waiver of Immunity, Course and Scope of Employment Presumptions

1. Notwithstanding the immunity granted in §25-1-2, Choctaw Tribal Code, or the provisions of any other law to the contrary, the immunity of the Tribe for monetary damages arising out of the acts of the Tribe, or acts of employees of the Tribe, is hereby waived from and after January 29, 2000; provided, however, immunity of the Tribe in any such case shall be waived only to the extent of the maximum amount of liability provided for in §25-1-8, Choctaw Tribal Code, and subject to the exemptions set forth in §25-1-5, Choctaw Tribal Code, and the limitations otherwise set forth in this title.

Whether an employee is acting within the course and scope of his employment is addressed in part in section 25-1-3(2), which states:

For purposes of this Title, an employee shall not be considered acting within the course and scope of his employment with the Tribe, if the employee's conduct constituted fraud, malice, libel, slander, defamation, or any criminal offense other than traffic violations; provided, however, that this listing shall not be considered exhaustive of the situations that may constitute action not within the scope of employment.

Plaintiff's claim for wrongful termination is one sounding in contract. Section 25-1-2 specifically refers to the Tribe's immunity from suit of any wrongful or tortuous act or omission or breach of an implied or expressed term or condition of any warranty or



contract. The Choctaw Supreme Court in *Sharp v. Mississippi Band of Choctaw Indians*, S.C. 2002-02 (2004), found that the Choctaw Tort Claims Act provides a limited waiver of sovereign immunity for a narrow range of claims. The Supreme Court then concluded that the wrongful discharge claim of Plaintiff Sharp was contractual in nature and, therefore, expressly barred by Section 25-1-2. Therefore, Plaintiff's wrongful termination claim in this case is likewise barred by sovereign immunity.

In addition to a wrongful termination claim, Plaintiff's claims are for negligent infliction of emotional distress and intentional infliction of emotional distress. Section 25-1-3(2) quoted above, places certain acts of an employee outside the course and scope of employment. In particular, if an employee's conduct constitutes malice (among others) then the action is not within the course and scope of employment. Malice is defined by Merriam-Webster's dictionary as "(1) desire to cause pain, injury or distress to another; (2) intent to commit an unlawful act or cause harm without legal justification or excuse." Section 25-1-3(5) specifically provides that "the Tribe shall not be liable for the acts of any tribal employee which were not within the course and scope of his employment with the Tribe."

Intentional infliction of emotional distress would be an act which requires malice as a motivating force. The Tribe's waiver of its sovereign immunity is limited in scope and its responsibility for its employees is generally for their negligent acts which injure others. Sovereign immunity is not 'clearly waived' by the Choctaw Tort Claims Act for intentional acts of an employee to inflict emotional distress. Therefore, any claims for

intentional infliction of emotional distress or other intentional injuries are not within the limited waiver set forth by the Choctaw Tort Claims Act.<sup>1</sup>

Plaintiff's remaining claim is for negligent infliction of emotional distress by being subjected to a hostile work environment and sexual harassment. Defendant's primary response to a sexual harassment claim is that it is a Title VII action and that Indian tribes are expressly excluded from the definition of employer under Title VII. 42 U.S.C.A. §2000e(b). *See also, Thomas v. Choctaw Management Services Int.*, 313 F.3d 910 (5<sup>th</sup> Cir. 2002).

However, Plaintiff has not brought this as a Title VII proceeding and that defense alone does not seem to be dispositive of the question. The Choctaw Tort Claims Act provides a number of exceptions to the waiver of immunity. One of those is set forth in Section 25-1-5(l), which specifically excludes from the waiver of sovereign immunity those claims covered by the workers' compensation law of any state or the Tribe.<sup>2</sup>

Plaintiff in her brief sites *Miller v. McRae's, Inc.* 444 So.2d 368 (Miss. 1984) for the proposition that the Mississippi Worker's Compensation Act does not bar an employee from pursuing a common law remedy for an injury that was the result of a willful and malicious act of a co-employee. *See also Newell v. Southern Jitney Jungle Co.*, 830 So.2d 621 (Miss. 2002). This Court does not disagree with that proposition. However, as mentioned earlier, a willful or malicious act is outside the course and scope of employment by definition and thus beyond the limited waiver of sovereign immunity of the Choctaw Tort Claims Act.

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<sup>1</sup> Section 25-1-4(2) protects an employee from personal liability for acts within the course and scope of employment, but not for those acts outside course and scope, i.e. with malice, for which the employee may be held personally liable.

<sup>2</sup> The Tribe by custom and practice follows the Mississippi Worker's Compensation Act and its employees are eligible for worker's compensation benefits.

A compensable injury for workers' compensation purposes is defined by the Mississippi Code as "accidental injury or accidental death arising out of and in the course of employment without regard to fault which results from an untoward event or events, if contributed to or aggravated or accelerated by the employment in a significant manner." Miss. Code Ann. § 71-3-3(b). The employee's remedy against an employer for a compensable injury under the worker's compensation act is exclusive. Miss. Code Ann. § 71-3-9. A claim for emotional distress caused by the negligence of a co-employee appears to be one within the applicable workers' compensation statutes, and thus an exception to the waiver of tribal sovereign immunity.

This Court thus finds that the Plaintiff has failed to show and demonstrate that the causes of action set forth in her complaint against the Mississippi Band of Choctaw Indians d/b/a Choctaw Resort Development Enterprise fall within an exception to the sovereign immunity doctrine by either congressional legislation or an explicit waiver of by the Tribe. As a result, the Plaintiff's claims must be dismissed with prejudice.

IT IS, THEREFORE, HEREBY ORDERED AND ADJUDGED, that Plaintiff's Complaint in this cause is hereby dismissed with prejudice.

SO ORDERED on the 14<sup>th</sup> day of October, 2009.

  
TRIBAL COURT JUDGE

IN THE CHOCTAW TRIBAL COURT OF THE  
MISSISSIPPI BAND OF CHOCTAW INDIANS  
CIVIL CLAIMS DIVISION

MICHELLE DAWN COPELAND

PLAINTIFF

VS.

CAUSE NO. 2009-426-CV

MISSISSIPPI BAND OF CHOCTAW d/b/a  
CHOCTAW RESORT DEVELOPMENT ENTERPRISE

DEFENDANT

**AGREED ORDER REGARDING BRIEFING  
RELATING TO PLAINTIFF'S COMPLAINT**

COME NOW, the parties in the instant case, by and through their attorneys of record, and file this their *Agreed Order Regarding Briefing Relating to Plaintiff's Complaint*, and would agree as follows:

1. The Plaintiff filed her first Complaint in the Choctaw Tribal Court of the Mississippi Band of Choctaw Indians in this matter on or about February 23, 2009. See Complaint attached as Exhibit "A". Said Complaint was voluntarily dismissed. See Voluntary Dismissal attached as Exhibit "B".
2. The Plaintiff filed her second Complaint in the Choctaw Tribal Court of the Mississippi Band of Choctaw Indians in this matter on or about March 19, 2009. See Complaint attached as Exhibit "C".
3. In response to the second Complaint, the parties exchanged extensive briefs related to the Defendant's Motion to Dismiss filed on or about May 19, 2009. See briefs filed by the parties and attached as Exhibits "D", "E" and "F".
4. This Court granted the Defendant's Motion to Dismiss on or about July 2, 2009, on the grounds that Plaintiff failed to comply with the exhaustion requirements of the Choctaw Tribal Tort Claims Act. See Memorandum Opinion and Order attached as Exhibit "G".
5. Plaintiff filed her third Complaint in the Choctaw Tribal Court of the Mississippi Band of Choctaw Indians in this matter on or about July 9, 2009. See Complaint attached as Exhibit "H".

**FILED**

AUG 27 2009

CHOCTAW TRIBAL COURT  
BY:   
COURT CLERK Court Record 00019

6. The parties agree that the briefs previously filed in conjunction with the above referenced second Complaint and attached hereto as Exhibits "D", "E" and "F" contain the same arguments and exhibits relevant to the issue of sovereign immunity of the Tribe which is relevant to the most recent Complaint filed in this case. The parties now wish to incorporate all the arguments and briefs previously filed and noted above in lieu of re-filing the same briefs minus of course the arguments which are now moot with this Court's prior ruling of July 2, 2009.

7. The parties are in agreement and do not wish to duplicate efforts and create more paper for the Court to sift through before it serves its' ruling on the issue of tribal sovereign immunity as to Plaintiff's claims in this matter.

8. The parties agree to file additional briefs or appear before the Court for oral arguments if the Court so desires.


**IT IS, THEREFORE ORDERED AND ADJUDGED**, that the arguments previously made by the parties in the prior cases filed by the Plaintiff and the briefs submitted by the parties and attached to this Order as Exhibits "D", "E" and "F" are hereby incorporated fully as if filed in the instant matter for the Court to review and make a finding as to the issue of Tribal sovereign immunity. The Court reserves its right to require the parties to submit additional briefing on these issues or appear for oral argument if it deems it appropriate.

**SO ORDERED**, this the 26<sup>th</sup> day of August, 2009.

  
HONORABLE JEFFREY T. WEBB

**AGREED:**

  
C. Victor Welsh, III, Esq.  
Attorney for Plaintiff

  
David Lee Gladden, Jr., Esq.  
Attorney for Defendant

IN THE CHOCTAW TRIBAL COURT  
MISSISSIPPI BAND OF CHOCTAW INDIANS

MICHELLE DAWN COPELAND

PLAINTIFF

V.

CAUSE NO. 2009-426-CV

MISSISSIPPI BAND OF CHOCTAW  
INDIANS D/B/A CHOCTAW  
RESORT DEVELOPMENT ENTERPRISE

DEFENDANT

**MEMORANDUM OPINION AND ORDER**

This case is before the Court on the Defendant's Motion to Dismiss based upon two separate legal grounds. The first is that the Plaintiff failed to comply with the special exhaustion requirements of Choctaw Tribal Code § 1-5-10, and the second is that the Plaintiff's claims are barred by the doctrine of tribal sovereign immunity.

The Plaintiff alleges that the Tribe and its employees were negligent as a result of continued sexual harassment of Plaintiff and exposing her to a hostile work environment. Plaintiff also seeks damages as a result of negligent and intentional infliction of emotional distress, and claims she was wrongfully terminated for bringing to her supervisors' attention the hostile work environment.

Plaintiff sets forth in her Response to the Defendant's Motion to Dismiss that, on September 26, 2007, she received notification that she had been terminated as a result of failure to return to work after an approved leave of absence. Plaintiff states that she was unaware that her approved leave of absence had a termination date.

Plaintiff then requested and was granted a hearing by the Choctaw Resort Review Committee to consider the appeal of her termination. The appeal hearing was set for January 31, 2008 at 10:00 a.m. in the conference room at the Golden Moon Hotel and Casino. When Plaintiff appeared at the hearing she was dismissed and informed that her right to appeal had been forfeited. She received a letter dated March 3, 2008 confirming that the decision to terminate her employment was upheld.

Plaintiff wrote to Miko Beasley Denson on March 19, 2009 informing him of the basis of her claim. On following day, March 20, 2009, she filed her complaint with the Choctaw Tribal Court.

**FILED**

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CHOCTAW TRIBAL COURT  
BY *[Signature]*  
Court Record 00021

Section 1-5-10 is the Choctaw Tribal Code provision which refers to exhaustion of administrative remedies. Paragraph 1 of the statute reads in part as follows:

No court of the Mississippi Band of Choctaw Indians shall have jurisdiction to entertain any civil suit or action, or any privately initiated criminal complaint, against the Mississippi Band of Choctaw Indians, the Tribal Council, a tribal government agency or instrumentality, or any tribal official or employee complaining of the official conduct thereof unless the plaintiff in such action has first exhausted tribal administrative remedies in an effort to correct the matter complained of;

In cases where section 1-5-10 is applicable, the jurisdiction of this Court is contingent upon exhaustion of administrative remedies as set forth therein. The statute reads that "no court of the Mississippi Band of Choctaw Indians shall have jurisdiction...." The statutory language does not allow for discretion by this Court on the issue. Either the administrative remedies have been exhausted or there is no jurisdiction.

Paragraph 2 of section 1-5-10 sets forth the requirements for exhaustion of administrative remedies:

To exhaust administrative remedies under this section, a petitioner, plaintiff, or complaining witness must

(a) Make a good faith effort to invoke and comply with all then existing, reasonable administrative procedures for handling disputes, grievance, or complaints applicable to the office or department in which the matter arose, and

(b) Upon compliance with (a), file a written complaint with the tribal Chief setting out the basis for the complaint and the administrative remedies pursued to correct the matter complained of, with the exception of complaints concerning the decisions of independent agencies, in which case a complaint need not be filed with the Chief.

It appears that Plaintiff may have complied with paragraph 2(a) by making a good faith effort to invoke and comply with all then existing reasonable administrative procedures as she arranged for and attended a hearing before the Choctaw Resort Review Committee, which resulted in confirmation of her termination. Paragraph 2(b) sets forth an additional step after one has made a good faith effort to comply with the existing reasonable administrative procedures to require the submission of a written complaint with the tribal Chief setting out the basis of the claim. Paragraph 2(b) must be read in

conjunction with paragraph 3, which allows the tribal Chief twenty days within which to resolve the dispute.

While Plaintiff may have complied with paragraph 2(a), it is undisputed that the mandates of paragraph 2(b) were not met. The Plaintiff's complaint was filed on the day following the submission of the notice to the tribal Chief as opposed to after the twenty day waiting period. Consequently, Paragraph 4 of section 1-5-10 makes it mandatory upon this Court to dismiss the Complaint without prejudice.

IT IS, THEREFORE, ORDERED AND ADJUDGED, that the complaint of the Plaintiff in this cause be and hereby is dismissed without prejudice based upon failure to comply with the mandatory requirements of Choctaw Tribal Code § 1-5-10.

SO ORDERED, this the 2<sup>nd</sup> day of July, 2009.

  
TRIBAL COURT JUDGE



IN THE CHOCTAW TRIBAL COURT OF THE  
MISSISSIPPI BAND OF CHOCTAW INDIANS  
CIVIL CLAIMS DIVISION

MICHELLE DAWN COPELAND

PLAINTIFF

VS.

CAUSE NO. 2009-426-CV

MISSISSIPPI BAND OF CHOCTAW d/b/a  
CHOCTAW RESORT DEVELOPMENT ENTERPRISE

DEFENDANT

**DEFENDANT'S REPLY IN SUPPORT  
OF ITS MOTION TO DISMISS**

COMES NOW, the Defendant, Mississippi Band of Choctaw Indians d/b/a Choctaw Resort Development Enterprise (the "Tribe"), by and through its counsel of record and filed this its *Reply in Support of its Motion to Dismiss* and in support thereof would show unto the Court the following:

As much as Plaintiff would like for her actions in this case to satisfy her burden of complying with the special exhaustion requirements of § 1-5-10 of the Choctaw Tribal Code, they simply do not. Filing her Complaint the same day the required notice letter is mailed, yet waiting more than the required twenty (20) days before actually serving the Complaint on the Defendant, does not comply with §1-5-10 of the Choctaw Tribal Code. *See Wanda Sharp v. Mississippi Band of Choctaw Indians*, SC 2002-02 (Memorandum Opinion and Order entered August 30, 2004); *see also Jean Johnson v. Mississippi Band of Choctaw Indians d/b/a Pearl River Resort and Casino d/b/a Silver Star Resort and Casino*, SC 2005-4 (Memorandum Opinion and Order entered May 10, 2006).

Several other jurisdictions have held that "if a plaintiff fails to exhaust his administrative remedies, the court lacks subject matter jurisdiction." *Foley v. Bates*, 2007 WL 1831133 (N.D. Cal. 2007) (citing *Hymen v. Merit Sys. Protection Bd.*, 799 F.2d 1421, 1423 (9<sup>th</sup> Cir. 1986) (overruled on other grounds by *Irwin v. Dept. of Veteran Affairs*, 498 U.S. 89 (1990); *see also Cook v. United States*, 978 F.2d 164, 165-66 (5<sup>th</sup> Cir. 1992) (holding that furnishing notice to appropriate federal agency is a "jurisdictional prerequisite to filing suit under the FTCA." (Emphasis Added)

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*see also Caldwell v. Warren*, 2 So. 3d 751 (Miss. Ct. App. 2009) (holding that the filing of a medical malpractice action prior to the sixty day notice provision in Miss. Code Ann. §15-1-36(15) was invalid); *See also Williams v. Skelton*, 2008 WL 1795415 (holding that where the plaintiff waited only thirty-seven days before filing the complaint, she did not comply with requisite sixty-day waiting period; thus, the medical negligence action was properly dismissed). Since Plaintiff failed to comply with the special exhaustion requirements of §1-5-10 of the Choctaw Tribal Code, Plaintiff's claims must be dismissed.

Secondly, Plaintiff failed to demonstrate on the face of her Complaint compliance with the requirements of these provisions as required by §1-5-10(4) of the Choctaw Tribal Code. Once again, this fact alone requires dismissal of this lawsuit.

Lastly, and most importantly, all of Plaintiff's claims in this lawsuit are based upon claims for which the Tribe has not waived sovereign immunity: (1) Sexual Harassment/Hostile Work Environment; (2) Negligent/Intentional Infliction of Emotional Distress; and (3) Wrongful Termination. Neither Congress nor the Tribe has waived sovereign immunity for any of these claims. Plaintiff argues in this case that the Tribe has waived immunity from and after January 29, 2000 for claims filed under the provisions of the Choctaw Tort Claims Act. While the Tribe agrees it has executed a limited waiver of sovereign immunity for claims timely and properly filed under the Act, none of Plaintiff's claims in this suit fall within this limited waiver of sovereign immunity.

§1-5-4 of the Choctaw Tribal Code specifically states that "[E]xcept as expressly abrogated by Congress, or as specifically waived by resolution or ordinance of the Tribal Council specifically referring to such, **the Choctaw tribe shall be immune from suit in any civil action**, and its officers and employees immune from suit for any liability arising from the performance of their official duties." (Emphasis added). The Tribe's defense of sovereign immunity is firmly established as a matter of federal law. *See Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 118 S.Ct. 1700 (1998). Furthermore, where, as here, the sovereign immunity defense has

been raised, the Plaintiff has the burden of showing an express and unequivocal waiver of that immunity, either by Congress, or by the Tribe itself. *Santa Clara, supra; Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S.Ct. 1670, 1677, 56 L.Ed.2d (1978). Since this defense is jurisdictional, mere conclusory allegations asserting the existence of some hoped for but unidentified waiver will never be sufficient to avoid dismissal on grounds of sovereign immunity. *Id.* The burden of proof is on the Plaintiff in this case who is the party asserting jurisdiction. See *Wright & Miller, Federal Practice and Procedure*, § 1350–Motion to Dismiss–Lack of jurisdiction over the subject matter, p. 226 (West 1990). Plaintiff has wholly failed to show a waiver of the Tribe’s sovereign immunity for her claims asserted in this lawsuit.

Plaintiff’s claims that she was sexually harassed, was forced to work in a hostile work environment or was wrongfully terminated are all barred by the doctrine of tribal sovereign immunity. Not only has Congress or the Tribe not waived sovereign immunity for these claims, as stated before Indian tribes are specifically exempt from the definition of employer under Title VII. See 42 U.S.C.A. §2000e(b) which states “The term “employer” means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an **Indian tribe . . .**” (Emphasis Added). Any claims that Plaintiff was sexually harassed or exposed to a hostile work environment while an employee of the Tribe are Title VII actions that do not apply to the Tribe and for which neither the Tribe, nor Congress, has waived the Tribe’s immunity.

Furthermore, this Court has previously ruled that a plaintiff’s claims for retaliatory and wrongful discharge were barred by the doctrine of tribal sovereign immunity. This holding was affirmed on appeal by the Mississippi Band of Choctaw Indians Choctaw Supreme Court. See *Wanda Sharp v. Mississippi Band of Choctaw Indians*, SC 2002-02 (Memorandum Opinion and

Order entered August 30, 2004). Plaintiff's claims in this case that she was wrongfully terminated are further barred by the doctrine of tribal sovereign immunity.

Plaintiff's argument that she anticipates the Tribe relying upon the Workers' Compensation Law exemption of liability set forth in §25-1-5(1)(l) is without merit. The Tribe in its arguments that Plaintiff's claims are barred by the doctrine of tribal sovereign immunity in no way relies upon the workers' compensation exclusion found in the Choctaw Tribal Code. Plaintiff's claims are barred for the other reasons set forth above.

As stated before, the U.S. Supreme Court has held on repeated occasions that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed in holding that there could be no implication of a waiver of tribal sovereign immunity even by Congress' enactment of a statute that was intended to protect the civil rights of persons as against possible infringement by Indian tribal governments. *Santa Clara Pueblo*, 436 U.S. at 58. See the Indian Civil Rights Act ("ICRA"), 25 U.S.C. §§ 1301-1302. Since there has been no waiver of sovereign immunity for any claims asserted by the Plaintiff in her Complaint, Plaintiff's Complaint must be dismissed.

### CONCLUSION

Plaintiff has failed to satisfy the requirements of Choctaw Tribal Code §1-5-10 in order to invoke the jurisdiction of this Court. Furthermore, the Tribe's sovereign immunity defense bars this Court from granting any relief to the Plaintiff in this action. All of the Plaintiff's claims are based upon Title VII liability and an Indian tribe is specifically excluded from the definition of an employer under Title VII. Moreover, any claims sounding in contract are also barred by the Tribe's sovereign immunity. Simply put, there has been no waiver of sovereign immunity in this case for any of Plaintiff's claims. Absent an unequivocal waiver of the Tribe's sovereign immunity for Plaintiff's claims, this suit is barred by the doctrine of tribal sovereign immunity. For these reasons, Plaintiff's claims against this Defendant should be dismissed with prejudice.

**WHEREFORE, PREMISES CONSIDERED**, the Defendant, Mississippi Band of Choctaw Indians d/b/a Choctaw Resort Development Enterprise requests that this Honorable

Court grant its Motion to Dismiss as this suit is barred by the Tribe's sovereign immunity and prays that this Honorable Court enter an Order of Dismissal with Prejudice against this Plaintiff, and for any other relief as this Court may deem equitable.

Respectfully submitted, this the 29<sup>th</sup> day of May, 2009.

**MISSISSIPPI BAND OF CHOCTAW INDIANS  
D/B/A CHOCTAW RESORT DEVELOPMENT  
ENTERPRISE, DEFENDANT**

By:   
DAVID LEE GLADDEN, JR.

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