

**IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA**

SHERRIE SANDERS

Plaintiff,

v.

BILL ANOATUBBY, et al.,

Defendant.

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Civil Action No. CIV-15-0089

**DEFENDANTS' MOTION TO DISMISS COMPLAINT
WITH BRIEF IN SUPPORT**

Defendants Bill Anoatubby, et al., respectfully move the Court, to dismiss the Complaint [Doc.1] under Fed. R. Civ. P. 8(a), 12(b)(1), 12(b)(6), and 12(b)(5) for the following reasons:

1. Failure to set forth a short and plain statement of jurisdiction and entitlement to relief;
2. Lack of subject matter jurisdiction over the Chickasaw Nation, a sovereign and federally recognized Indian nation;
3. The Complaint fails to state a claim against Defendants' upon which relief can be granted.

I. STATEMENT OF THE CASE

1. On January 28, 2015, Plaintiff Sherri Sanders commenced this *pro se* action against the Chickasaw Nation and individual officials/employees of the Chickasaw Nation, in a two paragraph Complaint that neither states a jurisdictional basis nor a claim for relief. [Doc. 1], [Exhibit 1]. Plaintiff makes the following apparent allegations related to her employment with the Chickasaw Nation: 1) wrongful termination; 2) abuse of authority; 3) non-compliance with several Chickasaw

Nation policies and procedures; 4) hostile work environment; 5) not allowing due process; and 6) denial of individual rights. [Doc. 1].

Plaintiff additionally asserts other alleged improper actions related to an application for housing assistance. The alleged improper actions include: 1) homeowner's application discrimination; 2) non-compliance with Native American Housing Assistance And Self-Determination Act of 1996 ("NAHASDA"); 3) improper handling of application due to retaliation from Housing Administration Superiors. [Doc. 1].

2. The Civil Cover Sheet contemporaneously filed with the Complaint specified "Title VII Of The Civil Rights Act of 1964 as the Cause of Action under Section VI. [Doc. 1, Att. 3].

3. The Complaint alleges no action taken by an official or employee of the Chickasaw Nation related to either Plaintiff's employment or housing application. [Doc. 1].

4. The Chickasaw Nation is a federally-recognized Indian tribe with sovereign immunity. [Exhibit 1], [Exhibit 2].

5. The Chickasaw Nation Code, Title 2, Administration Of Tribal Affairs And Government Section 2-401.8, Legal Protection For Officers And Employers Of the Nation in part states as follows: The Chickasaw Tribal Legislature extends full and complete tribal protection, legal defense, and indemnification to all officials of the judicial, executive and legislative departments, employees and/or agents of the Chickasaw Nation during any and all times that those officials, employees and/or agents are engaged in activities that are in full keeping with their assigned, mandated or delegated tasks as officials, employees and/or agents of the Chickasaw Nation. [Exhibit 3].

II. ARGUMENT AND AUTHORITY

A. PLAINTIFF'S COMPLAINT FAILS TO SET FORTH SHORT AND PLAIN STATEMENT OF JURISDICTION AND ENTITLEMENT TO RELIEF

Even though *Pro Se* litigant's pleading are entitled to liberal construction, a litigant must nonetheless follow the rules of federal procedure. Ogden v. San Juan County, 32 F .3d 452, 455 (10th Cir. 1994). Neither the parties nor the Court are under an obligation to develop legal theories for the Plaintiff and may not supply factual allegations to support a *pro se* litigant's claims for relief. Hall v. Bellmon, 935 F .2d 1106, 1110 (10th Cir. 1991); Glenn v. First Nat'l Bank in Grand Junction, 868 F .2d 368, 371-72 (10th Cir. 1989). Simply put, it is "not the role of either the court or the defendant to sort through a conclusory and poorly drafted complaint in order to construct a cause of action." Verry v. City of El Reno, 2005 WL 3187285 at *1 (W.D. Okla. Nov. 29, 2005) (citing Abdelsamed v. United States, 13 Fed. Appx, 883, 884 (10th Cir. 2001)).

Accordingly, Federal Rule of Civil Procedure 8(a)(1) requires the Plaintiff to provide "a short and plain statement of the grounds for the court's jurisdiction." Fed. R. Civ. P. 8(a)(1). Likewise, Rule 8(a)(2) provides that a claim for relief must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "The purpose of the modern complaint is to give opposing parties fair notice of the basis of the claim against them so that they may respond to the complaint, and to apprise the court of sufficient allegations to allow it to conclude, if the allegations are true, that the claimant has a legal right to relief." Monument Builders of Greater Kan. City, Inc. v. Am. Cemetery Ass'n of Kan., 891 F .2d 1473, 1480 (10th Cir. 1989). A complaint is subject to dismissal if it fails to comport with the requirements of Rule 8(a). Carpenter v. Williams, 86 F .3d 1015, 1016 (10th Cir. 1996) (dismissing complain as "incomprehensible"); Moser v. Oklahoma, 118 Fed. Appx. 378, 380-81 (10th Cir. 2004) (unpublished) (affirming dismissal under Rule 8(a) where complaint was sufficiently vague and

incomprehensible that defendants could not have discerned the claims or prepare a defense); Young v. Burd, 2007 WL 1456102 (D.Colo. May 15, 2007) (citing Carpenter and dismissing complaint that was “too vague, ambiguous and imprecise to allow Defendant to formulate an answer or other responsive pleading”); Wilson v. Gaylon, 2006 WL 249634 (W.D. Okla. Jan. 31, 2006) (dismissing complaint that left the defendant guessing as to the true nature of the claims against him). A dismissal pursuant to Rule 8(a) is reviewed for abuse of discretion. Moser, 118 Fed. Appx. at 381.

Plaintiff’s Complaint is vague, ambiguous, and imprecise and does not provide the short and plain statement demonstrating jurisdiction and entitlement to relief that is required. Plaintiff does not cite a statutory scheme nor jurisdictional statute, and fails to state any basis for jurisdiction. [Doc. 1]. Plaintiff alleges a string of conclusory pronouncements without providing any details of the alleged actions taken by Defendants. For example, Plaintiff contends she was wrongfully terminated but does not describe details related to her employment or termination. Next she concludes Defendants “abused their authority” without providing any basis or description of the Defendants respective authority or the factual basis for the alleged abuse. Plaintiff’s Complaint states the Defendants did not comply with Chickasaw Policies and Procedures but does not provide any policies, or even a hint as to the intent of the policy. Rather, Plaintiff simply states there were “several”. [Doc. 1]. Furthermore, Plaintiff alleges “Homeowner’s Application Discrimination” but provide no details regarding the application, that status of the application or the basis of the discrimination. Later in the Complaint Defendant states “Improper Handling of Application Due to Retaliation”, but does not provide Defendants’ any details that describe what the Defendants actually did wrong, or how the Defendants allegedly retaliated, either related to employment or housing. [Doc. 1]. The Complaint falls far short of the requirements necessary to maintain an

action. Defendants do not have sufficient information to prepare an answer. In fact, the Complaint simply strings conclusory statements without stating any action that was taken by any of the Defendants or why any of the enumerated items on the list entitle Plaintiff for relief.

Plaintiff's Complaint does not give "opposing parties fair notice of the basis of the claim against them so that they may respond to the complaint" or "apprise the court of sufficient allegations to allow it to conclude, if the allegations are true, that the claimant has a legal right to relief." Monument Builders of Greater Kan. City Inc., 891 F .2d at 1480. Simply put, it is impossible to determine what Plaintiff alleges the Defendants did wrong, either individually or collectively. Because Plaintiff's Complaint is vague, ambiguous and incomprehensible dismissal under Rule 8(a) is required.

B. THE CHICKASAW NATION IS A SOVEREIGN INDIAN TRIBE AND THEREFORE THIS SUIT IS BARRED, AS NEITHER THE CHICKASAW NATION NOR CONGRESS HAS UNEQUIVOCALLY AND EXPRESSLY WAIVED IT SOVEREIGN IMMUNITY.

If at any time a court determines it lacks subject-matter jurisdiction, the court must dismiss the action. Fed. R. Civ. P. 12(h)(3). Federal Rule of Civil Procedure 12(b)(1) authorizes a court to dismiss claims for lack of subject matter jurisdiction. The party seeking to invoke federal jurisdiction has the duty to establish that such jurisdiction is proper. Basso v. Utah Power & light Co., 495 F .2d 906, 909 (10th Cir. 1974). Because federal courts have limited jurisdiction, there is a presumption against jurisdiction. Id. When a court lacks jurisdiction, it must dismiss the proceeding. Fed. R. Civ. P. 12(b)(1). "Tribal sovereign immunity is a matter of subject matter jurisdiction, which may be challenged by a motion to dismiss under Fed. R. Civ. P. 12(b)(1)." E.F.W. v. St. Stephen's Indian High Sch., 264 F .3d 1297, 1302-03 (10th Cir. 2001) (citation omitted).

It is well established that Indian tribes are “domestic dependent nations” that exercise “inherent sovereign immunity”. Michigan v. Bay Mills Indian Cmty., ___ U.S. ___, 134 S. Ct. 2024, 2030 (2014) (quoting Okla. Tax Comm’n v. Citizen Band Potawatomi Tribe of Okla., 498 U.S. 505, 509 (1991). As dependents, the tribes are subject to plenary control by Congress. United States v. Lara, 541 U.S. 193, 200 (2004). However, the tribes remain “separate sovereigns pre-existing the Constitution”. Santa Clara Pueblo v. Martinez, 456 U.S. 49, 56 (1978).

One of the core aspects of sovereignty that tribes possess is the “common law immunity from suit traditionally enjoyed by sovereign powers.” Santa Clara Pueblo v. Martinez, 436 U.S. at 58-59 (1978). This immunity is not only for the tribe, but also its officers acting in their official capacities. Cohen v. Winkleman, 428 F. Supp. 2d 1184, 1186 (W.D. Okla. 2006) (citing Santa Clara Pueblo v. Martinez, 456 U.S. 49, 56 (1978); Fletcher v. U.S., 116 F.3d 1315 (10th Cir. 1997)). Therefore, Indian Tribes and tribal officials are subject to suit only where Congress has authorized it or where the tribe has waived its immunity. Cohen v. Winkleman, 428 F. Supp. 2d 1184, 1186 (W.D. Okla. 2006) (citing Kiowa Tribe of Oklahoma v. Mfg. Tech. Inc., 523 U.S. 751 (1998)). Additionally, the Chickasaw Nation extends full and complete tribal protection, legal defense, and indemnification to all officials of the judicial, executive and legislative departments, as well as all employees during the performance of assigned, mandated or delegated duties. [Exhibit 3]. Further, “[i]t is settled that a waiver of sovereign immunity cannot be implied but must be unequivocally expressed.” Santa Clara Pueblo v. Martinez, 456 U.S. 49, 56 (1978) (internal quotations omitted).

It is undisputed that the Chickasaw Nation is a federally-recognized Indian tribe, and all Defendants named in the Complaint are officials and employees acting within the scope of their employment. [Exhibit 1], [Exhibit 2]. Indeed, the Complaint list Plaintiff’s by name, followed

by their job titles. [Doc 1]. To be clear, the Defendants have not, and do not waive their sovereign immunity, nor has Plaintiff alleged a waiver of sovereign immunity. Because Plaintiff has not identified any explicit waiver of sovereign immunity, the Complaint against the Chickasaw Nation, and its officials, must be dismissed for lack of subject matter jurisdiction under rule 12(b)(1).

Further, Plaintiff's Civil Cover Sheet cites to Title VII of the Civil Rights Act of 1964 as the basis for the claim. [Doc. 1] However, "[i]t is clear that Congress did not abrogate tribal immunity with regard to Title VII." Robert Nanomantube v. The Kickapoo Tribe in Kansas, 631 F.3d 1150, 1152 (10th Cir. 2011). In fact, "Congress specifically exempted Indian tribes from the definition of 'employers' subject to Title VII's requirements. Id. (See 42 U.S.C. § 2000e(b)).

Because the Plaintiff's claims are, according to the Supreme Court of the United States, barred by tribal sovereign immunity, the Chickasaw Nation asks this Court to enter an Order dismissing all of the claims that have been asserted against it by the Plaintiff for lack of jurisdiction.

The Chickasaw Nation submits that this dismissal should be one with prejudice because this Motion is based upon the defense of (tribal sovereign) immunity.

C. PLAINTIFF'S COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED

A motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6) "admits all well-pleaded facts in the complaint as distinguished from conclusory allegations." Elliot Indus. Ltd. P 'ship v. BP Am. Prod. Co., 407 F.3d 1091, 1107 (10th Cir. 2005). In reviewing a dismissal the inquiry is whether the claim "contains enough facts to state a claim to relief that is plausible on its face." Ridge at Red Hawk, L.L.C. v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007) (quoting Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1969 (2007)). In order to survive a motion to dismiss, a plaintiff must nudge his claim across the line from conceivable to plausible. Id. Thus, "the mere metaphysical possibility that *some* plaintiff could prove *some* set

of acts in support of the pleaded claim is insufficient; the complaint must give the court reason to believe that *this* plaintiff has a reasonable likelihood of mustering factual support for *these* claims.”

Id.

Plaintiff’s Complaint fails to state a claim upon which relief can be granted, as required by Federal Rules of Civil Procedure 12(b)(6). Plaintiff’s Complaint does not clearly state causes of action, plead the required elements, or identify *any* facts, let alone facts that might nudge the claims across the line from conceivable to plausible. Indeed, as noted above, Plaintiff merely list a string of conclusions. If it is interpreted that Plaintiff was an employee of the Chickasaw Nation, the Complaint does not plead *any* elements or identify *any* facts to show *any* improper actions were taken by the Defendants related to her employment. [Doc. 1]. The second paragraph of the Complaint alleges another string of apparent allegations regarding a housing application. If it is assumed Plaintiff filed an application with the Defendants, the Complaint does not provide *any* facts to show *how* the application was allegedly mishandled or what form the retaliation took, or if the retaliation was related to employment or the housing application.

Furthermore, the appropriate forum to address these allegations would be through the administrative and judicial channels within the Chickasaw Nation.

III. CONCLUSION

For the reasons set forth above, this Court should dismiss this Complain for failure to set forth a short and plain statement of jurisdiction and entitlement to relief under Rule 8(a); lack of subject matter jurisdiction over the Chickasaw Nation under Rule 12(b)(1), and failure to state a cognizable claim for relief under Rule 12(b)(6)

Respectfully submitted,

s/ Michael Burrage

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CERTIFICATE OF SERVICE

I hereby certify that on 16th day of March, 2015, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file with the Clerk of the Court, I served the attached document by (service method) certified and first class mail on the following, who are not registered participants of the ECF System:

Sherri Sanders
6319 N.W. Cheyenne Avenue
Lawton, OK 73505

s/ Michael Burrage

Michael Burrage