

1997). Although, in some cases the Tenth Circuit has “interpret[ed] the inclusion of new allegations in a response to a motion for summary[] as potential request to amend the complaint.” *Fuqua v. Lindsey Management Co.*, 321 Fed. App’x. 732, 735 (10th Cir. 2009) (quoting *Martinez v. Potter*, 347 F.3d 1196, 1201 (10th Cir. 2007)). Therefore, Defendants ask this Court to disregard all new allegations contained in Plaintiff’s *Response in Opposition to Defendants’ Motion to Dismiss*. [Doc. 14]. Alternatively, if this Court considers the new allegations the Plaintiff still has not set forth a complaint that will withstand a Motion to Dismiss.

II. PLAINTIFF’S PERCEIVED VIOLATION OF TRIBAL POLICIES AND PROCEDURES DO NOT VEST THIS COURT WITH SUBJECT MATTER JURISDICTION.

Plaintiff seeks remedy from this Court based upon alleged violations of *tribal employment policies*¹. [Doc. No. 14, Section A.1-2]. Although Plaintiff’s *Response* offers new details not included in the *Complaint* alleging tribal supervisors violated *tribal policies* during her employment and subsequent termination, these new details do not assert any action that grants this Court jurisdiction, because the Chickasaw Nation is a federally recognized tribe with sovereign immunity. [Doc. No. 11, Ex. 1, ¶ 2, Ex. 2]. Federally recognized Indian tribes are “domestic dependent nations” that retain inherent sovereign *authority* over their membership and lands and suits are barred absent clear waiver by the tribe or congressional abrogation. *Oklahoma Tax Com’n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509 (1991). Plaintiff neither disputes that the

¹The Chickasaw Nation disputes the allegations presented by Plaintiffs.

tribe is a federally recognized tribe with sovereign immunity, nor claims the Chickasaw Nation waived its immunity, therefore there is no jurisdictional basis for this Court to address Plaintiff's employment grievance.²

Indian tribes are "distinct, independent political communities, retaining their original natural rights" in matters of local self-government. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978) citing *Worcester v. Georgia*, 6 Pet. 515, 559, 8 L.Ed. 483 (1832); see *United States v. Mazurie*, 419 U.S. 544, 557 (1975); F. Cohen, Handbook of Federal Indian Law 122-123 (1945). Although no longer "possessed of the full attributes of sovereignty," they remain a "separate people, with the power of regulating their internal and social relations." *United States v. Kagama*, 118 U.S. 375, 381-382 (1886). See *United States v. Wheeler*, 435 U.S. 313 (1978). They have power to make their own substantive law in internal matters, see *Roff v. Burney*, 168 U.S. 218 (1897) (membership)s *56 *Jones v. Meehan*, 175 U.S. 1, 29 (1899) (inheritance rules); *United States v. Quiver*, 241 U.S. 602 (1916) (domestic relations), and to enforce that law in their own forums, see, e. g., *Williams v. Lee*, 358 U.S. 217 (1959).

Furthermore, the Chickasaw Nation Code (the "Code") Title 2, Section 2-503.2 SCOPE AND AUTHORITY, provides "The leadership of each of the three Department of

² 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)).

government of the Chickasaw Nation... have the authority to promulgate policies and procedures applicable to the employees of that respective Department of the Chickasaw Nation. (Exhibit 1). Additionally, The Chickasaw Nation Employees Code (the “Employee Code”) was adopted by the Chickasaw Tribal Legislature on February 19, 1988 and governs tribal employment policies and procedures. (Exhibit 2). In addition, Title 2, Section 2-503.9 PERSONNEL MANAGEMENT, allows for “[a]ll matters involving personal actions. Promotions, demotions, transfers to new positions, terminations, suspensions... shall be determined according to tribal employment policies.” (Exhibit 3). Because all of Plaintiff’s newly alleged facts relate to her employment and subsequent termination the appropriate forum for her grievances can be addressed in the Employee Code.³

Plaintiff’s claims against her supervisors are equally without merit. Plaintiff accuses her tribal supervisors of “abus[ing] their authority, ...acting outside the scope of their official duties and in direct violation of the power entrusted to them, and breaking policies and procedures as stated in the Chickasaw Nation’s Employees’ (sic) Code and Handbook.” [Doc. No. 14, ¶ 2]. However, all of the alleged violations Plaintiff list in the *Response* are related to actions taken by Plaintiff’s supervisors in their official capacity while enforcing tribal employment policies. These allegations include employee counseling sessions related to Plaintiff’s failure to follow proper policy when requesting time off and various exchanges allegedly occurring between Plaintiff and supervisors in

³ Exhibit 2, Art. XI, Grievances

the work place. [Doc. No. 14, Section A.2.] Each named tribal official as designated by Plaintiff were acting within the scope of their employment and therefore are covered under the tribe's sovereign immunity. [Doc. No. 11, Ex. 1, ¶ 3] "The interest in preserving the inherent right of self-government in Indian tribes is equally strong when suit is brought against individual officers of the tribal organization as when brought against the tribe itself" *Native American Distributing v. Seneca-Cayuga Tobacco Co.*, 546 F .3d 1288, 1296 (10th Cir. 2008).

In addition Plaintiff concludes these examples "shows a pattern of different treatment of the Plaintiff versus other employees." [Doc. No. 14, Section A.2.] Because Plaintiff fails to provide any factual basis for this assertion it must be rejected.

III. THE NATIVE AMERICAN HOUSING ASSISTANCE AND SELF DETERMINATION ACT DOES NOT PROVIDE FOR PRIVATE CAUSE OF ACTION THAT WILL ALLOW PLAINTIFF TO MAINTAIN AN ACTION IN THIS COURT.

The Native American Housing Self Determination Act (NAHASDA) does not provide for a private cause of action that would allow Plaintiff to bring a claim in this Court. Rather, NAHASDA authorizes the Secretary of Housing and Urban Development (the "Secretary") to refer the matter to the Attorney General if the Secretary believes the recipient⁴ "has failed to comply substantially" with specific requirements. 25 U.S.C. § 4161 (c)(1).

⁴ "Recipient" is defined as "an Indian tribe or the entity for one or more Indian tribes that is authorized to receive grant amounts under this chapter on behalf of the tribe or tribes." 25 U.S.C. §4103 (19).

NAHASDA allocates annual block grants to Indian tribes for affordable housing and related activities for the benefit of primarily low-income Indian families. Further, NAHASDA regulations allow Indian tribes to direct its own housing program. *Id.* at § 4113 (e). In addition, NAHASDA permits the recipient Indian tribes to develop a preference system to serve its tribal members. *Id.* at § 4131 (b)(6) (Preference for tribal members and other Indian families). Each year the Indian tribe must submit its housing plan to the Secretary which includes a certification that it complies with various requirements. *Id.* at § 4112 (b)(2)(D). This housing plan also describes its planned activities including the types of households to receive assistance, the level of assistance and other details. *Id.* at § 4112 (b)(2)(A)(i-vi). Upon receipt the Secretary will conduct a limited review and notify each Indian tribe of plan approval. *Id.* at § 4113 (a)(2). The Indian tribes housing plan submissions may utilize a tribal preference with their housing program. *Id.* at § 4131 (b)(6). The Chickasaw Nation submits its housing plan annually and receives notice from HUD that its plan is in compliance with the applicable provisions in NAHASDA and therefore it has the discretion to administer its housing program in the manner it deems most effective. *Id.* at § 4131 (b)(6). (Preference of tribal members and other Indian families). (Exhibit 4)⁵. In order to efficiently and fairly administer its housing program the Chickasaw Nation uses a preferences system to determine placement on its waiting list. Plaintiff objects to the Chickasaw Nation's use of this preference system. Specifically, Plaintiff objects to her distinction as "single" for the purpose of waitlist placement. However, this is precisely the

⁵ Exhibit 4 includes HUD certification for the years Plaintiff has had an active housing application with the Chickasaw Nation.

preferential determinations NAHASDA allows, and the Chickasaw Nation utilizes. It is important to note Plaintiff has never been denied for tribal housing. Plaintiff also claims that Title VI of the Civil Rights Act of 1968 (Title IV”) provides a jurisdictional basis in this matter. (42 U.S.C. 3601 *et seq.*). In fact, NAHASDA provides an *exemption* from Title VI in § 4131 (b)(6), specifically as it relates to tribal preferential programs.

Accordingly, this Court does not have jurisdiction to address this claim. Nonetheless, Plaintiff does have access to the Chickasaw Nation’s grievance program which provides for redress for tribal members dissatisfied with the program.

IV. PLAINTIFF CANNOT ESTABLISH JURISDICTION THROUGH EITHER TITLE VI OR EX PARTE YOUNG.

Plaintiff attempts to allege jurisdiction is granted to this Court by Title VI and Ex parte Young. *Ex parte Young*, 209 U.S. 123 (1908). Neither Title VI, nor the *Ex Parte Young* doctrine are applicable to this action. In general, Title VI prohibits discrimination based on race, color, or national origin in covered programs and activities and recipients of federal funding are prohibited from formulating a criteria which results in discrimination on those prohibited grounds. *Alexander v. Sandoval*, 523 U.S. 275 (2001). The purpose of NAHASDA is to provide assistance with affordable housing to Indian tribal members which can only be accomplished by excluding non-Indians from the program. In addition to the “preference” exemption provided 25 U.S.C. § 4131 (b)(6) NAHASDA exempts Indian tribes which have submitted a yearly housing plan from Title VI. 77 Fed. Reg. 71513, 71522 (2012).

Therefore, even if Plaintiff had alleged a violation of a protected class, which has not been pled, as stated above the Chickasaw Nation is exempted from Title VI.

Further, Plaintiff states Title VI is intended to “prevent intentional discrimination in programs and activities” but does not plead any facts that allege any discriminatory action by the Chickasaw Nation relate to this claim. [Doc. No. 14 ¶ 4] Specifically, Plaintiff fails to identify a class of discrimination as required by Title VI, rather she *concludes* discrimination occurred. Other than violation of tribal employment policies Plaintiff does not provide any details that point to a violation of federal law. Accordingly, Even if Plaintiff’s claim adequately asserted a Title VI claim, jurisdiction would not be available in this federal forum.

Ex Parte Young is inapplicable because Plaintiff alleges only violations of tribal employment policies.⁶ *Ex parte Young* stands for the proposition that the supremacy clause authorizes equitable relief against state officers for *prospective* ongoing violations of federal law. *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 275 (1997). Other than violation of tribal employment policies Plaintiff does not provide any details that point to a violation of federal law. Plaintiff uses the phrases “application was handled differently than other applicants” and “due to retaliation” but fails to point to any behavior or activity which may show these actions. [Doc. No. 14, ¶ 3]

⁶ Plaintiff concludes “discrimination” occurred and cites to Title VI, Appendix A to Subpart A of Part 17 in support of her jurisdictional argument. [Doc. No. 14 ¶4] Defendant attempted to locate this reference to understand the context of Plaintiff’s argument but was unable to find it. Defendant did find Title 43 Public Lands Interior, Part 17, Subpart A VI (a), which is inapplicable in this action.

Additionally, the remedy available in *Ex parte Young* claims is limited to injunctive relief, but Plaintiff does not request an injunction rather Plaintiff is asking for one-million dollars.

CONCLUSION

For the reasons set forth above, this Court should dismiss this Complaint. Plaintiff's action fail because this Court does not have jurisdiction over the asserted claims and Plaintiff failed to state a claim upon which relief can be granted.

Relief is available to Plaintiff through the mechanisms established by the Chickasaw Nation in its Tribal Code, and applicable policies and procedures.

Respectfully submitted,

s/ Michael Burrage

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CERTIFICATE OF SERVICE

I hereby certify that on 10th day of April, 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