IN THE DISTRICT COURT OF THE CHEROKEE NATION

DAVID COMINGDEER,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**CV-2016-180**
	)	
CHEROKEE NATION,	)	
	)	
Defendant.	)	

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

COMES NOW the Cherokee Nation and in support of its Motion to Dismiss, hereby offers the following:

I. In his Objection, the Plaintiff fails to demonstrate a waiver of sovereign immunity for claims of constructive discharge under the Whistleblower Protection Act. Therefore, Count I of the Plaintiff's Complaint should be dismissed for lack of jurisdiction.

"It is well-established as a matter of Cherokee law and federal law that suits against the Indian tribes and in this instance, the Cherokee Nation, are permissible only when the tribe has waived sovereign immunity." Littlejohn v. Smith, JAT-03-18, 3 (2004). "Absent an express waiver of sovereign immunity, causes of action against the Cherokee Nation are barred." Id. "Sovereign immunity is applicable in all causes of action filed against the Cherokee Nation, in Cherokee, state and federal courts. Only where there has been a waiver of sovereign immunity can a cause of action against the Cherokee Nation proceed." Id. Furthermore, it is well-established under Cherokee law that "[t]he Court is not permitted to imply waivers of sovereign immunity. Only when it is express and clear from a statute will the Court find that the Council intended to permit a complaint to be brought against the Cherokee Nation." In re Sanders, JAT-99-26, 11 (2002).

In his Objection to the Defendant's Motion to Dismiss (Jan. 19, 2018), the Plaintiff fails to identify an express and clear waiver of the Cherokee Nation's sovereign immunity for claims of constructive discharge under the Public Integrity and Whistleblower Protection Act of 2004, LA 13-04 ("the Whistleblower Protection Act"). In doing so, the Plaintiff argues that the Tribal Council has implied a waiver for this cause of action within the meaning of the text of the Whistleblower Act. See Pl.'s Obj. at 2-3. In support of this argument, the Plaintiff cites to McCoy and Ragsdale. Pl.'s Obj. at 3. However, neither McCoy nor Ragsdale discuss the Whistleblower Protection Act as their respective holdings are limited to claims brought under the Employee Administrative Appeals Act, 51 CNCA § 1001, et seq. ("the Employee Appeals Act"). McCoy and Ragsdale, if anything, demonstrate that the Tribal Council chose to waive sovereign immunity for claims of constructive discharge within the Employee Appeals Act, but chose not to in the Whistleblower Act. This distinction notwithstanding, the Plaintiff's citation to these cases fails to demonstrate an express and clear waiver of the Nation's sovereign immunity for claims of constructive discharge under the Whistleblower Act. Therefore, because the Plaintiff has failed to identify an express waiver of sovereign immunity for claims of constructive discharge under the Whistleblower Act, and Cherokee law prohibits a finding of the same by implication, Count I of the Plaintiff's Complaint should be dismissed for lack of jurisdiction.

II. In his Objection, the Plaintiff has failed to allege facts demonstrating constructive discharge. Therefore, in the alternative, Count I of the Plaintiff's Complaint should be dismissed for failing to state a claim upon which relief can be granted.

Assuming *arguendo* that the Tribal Council has waived sovereign immunity for claims of constructive discharge under the Whistleblower Act, which it has not, the Plaintiff has failed to plead facts supporting a claim of constructive discharge. Generally, in order to prove constructive termination or constructive discharge, an employee must demonstrate that the

employer's discriminatory conduct produced working conditions that a reasonable person would view as intolerable. 45B Am. Jur. 2d Job Discrimination § 967; see also Collier v. Insignia Financial Group, 1999 OK 49, ¶ 10 (requiring the trial court to inquire (1) whether the employer either knew or should have known of the "intolerable" work conditions and (2) if the permitted conditions were so intolerable that a reasonable person subject to them would resign).

In his Complaint, the Plaintiff does not allege that the Defendant knew of "intolerable" work conditions, or that such conditions brought about his resignation. Instead, in his Objection, the Plaintiff re-alleges that the Nation transferred him and "reduced the compensation available to him as a firefighter". Pl.'s Obj. at 3. Here again, the Plaintiff's previous citation to McCoy warrants dismissal as the Plaintiff does not allege that the Nation reduced his pay and/or benefits or demoted him. Id. (citing McCoy at 3). Likewise, McCoy and Ragsdale require that these claims are properly adjudicated, if at all, under the Employee Appeals Act and not the Whistleblower Act. Therefore, in the alternative, Count I of the Plaintiff's Complaint should be dismissed for failure to state a claim by which relief can be granted.

III. Count III of the Plaintiff's Complaint should be dismissed for lack of jurisdiction as the Plaintiff has failed to demonstrate a waiver of sovereign immunity by the Tribal Council for "violations of free speech" under the Whistleblower Act.

In his Objection, the Plaintiff fails to identify a waiver of the Cherokee Nation's sovereign immunity which would allow his freedom of speech claim to proceed under the Whistleblower Protection Act. The Whistleblower Protection Act provides a waiver of sovereign immunity only for retaliatory actions brought against an employee engaged in a "protected activity" as that term is narrowly defined in Section 4 of the Act:

> (a) Discloses...to a supervisor or to a public body, an activity, policy or practice of the employer,...that the employee reasonably believes is *in violation of a law, or a rule or regulation...*; or

(c) Discloses...to a supervisor or to a public body or any law enforcement agency, an activity, policy or practice of the employer...that the employee reasonably believes is *incompatible with a clear mandate of public policy* concerning the public health, safety or welfare or protection of the environment[...]

LA 13-04, sec.4 (emphasis added).

The Plaintiff has wholly failed to offer any evidence that his social media comments identified a policy or practice of the Cherokee Nation that he reasonably believed to be in violation of any law, rule or regulation. The Plaintiff has also failed to identify any clear mandate of public policy concerning the public health, safety or welfare or protection of the environment, with which he reasonably believed a Cherokee Nation practice or policy to be incompatible with. The Plaintiff's failure to offer evidence that his social media comments meet either of the two aforementioned section 4 requirements, demonstrates that his comments do not rise to a protected activity contemplated by the Whistleblower Act. Therefore, the Plaintiff has failed again to demonstrate a waiver of sovereign immunity under the Whistleblower Act and Count III of the Plaintiff's Complaint must be dismissed for lack of jurisdiction.

Conclusion

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

Respectfully submitted,

John C. Young, CNBA #474
Senior Assistant Attorney General
Cherokee Nation
P. O. Box 948
Tahlequah, OK 74465
(918) 453-5726, fax (918)458-6142
john-young@cherokee.org

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above was mailed to Counsel for the Plaintiff, Chad Smith, at 22902 S. 494 Road, Tahlequah, OK 74464 on the 20th day of February, 2018.

John C. Young