

IN THE SUPREME COURT OF THE CHEROKEE NATION

CHEROKEE NATION
SUPREME COURT
KEMAL L. BIRD, COURT CLERK

2018 MAY -1 AM 8:21

FILED

HEATHER LOVETT,)	
)	
Appellant,)	
)	
v.)	Case No. SC 2018- 03
)	
CHEROKEE NATION BUSINESSES. LLC.)	
)	
Appellees.)	

OBJECTION TO CNB’S MOTION TO DISMISS

Appellant Lovett objects to the Cherokee Nation Businesses’ (CNB) Motion to Dismiss. CNB argues Lovett only seeks review of the exact same issues that the District Court already decided on appeal and that law of the case doctrine prohibits appeal to this Court from the District Court. CNB is wrong because an appeal is the Supreme Court’s reconsideration of issues presented at the District Court, this Court has never heard this case, and the law of case doctrine does not apply to this case.

I. ARGUMENT

First, Lovett *does* appeal the same issues that the District Court decided. That is what an appeal is and the purpose of the appeal. Lovett cannot introduce issues not brought before or addressed by the District Court. Therefore, CNB’s argument regarding the scope of appeal is without merit.

Second, the law of the case doctrine does not apply. In *Webb v. Cherokee Nation of Oklahoma*, JAT-99-02, the Judicial Appeals Tribunal (“JAT”) held:

Moreover, this Court in the case *In Re: The Termination of Joseph Kinnison* JAT 93-03, has clearly interpreted Article XII as **giving unquestioned jurisdiction to this Court to finally determine issues in wrongful termination cases.** (Emphasis added.)

In *Standingwater v. Cherokee Nation Bingo Outpost, Inc.*, JAT 95-12, the JAT asked and answered the pertinent question about the purpose of Article XII, “Just what does the Cherokee Constitution call for this Court to do? **It calls for us to ensure that no employee of the Cherokee Nation is terminated ‘except for cause.’**” (Emphasis added)

In *In re: Hannaford* SC 2011-01, a case involving a terminated CNB employee, this Court held:

The Cherokee people, through adoption of their Constitutions, have a sound history of extending to employees of the Cherokee Nation a system of protections affording Due Process rights. **These rights include policies and procedures of discipline, termination, a right of hearing before the EARP, a right to appeal to the District Court of the Cherokee Nation, and a Constitutional right of appeal to this Court.** Constitution of the Cherokee Nation (1999), Article XII; Cherokee Nation Human Resources Policy, Title 51 CNCA §1001 et seq.; *In Re: The Termination of William Bush*, JAT 2000-05D; *Watkins v. Cherokee Nation, et al.*, JAT 2002-01; *Cantrell v. Cherokee Nation*, JAT 1997-01; *Looney v. Cherokee Nation Bingo Outpost*, JAT 1996-05; *Standingwater v. Cherokee Nation Bingo Outpost*, JAT 1995-12. (Opinion at pg. 6, Emphasis added.)

Lovett’s right to appeal the District Court’s Order to this Court cannot be any clearer.

CNB’s entire argument rests on the faulty premise that the District Court was an appellate court for purposes of the “law of the case” doctrine. The District Court is a court of general jurisdiction; the Cherokee Nation Supreme Court is the appellate court and court of final decision.¹ The District Court hearing of an administrative appeal does make it an appellate court for the purpose of the “law of the case” doctrine². This Court has never hear this case.

¹ Cherokee Nation Constitution Article VIII. Judicial Section 1.” The Judicial powers of the Cherokee Nation shall be vested in a Supreme Court and such lower courts as the Council shall from time-to-time ordain and establish.”

² CHAPTER 2 DISTRICT COURT—JURISDICTION AND PROCED

§ 11. Application and purpose

The purpose of this chapter is to provide for the establishment of a Cherokee Nation District Court of general jurisdiction to hear cases and controversies arising under the Constitution, treaties and laws of Cherokee Nation. Decisions of the Cherokee Nation District Court will be subject to review by the Cherokee Nation Supreme Court as the court of final review.

Also see § 24. Jurisdiction—Generally

Therefore CNB's argument that the "law of the case" doctrine applies to this case is without merit.

II. CONCLUSION

Lovett repeatedly denied selling her supervisor a controlled dangerous substance pain patch.³ CNB's administrative panel, the Employee Appeals Review Board and the District Court erred because it admitted hearsay evidence and denied Lovett the right to confront her accuser. Now CNB wants to the Court to deny Lovett her right to constitutional appeal to this Court.

³ Lovett consistently advised CNB she sold over-the-counter patches to Annett and not any fentanyl controlled dangerous substance pain patches. The EARP record reflects:

Nicole Cole's (CNB Loss Prevention Agent, "Cole") Statement on August 30th, 2016 –

- "Ms. Lovett admitted to selling a "pain patch" to Mr. Annett for \$25 approximately 2 or 3 months ago." CNB personnel file pg. 1. **Note: there was no reference by Clayton or Lovett that the pain patches were fentanyl.**

Heather Lovett's Statement on August 29, 2016-

- "Today 8-29-16 I talked to Larry and Nicole about selling a pain patch to my boss Larry Annett for I think \$25." CNB personnel file pg. 2. **Note: there was no reference by Clayton or Lovett that the pain patches were fentanyl.**

Heather Lovett's Statement on August 31, 2016-

- "I feel there was a big misunderstanding in my interview on 8-29-16. I NEVER sold Larry Annett prescription drugs. I NEVER sold or gave anyone drugs." CNB personnel file pg. 5.

Heather Lovett's submission on September 14, 2016- Lovett provided pictures of the over-the-counter pain patches she sold Annett. Personnel file pg. 9.

Larry Clayton (CNB Loss Prevention Manager, "Clayton") Statement on August 26, 2016- Clayton reports his conversation with Larry Annett. Lovett objected to his hearsay testimony and documents. However, according to Clayton, Mr. Annett first denied buying any pills of pain patches from any other employees. *Then Annett changed his story and Clayton reported,*

- "Mr. Annett admitted to purchasing pain patch from another of his employees, Heather Lovett; additional, he had purchased the pain patches for \$40.00." Investigation Report Exhibit 5 pg. 2. **Note: there was no reference by Clayton or Annett that the pain patches were fentanyl.**

Nicolas Goodacre (Employee Services Manager, "Goodacre") Statement on August 26, 2016

- "Larry Annett was hesitant to answer the question, but then stated he bought pain patches from Heather Lovett as well." Investigation Report Exhibit 5 pg. 5. **Note: there was no reference by Goodacre or Annett that the pain patches were fentanyl.** Goodacre in a telephone conversation with Lovett and overheard on speaker phone by Barbara Andrews, in response to Lovett advising him the pain patches were over the counter, stated
- "I understood that it was prescription medication". In response to Lovett advising him, "No its over-the counter medication, like Icy Hot patches or things like that" he stated, "We must have a big misunderstanding" (Andrews trans. pg. 256, ln. 1.) Goodacre also stated "*We assumed that they were prescription because he paid you.*" Lovett Trans. pg. 210, ln 1

Larry Clayton's Statement on August 30, 2016- Clayton reports his interview with Heather Lovett and states

- "Ms. Lovett was directly asked if she had sold any pain patches to any employees in her department. Ms. Lovett replied; yes, sold to my boss Marry Annett, for \$25.00, only one time, about 2-3 months ago" Investigation Report Exhibit 5, pg. 6. **Note: there was no reference by Clayton or Lovett that the pain patches were fentanyl.**

