# IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Case No. 122,216



**CLAUDIA C. CONNER,**

Plaintiff/Respondent,

v.

**THE STATE OF OKLAHOMA, d/b/a OKLAHOMA EMPLOYMENT SECURITY COMMISSION,**

Defendant/Petitioner.

Appeal from the District Court of Oklahoma County, State of Oklahoma,
Case No. CJ-2022-5699,
The Honorable Sheila Stinson Presiding.

## PLAINTIFF/RESPONDENT'S ANSWER BRIEF

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## INTRODUCTION

The Plaintiff/Respondent, Claudia Conner (hereafter "Conner"), was the General Counsel for the Defendant/Respondent, OESC (hereafter "OESC"), from August 2020 until November 2021. Ms. Conner was approximately sixty seven (67) years old and was terminated after she complained about inappropriate gender conduct in the workplace and opposed the actions of her much younger supervisor to get rid of older employees.

Ms. Conner brought her action in state court alleging both federal and state discrimination claims, and the OESC removed the action to federal court. The OESC secured dismissal of the federal claims, at which point this matter was remanded to state court for resolution of the state law claims.

In state court, the OESC attempted to secure dismissal of the claim on Ms. Conner's purported failure to comply with the notice requirements of the Governmental Tort Claims Act (GTCA). The trial court denied the motion to dismiss on the basis that it was not clear that the GTCA covered the state law claims brought under the Oklahoma Anti-Discrimination Act (OADA).

OESC then secured an Order from the Oklahoma County District Court certifying the question of whether compliance with the GTCA notice requirements was necessary in case arising under the OADA. This Court accepted the petition for the certified question, and this briefing is designed to address which statute– the GTCA or the OADA– controls employment discrimination claims made under the OADA.

## SUMMARY OF THE RECORD

The OESC's summary of the record found in their Opening Brief, p. 1-2, is generally correct and does not require supplementation.

## ARGUMENT AND AUTHORITY

## I. - SUMMARY OF THE ARGUMENTS

The gravamen of this dispute boils down to whether a person making an employment discrimination claim against a government entity must comply with the notice requirements set out in the GTCA. The GTCA has a special, mandatory notice requirement at 51 O.S. §§ 156, 157. The OESC argues, Open Bf, Prop. I(B), (C), p. 5-8, that compliance with the GTCA notice requirement is mandatory such that dismissal of the action is required when there has been no compliance.

The OADA, however, has its own mandatory notice requirement which is found at 25 O.S. § 1350(B). As will be discussed *infra*, the two notice requirements are not merely different, but are, in fact, incompatible.

As will be shown hereafter, the GTCA requirements are simply not applicable to claims under the OADA. The GTCA covers negligent, and sometimes reckless, torts by state employees, but requires that the tortious conduct have been carried out in "good faith." 51 O.S. § 152(12). The OADA, in contrast, requires proof of an intentional, wrongful act of discrimination. 25 O.S. § 1302.

Thus, the kinds of claims covered by the two Acts are mutually exclusive. The OESC's arguments about failure to comply with GTCA notice requirements are simply beside the point, because "[i]f [a government] employee is acting outside the scope of employment, the GTCA does not apply." ***Speight v. Presley***, 2008 OK 99, ¶ 11, 203 P.3d 173, 176.

However, even if there were an overlap between the coverage of these Acts, the OADA would be, by its own terms, the exclusive remedy for employment discrimination.

## II. - DISCRIMINATION IS AN INTENTIONAL TORT WHICH IS EXCLUDED FROM THE COVERAGE OF THE GTCA

The OESC asserts that amendments to the GTCA now include statutory violations within the definition of a covered "tort," and therefore the statutory discriminations claims created by the OADA are encompassed within the GTCA's general framework. OESC Open Bf, Prop. I(A), (C), pg. 4-5, pg 6-8 respectively.

In making this argument, the OESC focuses on only on the 2014 amendments which included actions under a statute with the GTCA tort definition. OESC Open Bf, Prop. I(A), p. 4-5. This statutory amendment has led some federal district courts to believe that OADA claims now fell under the GTCA. See OESC Open Bf, p. 6-8, listing such decisions.

While federal district court decisions are, at best, merely persuasive as to issues of state law[1], such decisions share the same fatal flaw as the OESC's arguments– they fail to consider that GTCA coverage is limited to actions taken in good faith and therefore exclude the intentional wrongs covered by the OADA.

The liability of the State under the GTCA is set out at 51 O.S. § 153(A):

> A. *The state or a political subdivision shall be liable for loss resulting from its torts or the torts of its employees acting within the scope of their employment* subject to the limitations and exceptions specified in The Governmental Tort Claims Act and only where the state or political subdivision, if a private person or entity, would be liable for money damages under the laws of this state. *The state or a political subdivision shall not be liable under the provisions of The Governmental Tort Claims Act for any act or omission of an employee acting outside the scope of the employee's employment.*

Emphasis supplied.

Accordingly, there are **four** necessary components for coverage under the GTCA:

1: Conduct by a government employee

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[1] ***Martin v. Johnson***, 1998 OK 127 ¶ 31, 975 P.2d. 889, 896 ("the holding of the federal court on a matter of state law has no precedential value").

2: Which constitutes a tort,

3: Committed within the scope of the employee's duties, and

4: ***Performed in good faith.***

For the purpose of this argument, Ms. Conner will concede that the action involves conduct by a state employee and that it was within the scope of the employee's duties to hire and fire her. That is not enough, however, because the action must also be carried out in "good faith."

The GTCA defines the terms "scope of employment" and includes "good faith" as a necessary component. See 51 O.S. § 152(12):

> As used in the The Governmental Tort Claims Act: * * *
>
> 12. 'Scope of employment' means performance by an employee ***acting in good faith*** within the duties of the employee's office or employment or of tasks lawfully assigned by a competent authority including the operation or use of an agency vehicle or equipment with actual or implied consent of the supervisor of the employee, but shall not include corruption or fraud; . . .

Thereafter, the GTCA definition of "tort" incorporates the "scope of employment/good faith" requirement as part of the definition of that term. 51 O.S. § 152(17):

> 17. 'Tort' means a legal wrong, independent of contract, involving violation of a duty imposed by general law, statute, the Constitution of the State of Oklahoma, or otherwise, resulting in a loss to any person, association or corporation as the proximate result of ***an act or omission of*** a political subdivision or the state or ***an employee acting within the scope of employment***; provided, however, a tort shall not include a claim for inverse condemnation.

Emphasis supplied.

"The concept of scope of employment is thus tied to whether the employee or the government entity may be liable for a particular act." ***Pellegrino v. Cameron Univ. ex rel. Bd. of Regents***, 2003 OK 2, ¶ 4, 63 P.3d 535, 537.

In consideration of the "scope of employment" and concomitant "good faith" requestion, this Court has explained that actions which inherently contain an element of "bad faith" are, by definition, excluded from the coverage of the GTCA. ***See Tuffy's, Inc. v. City of Okla. City***, 2009 OK 4, ¶ 14, 212 P.3d 1158, 1165:

> . . . Because the element of malicious and wrongful interference necessarily involves some degree of bad faith, a political subdivision is not liable for malicious interference with a business relationship committed by its employees because bad faith actions are specifically excluded from the GTCA's definition of the scope of employment.

***Accord Pellegrino***, 2003 OK 2, ¶ 2, 63 P.3d, at 536 (GTCA did not apply because "[t]he Pellegrinos alleged in their complaints that defendant Dr. Bhattacharya acted outside the scope of his employment by tortiously interfering with their employment contracts.") ***See also Parker v. City of Midwest City***, 1993 OK 29, ¶ 12, 850 P.2d 1065, 1068 holding the GTCA did not cover malicious prosecution claims because:

> Malicious prosecution requires, as elements to be proven, lack of probable cause and malice. . . . These two elements necessarily include some degree of bad faith. . .

Here, Ms. Conner's OADA claims required proof intentional discrimination "which necessarily include[s] some degree of bad faith." ***Id.***

It did not matter that the plaintiffs in ***Tuffy's*** had cast their action as one for tortious interference, because it is the factual elements necessary to sustain the claim which determine whether coverage exists. In ***Tuffy's,*** this Court held that "the tort [of] 'intentional interference,' requires a showing of intentional action using unfair or improper means. These elements contain some degree of bad faith on the part of the tortfeasor." ***Id.***, ¶ 15, 212 P.3d, at 1165.

An act of discrimination is, by definition, an "intentional action using unfair or improper means" which "contain some degree of bad faith on the part of the tortfeasor," ***id.***, and thus places the claim outside of the GTCA. When, as here, the nature of the claim is

outside GTCA coverage, the GTCA and its notice and other provisions do not apply. ***Pellegrino, supra***, 2003 OK 2, ¶ 11, 63 P.3d, at 539:

> [In ***Sholer v. State ex rel. Dept. of Public Safety***, 945 P.2d 469 (1995)] [w]e explained that because the plaintiffs did not bring a tort claim, but one for a refund of amounts overpaid, they were not seeking to impose tort liability against the State, and plaintiffs 'were not required to comply with the claims procedure provided in the Act.' ***Id.*** 945 P.2d at 472- 473. In other words, (1) a 'tort claim' under the GTCA is defined as one where the employee was acting within the scope of employment, and (2) if a claim is not a 'tort claim' under the GTCA then the claims procedure of the GTCA need not be followed prior to commencing a legal action. A similar result occurred in ***Duncan v. City of Nichols Hills***, 1996 OK 16, 913 P.2d 1303, where we said that the notice provisions of the GTCA did not apply to an employment discrimination claim brought pursuant to 25 O.S. 1991 § 1101 et seq. In other words, the GTCA procedure applies to a 'tort claim' as such is defined by the GTCA.

In its Opening Brief, p. 10, the OESC argues that ***Pelligrino*** is no longer good law because it "relies on ***Duncan*** and thus relies on an outdated holding in light of recent changes to the GTCA." ***Id.*** To the contrary, ***Pelligrino*** relied on the more general statement that actions based on conduct which was outside the scope of employment as defined by the GTCA were not governed by the GTCA:

> We hold that the procedural requirements of the Oklahoma Governmental Tort Claims Act for presenting claims to governmental entities do not apply to tort claims against a governmental employee when plaintiff's claim is based upon allegations that the employee's acts were outside the scope of his or her employment.

2003 OK 2, ¶ 18, 63 P.3d, at 540. This rule has been consistently followed.

Simply put, if the elements of the claim require proof of conduct inconsistent with bad faith, then the government "employee is acting outside the scope of employment, [and] the GTCA does not apply." ***Speight, supra,*** 2008 OK 99, ¶ 11, 203 P.3d, at 176. ***Accord Barnard v. Sutton***, 2014 OK CIV APP 30, ¶ 9, 321 P.3d 999, 1001 and ***Holman v. Wheeler***, 1983 OK 72, ¶¶ 1-2, 12-15. 677 P.2d 645, 646, 647 (GTCA notice provisions did not apply to a claim of the willful imposition of excessive corporal punishment).

Here, the concept of discrimination as prohibited by the OADA inherently involves an element of bad faith or misconduct which takes such claims outside the scope of the GTCA. The OADA defines discrimination by reference to the discriminatory practices set out in the act. 25 O.S. § 1201. Those discriminatory practices are set out in 25 O.S. § 1302 as follows:

> A. It is a discriminatory practice for an employer:
> 1. To fail or refuse to hire, to discharge, or otherwise to discriminate against an individual with respect to compensation or the terms, conditions, privileges or responsibilities of employment, ***because of*** race, color, religion, sex, national origin, age, genetic information or disability, unless the employer can demonstrate that accommodation for the disability would impose an undue hardship on the operation of the business of such employer; or
> 2. To limit, segregate, or classify an employee or applicant for employment in a way which would deprive or tend to deprive an individual of employment opportunities or otherwise adversely affect the status of an employee, ***because of*** race, color, religion, sex, national origin, age, genetic information or disability, unless the employer can demonstrate that accommodation for the disability would impose an undue hardship on the operation of the business of such employer.

Emphasis supplied.

The intentional discrimination is a necessary element of every OADA disparate treatment claim Indeed, "[t]he ultimate question is whether the employer intentionally discriminated"[.] ***Reeves v. Sanderson Plumbing Prods.***, 530 U.S. 133, 146 (2000). ***E.g., Scott v. Solano Cnty. Health & Soc. Order Servs. Dep't***, 459 F. Supp. 2d 959, 972 (E.D. Cal. 2006) ("Discrimination is an intentional act and not the result of negligence.") The United States Supreme Court has determined, using the common law meaning of the words "because of," that the prohibited characteristic must be a motivation for the harmful act:

> Most notably, the statute prohibits employers from taking certain actions 'because of' sex. And, as this Court has previously explained, "the ordinary meaning of 'because of ' is 'by reason of ' or 'on account of.'" ***University of Tex. Southwestern Medical Center v. Nassar***, 570 U. S. 338, 350 (2013) (citing ***Gross v. FBL Financial Services, Inc.***, 557 U. S. 167, 176 (2009); quotation altered). In the language of law, this means that Title VII's 'because of' test incorporates the "'simple" and "traditional" standard of but-for causation. ***Nassar***, 570 U. S., at 346, 360. That form of causation is established

> whenever a particular outcome would not have happened 'but for' the purported cause. ***See Gross***, 557 U. S., at 176. In other words, a but-for test directs us to change one thing at a time and see if the outcome changes. If it does, we have found a but-for cause.

***Bostock v. Clayton Cnty.***, 590 U.S. 644, 656 (2020). Though not controlling, the Oklahoma Court of Civil Appeals has construed the OADA as requiring intentional discrimination. ***See Goff v. Salazar Roofing & Constr., Inc.***, 2010 OK CIV APP 118, ¶ 14, 242 P.3d 604, 608 ("If the plaintiff cannot prove intentional discrimination motivated by [her] disability, then the defendant is entitled to summary judgment." Quotation omitted). While the prohibited characteristic need not be the sole or predominate cause,[2] the action still must have been based on the *intention* to discriminate based on that characteristic.

To 'discriminate,' in the context of a discriminatory employment practice, means to treat the aggrieved person *worse* because of his or her protected characteristic. "To 'discriminate against' a person, then, would seem to mean treating that individual ***worse*** than others who are similarly situated." ***Bostock***, 590 U.S., at 657 (emphasis supplied).[3]

Thus, the gravamen of every OADA action is proof that the defendant committed an intentionally wrongful act.

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[2] ***Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.***, 600 U.S. 181, 289 (2023).

[3] Some federal anti-discrimination statutes provide protection against *practices* which have a discriminatory disparate impact regardless of intent, but the OADA does not seem to have such a provision. That is irrelevant to this case, which is solely based on disparate treatment of an individual. All disparate treatment claims require a showing of intent. "A disparate-treatment plaintiff must establish that the defendant had a discriminatory intent or motive for taking a job related action." ***Ricci v. DeStefano***, 557 U.S. 557, 577 (2009) (internal quotation omitted). "The requirement of intent for a disparate-treatment claim is well established. ***See Watson v. Forth Worth Bank & Trust***, 487 U.S. 977, 986 (1988); ***Chattman v. Toho Tenax Am., Inc.***, 686 F.3d 339, 346 (6th Cir. 2012) (citation and quotation omitted)." ***Beard v. AAA of Mich.***, 593 F. App'x 447, 453 (6th Cir. 2014).

This Court has consistently recognized that intentional wrongs are incompatible with the "good faith" required for GTCA coverage. ***See Nail v. City of Henryetta***, 1996 OK 12, ¶ 6, 911 P.2d 914, 916 (explaining that an intentional use of excessive force was not covered by the GTCA, but a negligent use of force would be covered). ***Accord Houston v. Reich***, 932 F.2d 883 (10th Cir. 1991) (holding a willful use of excessive force placed the action outside coverage of the GTCA, cited with approval in ***Parker v. City of Midwest City***, 1993 OK 29, ¶ 11, 850 P.2d 1065, 1067); ***Phillips v. City of Bethany***, 2011 Okla. Dist. LEXIS 3618, * 23 (Okla.Dist.Ct. June 27, 2011) ("[I]f Plaintiffs are asserting some intentional action by either Sheriff Whetsel or Deputy Sheriff Ralph Bolles that removes them from the scope and course of their employment. Under Oklahoma law, the County is not responsible for the intentional torts of its employees."), and ***Jackson v. Okla. City Pub. Sch. (Indep. Sch. Dist. No. 89)***, 2014 OK CIV APP 61, ¶ 11, 333 P.3d 975, 979 ("Parents have failed to provide authority that District is subject to tort liability for the intentional tort alleged here.").[4] Under ***Tuffy's***, such discrimination would be an "intentional action using unfair or improper means [which] contain some degree of bad faith on the part of the tortfeasor." ***Id.***, ¶ 15, 212 P.3d, at 1165. ***Accord Parker, supra***, 1993 OK 29, ¶ 12, 850 P.2d 1065, 1068

It cannot be an act of "good faith" to intentionally treat a person worse because that person has a characteristic protected by the law. Though focused on sexual harassment, ***State Farm Fire & Cas. Co. v. Compupay***, 654 So. 2d 944, 947 (Fla. Dist. Ct. App. 1995) explains the general understanding of prohibited discrimination:

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[4] The OESC attempts to deflect from the substance of this argument by pointing out that some of the cases cited to the District Court were "assault and battery" actions, and "Respondent is not alleging assault and battery or sexual misconduct [so] these case do not apply." OESC Bf, p. 10.

Ms. Conner's argument is that intentional wrongs (of which assault and battery is only one example) have never been within the coverage of the GTCA.

> . . .It can be reasoned that an act of discrimination or harassment, like an act of sexual abuse, has but one end: to harm the victim. Indeed several courts have concluded that sexual harassment is deemed an intentional act as a matter of law. ***Commercial Union Ins., Co. v. Sky, Inc.***, 810 F. Supp. 249, 253 (W.D. Ark. 1992)('it strains the imagination to speculate how a pattern of sexual overtures and touching can be "accidental."'), and cases cited therein; ***Sena v. Travelers Ins. Co.***, 801 F. Supp. 471 (D. N.M. 1992); ***Old Republic Ins. Co. v. Comprehensive Health Care Assoc., Inc.***, 786 F. Supp. 629 (N.D. Tex. 1992). Harassment and discrimination are neither negligent nor accidental; the perpetrator focuses on a chosen victim for the express purpose of carrying out the acts of harassment and discrimination. . .

Discrimination is, by its ordinary meaning, malicious because "[m]alice is a 'condition of mind which prompts a person to do a wrongful act willfully. . . .'" ***Parker v. City of Midwest City,*** 1993 OK 29, ¶¶ 12-13, 850 P.2d 1065, 1068 (Quoting **Black's Law Dictionary** (5th Ed.). It can hardly be disputed that a person who intends to harm because of animus towards the victim's protected characteristic has acted maliciously.

**WHEREFORE**, this Court should determine that Ms. Conner's claim of intentional discrimination contains inherent elements negating good faith and thus is not covered by the provisions of the GTCA.

## III. - THE OADA CONTROLS ON MATTERS OF EMPLOYMENT DISCRIMINATION

As a matter of statutory construction, the OADA controls the procedures and remedies for employment discrimination claims. This is true for two reasons:

First, the OADA itself specifies that it is the exclusive remedy for such claims, and second, the OADA is the more specific statute when it comes to employment discrimination.

### A. - The OADA Is The Exclusive Remedy For Employment Discrimination

The plain text of the OADA states that it– **not** the OGTCA– is the exclusive remedy for discrimination claims. See 25 O.S. § 1101:

> A. *This act provides for exclusive remedies within the state* of the policies *for individuals alleging discrimination in employment on the basis of* race, color, national origin, sex, religion, creed, *age*, disability or genetic information.

> B. This act shall be construed according to the fair import of its terms to further the general purposes stated in this section and the special purposes of the particular provision involved.

Emphasis supplied.

This language is plain and unambiguous and requires no interpretation:

> As a rule of statutory construction the Court must first look to the plain language of the statute. ***In re Estate of Flowers***, 848 P.2d 1146, 1151 (Okla. 1993). This Court has held that 'if a statute is plain and unambiguous and its meaning clear...[the] statute will be accorded the meaning expressed by the language used,' ***TRW/REDA Pump v. Brewington***, 829 P.2d 15, 20 (Okla. 1992), making it unnecessary to apply rules of statutory construction. ***Flowers***, 848 P.2d 1146 at 1151.

***State ex rel. Dept. Of Pub. Safety v. 1985 GMC Pickup***, 1995 OK 75, 898 P.2d 1280, 1285.

The OESC relies on the "exclusive remedy" language in the GTCA as the basis for claiming the GTCA supercedes the OADA. OESC Open Bf, p. 4 & fn 2, p. 9 (citing 51 O.S. § 153). The problem with this argument is that this Court has already considered and addressed the GTCA's exclusivity provision, and rejected it in favor of the OADA's more specific and more recent pronouncement:

> We are cognizant of Section 170 of the Act [51 O.S. § 153]t, which provides the [GTCA] is exclusive and supersedes all special laws on the subject. While we acknowledge the legislature intended the Act to provide the exclusive remedies for tort actions brought against the state or a political subdivision, we conclude that the limitation provision in Section 1901 E [of the OADA] which was adopted after the [GTCA], is an exception to the exclusive liability provisions of the [GTCA] where a civil rights claim brought pursuant to [the OADA] 25 O.S. 1991, § 1901.

***Duncan v. City of Nichols Hills***, 1996 OK 16, ¶ 28, 913 P.2d 1303, 1310.

It may fairly be said that the Legislature 'doubled down' on the OADA superceding the GTCA and other remedies for employment discrimination, when section 1101(A) of the OADA was amended to specify the OADA was the exclusive remedy for employment discrimination.

Surely, the Legislature had a full understanding of both sovereign immunity and the requirements of the GTCA when the amendment to the OADA was enacted. The GTCA was adopted in 1985. Law 1984, SB 469, c. 226, §3 (effective Oct 1, 1985). ***Duncan*** was decided in 1996 and held that the OADA applies to governmental entities and superceded the GTCA.[5] The language expressly providing that the OADA is the exclusive remedy for discrimination claim was added in 2011 to codify– not modify– this portion of ***Duncan***. See 2011 OK. ALS 270, 2011 OK. Laws 270, 2011 OK. Ch. 270, 2011 OK. SB 837, 2011 OK. ALS 270, 2011 OK. Laws 270, 2011 OK. Ch. 270, 2011 OK. SB 837. The OADA amendment is shown below with the language deleted in 2011 shown by strike-throughs, and the added language underlined and in boldface:

> A. ~~The general purposes of this~~ **This** act ~~are to provide~~ **provides** for ~~execution~~ **exclusive remedies** within the state of the policies ~~embodied in the federal Civil Rights Act of 1964, the federal Age Discrimination in Employment Act of 1967, and Section 504 of the federal Rehabilitation Act of 1973 to make uniform the law of those states which enact this act, and to provide rights and remedies substantially equivalent to those granted under the federal Fair Housing Law~~ **for individuals alleging discrimination in employment on the basis of race, color, national origin, sex, religion, creed, age, disability or genetic information** .

The GTCA, even after amending the part of the definition of a tort in 2014, makes no reference to the OADA, and does not purport to amend that statute. Certainly, the OADA cannot be deemed repealed or amended by implication:

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[5] ***Duncan*** held that the OADA was "intended to provide redress for the types of discrimination" set out in that Act "even where the action is brought against the state or a political subdivision." ***Id.***, 1996 OK 16, ¶18, 913 P.2d 1303, 1308. OESC agrees that the OADA "is a statute that applies to governmental entities. . . It applies to both governmental entities and private employers." OESC Open Bf, p. 3-4.

While certain portions of the statutory language in the OADA has changed, the definition of "employer" encompasses *any* "legal entity, institution or organization that pays one or more individuals a salary or wages for work performance." 25 O.S. § 1301(1)(a). Further, the OADA, 25 O.S. § 1307, identifies entities exempted from the Act, and there is no exclusion for any level of governmental entities.

> The general rule is that (1) repeals by implication are never favored, (2) it is not presumed that the legislature in the enactment of a subsequent statute intended to repeal an earlier one, unless it has done so in express terms, and (3) all provisions must be given effect unless irreconcilable conflicts exist. . .

***CompSource Mut. Ins. Co. v. State***, 2018 OK 54, ¶ 34, 435 P.3d 90, 103.

**WHEREFORE**, applying the plain language test, the OADA, by its explicit terms, controls the actions, procedures, and remedies for employment discrimination.

### B. - The OADA Controls Employment Discrimination Claims Because It Is The More Specific Statute

When this Court was first called to address the interplay between the GTCA and the OADA, it held that the OADA controlled for two reasons:

First, the claims under the OADA were not within the then-existing definition of a tort. ***Duncan***, 1996 OK 16, ¶ 27, 913 P.2d, at 1310.

Second, the OADA was the controlling statute because it was more specific. ***Duncan***, 1996 OK 16, ¶ 27, 913 P.2d, at 1310.

The amendments to the statutory definition of a "tort" in the GTCA admittedly now include statutory claims, although subject to the continuing caveat that only "good faith" acts are covered. However, the second, equally important, basis for the Court's holding in ***Duncan*** was that "where two statutes are in conflict, a specific statute will control and act as an exception to a statute of general applicability." ***Id.,*** 1996 OK 16, ¶ 27, 913 P.2d, at 1310.

On that basis, the Supreme Court held that notwithstanding the GTCA's provision that "the [GTCA] is exclusive and supersedes all special laws on the subject [and was] intended. . . to provide the exclusive remedies for tort actions brought against the state or a political subdivision," the more recent enactment of the OADA "is an exception to the exclusive liability provisions of the" GTCA. ***See Duncan***, 1996 OK 16, ¶ 28, 913 P.2d, at 1310:

> Under Oklahoma law, where two statutes are in conflict, a specific statute will control and act as an exception to a statute of general applicability. In ***Taylor v. Special Indemnity Fund***, we restated the general rule:
>
> > Where there are two provisions of the statutes, one of which is special and particular and clearly includes the matter in controversy, and where the special statute covering the subject prescribes different rules and procedures from those in the general statute, it will be held that the special statute applies to the subject matter, and the general statute does not apply.
>
> 804 P.2d 431, 432 (Okla. 1990) (quoting ***State ex rel. White v. Beeler***, 327 P.2d 664 (Okla. 1958)). ***See also Travelers Ins. Co. v. Panama-Williams, Inc.***, 597 F.2d 702 (10th Cir. 1979) (stating the rule that where two statutes unavoidably conflict, the statute most recently enacted controls).

It remains the rule that when two statutes cover an area, the more specific statute will control.

> A statute which is enacted for the primary purpose of dealing with a particular subject, and which prescribes the terms and conditions of that particular subject matter, ***prevails over a general statute which does not refer to the particular subject matter***, but does contain language which might be broad enough to cover the subject matter if the special statute was not in existence. In summary, when there is a conflict between two statutes, one specific (or special) and one general, the statute enacted for the purpose of dealing with the subject matter controls over the general statute.

***Okla. Auto. Dealers Ass'n v. State***, 2017 OK 64, ¶ 15, 401 P.3d 1152, 1171 (Quoting ***Multiple Injury Tr. Fund v. Coburn***, 2016 OK 120, ¶ 23, 386 P.3d 628, 635-36 (emphasis by the Court).[6]

Under the ***Auto Dealers*** analysis, the OADA "prevails over" the GTCA because the OADA was "enacted for the primary purpose of dealing with" employment discrimination

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[6] OESC makes the argument that the GTCA is the more specific statute "when it comes to waiving sovereign immunity against the State." Open Bf, p. 10. ***Duncan*** rejected such analysis, 1996 OK 16, ¶ 28, 913 P.2d, at 1310, and this undeveloped argument fails under the controlling analysis set out in ***Auto. Dealers, supra,*** 2017 OK 64, ¶ 15, 401 P.3d, at 1171. While the GTCA was enacted as an adoption and partial waiver of sovereign immunity, it addressed only certain kinds of claims not covered by the OADA. Under ***Auto Dealers***, as well as ***Duncan***, the OADA remains the more specific statute, as its speaks to the waiver of sovereign immunity for discrimination claims.

claims, and it "prescribes the terms and conditions of that particular subject matter." ***Id.*** In contrast, the GTCA is "a general statute which does not refer to [employment discrimination], but does contain language which might be broad enough to cover [employment discrimination] if the [OADA] was not in existence." ***Id.*** Because "there is a conflict between two statutes, [the OADA and the GTCA], the statute enacted for the purpose of dealing with the subject matter controls over the general statute." ***Id.*** ***Accord see Stitt v. Treat***, 2024 OK 21, ¶ 30, 546 P.3d 882, 893 and ***CompSource Mut. Ins. Co. v. State***, 2018 OK 54, ¶ 52 n.80, 435 P.3d 90, 108.

The OESC's Opening Brief, Prop. I(D), p. 8-11, argues that there are no conflicts between the OADA and the GTCA, but this a claim made without supporting reasoning. At the district court level, Ms. Conner pointed out the ***many*** conflicts between the GTCA and the OADA. The OESC even repeats those conflicts at page 9 of its Brief without any apparent disagreement as to the accuracy of Ms. Conner's list.

The OESC's attempt to "reconcile" those conflicts is internally inconsistent and self-defeating. For instance, the OESC argues that there is no conflict between the damages provisions of the two Acts by simply arguing that the GTCA controls. OESC Brief, p. 9. Although the OADA damage provisions have changed since ***Duncan***, ***Duncan*** rejected the argument that the OADA should be interpreted to provide dichotomous remedies depending on whether the defendant was a private employer as opposed to a governmental employer. ***Id.***, 1996 OK 16, ¶ 29, 913 P.2d, at 1310.

Similarly, the OESC's attempt to avoid the "scope of employment" limitation in the GTCA, OESC Bf, p. 9-10, fails to address the "good faith" predicate for the GTCA to apply. As explained in Ms. Conner's Prop. II, above, the GTCA's coverage is limited to actions carried out in "good faith," and discrimination is inherently inconsistent with "good faith."

The OESC makes no argument about how to reconcile the differences between the GTCA and OADA provisions regarding 'exemptions from liability,' 'notice requirements,' or 'accrual' of the underlying actions which it acknowledges at page 9 of its Brief.

**WHEREFORE**, the OADA is the more specific statute whose provisions must control over the conflicting provisions of the GTCA.

## IV. - THE COURT NEED NOT OVERRULE OR MODIFY DUNCAN

In its Prop. II, p. 11-12, the OESC argues that this Court should overrule or modify ***Duncan,*** but there is no sound reason to do so.

The general principles followed by ***Duncan*** regarding statutory construction are all consistent with the present state of law. That the statutory provisions have changed does not undermine the correctness of the rules of construction applied by ***Duncan***, and it would only sow improper confusion to call those rules into question.

Rather, this Court need only engage in an analysis of the current statutes and hold that:

a. The GTCA does not cover the intentionally wrongful act of employment discrimination, and

b. When it comes to unlawful employment discrimination, the applicable rights, remedies, and procedures are exclusively provided by the OADA.

## CONCLUSION

Having granted certiorari to review this issue, the Court should reject the Petitioner's arguments and adopt the argument and analysis offered by Ms. Conner, Respondent herein.

**RESPECTFULLY SUBMITTED THIS 6th DAY OF SEPTEMBER, 2024.**

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## CERTIFICATE OF SERVICE

A true copy of the foregoing instrument was filed and served on opposing counsel below listed on this 6th day of September, 2024, to counsel for the Petitioner below listed by US Mail postage prepaid:

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