



ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Case No. 122,216

FILED
SUPREME COURT
STATE OF OKLAHOMA

CLAUDIA CONNER,

AUG - 6 2024

Plaintiff/Respondent,

JOHN D. HADDEN
CLERK

vs.

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.

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OKLAHOMA EMPLOYMENT SECURITY COMMISSION

August 6, 2024

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Introduction

Petitioner Oklahoma Employment Security Commission employed Respondent Claudia Conner as its General Counsel from approximately August 2020 until November 2021. Based on various reasons related to her overall work performance, OESC terminated Respondent. She then brought suit asserting age and gender discrimination and retaliation related to alleged complaints she made. Initially, OESC removed this case to federal court and all federal claims were dismissed for failure to state a claim upon which relief can be granted. *See Conner v. Okla. d/b/a Okla. Emp. Sec. Comm'n*, No. CIV-22-1095-G, 2023 WL 6380018 (W.D. Okla. Sept. 29, 2023). Respondent refiled her suit alleging only claims under the Oklahoma Anti-Discrimination Act. Throughout the litigation, OESC maintained its position that Respondent's failure to plead compliance with the Oklahoma Governmental Tort Claims Act or actually comply with it bars her claims.

Summary of the Record

After proceedings in federal court resulted in the complete dismissal of Respondent's federal claims, she filed her Amended Petition containing age and gender discrimination and retaliation claims under the OADA. *See* Am. Pet. ¶ 19 (ROA, p. 7). In her lawsuit, Respondent alleges that she worked as the General Counsel and Chief of Staff for OESC until November 10, 2021. *Id.* ¶ 3 (ROA, p. 5). Respondent claims that the OESC Executive Director asked her to fire older employees, made "ageist statements," and referred to older "female employees as dowdy and frumpy." *Id.* ¶¶ 9-10 (ROA, p. 6). She further contends that a state vendor made "inappropriate remarks to young women and men working in the office," and she counseled him and reported the incident to Human Resources. *Id.* ¶ 14 (ROA, p. 7). Respondent asserts

that her termination occurred two days after her final complaint about the state vendor. *Id.* ¶ 15.

Respondent purportedly filed a Charge of Discrimination with the Equal Employment Opportunity Commission on December 1, 2021. *Id.* ¶ 16; *see also* EEOC Charge (ROA, pp. 20–21). The EEOC issued its right-to-sue letter on or about August 25, 2022. Am. Pet. ¶ 17 (ROA, p. 7). Nowhere in Respondent’s Amended Petition does she plead compliance with or allege actual compliance with the GTCA. *See generally* Am. Pet. 1–4 (ROA, pp. 5–8).

OESC moved to dismiss the Amended Petition on the basis that she “fail[e]d to allege compliance with the . . . GTCA . . . and did not in fact comply” Def.’s Mot. Dismiss 1 (ROA, p. 10). Respondent filed a response claiming that the OADA “is independent of and supercedes the OGTCAs provisions.” Pl.’s Resp. to Def.’s Mot. Dismiss 1 (ROA, p. 22). OESC filed a reply brief, Def.’s Reply in Support of Def.’s Mot. Dismiss 1–5 (ROA, pp. 30–34), and the district court heard oral argument on the briefing, *see* Jan. 11, 2024 Journal Entry (ROA, p. 36); Docket 1, 4 (ROA, pp. 57, 60). The district court denied OESC’s Motion to Dismiss. *See* Jan. 11, 2024 Journal Entry (ROA, p. 36). Recognizing that the issue “affects a substantial part of the merits of the controversy,” the district court certified the Journal Entry for immediate appeal. *See* Apr. 29, 2024 Journal Entry (ROA, p. 52); *see also* Okla. Stat. tit. 12, § 952(b)(3); Okla. Sup. Ct. R. 1.50.

Argument

Where there is a pure question of law for this Court to decide, especially one involving statutory interpretation, the standard of review is de novo. *Frank Bartel Transp., Inc. v. State ex rel. Murray State Coll.*, 2023 OK 121, ¶ 3, 540 P.3d 480, 483.

I. The district court should have dismissed Respondent’s claims under the OADA because the GTCA applies, and she did not allege compliance with or actually comply with the GTCA’s notice provisions.

Because Plaintiff brings her claims against OESC under the OADA, they are subject to compliance with the GTCA, which is the exclusive statute for waiving governmental immunity. Nowhere in her Amended Petition does she allege any compliance with the notice requirements of the GTCA. Her failure to do so bars her claims, and the district court did not have jurisdiction to consider them. With respect to governmental entities, the GTCA serves as the exclusive remedy to recover against them, and it holds governmental employers liable for the acts of their employees within the scope of their employment.¹ *Gowens v. Barstow*, 2015 OK 85, ¶ 12, 364 P.3d 644, 649–50. On the other hand, the OADA’s purpose is to “provide redress for the types of discrimination embodied in the federal Civil Rights Acts, even where the action is brought against the state or a political subdivision.” *Duncan v. City of Nichols Hills*, 1996 OK 16, ¶ 18, 913 P.2d 1303, 1308. Both statutes can be read in harmony. One, the GTCA, provides notice to the state of a tort claim “to further protect municipal interests by promoting prompt investigation, providing the opportunity to repair any dangerous condition and for speedy and amicable settlement of meritorious claims, and to prepare to meet possible fiscal liabilities.” *Duncan*, 1996 OK 16, ¶ 14, 913 P.2d at 1307. It is a statute that applies to

¹ “[U]nder the doctrine of respondeat superior one acts within the scope of employment if engaged in work assigned, or if doing that which is proper, necessary and usual to accomplish the work assigned, or doing that which is customary within the particular trade or business.” *Gowens*, 2015 OK 85, ¶ 12, 364 P.3d at 650.

governmental entities. The other, the OADA, allows suits against *all* employers for various types of workplace discrimination. *See Smith v. Pioneer Masonry, Inc.*, 2009 OK 82, ¶ 12, 226 P.3d 687, 689. It applies to both governmental entities and private employers.

A. An individual seeking tort liability against the State must comply with the directives of the GTCA.

“GTCA procedure applies to a ‘tort claim’ *as such is defined by the GTCA.*” *Pellegrino v. State ex rel. Cameron Univ. ex rel. Bd. of Regents of State of Okla.*, 2003 OK 2, ¶ 11, 63 P.3d 535, 539 (emphasis added). Under the GTCA, governmental immunity is “waived . . . subject only to specific limitations and exceptions.” *Id.* The GTCA itself states:

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.

Okla. Stat. tit. 51, § 153(A); *see also* Okla. Stat. tit. 51, § 153(B) (limiting any tort claim to the limits of liability contained in the GTCA). It further provides, “The liability of the state or political subdivision under The Governmental Tort Claims Act shall be exclusive and shall constitute the extent of tort liability of the state, a political subdivision or employee arising from common law, statute, the Oklahoma Constitution, or otherwise.” Okla. Stat. tit. 51, § 153(B).² “Tort” is broadly defined by the statute as:

[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

² Also, “[i]f a court of competent jurisdiction finds tort liability on the part of the state or a political subdivision of the state based on a provision of the Oklahoma Constitution or state law other than The Governmental Tort Claims Act, the limits of liability provided for in The Governmental Tort Claims Act shall apply.” Okla. Stat. tit. 51, § 153(B).

Okla. Stat. tit. 51, § 152(14) (emphasis added); *see also* 2014 Okla. Sess. Laws Ch. 77, § 1 (H.B. 2405) (adding the word “statute” to the definition for the first time in 2014, as well as claims under “the Constitution of the State of Oklahoma”). Clearly, it now applies to claims brought under statute.

B. Notice to the State is required.

Under the GTCA, an aggrieved party must file a claim against the state prior to initiating a lawsuit. Okla. Stat. tit. 51, § 157(A); *see also* Okla. Stat. tit. 51, § 156(A). This notice must be provided “within one (1) year of the date the loss occurs.” Okla. Stat. tit. 51, § 156(B). Once denied, then the party has 180 days to file suit. Okla. Stat. tit. 51, § 157(B). Specifically, the contents of the notice are outlined in one statutory section of the GTCA, *see* Okla. Stat. tit. 51, § 156, and it requires:

The written notice of claim to the state or a political subdivision shall state the date, time, place and circumstances of the claim, the identity of the state agency or agencies involved, the amount of compensation or other relief demanded, the name, address and telephone number of the claimant, the name, address and telephone number of any agent authorized to settle the claim, and any and all other information required to meet the reporting requirements of the Medicare Secondary Payer Mandatory Reporting Provisions in Section 111 of the Medicare, Medicaid and SCHIP Extension Act of 2007 (MMSEA) through the Centers for Medicare & Medicaid Services (CMS).

Okla. Stat. tit. 51, § 156(E). And if the claim alleges a “loss of earnings,” documentation of those lost earnings must also be provided. Okla. Stat. tit. 51, § 156(G). The GTCA notice allows the State to evaluate the claim and determine whether it should be settled and resolved.

It is not until a claim is *timely* filed and the other prerequisites of §§ 156 and 157 have been complied with that a claim may be validly brought in court. *Schauf v. The GEO Grp.*, 2018 OK CIV APP ¶ 8, 439 P.3d 442, 445. “[J]udicial power is invoked by the timely filing of the governmental tort claims action pursuant to § 157, and . . . expiration of the 180-day time period in § 157(B) operates to bar judicial enforcement of the claim against the

government to which the Legislature waived sovereign immunity.” *Kennedy v. City of Talihina*, 2011 OK CIV APP, ¶ 4, 265 P.3d 757, 760. Otherwise, a claim is barred forever. *Id.*

C. An OADA claim is subject to notice requirements of the GTCA.

Below, while Respondent claims that she submitted relevant documentation to the EEOC, Am. Pet. ¶ 16 (ROA, p. 7), she fails to allege compliance with the GTCA. Decades ago, this Court in *Duncan v. City of Nichols Hills* decided that OADA claims were subject to the specific notice requirements in the OADA rather than the general ones in the GTCA. 1996 OK 16, ¶¶ 27–30, 913 P.2d 1303, 1310. But much has changed since that 1996 decision. Perhaps most importantly, the definition of “tort” changed to include “legal wrong[s] . . . involving violation of a duty imposed by . . . statute” *See* Okla. Stat. tit. 51, § 152(14). Now, OADA claims fall squarely within that definition of “tort” because the OADA imposes a duty to refrain from discrimination in employment, Okla. Stat. tit. 25, § 1302(A)(1), and thus the claims are subject to the GTCA’s notice requirements.

Relying on *Duncan*, some federal courts previously decided that OADA claims were not torts and thus not subject to the GTCA. *See, e.g., Hall v. Okla. Dep’t of Rehab. Servs.*, No. CIV-17-497-D, 2018 WL 991543, at *7 n.8 (W.D. Okla. Feb. 20, 2018); *Bruehl v. Okla. ex rel. Okla. Indigent Def. Sys.*, No. CIV-13-1247-HE, 2014 WL 2879744, at *4 (W.D. Okla. June 24, 2014). The particular judge in *Hall*, however, later reversed course in *Stainsby v. Oklahoma ex rel. Oklahoma Health Care Authority*, No. CIV-21-1073-D, 2023 WL 1825099 (W.D. Okla. Feb. 8, 2023). His reasoning followed that of another federal judge in *Hauck v. Putnam City Independent School District I001*, No. CIV-20-390-G, 2022 WL 3654749 (W.D. Okla. Aug. 24, 2022).

In *Hauck*, the court determined that changes in the law since *Duncan* had been decided warranted a reversal in course. *Id.* at *3–4. Specifically, the court in *Hauck* noted the following that had changed over time since the decision in *Duncan*:

- [T]he disability-discrimination provision of the OADA that was at issue in that case has been repealed,
- a cause of action for employment-based discrimination has been created under a separate section,
- and the stated purpose of the OADA has been amended such that it no longer expressly references federal civil rights law.

Id. at *3. Also, the time limits posed by the OADA’s notice provisions no longer exceed the GTCA’s notice requirements, and as stated above, the definition of “tort” in the GTCA now includes reference to “a violation of duty imposed by . . . statute.” *Id.* (emphasis added). The court in *Stainsby*, quoting *Duncan*, further noted that the *Duncan* Court stated, “[h]ad [the plaintiff] asserted a cause of action in tort, . . . the plain language of the [GTCA] requires compliance with the notice provisions of the [GTCA].” *Id.* at *3 (quoting *Duncan*, 1996 OK 16, ¶ 12, 913 P.2d at 1306). Now that the definition of “tort” has been changed to include claims brought under “statute,” the GTCA notice provisions must be followed. In addition to *Hauck* and *Stainsby*, other courts have now followed similar reasoning. *See, e.g., Smith v. City of Norman*, No. CIV-22-01002-JD, 2023 WL 6521000, at *2–3 (W.D. Okla. Oct. 5, 2023) (finding OADA claims are subject to GTCA notice requirements); *Jones v. Indep. Sch. Dist. 89*, No. CIV-19-797-R, 2019 WL 6917896, at *1 (W.D. Okla. Dec. 19, 2019) (same); *Childers v. Bd. of Comm’rs of Okla. Cnty.*, No. No. CIV-19-460-F, 2019 WL 3069446, at *5 (W.D. Okla. July 12, 2019) (same). Based on changes in the law since the decision in *Duncan*, Respondent’s failure to allege compliance with the GTCA (or in fact comply with the GTCA) bars her claims under the OADA. The reasoning in *Duncan* was based in part on the definition

of “tort” at the time, and the decision recognized that if the claim had been brought in tort, then the GTCA notice provision would apply.

To the extent Respondent argues that her EEOC Charge of Discrimination is sufficient “notice,” other courts have decided that is not the case considering the specific requirements of the notice listed in the GTCA. *See Stainsby*, 2023 WL 1825099, at *4 (citing *Wright v. KIPP Reach Acad. Charter Sch.*, No. CIV-10-989-D, 2011 WL 1752248, at *7–8 (W.D. Okla. 2011)). This is because the GTCA notice provision “is not designed merely to notify a political subdivision that a claim is being asserted; rather, the notice is required to provide the political subdivision with an opportunity to promptly investigate the claim, to assess any liability, and to communicate with the claimant regarding possible resolution before a lawsuit is filed.” *Wright*, 2011 WL 1752248, at *8. A claim against the State “shall be in writing and filed with the Office of the Risk Management Administrator of the Office of Management and Enterprise Services” Okla. Stat. tit. 51, § 156(C). “[T]he notice [must] contain very specific information regarding the amount of compensation or other relief demanded, and the name, address and telephone number of any agent authorized to settle the claim.” *Wright*, 2011 WL 1752248, at *8 (citing Okla. Stat. tit. 51, § 156(D)); *see also* Okla. Stat. tit. 51, §§ 156(E) (same), 156(G) (providing that claim shall provide documentation for loss of earnings, if alleged). Respondent’s EEOC Charge contains none of those requirements and is thus insufficient to constitute “notice” under the GTCA. *See* EEOC Charge (ROA, pp. 20–21).

D. The GTCA and the OADA are not in conflict.

The district court ultimately decided that there were “material conflicts between the [GTCA and the . . . OADA which precludes dismissal.” Jan. 11, 2024, Journal Entry (ROA, p. 36). Below, Respondent made the following arguments about alleged conflicts in the two statutes:

Liability

- OGTCA: Liability is limited to good faith negligent acts of employees.
OADA: Liability is extended to intentionally discriminatory acts.

Damages

- OGTCA: Damages are capped at \$175,000/ \$125,000 for claims and include emotional distress. 51 O.S. § 154(A)(2).
OADA: Damages include backpay and liquidated damages but does not include emotional distress. 25 O.S. § 1350(G)

Exemptions From Liability

- OGTCA: 37 exemptions exist for OGTCA liability, none of which are contained in the OADA. 51 O.S. § 155.
OADA: Religious organizations are exempt from coverage, and the defenses available under corresponding federal statutes are available to the OADA. 25 O.S. §§§ 1307, 1350(F). These defenses do not appear in the OGTCA.

Notice

- OGTCA: For actions against the State OGTCA requires notice to be served against the Office of Risk Management within one year of the event. 51 O.S. § 156(A).
OADA: Notice must be served on the EEOC or Office of Civil Rights Enforcement within 180 days from the discrimination.
The contents of the notices are also different for OADA versus OGTCA claims.

Accrual

- OGTCA: The action accrues either upon denial of the claim or the expiration of 90 days from submission if no action is taken. 51 O.S. § 157,
OADA: Issuance of a right to sue letter is required, followed by suit within 90 days after receipt of the right to sue. 25 O.S. § 1350(B), (I).

With respect to the argument on liability and damages, there is no inconsistency because the GTCA limits all liability against the State, even if liability is found under another statute. Okla. Stat. tit. 51, § 153(B) (“If a court of competent jurisdiction finds tort liability on the part of the state or a political subdivision of the state based on a provision of the Oklahoma Constitution or state law other than The Governmental Tort Claims Act, the limits of liability provided for in The Governmental Tort Claims Act shall apply.”). Respondent also argued that the definition of “[s]cope of employment” contained in the GTCA precludes its application to

OADA claims, but the caselaw relied on by Respondent related to allegations of assault and battery and sexual misconduct. *See Schovanec v. Archdiocese of Okla. City*, 2008 OK 70, ¶¶ 5–7, 188 P.3d 158, 161–62 (finding that acts of sexual assault are outside the scope of employment for a respondeat superior claim brought against a church in a non-GTCA case); *N.H. v. Presbyterian Church (U.S.A.)*, 1999 OK 88, ¶ 17, 998 P.2d 592, 599 (finding that acts of molestation are outside the scope of employment for a respondeat superior claim brought against a church in a non-GTCA case); *Jackson v. Okla. City Pub. Schs.*, 2014 OK CIV APP 61, ¶ 9, 333 P.3d 975, 979–80 (holding that assault and battery is not in the course and scope of employment of a teacher); *see also* Pl.’s Resp. to Def.’s Mot. Dismiss 2–3 (ROA, pp. 22–23). Since Respondent is not alleging assault and battery or sexual misconduct, these cases do not apply. She also does not specifically allege that any one employee terminated her employment. Respondent also cited *Pellegrino* stating that actions outside the scope of employment do not need to comply with the notice provisions of the GTCA. But *Pellegrino* specifically cites to and relies on *Duncan* and thus relies on an outdated holding in light of the recent changes to the GTCA.

Finally, to the extent Respondent argues that the specific statute over the general statute must govern in this case, the GTCA is the more specific statute when it comes to waiving sovereign immunity against the State. Considering the purposes of the two statutes at issue in this case—the GTCA and the OADA—this principle of statutory construction actually works against Respondent. The OADA prohibits employment discrimination against all employers—both governmental and private. See Okla. Stat. tit. 25, § 1201(3) (defining “[p]erson” as a “corporation . . . the state, or any governmental entity or agency”). Obviously, individuals bringing claims against private corporations do not need to submit a tort claim thus the more

general statute, the OADA, does not mention tort claims. However, the more specific statute, the GTCA, which limits all governmental liability, specifically requires the tort claim notice.

There is thus no conflict—material or otherwise—between the two statutes.

II. To the extent necessary, the Court should overrule *Duncan*—or factually distinguish it based on the variety of changes in the law since its decision.

Almost three decades ago, this Court held in *Duncan* that claims under the OADA are not subject to the requirements of the GTCA. 1996 OK 16, ¶¶ 27–30, 913 P.2d at 1310. But, as outlined above, much has changed since *Duncan*, including the definition of “tort,” which now includes “legal wrong[s] . . . involving violation of a duty imposed by . . . statute” *see* Okla. Stat. tit. 51, § 152(14), among other the other issues also outlined above. Numerous federal court cases from the United States District Court for the Western District of Oklahoma have concluded that that OADA claims *are* subject to the GTCA notice provisions. The material differences in the GTCA at the time this Court decided *Duncan* factually distinguish *Duncan* from the GTCA requirements as they now exist. But to the extent the Court finds otherwise, it should then overrule *Duncan*.

When reconsidering binding precedent, it is necessary to consider the following:

(1) whether the rule has proved to be intolerable by defying practical workability, (2) whether the rule is subject to the sort of reliance that would add special hardship to the consequences of overruling and inequity to the cost of repudiation, (3) whether related principles of law have developed so far that the old rule remains no more than a remnant of abandoned doctrine and (4) *whether facts have so changed or come to be viewed so differently that the old rule has been robbed of significant application or justification.*

Rodgers v. Higgins, 1993 OK 45, ¶ 29, 871 P.2d 398, 412 (emphasis added). Because of the same reasons outlined above, and specifically in *Hauck*, facts regarding the statutory regimes of both the GTCA and the OADA have changed such that *Duncan* should no longer apply to prevent litigants from first going through the GTCA notice process before bringing suit against

the State. To reconcile the various changes since the decision in *Duncan*, as well as the various federal court decisions noted above, this Court should reexamine *Duncan* and overrule it (if necessary) based on these changes.

Conclusion

The OESC respectfully requests this Court reverse the decision of the district court finding that the GTCA notice provisions do not apply to Respondent's claims under the OADA and remand it directing the district court to dismiss Respondent's Amended Petition with prejudice.

Respectfully submitted,



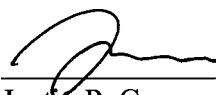
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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2024, a true and correct copy of the foregoing has been forwarded to the following via U.S. mail, postage prepaid:

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