ORIGINAL

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Case No. 122,216



**CLAUDIA CONNER,**

**Plaintiff/Respondent,**

**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.

# DEFENDANT/PETITIONER'S REPLY BRIEF



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## Argument

### I. "Good faith" in the context of the GTCA is not synonymous with "intentional discrimination" under the OADA; and even if it is, that is a fact question for a jury, not a preliminary question of whether the GTCA applies at all.

Initially, it is important to note that the GTCA is merely a vehicle, similar to 42 U.S.C. § 1983, that does or does not allow liability against the State. It only applies against the State, not private employers. It does not create the underlying cause of action, e.g., negligence, which can be alleged against the State. *See, e.g.*, *Frank Bartel Transp., Inc. v. State ex rel. Murray State Coll.*, 2023 OK 121, 540 P.3d 480 (alleging negligence for car wreck caused by a State employee); *Tuffy's, Inc. v. City of Okla. City*, 2009 OK 4, 212 P.3d 1158 (alleging negligence for the forceful removal of nightclub patrons by police officers). The causes of action are usually created by common law and can apply to both governmental employers and private employers alike. On the other hand, the OADA actually creates the cause of action. *See* Okla. Stat. tit. 25, § 1302. Both governmental employers and private employers are subject to it. *See* Okla. Stat. tit. 25, § 1301(1) (defining "employer").

Respondent confuses the question of "good faith" under the GTCA believing it is a prerequisite to bringing a claim against the State. But unless the cause of action itself has bad faith as one of its elements, e.g., tortious interference with a business relationship or malicious prosecution, then the question of "scope of employment" under the GTCA is usually a fact question for the jury. In some cases, the act by an employee may be so egregious as to be outside the scope of employment as a matter of law. *See, e.g.*, *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 as a matter of law); *Koch v. Juber*, No. CIV-13-0750-HE, 2014 WL 2171753, at *5 (W.D.

Okla. May 23, 2014) (holding that sexual acts committed by a prison guard against inmates are outside the scope of employment as a matter of law).

### A. Some discrimination claims do not require intent.

Not all employment cases require "intentional discrimination." For example, a claim brought under the American With Disabilities Act of 1990, 42 U.S.C. §§ 12111–12117, alleging failure to accommodate a disability does not. *See Punt v. Kelly Servs.*, 862 F.3d 1040, 1049 (10th Cir. 2017) ("Failure-to-accommodate cases should not be classified either as direct-evidence cases or as *McDonnell Douglas* circumstantial-evidence cases, but rather as a separate category of cases that require no evidence of discriminatory intent in any form."). The OADA prohibits discrimination based on disability. *See* Okla. Stat. tit. 25, § 1302(A)(1). It specifically contemplates failure-to-accommodate claims. *See id.* (stating "unless the employer can demonstrate that accommodation for the disability would impose an undue hardship on the operation of the business of such employer"). But those claims are still classified as a "discriminatory practice." Okla. Stat. tit. 25, § 1302(A). While family and medical leave provided in the Family and Medical Leave Act of 1993, 29 U.S.C. § 2615, does not appear to have made it into the OADA, a claim for interference with FMLA rights also does not require intent. *See Ford v. Brennan*, No. 21-4086, 2023 WL 5606233, at *3 n.3 (10th Cir. Aug. 30, 2023) ("FMLA interference 'is a violation regardless of the employer's intent,' and therefore, 'the *McDonnell Douglas* burden-shifting analysis does not apply.'").

### B. "Scope of employment" is usually a question of fact for the jury, not a prerequisite of a GTCA claim.

The holding in *Tuffy's* is more nuanced than Respondent makes it seem. The plaintiffs in that case, a nightclub and its owner, sued the City of Oklahoma City alleging police officers from the Oklahoma City Police Department physically and verbally attacked multiple

customers in the nightclub. *Tuffy's*, 2009 OK 4, ¶ 2, 212 P.3d at 1161. Two claims were alleged against the City (after earlier procedural motions): (1) negligence, and (2) tortious interference with a business relationship. *Id.* ¶ 3, 212 P.3d at 1161. In analyzing the claim for tortious interference with a business relationship, this Court held—as a matter of law—that it fell outside the GTCA because *an element of the claim* required bad faith. *See id.* ¶ 13, 212 P.3d at 1164–65. The second element of that claim is "malicious and wrongful interference that is neither justified, privileged, nor excusable." *Id.* ¶ 14, 212 P.3d at 1165. *Tuffy's* defined this element of malice "as an unreasonable and wrongful act done intentionally, without just cause or excuse." *Id.* "This element clearly requires a showing of bad faith." *Id.*; *see also Parker v. City of Midwest City*, 1993 OK 29, ¶ 8, 850 P.2d 1065, 1067.

Because OADA claims are analyzed the same as their federal counterparts, *see, e.g.*, *Jones v. Needham*, 856 F.3d 1284, 1292 (10th Cir. 2017), the process of reviewing Respondent's age and sex discrimination claims simply follows the burden-shifting framework outlined in *McDonnell Douglas Corp v. Green*, 411 U.S. 792 (1973). This is a three-step analysis:

> To set forth a prima facie case of discrimination, a plaintiff must establish that (1) she is a member of a protected class, (2) she suffered an adverse employment action, (3) she qualified for the position at issue, and (4) she was treated less favorably than others not in the protected class. The burden then shifts to the defendant to produce a legitimate, non-discriminatory reason for the adverse employment action. If the defendant does so, the burden then shifts back to the plaintiff to show that the plaintiff's protected status was a determinative factor in the employment decision or that the employer's explanation is pretext.

*Conner v. Oklahoma*, No. CIV-22-1095-G, 2023 WL 6380018, at *2 (W.D. Okla. Sept. 29, 2023) (quoting *Khalik v. United Air Lines*, 671 F.3d 1188, 1192 (10th Cir. 2012)). Nowhere in that process does an *element* of the claim necessarily require a showing of bad faith. Rather, the ultimate question for the factfinder is whether the employer, through one of its employees,

intentionally discriminated against the plaintiff. Where the employer puts forth a legitimate, nondiscriminatory reason for the termination, the employee must show pretext, i.e., a sham reason for the termination, in order to defeat summary judgment.

Importantly, this Court held in *Tuffy's* that the other claim against the City, negligence, should not have been dismissed. 2009 OK 4, ¶ 21, 212 P.3d at 1167. The underlying factual allegations supporting this claim were that police officers "physically and verbally attacked, harassed, and *assaulted* numerous customers (and) used mace on customers and ordered their dogs to bite customers inside the building." *Id.* ¶ 2, 212 P.3d at 1161 (emphasis added); *see also id.* ¶ 21, 212 P.3d at 1167 (stating that the facts could show that officers "breached a duty by negligently removing customers from the nightclub"). This Court, as part of this analysis, looked at two other cases involving arrests where police officers acted intentionally: *Nail v. City of Henryetta*, 1996 OK 12, 911 P.2d 914, and *Decorte v. Robinson*, 1998 OK 87, 969 P.2d 358. All three cases involved intentional acts.

"In *Nail* . . ., a police officer pushed a handcuffed boy to the ground, resulting in a broken nose, cuts, and bruises." *Tuffy's*, 2009 OK 4, ¶ 17, 212 P.3d at 1166 (citing *Nail*, ¶ 3, 911 P.2d at 915). This Court in *Nail* reversed the Court of Civil Appeals after it had granted immunity finding the officer acted outside the scope of employment. *See id.* While it is "usually not within the scope of employment to commit an assault on a third person," *id.* (citing *Nail*, ¶ 10, 911 P.2d at 914), this general rule does not apply where "the act is one which is fairly and naturally incident to the business and is done while the employee is doing employer's business" or if the action is taken "however ill-advisedly, with a view to further the employer's interest or arises out of an emotional response to actions being taken for the employer," *id.* ¶ 18, 212 P.3d at 1166 (citing *Nail*, ¶ 10, 911 P.2d at 914). The *Nail* Court found that arresting someone

is clearly within the scope of employment, but whether the office exceeded that scope through his actions, is a jury question. *Id.* Similarly, in *Decorte*, this Court stated that an officer's misconduct may be accomplished through an abuse of power lawfully vested in that officer, as opposed to "an unlawful usurpation of power the officer did not rightfully possess." 1998 OK 87, ¶ 12, 969 P.2d at 362. In other words, intentional acts such as assault and battery committed by a police officer *may* be within the course and scope of employment. Whether an officer exceeds the scope of their authority is a jury question, not a preliminary question of whether the GTCA applies at all.

Two other cases are illustrative of the "scope of employment" definition in the GTCA. *See* Okla. Stat. tit. 51, § 152(12). In *Rodebush By & Through Rodebush v. Oklahoma Nursing Homes, Ltd.*, a "nurse's aide was assigned the duty of bathing residents." 1993 OK 160, ¶ 15, 867 P.2d 1241, 1246. Some of the patients at the nursing home had Alzheimer's disease, which is known to make patients, particularly the patient in question, combative. *Id.* This Court found that the nurse's aide was carrying out his duties as assigned when bathing the patient. *Id.* During this bath, the nurse's aide slapped the patient. *Id.* Because the nurse's aid was carrying out his assigned duties, this Court upheld the jury verdict against the nursing home, which necessarily found him to be acting in the scope of employment. *Id.* ¶¶ 15, 41, 867 P.2d at 1246, 1252. And in *Baker v. Saint Francis Hospital*, a daycare worker intentionally struck the head of a baby against the corner of a shelf because the baby would not stop crying. 2005 OK 36, ¶ 4, 126 P.3d 602, 604. Thankfully, the daycare worked was charged in a criminal case and pled guilty to injury to a minor child. *Id.* This Court reversed summary judgment stating that the jury should decide if the daycare worker's actions were "so far removed from any work-related endeavor and geared, instead, toward a personal course of conduct unrelated to her work so

that it would no longer be appropriate to hold her employer responsible for her act(s)." *Id.* ¶ 18, 126 P.3d at 607. At trial, the daycare worker's *motivation* would be key in deciding whether he acted in the scope of employment. *Id.*

Unlike where an actual element of the claim requires a showing of bad faith, "[e]xcept in cases where only one reasonable conclusion can be drawn, the question of whether an employee has acted within the scope of employment at any given time is a question for the trier of fact." *Id.* ¶ 8, 212 P.3d at 1163. "An employee of a political subdivision is relieved from private liability for tortious conduct committed within the scope of employment." *Id.* "A political subdivision is relieved from liability for tortious conduct committed by employees outside the scope of employment." *Id.*

Here, although this case should be dismissed with prejudice for failure to comply with the notice provision of the GTCA, if it did go to trial, the jury would decide the question of whether the decision-maker acted in the scope of employment. It is not a preliminary question. It will require the jury to decide if "the act is one which is fairly and naturally incident to the business and is done while the employee is doing employer's business" or if the action is taken "however ill-advisedly, with a view to further the employer's interest or arises out of an emotional response to actions being taken for the employer," *Tuffy's*, 2009 OK 4, ¶ 18, 212 P.3d at 1166 (citing *Nail*, ¶ 10, 911 P.2d at 914).

## II. There is no conflict between the two statutes.

### A. Respondent misinterprets the exclusivity language in the OADA, and she fails to reconcile it with the exclusivity language in the GTCA.

The GTCA is only a vehicle that allows for monetary liability against the state in some instances: "The liability of the state or political subdivision under The [GTCA] 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). In other words, it seeks to establish the limit of monetary damages that can be sought against the State. *See, e.g.*, Okla. Stat. tit. 51, § 154(A)(2)–(3). And, importantly, even if a court finds that there is liability against the state "based on a provision of the Oklahoma Constitution *or state law other than [the GTCA]*, the limits of liability provided for in [the GTCA] shall apply." Okla. Stat. tit. 51, § 153(B) (emphasis added). The Oklahoma Legislature clearly intended to limit any and all claims against the State by the amounts found in Section 154 of the GTCA—and it clearly contemplated that other statutes, e.g., the OADA, may be used to establish that liability.

Unlike the GTCA, both governmental employers and private employers are subject to the OADA. *See* Okla. Stat. tit. 25, § 1301(1) (defining "employer"). The "exclusive remedies" provision in the OADA means that other sources of law may not be substituted to bring claims (as opposed to establishing liability) against an employer. *See* Okla. Stat. tit. 25, § 1101(A). *Jones v. Needham* illustrates this point where the employee brought claims under Title VII, the OADA, and Oklahoma state common law (tortious interference with a contractual or business relationship) against his former employer alleging that he had been sexually harassed. 856 F.3d at 1288. In analyzing the "exclusive remedies" language in the OADA, the court found that the "tortious interference claim was based on the same set of facts as his sex discrimination claim [and] it fell within the OADA's limitation of common law remedies." *Id.* at 1291. It held that other causes of action could not replace a claim under the OADA. The analysis applies here without conflict because the GTCA does not provide the elements of a cause of action, it only provides for monetary liability against the State and in doing so it caps those potential damages reflecting a conscious decision by the Oklahoma Legislature to limit exposure and

"set the State's fiscal policy." *See Barrios v. Haskell Cnty. Pub. Facilities Auth.*, 2018 OK 90, ¶ 7, 432 P.3d 233, 237.

One statute, the OADA, is the exclusive remedy for employment claims, i.e., causes of action, and supersedes common law, e.g., claims for tortious interference with a business relationship. It applies to both governmental and private employers. The other, the GTCA, is the exclusive remedy for obtaining monetary damages against the State. It does not independently create a cause of action. It also specifically contemplates that the GTCA's monetary limits "shall apply" even where a claim is "based on a provision of the Oklahoma Constitution or state law other than [the GTCA] . . . ." Okla. Stat. tit. 51, § 153(B).

Respondent continues to rely on this Court's holding in *Duncan v. City of Nichols Hills* for the proposition that "this Court has already considered and addressed the GTCA's exclusivity provision, and rejected it . . . ." Resp't's Br. 11 (citing *Duncan*, 1996 OK 16, ¶ 28, 913 P.2d 1303, 1310. But *Duncan*, decided almost 29 years ago, does not account for the multiple changes to the OADA during the interim, as well as the important change to the definition of "tort" in the GTCA. Importantly, the portion of *Duncan* relied on by Respondent cites Section 170 of the OADA, which was repealed in 2011. *See* Okla. Stat. tit. 25, § 1901; *see also* 2011 Okla. Sess. Laws Ch. 270, § 21 (S.B. 837). In fact, *Duncan* contemplated the possibility presented in this case: "Had Duncan asserted a cause of action in tort . . . the plain language of the [GTCA] requires compliance with the notice provisions of the Act." *Duncan*, 1996 OK 16, ¶ 26, 913 P.2d at 1309–10. With the definition of "tort" now including violations of statutes, the GTCA notice provision applies.

### B. Respondent's other claimed conflicts between the two statutes are unavailing.

Before the district court, Respondent merely listed what she believed to be "directly conflicting provisions" between the two statutes, but she did not provide any argument on why the alleged conflict mattered or how it rendered the two statutes incompatible. *See* Pl.'s Resp. to Def.'s Mot. Dismiss 6–7 (ROA, pp. 28–29). The only argument she provides before this Court is that the OADA is the "exclusive remedy" for all employment claims and that there is a "good faith" predicate before the GTCA applies. *See* Resp't's Br. 3–16; *see also id.* at 15 (claiming there are many conflicts between the two statutes).

As outlined above in detail, OESC has already explained why the two statutes are not in conflict due to either the "exclusive remedy" language in the OADA or the GTCA's "good faith" requirement in the definition of "scope of employment."

Liability and damages are interrelated. If an employee is found to be within the scope of employment, then the State may be liable. *See* Okla. Stat. tit. 51, § 152(12). If they are outside the scope of employment, then the State is not liable. *Id.* As discussed above, unless the elements of a cause of action include bad faith, the question of scope of employment is a fact question. Similarly, whether an employee discriminated against another under the OADA is also a fact question. There is no conflict between the two statutes on liability. Although the GTCA does not specifically state whether it contemplates emotional distress damages, it seeks to cap the amount of money damages against the State. *See* Okla. Stat. tit. 51, § 154(A).

Before the district court, Respondent pointed to exemptions in the two statutes, but did not explain why the exemptions in the two statutes are in conflict with one another.

Finally, as previously explained by OESC, the notice provided in each statute serves different purposes. The notice in the GTCA allows for the "speedy and amicable settlement of

meritorious claims, and to prepare to meet possible fiscal liabilities." Pet'r's Br. 3 (citing *Duncan*, 1996 OK 16, ¶ 14, 913 P.2d at 1307). That notice is sent to the Office of the Risk Management Administrator of the Office of Management and Enterprise Services. Okla. Stat. tit. 51, § 156(C). The notice in the OADA is not really a notice as much as it is a request to investigate alleged discrimination. *See* Okla. Stat. tit. 25, § 1350(B). That notice is sent to the Office of Civil Rights Enforcement. *See* EEOC Charge (ROA, p. 20); *see also* Okla. Stat. tit. 25, § 1350(B).

In short, the two statutes are not in conflict, and they serve different purposes.

**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 September 13, 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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