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**IN THE
HO-CHUNK NATION TRIAL COURT**

**Ho-Chunk Nation and HCN Department of
Business, and DeJope Gaming,**
Plaintiffs,

v.

Case No.: **CV 10-37**

Nicole Koenig,
Defendant.

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**ORDER
(Addressing the Summary Judgment Motion Hearing
and Requiring Further Briefing)**

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INTRODUCTION

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The Court must determine whether to grant the plaintiffs' motion for summary judgment. The Court finds that there are no genuine issues as to material fact; however the plaintiffs may not entitled to judgment as a matter of law. The analysis of the Court follows below.

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PROCEDURAL HISTORY

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The plaintiffs, Ho-Chunk Nation (hereinafter HCN), HCN Department of Business (hereinafter Business Department), and HCN DeJope Gaming filed a *Complaint* with the Court on May 18, 2010. Consequently the Court issued a *Summons* accompanied by the above-mentioned *Complaint* and attachments on May 27, 2010, and delivered the documents by certified mail to the defendant, Nicole Koenig. *See Ho-Chunk Nation Rules of Civil Procedure* (hereinafter *HCN R. Civ. P.*), Rule 5(C)(1)(e). One Nicole Koenig affixed her signature to the Domestic Return Receipt. The *Summons* informed the defendant of his right to file an *Answer*

1 within (20) days of the issuance of the *Summons. Ho-Chunk Nation Rules of Civil Procedure*
2 (hereinafter *HCN R. Civ. P.*), Rule 6(A). The *Summons* also cautioned the defendant that a
3 *Default Judgment* could result from failure to file within the prescribed timeframe.
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5 The defendant timely filed *Answer to the Complaint* on June 16, 2010. On the same date,
6 the plaintiffs filed a premature *Plaintiffs' Notice and Motion for Default Judgment for Failure to*
7 *Answer Complaint*. Consequently, the Court mailed *Notice(s) of Hearing* on June 17, 2010,
8 informing them of the date, time, and location of the *Scheduling Conference*. The Court
9 convened a *Scheduling Conference* on July 12, 2010 at 3:00 p.m. CDT. *See Notice of Hr'g, CV*
10 *10-37 (HCN Tr. Ct., June 17, 2010)*. The following parties appeared at the *Scheduling*
11 *Conference*: Department of Justice Attorney (hereinafter DOJ) Attorney Wendi A. Huling,
12 plaintiffs' counsel; and Nicole Koenig, defendant. The Court entered the *Scheduling Order* on
13 July 13, 2010, setting forth the timelines and procedures to which the parties should adhere prior
14 to trial.
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17 In accordance with the *Scheduling Order*, the plaintiffs untimely filed *Plaintiffs'*
18 *Preliminary Witness List* on July 21, 2010. The defendant did not file a witness list.
19 Subsequently, on September 10, 2010 the plaintiffs, by and through DOJ Attorney Wendi A.
20 Huling, filed *Plaintiff's [sic] Notice and Motion for Summary Judgment* (hereinafter *Plaintiffs'*
21 *Motion*) and *Plaintiff's [sic] Brief in Support of Motion for Summary Judgment* (hereinafter
22 *Plaintiffs' Brief*). *Id.*, Rule 18. The Court afforded the plaintiffs the opportunity to argue
23 *Plaintiffs' Motion* and to provide the defendant the opportunity to offer a response. *Order*
24 *(Addressing the Summary J. Motion Hr'g)*, CV 10-37 (HCN Tr. Ct., Oct. 21, 2010). However,
25 the Court did not properly alert the defendant to her need to set forth specific material facts
26 capable of contradicting the plaintiffs' recounting of events in the motion. *Id.* (citing *Sherry*
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1 *Wilson v. HCN Dep't of Pers.*, CV 05-43 (HCN Tr. Ct., Dec. 21, 2006) at 14, n.2). The Court
2 allowed the defendant an additional two (2) weeks to submit any relevant documentation. On
3 November 2, 2010, the defendant filed a *Motion for Discovery*, which included *Cash Count*
4 *Sheets*. On November 9, 2010, the plaintiffs filed its *Plaintiffs' Response to Motion*. The Court
5 convened a *Motion Hearing* on December 29, 2010 at 1:30 p.m. *See Notice of Hr'g*, CV 10-37
6 (HCN Tr. Ct., Nov. 19, 2010). The following parties appeared at the *Motion Hearing*: DOJ
7 Attorney Wendi A. Huling, plaintiffs' counsel; and Nicole Koenig, defendant.
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10 **APPLICABLE LAW**

11 **HO-CHUNK NATION RULES OF CIVIL PROCEDURE**

12 **Rule 6. Answering a Complaint or Citation.**

13 (A) Answering a Complaint. A party against whom a *Complaint* has been made shall have
14 twenty (20) calendar days from the date the *Summons* is issued, or from the last date of service
15 by publication, to file an *Answer* with the Clerk of Court. The *Answer* shall use short and plain
16 statements to admit, admit in part, or deny each statement in the *Complaint*, assert any and all
17 claims against other parties arising from the same facts or circumstances as the *Complaint* and
18 state any defenses to the *Complaint*. The *Complaint* must contain the full names of all parties and
19 any counsel. The *Answer* must be signed by the party or his or her counsel and contain their full
20 names and addresses, as well as a telephone number at which they may be contacted. An *Answer*
shall be served on other parties and may be served by mail. A *Certificate of Service* shall be filed
as required by Rule 5(B).

21 **Rule 18. Types of Motions.**

22 *Motions* are requests directed to the Court and must be in writing except for those made in Court.
23 *Motions* based on factual matters shall be supported by affidavits, references to other documents,
24 testimony, exhibits or other material already in the Court record. *Motions* based on legal matters
shall contain or be supported by a legal memorandum, which states the issues and legal basis
relied on by the moving party. The *Motions* referenced within these Rules shall not be considered
exhaustive of the *Motions* available to litigants.

25 **Rule 19. Filing and Responding to Motions.**

26 (A) Motion. *Motions* may be filed by a party with any pleading or at any time after their first
27 pleading has been filed. A copy of all written *Motions* shall be delivered or mailed to other
28 parties at least five (5) calendar days before the time specified for a hearing on the *Motion*. A
Response to a written *Motion* must be filed at least one day before the hearing. If no hearing is
scheduled, the *Response* must be filed with the Court and served on the other parties within ten

1 (10) calendar days of the date the *Motion* was filed. The party filing the *Motion* must file any
2 *Reply* within three (3) calendar days.

3 Rule 55. Summary Judgment.

4 Any time after the date an *Answer* is due or filed, a party may file a *Motion for Summary*
5 *Judgment* on any or all of the issues presented in the action. The Court will render *Summary*
6 *Judgment* in favor of the moving party if there is no genuine issue as to material fact and the
7 moving party is entitled to judgment as a matter of law.

8 Rule 58. Amendment to or Relief from Judgment or Order.

9 (A) Relief from Judgment. A *Motion to Amend* or for relief from judgment, including a request
10 for a new trial shall be made within ten (10) calendar days of the filing of judgment. The *Motion*
11 must be based on an error or irregularity which prevented a party from receiving a fair trial or a
12 substantial legal error which affected the outcome of the action.

13 (B) Motion for Reconsideration. Upon motion of the Court or by motion of a party made not
14 later than ten (10) calendar days after entry of judgment, the Court may amend its findings or
15 conclusions or make additional findings or conclusions, amending the judgment accordingly.
16 The motion may be made with a motion for a new trial. If the Court amends the judgment, the
17 time for initiating an appeal commences upon entry of the amended judgment. If the Court
18 denies a motion filed under this rule, the time for initiating an appeal from the judgment
19 commences when the Court denies the motion on the record or when an order denying the
20 motion is entered, whichever occurs first. If within thirty (30) days after the entry of judgment,
21 the Court does not decide a motion under this Rule or the judge does not sign an order denying
22 the motion, the motion is considered denied. The time for initiating an appeal from judgment
23 commences in accordance with the Rules of Appellate Procedure.

24 (C) Erratum Order or Reissuance of Judgment. Clerical errors in a court record, including the
25 *Judgment* or *Order*, may be corrected by the Court at any time.

26 (D) Grounds for Relief. The Court may grant relief from judgments or orders on motion of a
27 party made within a reasonable time for the following reasons: (1) newly discovered evidence
28 which could not reasonably have been discovered in time to request a new trial; or (2) fraud,
misrepresentation or serious misconduct of another party to the action; or (3) good cause if the
requesting party was not personally served in accordance with Rule 5(c)(1)(a) or (b); did not
have proper service and did not appear in the action; or (4) the judgment has been satisfied,
released, discharged, or is without effect due to a judgment earlier in time.

29 **UNDISPUTED FACTS**

30 The parties did not stipulate that “no genuine issue as to material fact” existed within the
31 instant case, however, the defendant questioned whether she was responsible for Mr. Hillmer’s

1 conduct, which thereby renders the matter capable of resolution through summary judgment.
2 *HCN R. Civ. P. 55*. The following undisputed facts reflect common assertions of the parties and
3 references to "documents subject to public inspection." *HCN R. Civ. P. 31(A)(5)*.
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5 1. The parties received proper notice of the December 29, 2010 *Motion Hearing*.

6 2. The plaintiff, Ho-Chunk Nation (hereinafter HCN or Nation), is a federally recognized
7 Indian tribe with principal offices located on trust lands at the HCN Headquarters, W9814
8 Airport Road, P.O. Box 667, Black River Falls, WI. *See* 74 Fed. Reg. 40218 (Aug. 11, 2009).
9 The plaintiff, Business Department, is an HCN executive department, located at the HCN
10 Headquarters. *See* CONSTITUTION OF THE HO-CHUNK NATION (hereinafter CONSTITUTION), ART.
11 VI, § 1(b). The plaintiff, HCN Dejope Gaming, a division within the Business Department,
12 located on trust lands at 4002 Evan Acres Road, Madison, WI 53718. *See* DEP'T OF BUS.
13 ESTABLISHMENT & ORG. ACT OF 2001, 1 HCC § 3.5c (on file with Bus. Dep't). *Compl.* at 2.
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15 4. The defendant, Nicole Koenig, is non-member, and former Cage Shift Supervisor at HCN
16 Dejope Gaming. She resides at 240 Pinnacle Drive, Lake Mills, WI 53551. *Id.*
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18 5. On August 180, 2008, the defendant was employed as a Cage Shift Supervisor. *Id.* at 3.

19 6. On the same date, HCN Dejope Gaming Cage Cashier, Christopher Hillmer filled the
20 cassettes for Kiosk #1. *Id.*, Attach. 4.
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22 7. The defendant counted the straps on the lids of the cassettes. *Id.*

23 8. During the subsequent thirty minutes, Mr. Hillmer unsecured the straps and placed the
24 bills into cassettes. *Id.*

25 9. Mr. Hillmer exited the vault into the mantrap with the four (4) cassettes, and awaited a
26 security escort. *Compl.*, Attach. 4.
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1 10. Security Officer Brian Nicholas and Mr. Hillmer go to the cage and Kiosk #1. *Id.* Mr.
2 Hillmer loads the kiosk, and the Security Officer checks that it is secure. *Id.*

3 11. The defendant did not stay with Mr. Hillmer and supervise him while these procedures
4 were conducted. *Mot. For Summary J.* at 3.

5 12. A patron later complained that he was shortchanged. *Compl.* at 3.

6 13. The defendant, Mr. Hillmer, and a Security Officer checked Kiosk #1, and determined
7 that the cassettes contained inappropriate bills.

8 14. Due to the error, patrons mistakenly received \$1,365.00.

9 15. The defendant did not stay with Mr. Hillmer and supervise him while these procedures
10 were conducted. *Mot. For Summary J.* at 3.

11 16. The defendant provided a *Cash Count Sheet*, which indicated an outgoing and incoming
12 cashier. *Mot.* (Nov. 2, 2010) at 2.

13 DECISION

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19 The Court employs the standard articulated in the *HCN R. Civ. P.* to determine the
20 *Plaintiffs' Motion*, assessing whether “there is no genuine issue as to material fact and [whether]
21 the moving party is entitled to judgment as a matter of law.” *HCN R. Civ. P.* 55. The parties
22 have not submitted any evidence suggesting that there is “a genuine issue as to material fact.”
23 *Id.* The Court affords the parties twenty (20) days to object to the undisputed facts as presented.

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25 However, the Court must subsequently determine whether the plaintiffs are “entitled to
26 judgment as a matter of law.” *Id.* The moving party must be able to show that they are entitled to
27 judgment as a matter of law. The plaintiffs assert that the defendant as a Cage Supervisor had a
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1 duty to stay with the Cage Cashier and supervise him. *Compl.* at 3. Although the defendant
2 initially denied all allegations, she did not provide the Court with any documentation which
3 disputed the facts. *See Answer to Compl.* (June 16, 2010). However, she did state that the *Cash*
4 *Count Sheet* showed that Christopher Hillmer is the incoming cashier. *Mot. Hr'g* (LPER at 2,
5 Dec. 29, 2010, 1:34:53 CST). The defendant indicated that once she signed the *Cash Count*
6 *Sheet*, it became Mr. Hillmer's responsibility. *Id.* at 3, 1:37:40 CST. As the source of the
7 defendant's purported responsibility to pay one-half (1/2) of the shortage, the plaintiffs reference
8 a job description, which is not contained within the Court's record; the *Ho-Chunk Nation Class*
9 *III Gaming Operations – Variance Policy for Class III Operations*, which references the HO-
10 CHUNK NATION PERSONNEL POLICIES AND PROCEDURES MANUAL; and the EMPLOYMENT
11 RELATIONS ACT OF 2005.

14 The Court shall require the parties to brief two (2) issues prior to the Court proceeding.
15 The Court has had difficulty ascertaining what source of law the plaintiffs are relying upon as to
16 the defendant's responsibility, which entitle the plaintiffs to a judgment as a matter of law. The
17 Court would like the parties to brief two (2) issues. First, a brief indicating whether a Cage Shift
18 Supervisor is required to observe a Cage Cashier in the vault or at a kiosk, and which law
19 mandated such and whether it is a common practice. Second, if there was in fact a mandate,
20 whether a Cage Shift Supervisor must be held responsible for one half (½) of a Cage Cashier
21 error, and which law mandated such and whether it is a common practice. **BASED UPON THE**
22 **FOREGOING**, the Court requires both parties to submit briefs on the two (2) aforementioned
23 issues within thirty (30) days of this order. Any response brief(s) must be filed on or before May
24 9, 2011.

Ho-Chunk Nation Court System
P.O. Box 70
Black River Falls, WI 54615
(715) 284-2722 or 800-434-4070



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IT IS SO ORDERED this 29th day of March 2011, by the Ho-Chunk Nation Trial Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.

SgPlus1
Amanda L. Rockman
03/29/2011 04:28:14 pm

Honorable Amanda L. Rockman
Associate Trial Court Judge