

APR 29 1999

Willard RedCloud
Clerk of Court/Assistant

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IN THE
HO-CHUNK NATION SUPREME COURT

GARY LONETREE, SR.
Appellant,

v.

DECISION
Case No. SU-98-07

JOHN HOLST, as Slot Director
And HO-CHUNK CASINO SLOT DEPARTMENT,
Appellees.

STATEMENT OF THE CASE

This matter, an employment dispute involving sexual harassment, came before the full Court for oral argument on Saturday, February 6th, 1999 at the Ho-Chunk Nation Tribal Court Building, W9598 Highway 54 East, Black River Falls, Wisconsin. The Court reviewed the Appellant's Brief, the Appellee's Response Brief, the Appellant's Reply Brief and the entire court record consisting of exhibits, records and transcripts from the trial court case. Justices Debra Greengrass and Rita A. Cleveland heard, while Chief Justice Mary Jo B. Hunter presided over this matter.

This case is an appeal of a part of a judgment entered in the Ho-Chunk Nation Trial Court on September 24, 1998 by the Honorable Mark Butterfield (CV-97-127).

1 The appellant argues that the taped transcript was so faulty and indecipherable as to totally deny his client an opportunity to adequately exercise his right to appeal by directly impeding his ability to determine if any substantial error was made during the trial below, resulting in a denial of due process for his client. This court will address this argument more completely in the body of this opinion.

1 Specifically, that part of the judgement which upheld the appellee's termination of the
2 appellant based upon a violation of the Ho-Chunk Nation [hereinafter HCN] sexual
3 harassment policy. On this question the lower court concluded that the standard used by
4 the Appellee to determine whether or not the appellant engaged in sexually harassing
5 behavior was reasonable and that the allegations of appellant's conduct which resulted in
6 his termination under that standard was supported by substantial evidence.
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8 On October 23rd, 1998, the appellant appealed the judgment of the lower court
9 for the following reasons:

10 (1) Appellant was never advised that his conduct with respect to his co-worker
11 was unwelcome;

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13 (2) Evidence of other acts of appellant's character were improperly allowed into
14 the record to prove appellant had acted in conformity with that character in
15 the case before the lower court, which is in violation of Federal Rule 404(b);

16 (3) Other evidence was improperly received by the court bearing upon the lower
17 court's decision of prior misconduct and progressive discipline, of which the
18 appellant had not received notice of, nor was given an opportunity to be heard
19 on;

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21 (4) The appellant's due process rights to adequately appeal the lower court
22 decision were violated because of the lack of a transcript or audible tape of
23 the trial;

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25 (5) Failure of the Appellee to provide the court with information concerning
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1 sexual misconduct of the co-worker denied the appellant due process; and

2 (6) The policy of the Ho-Chunk Nation to provide inadequate legal representation
3 through lay advocates is a violation of the appellant's substantive due process
4 rights.

5 On October 27, 1998, this case was accepted for appeal through a scheduling
6 order issued by the Honorable Rita A. Cleveland.

7 On November 3, 1998, a Motion for Extension of Time to File Brief was filed by
8 Donald J. Harmon, Attorney for the Appellant, an Order granting the extension was issued
9 on November 10, 1998, by the Honorable Rita A. Cleveland.

10 On December 15, 1998, a Motion to Dismiss was filed by Todd R. Matha on
11 behalf of the Appellees. The basis for the Motion was the Appellants lateness in filing the
12 Brief of the Appellant.

13 The Appellant filed a Response to the Motion to Dismiss on December 18, 1998,
14 and on December 21, 1998, the Appellant also filed a Supplemental Response to Motion
15 to Dismiss.

16 The Appellant filed the Brief of Appellant on December 24, 1998.

17 The Appellee filed a Notice and Motion for Extension of Time to File Brief on
18 January 4, 1999. Due to the holiday and bad weather, Todd Matha, Attorney for
19 Appellee, was unable to return in time to file the Brief on time. The Appellees' Response
20 was filed January 5, 1999.

21 On December 29, 1998, this Court met through a telephonic conference call to
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1 decide on the various motions made by both parties. On January 7, 1999, the Honorable
2 Rita A. Cleveland issued an Order Denying Motion to Dismiss filed by the Appellee's. In
3 the same Order, this Court granted the Appellant's Motion for an Extension of Time as
4 well as granting the Appellee's Motion for an Extension of Time.

5 On January 15, 1999, the Appellant filed the Appellant's Reply Brief and on
6 January 25, 1999, the Appellees' filed a Reply Brief. On January 17, 1999, the Appellant
7 filed a Motion to Strike Appellee's Reply Brief.
8

9 On January 27, 1999, an Order Denying Renewal of Motion to Dismiss and
10 Schedule for Oral Argument was issued by the Honorable Rita A. Cleveland. Oral
11 Argument was scheduled for Saturday, February 6, 1999 at 9:00 A.M., at the HCN Tribal
12 Court Building in Black River Falls, WI.
13

14 On January 27, 1999, the Appellee filed a Request for Consideration of Appellee's
15 Reply Brief.

16 **STATEMENT OF THE FACTS**

17 The Appellant, Gary LoneTree, Sr., was hired by the Ho-Chunk Casino on
18 October 30, 1992 and employed as a Slot Shift Supervisor from March 17, 1989 through
19 July 3, 1997. At all times relevant to this case Mr. LoneTree worked with David Granger
20 and Sandra Thalaker, both of whom were also employed as Slot Shift Supervisors. From
21 March 17, 1997 to July 1997 Mr. LoneTree supervised Ms. Stacy Jones.
22

23 In early June of 1997, both Mr. Granger and Mr. Thalaker perceived changes in
24 Ms. Jones attitude. Sometime in mid-June of 1997 Ms. Jones spoke with Ms. Thalacker
25 about switching shifts. Ms. Jones, Mr. Granger, Ms. Thalacker and Acting Slot Director
26 John Holst were present at a meeting held on June 20, 1997. During this meeting, Ms.

1 Jones stated she wanted to get away from Mr. LoneTree, Sr. and described several actions
2 by Mr. LoneTree that made her uncomfortable. Ms. Jones stated that once she was
3 blowing into a slot machine to clean it out and Mr. LoneTree told her "Don't be afraid to
4 blow hard" at which time she looked up to see Mr. LoneTree smirking. Ms. Jones also
5 stated that at one time she was looking for an apartment and Mr. LoneTree asked if she
6 would be interested in renting an apartment from him, which was next to his.

7 Ms. Jones thought Mr. LoneTree was just being helpful at first, but after she made
8 it clear that she was not interested, Mr. LoneTree asked her again. Ms. Jones stated that
9 Mr. LoneTree would often look over her shoulder "as if he was checking my work" but
10 when she made mistakes on two occasions while Mr. LoneTree was watching, he did not
11 catch these mistakes". Mr. LoneTree at times would sneak up behind Ms. Jones while she
12 was working on machines and stand so close that when she would turn around he would
13 startle her. Incident reports from other employees' state that Mr. LoneTree did this to
14 other employees as well.

15 Ms. Jones stated that one day she had changed into shorts after her shift had ended
16 and went to the Slot Office to turn in some paper work. When Ms. Jones went into the
17 Slot Office, Mr. LoneTree made a comment about her legs. Ms. Jones ignored the
18 comment but as she was walking away, Mr. LoneTree called her back. When she went
19 back, Mr. LoneTree said he just wanted to see her legs again. Ms. Jones stated that
20 similar incidents occurred throughout her probationary period. Ms. Jones stated that she
21 was hesitant to say anything because Mr. LoneTree was her superior and she feared
22 retaliation.

23 Ms. Jones stated that Mr. LoneTree's actions affected her work and home life. At
24 no time did Ms. Jones tell Mr. LoneTree that his actions were inappropriate or were
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1 making her uncomfortable.

2 On June 25, 1997, Kevin Nichols sent a Request for Approval to Suspend to Jean
3 Ann Day, HCN Department of Personnel Executive Director. Mr. Nichols was aware that
4 Mr. LoneTree had been previously suspended for five days in 1994 "pending sexual
5 harassment charges." Ms. Day approved the request to suspend Mr. LoneTree for five
6 days pending an investigation. Mr. Nichols advised Mr. LoneTree of the suspension and
7 gave him a copy of the request and associated Disciplinary Action Form. Pierre Decorah,
8 Jr., a Department of Personnel Investigator, conducted an investigation into Ms. Jones's
9 allegations.
10

11 On June 27, 1997, Mr. Decorah interviewed Mr. LoneTree. Mr. LoneTree stated
12 that Ms. Jones never told him that she found his actions offensive, that she often laughed
13 at the comments he made herself, that he did make the comment about Ms. Jones' legs.
14 Mr. Decorah gave Mr. LoneTree a copy of Ms. Jones' Incident Report. In Mr. Decorah's
15 report to Ms. Day on June 30, 1997, Mr. Decorah wrote, "In this case a form of Sexual
16 Harassment exists, Hostile Environment in which the conduct interferes with the
17 employees work performance or creating an intimidating hostile or offensive work
18 environment."
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21 On July 1, 1997, Mr. LoneTree filed a Level-One Grievance. On July 2, 1997,
22 Mr. Decorah submitted another report to Ms. Day, outlining further investigation he had
23 done. On July 3, 1997, Mr. Holst and Mr. Nichols sent a memorandum to Ms. Day
24 requesting that Mr. LoneTree be terminated. Ms. Day approved the termination request
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1 July 3, 1997.

2 **ANALYSIS**

3 **I. Appellant was never advised that his conduct with respect to his co-worker**
4 **was unwelcome.**

5 The Trial court reviewed the totality of the circumstances and determined that Ms.
6 Jones, Appellee, was indeed subjected to sexual harassment over a period of three months.

7 The Appellant cited case law to support his argument that specifically states that the
8 complainant is required to advise the harasser that his/her conduct is unwelcome. This
9 Court turns to HCN Tribal Law in reference to Sexual Harassment. HCN Personnel
10 Policies and Procedures Manual (hereinafter Policy Manual), Chapter 2 titled Sexual
11 Harassment, states the following:

13 Any employee who believes that a Supervisor's, another employee's, or a non-
14 employee's actions or words constitute unwelcome sexual harassment had a
15 responsibility to report or complain about the situation as soon as possible.
16 Such report or complaint should be made to the employee's supervisor or to
the Department head if the complaint involves the supervisor.

17 The fact that Ms. Jones filed a grievance is a clear indication that the behavior of the
18 Appellant was unwelcome. This Court determines that Ms. Jones followed the
19 appropriate steps necessary to report the "undesirable and offensive" conduct of her
20 "Supervisor." The acts committed by the Appellant qualify as sexual harassment in the
21 sense that they created a hostile and offensive working environment that substantially
22 interfered with the work performance of Ms. Jones. This Court hereby affirms the Trial
23 Court findings that the acts reported by Ms. Jones were indeed Sexually Harassing.

24 **II. Evidence of other acts is not admissible to prove the character of a person in**
25 **order to show conformity therefore.**

1 The Trial Court considered the information regarding the testimony of other
2 employees regarding other incidents of sexual harassment. The Trial Courts decision
3 however was not based solely on the documents referenced by the Appellant. In fact the
4 Trial Court makes reference only to the fact that the Appellant was disciplined previously
5 for such behavior. The Trial Court makes reference to the testimony of other employees
6 in a footnote. The decision was based on the substantial facts in support of the acts of
7 sexual harassment directed toward Ms. Jones and the hostile and offensive work
8 environment created by those acts. The Appellant has the responsibility to object, in
9 court, as to the admission of exhibits. The admission of the exhibits does not indicate an
10 abuse of discretion, as they did not weigh on the decision of the Trial Court.
11

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13 **III. Additional other evidence of appellant's sexual harassment sufficient to justify**
14 **his termination (Exhibit "x") not able to pass the constitutional matter of due**
15 **process notice and opportunity to be heard that the court required in the notice**
16 **given to appellant of Stacy Jones' complaint? (Pgs. 8,9, and 10 of the**
Judgement)

17 The admission of exhibit "x" adds to justifiable reasons to support termination as
18 the next step in the disciplinary process, not in reference to the Appellants character, but
19 to illustrate prior disciplinary action related to the same offense. The HCN Policy Manual
20 (pg. 48) makes allowances for Administration to use its discretion in determining whether
21 the offense warrants progressive discipline. Progressive discipline may be circumvented
22 given the seriousness of the offense and the history of disciplinary actions filed while
23 employed by the HCN.
24

25 **IV. The exhibits labeled "K" on Page 28, exhibit "L" on page 30, and exhibit "M"**
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1 **on page 33 were received into evidence but were not referred to in the Trial**
2 **Court's Opinion and Judgement.**

3 Based on the reasoning above, this Court will not address this issue. As previously
4 stated, it is the Appellant's responsibility to object to the admission to evidence submitted
5 to the Court. The Trial Court obviously did not find the evidence relevant to the final
6 decision.

7 **V. The lack of transcript or audible tapes of the trial testimony puts the Appellant**
8 **at such a disadvantage, that a claim of lack of constitutional due process needs**
9 **no citation.**

10 This Court is sympathetic to the unfortunate situation that the lack of a transcript
11 or audible tapes created for the Appellant. However unfortunate, the lack of a transcript
12 or audible tapes does not warrant a re-trial.² The standard by which the Trial Court based
13 its decision on was that the behavior of the Appellant created a hostile working
14 environment for the Appellee that affected her job performance as well as her mental well
15 being. Even without a trial court transcript, the incident report of the Appellee alone
16 provides evidence of sexual harassment. This Court determines that the Trial Court
17 record available is sufficient to make a decision.

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19 **VI. The failure of the defendants to provide information of sexual misconduct of**
20 **Stacy Jones and Larry Littlegeorge is also significant to establish the lack of**
21 **procedural and constitutional due process when the appellant is aware of all of**
22 **the details of the incidents; even in the use of the denial of the Department of**
23 **Justice that such reports exist.**

24 The information obtained by the Appellant regarding the sexual misconduct of Ms.

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26 ² The Attorney for the Appellant was granted additional time to review the Trial Court record. The Appellant is
27 responsible to make inquiries and arrangements to listen to the original taped transcripts. The Appellant acquired
28 "dubbed" transcripts, however, documentation indicates that the Appellant did not make an effort to listen to the

1 Jones is not a part of the record from the Trial Court. The Appellant filed a Supplemental
2 Response, however, this Court did not address this issue. This Court finds it necessary to
3 point out that an individuals sexual behavior or misconduct does not imply that sexual
4 harassment is welcome or gives unspoken approval of such behavior. Nor does it
5 automatically grant an individual the right to sexually harass.
6

7 **VII. Mistakes or errors on the part of the Appellant or his Attorney are normally**
8 **attributed to the Appellant, but in this case, the Ho-Chunk Nation has a**
9 **policy of providing Law Advocates, who are not Attorneys, to represent the**
10 **litigants who cannot afford private attorneys.**

11 Individuals wishing to file an action in the HCN Court System are responsible for
12 acquiring their own legal representation. The HCN Court system is not in the practice of
13 providing individuals with legal representation. Periodically through joint efforts of the
14 HCN and Judicare, a training program is held to train tribal members as Lay Advocates.
15 Upon successful completion of the course, a Lay Advocate may apply for a HCN Bar
16 membership and represent individuals in the HCN Court system. Lay Advocates are
17 expected to adhere to all Rules of the Court and conduct themselves with utmost
18 professionalism. The acquisition of a Lay Advocate as representation was the sole
19 decision of the Appellant. Individuals dissatisfied with their representation must address
20 those issues with the Lay Advocate and file necessary action to gain satisfaction.
21

22 Statements made by the Appellant regarding this issue are inaccurate.

23 **Conclusion**

24 Fore the foregoing reasons, the Judgement of the Honorable Mark Butterfield
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1 signed on September 24, 1998 in this matter is hereby **AFFIRMED**.

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3 **IT IS SO ORDERED.**

4 Dated this 28th day of April 1999.

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7 **Per Curiam.**

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10 Hon. Rita A. Cleveland, Associate Justice
11 Ho-Chunk Nation Supreme Court

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CERTIFICATE OF SERVICE

I, Willa RedCloud, Clerk of the Ho-Chunk Nation Supreme Court of the Ho-Chunk Nation, do hereby certify that on the date set forth below I served a true and corrected copy of the attached paper filed in Case No. SU-98-07 (CV-97-127) by the United States Postal Service, upon all persons listed below:

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Date: 4/29/99

Willa RedCloud
Willa RedCloud, Clerk of Court
Ho-Chunk Nation Supreme Court