



1 The petitioner next filed a timely *Initial Brief & Motion for Evidentiary Hearing* on June  
2 5, 2008. See ERA, § 5.35e; HCN R. Civ. P. 63(D)(1). The respondent filed a timely *Response*  
3 *Brief* on July 7, 2008. See HCN R. Civ. P. 63(E). The petitioner reiterated her earlier request on  
4 July 11, 2008, with the filing of the *Motion for Evidentiary Hearing*. The Court accordingly  
5 issued *Notice(s) of Hearing* on July 25, 2008, informing the parties of the date, time and location  
6 of a *Status Hearing*. The Court convened the *Hearing* on August 26, 2008 at 2:00 p.m. CDT.<sup>1</sup>  
7 The following parties appeared at the *Status Hearing*: Attorney Mark L. Goodman, petitioner's  
8 counsel, and Ho-Chunk Nation Department of Justice Attorney Alysia E. LaCounte,  
9 respondent's counsel.  
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11  
12 On October 27, 2008, the respondent submitted a compact disc recording of the April 9,  
13 2008 GRB hearing. The petitioner subsequently filed her *Initial Brief & Appendix* (hereinafter  
14 *Initial Brief II*) on Dec. 4, 2008. See *supra* note 1. The respondent requested an extension to file  
15 its responsive pleading on January 5, 2009, with which the petitioner noted her assent. The  
16 Court consequently granted the request within its January 5, 2009 *Order to Extend Time to*  
17 *Respond to Petitioner's Initial Brief*. The respondent filed a timely *Response Brief* (hereinafter  
18 *Response Brief II*) on January 12, 2009, followed by petitioner's timely *Reply Brief* on January  
19 22, 2009. See HCN R. Civ. P. 63(E). Neither party requested the ability to present oral  
20 argument, prompting the Court to determine the matter on the documentary materials. *Id.*, Rule  
21 63(G); *Scheduling Order* at 3.  
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26 <sup>1</sup> The petitioner questioned the absence of a transcript of the GRB proceeding, believing that a limited hearing had  
27 occurred prior to the issuance of the administrative decision. *Status Hr'g* (LPER at 3, Aug. 26, 2008, 02:21:12  
28 CDT); see also HCN R. Civ. P. 63(F)(2). The respondent indicated a lack of knowledge, and accepted the Court's  
suggestion that the parties depose GRB Chairperson Jon J.F. Greendeer to ascertain the truth. LPER at 3, 02:23:29  
CDT. The petitioner agreed to file a supplemental *Initial Brief* within thirty (30) days of concluding the  
deposition(s), and the Court directed the parties to adhere to the presumptive procedural timeframe thereafter. *Id.* at  
4, 02:26:10 CDT (citing HCN R. Civ. P. 63(E)).

1 **APPLICABLE LAW**

2 **CONSTITUTION OF THE HO-CHUNK NATION**

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4 **Art. VI - Executive**

5 **Sec. 1. Composition of the Executive.**

6 (b) The Executive Branch shall be composed of any administrative Departments created by  
7 the Legislature, including a Department of the Treasury, Justice, Administration, Housing,  
8 Business, Health and Social Services, Education, Labor, and Personnel, and other Departments  
9 deemed necessary by the Legislature. Each Department shall include an Executive Director, a  
10 Board of Directors, and necessary employees. The Executive Director of the Department of  
Justice shall be called the Attorney General of the Ho-Chunk Nation. The Executive Director of  
the Department of Treasury shall be called the Treasurer of the Ho-Chunk Nation.

11 **Art. X - Bill of Rights**

12 **Sec. 1. Bill of Rights.**

13 (a) The Ho-Chunk Nation, in exercising its powers of self-government, shall not:

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15 (8) deny to any person within its jurisdiction the equal protection of its laws or  
deprive any person of liberty or property without due process of law;

16 **EMPLOYMENT RELATIONS ACT OF 2004, 6 HCC § 5**

17 **Ch. 1 - General Provisions**

18 **Subsec. 3. Declaration of Policy.**

19  
20 a. This Employment Relations Act is the official employment law of the Ho-Chunk  
21 Nation. It supersedes the Nation's Personnel Policies and Procedures Manual and all policies,  
22 rules, and regulations enacted by Legislative resolutions pertaining to the employment law of the  
Nation.

23 **Subsec. 5. Employment Clause.**

24 a. Equal Employment Opportunity. With the exception of Ho-Chunk Preference in  
25 Employment as set forth in paragraph (b), below, it will be a violation of this Act to discriminate  
26 based on an individual's sex, race, religion, national origin, pregnancy, age, marital status, sexual  
orientation, or disability.

27 **Subsec. 6. Employee Rights.**

28 d. Harassment.

1 (1) Harassment (both overt and subtle) is a form of employee misconduct that  
2 both demeans another person and undermines the integrity of the employment  
3 relationship by creating an unreasonably intimidating, hostile, and objectively offensive  
working environment.

4 e. Sexual Harassment.

5 (1) Purpose. The purpose of the Ho-Chunk Nation sexual harassment policy  
6 is to:

7 (a) Prohibit sexual harassment in the workplace.

8 (2) Policy. Sexual harassment by or of supervisors, employees, or non-  
9 employees is strictly prohibited and will be investigated for possible disciplinary action.

10 (e) An employee who believes that he or she has been subjected to  
11 unwelcome sexual conduct or that there exists an objectively hostile work environment has a  
12 duty to report the situation. Such report shall be made directly to the Department of Personnel.

## 13 Ch. II - Definitions

14 Subsec. 7. Definitions. Whenever the following terms are used in this Act, they shall have  
15 the meanings indicated.

16 o. Employee. Any individual employed by the Ho-Chunk Nation, regardless of the  
17 source of funds by which the employee is paid. The term "employee" shall include any person  
elected or appointed. The Nation further classifies its employees as follows:

18 (1) At -Will Employee. An employee who is subject to termination with or  
19 without cause or notice. The employee also has the right to leave at any time for any or  
20 no reason or notice. At-will employees include Executive Managers of the Nation's  
21 Gaming Facilities and Managers of the non-gaming revenue generating facilities. The At-  
Will Employee classification will be stated on the employee's job description.

22 ss. Separation.

23 (2) Resignation. Voluntary separation from employment in either "good  
24 standing" or "not in good standing."

25 (3) Termination. Involuntary separation from employment not in good  
26 standing.  
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1 Ch. III - Employment Policies

2 Subsec. 10. Employee Separation Policy.

3 b. Resignation. An employee voluntarily wishing to leave employment with the Ho-  
4 Chunk Nation in good standing must file a written resignation with the immediate supervisor at  
5 least two (2) weeks prior to the effective date, stating specific reason(s) for the resignation. The  
6 employee's resignation shall be promptly forwarded through the Executive Director to the  
Department of Personnel.

7 Subsec. 14. Performance Evaluations.

8 a. The Executive Director, Department of Personnel shall promulgate the process  
9 and procedures for Performance Evaluations to ensure regular reports are made as to the  
10 competence, efficiency, adaptation, conduct, merit, and other job related performance conditions  
of the Nation's employees.

11 b. Annual Performance Evaluation.

12 (1) Supervisors shall be responsible for the completion of an annual  
13 evaluation up to ten (10) days prior to the employee's Annual Review Date.

14 (2) An employee who has not received an annual evaluation within thirty (30)  
15 days after his or her scheduled Annual Review Date may be eligible to receive a merit  
16 pay increase in a range of 0% to 4%, not to surpass the maximum rate of his or her pay  
range, if the following criteria have been met:

17 (a) The employee has had no disciplinary action placed in his or her  
18 personnel file since the previous evaluation date.

19 (b) The employee's previous evaluation met the criteria for a merit  
20 increase. If the employee has not received an evaluation since working with the  
21 Nation, assuming the employment has been continuous, it will automatically be  
22 assumed that the employee has met the evaluation criteria to receive a merit  
increase.

23 (c) The employee is not currently on a temporary reassignment, any  
24 type of leave of absence, layoff or other event that would affect the employee's  
Annual Review Date.

25 (d) The Nation has not imposed any temporary across-the-board  
26 payroll restrictions that would suspend merit increases for all employees.

27 (3) If the above criteria are met, the necessary documentation will be  
28 generated, signed and processed by the Department of Personnel granting the employee a  
pay increase effective the date that the employee's Annual Review Date was due.

1 Ch. V - Work Rules & Employee Conduct, Discipline, & Administrative Review

2 Subsec. 30. Employee Conduct.

3 e. Unacceptable Conduct. The following employee acts, activities, or behavior that  
4 are unacceptable conduct.

5 (20) Employees may not engage in coercion, nor be subject to coercive tactics  
6 that constitute a deprivation of legally protected rights.

7 Subsec. 33. Grievances.

8 a. Employees may seek administrative and judicial review only for alleged  
9 discrimination and harassment.

10 Subsec. 34. Administrative Review Process.

11 a. Policy.

12 (1) The Department of Personnel will take all reasonable steps to investigate  
13 any incident, which has resulted in disciplinary action. It is the policy of the Ho-Chunk  
14 Nation to afford all eligible employees who have been subject to suspension or  
15 termination a means of having the circumstances of such disciplinary action reviewed by  
an impartial and objective Grievance Review Board (Board).

16 (2) Employees are entitled to grieve suspensions or terminations to the Board.  
17 The Board will be selected from a set pool of employees and supervisors with grievance  
18 training, who will review a case and determine whether to uphold the discipline.

19 (3) Following a Board decision, the employee shall have the right to file an  
20 appeal with the Ho-Chunk Nation Trial Court (Court).

21 Subsec. 35. Judicial Review.

22 c. Judicial review of a grievance involving suspension, termination, discrimination  
23 or harassment may proceed to the Ho-Chunk Nation Trial Court only after the Administrative  
24 Review Process has been exhausted through the Grievance Review Board. An employee may  
appeal a Board decision to the Trial Court within thirty (30) calendar days of when the Board  
decision is served by mail.

25 e. Under this limited waiver of sovereign immunity, the Court shall review the  
26 Board's decision based upon the record before the Board. Parties may request an opportunity to  
27 supplement the record in the Trial Court, either with evidence or statements of their position.  
28 The Trial Court shall not exercise *de novo* review of Board decisions. The Trial Court may only  
set aside or modify a Board decision if it was arbitrary or capricious.

1 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

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

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

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

18 (C) Motion to Modify. After the time period in which to file a *Motion to Amend* or a *Motion for*  
19 *Reconsideration* has elapsed, a party may file a *Motion to Modify* with the Court. The *Motion*  
20 must be based upon new information that has come to the party's attention that, if true, could  
21 have the effect of altering or modifying the judgment. Upon such motion, the Court may modify  
22 the judgment accordingly. If the Court modifies the judgment, the time for initiating an appeal  
23 commences upon entry of the modified judgment. If the Court denies a motion filed under this  
24 Rule, the time for initiating an appeal from the judgment commences when the Court denies the  
25 motion on the record or when an order denying the motion is entered, whichever occurs first. If  
26 within thirty (30) calendar days after the filing of such motion, and the Court does not decide the  
27 motion or the judge does not sign an order denying the motion, the motion is considered denied.  
28 The time for initiating an appeal from judgment commences in accordance with the *Rules of*  
*Appellate Procedure*.

(D) Erratum Order or Re-issuance of Judgment. Clerical errors in a Court record, including the  
*Judgment or Order*, may be corrected by the Court at any time.

(E) Grounds for Relief. The Court may grant relief from judgments or orders on motion of a  
party made within a reasonable time for the following reasons: (1) newly discovered evidence  
which could not reasonably have been discovered in time to request a new trial; (2) fraud,  
misrepresentation or serious misconduct of another party to the action; (3) good cause if the  
requesting party was not personally served in accordance with Rule 5(c)(1)(a)(i) or (ii), 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.

1 Rule 61. Appeals.

2 Any final *Judgment* or *Order* of the Trial Court may be appealed to the Supreme Court. The  
3 *Appeal* must comply with the *Rules of Appellate Procedure*, specifically *Rules of Appellate*  
4 *Procedure*, Rule 7, Right of Appeal. All subsequent actions of a final *Judgment* or Trial Court  
5 *Order* must follow the *Rules of Appellate Procedure*.

6 Rule 63. Judicial Review of Administrative Adjudication.

7 (A) Any person aggrieved by a final agency decision may request that the Ho-Chunk Nation  
8 Trial Court review such decision by filing a *Petition for Administrative Review* with the Court  
9 within thirty (30) calendar days of such decision, unless otherwise provided.

10 1. The following laws provide for filing within thirty (30) days:

11 a. EMPLOYMENT RELATIONS ACT OF 2004

12 (D) The commission or board, designated as the respondent, must transmit the administrative  
13 record to the Court within fifteen (15) days after receipt of the *Petition for Administrative*  
14 *Review*. The administrative record shall constitute the sole evidentiary record for judicial review  
15 of the agency decision, unless the petitioner avails him or herself of the following exception:

16 1. The petitioner may request an opportunity to supplement the evidentiary record  
17 within an Employee Grievance Review Board appeal, provided that the petitioner demonstrates  
18 that the Board:

19 a. excluded relevant evidence as defined by the *Federal Rules of Evidence*,  
20 Rule 401; or

21 b. failed to consider evidence that could not reasonably have been discovered  
22 prior to the Employee Grievance Review Board hearing.

23 (E) Within thirty (30) calendar days of filing the *Petition for Administrative Review*, the  
24 petitioner shall file a written brief, an *Initial Brief*, unless the petitioner has sought an evidentiary  
25 modification pursuant to *HCN R. Civ. P. 63(D)(1)(a-b)*. The respondent shall have thirty (30)  
26 calendar days after filing of the brief in which to file a *Response Brief*. After filing of  
27 respondent's *Response Brief*, the petitioner may file the *Reply Brief* within ten (10) calendar  
28 days.

(F) The administrative record shall consist of all evidence presented to the agency, including but  
not limited to:

2. a transcript of the proceedings, which may be in digital or other electronically  
recorded format, sufficiently clear so that the Court may determine what transpired in the  
proceedings,

1 (G) At the discretion of the Court, the Court may require an oral argument. The Court shall  
2 decide the order of the presentation, the length of time each party is permitted for their  
3 presentation, the issues to be addressed in oral argument, and such other matters as may be  
4 necessary. An order entitled, *Notice of Oral Argument*, shall include all such matters and shall be  
5 served on all parties at least ten (10) calendar days prior to the date set for argument.

## 6 **FINDINGS OF FACT<sup>2</sup>**

7 1. The petitioner, Kristen K. White Eagle, is an enrolled member of the Ho-Chunk Nation,  
8 Tribal ID# 439A002983, and maintains an address of S3062 Fox Hill Road, Baraboo, WI 53913.  
9 *Pet.* at 1. The petitioner was employed as Executive Manager at Ho-Chunk Casino, Hotel &  
10 Convention Center, a division within the Ho-Chunk Nation Department of Business (hereinafter  
11 Business Department), located at S3214 Highway 12, Baraboo, WI 53913. *Id.*; *see also* DEP'T OF  
12 BUS. ESTABLISHMENT & ORG. ACT OF 2001, 1 HCC § 3.5c. The Business Department is an  
13 executive department with principal offices located on trust lands at Ho-Chunk Nation  
14 Headquarters, W9814 Airport Road, P.O. Box 667, Black River Falls, WI. *See* CONSTITUTION  
15 OF THE HO-CHUNK NATION (hereinafter CONSTITUTION), ART. VI, § 1(b). The Ho-Chunk Nation  
16 (hereinafter HCN or Nation) is a federally recognized Indian tribe. *See* 73 Fed. Reg. 18533 (Apr.  
17 4, 2008).

18 2. The respondent, GRB, is a statutorily established entity for the purpose of hearing certain  
19 employment grievances, and is primarily comprised of randomly selected members who receive  
20 training facilitated by the HCN Department of Personnel (hereinafter Personnel Department).  
21 ERA, § 5.34a(1-2); *see also Janet Funmaker v. Libby Fairchild, in her capacity as Executive*

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25 <sup>2</sup> The Court does not perform a *de novo* review of administrative agency decisions, and, consequently, generally  
26 refrains from making independent factual findings. ERA, § 5.35e. In this instance, the GRB declined to find facts  
27 since it determined that it lacked authority to adjudicate a case presenting the defense of constructive discharge in  
28 the context of a proffered resignation. *In the Matter of: Kristin White Eagle v. Dep't of Bus. et al.*, GRB-018.08-T  
(GRB, Apr. 9, 2008) (hereinafter *GRB Decision*) at 1. The GRB viewed this case as one “better suited for a Judicial  
Review,” and it perceived “that a GRB dismissal would allow unmitigated access to the judicial process.” *Id.*  
Regardless, the Court shall not accept the role of trier of fact, but rather simply reiterate the basic, undisputed factual  
assertions of the parties.

1 *Dir. of HCN Dep't of Pers., et al.*, SU 07-05 (HCN S. Ct., Aug. 31, 2007) at 4 (clarifying that the  
2 GRB is “an agency within the Department of Personnel”).

3 3. The petitioner occupied an at-will employment position as Executive Manager. *Reply Br.*  
4 at 2; *Resp. Br. II* at 3; *see also* ERA, § 5.7o(1).

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6 4. On February 5, 2008, the petitioner resigned her position at the request of her immediate  
7 supervisor, Joseph E. Decorah, Executive Director of the Business Department. *Resp. Br. II* at 1;  
8 *Initial Br. II* at 2.

9 5. Executive Director Decorah purportedly instructed the petitioner to resign in order, in  
10 part, to maintain her good standing. *Reply Br.* at 2;<sup>3</sup> *Resp. Br. II* at 3-4; *see also* ERA, § 5.7ss(2).

11 6. The petitioner references “numerous policy violations lurking in this case,” which render  
12 her capable of making “a prima facie defense of constructive discharge.” *Reply Br.* at 6. The  
13 petitioner specifically cites to four (4) statutory provisions. *Id.* at 5; *Initial Br. II* at 5 (citing  
14 ERA, § 5.6d(1), 10b, 14a-b, 30e(20)).

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17 7. The administrative hearing concerning the alleged wrongful termination occurred on  
18 April 9, 2008.<sup>4</sup>

## 20 DECISION

21 In 2001, the Court adopted a test for tortious constructive discharge. If a plaintiff  
22 asserted such a defense, the Court would require that he or she adequately demonstrate:

23  
24 (1) the actions and conditions that caused the employee to resign were  
25 violative of [fundamental] public policy;

26 <sup>3</sup> The petitioner contends that she remains unaware of the full consequences of her resignation, but she does not  
27 dispute that Mr. Decorah made an assertion in this regard. *Reply Br.* at 2. The petitioner’s resignation letter  
28 indicates as follows: “Joe Decorah stated that he was asking for my resignation and that along with this discharge  
he could offer the following: Severance Pay for two weeks, Guaranteed Unemployment, Placement on a Recall  
List, and no notation of the discharge on my record.” *Discharge of Employment/Resignation Letter* (Feb. 5, 2008).

<sup>4</sup> The ERA does not establish a timeframe in which the GRB must convene a hearing after receiving a grievance. In  
this instance, fifty-seven (57) days elapsed between the filing of the February 11, 2008 grievance and the hearing.

1 (2) these actions and conditions were so intolerable or aggravated at the  
2 time of the employee’s resignation that a reasonable person in the  
3 employee’s position would have resigned; and

4 (3) facts and circumstances showing that the employer had actual . . .  
5 knowledge of the intolerable actions and conditions and of their impact on  
6 the employee and could have remedied the situation.

7 *Maureen Arnett et al. v. HCN Dep’t of Admin.*, CV 00-60, -65 (HCN Tr. Ct., Jan. 8, 2001) at 16  
8 (quoting *Brady v. Elixir Industries*, 196 Cal. App. 3d 1299, 1306 (Cal. Ct. App. 1987) (citing  
9 *Turner v. Anheuser Busch, Inc.*, 7 Cal. 4th 1238, 1244-45 (Cal. 1994)).<sup>5</sup>

10 A “constructive discharge is not in itself a cause of action, although it is routinely alleged  
11 as a separate count in complaints for wrongful discharge. Rather, constructive discharge is a  
12 defense against the argument that no suit should lie in a specific case because the plaintiff left the  
13 job voluntarily.” *Id.* at 13 (quoting *Vagts v. Perry Drug Stores*, 204 Mich. App. 481, 487 (Mich.  
14 Ct. App. 1994)). Consequently, the Court concluded that a tribal plaintiff could assert such a  
15 defense by reference to a former statutory definition of “discharge,” which constituted an  
16 “involuntary separation or termination of employment.” *Id.* at 14 (quoting PERS. MANUAL, Ch.  
17 14 at 55 (updated Mar. 31, 1999) (emphasis added)). The Court has not had an opportunity to  
18 determine whether a constructive discharge defense remains available under the ERA, and  
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23 <sup>5</sup> The respondent asserts that the “Arnett decision was based is [*sic*] *Strozinsky v. School District of Brown Deer*[,]  
24 237 Wis. 2d 19 [(Wis. 200)].” *Resp. Br. II* at 4. However, in *Arnett*, the Court clearly states:

25 The Court hereby adopts the test for tortious constructive discharge as articulated by the courts of  
26 the State of California. The Court looks for guidance from this jurisdiction due to the  
27 thoroughness of examination and compatibility of the resulting standards with the [HO-CHUNK  
NATION PERSONNEL POLICIES & PROCEDURES MANUAL (hereinafter PERSONNEL MANUAL)]. For  
example, the requirement that the employer possess actual knowledge of the intolerable conditions  
comports with the responsibility to report found in the PERSONNEL MANUAL.

28 *Arnett*, CV 00-60, -65 at 16-17 (citations omitted). The successor legislation likewise contains a duty to report a  
species of conduct oftentimes associated with a constructive discharge case, *i.e.*, sexual harassment. ERA, §  
5.6e(2)(e).

1 declines to directly address the issue within this decision. The Court anticipates that the GRB  
2 will make this determination as a matter of first impression within a future administrative case.

3           Nonetheless, the Court feels capable of resolving the instant matter without unduly  
4 intruding into the reserved role of the administrative agency. The Court shall begin by  
5 commenting upon the nature of at-will employment. The ERA explains that an at-will  
6 “employee . . . is subject to termination with or without cause or notice,”<sup>6</sup> and “include[s]  
7 Executive Managers of the Nation’s Gaming Facilities.” ERA, § 5.7o(1). Expanding on this  
8 concept, the Court previously explained that ““either the employer or the employee may  
9 terminate the relationship at any time for any reason, or even no reason[,] and that the position is  
10 held for an unspecified amount of time.”” *Dan M. Sine v. Jacob Lonetree, as Pres. of the Ho-*  
11 *Chunk Nation*, CV 97-143 (HCN Tr. Ct., Aug. 3, 1998) at 6 (quoting *Joan Whitewater v. Millie*  
12 *Decorah, as Fin. Dir., et al.*, CV 96-88 (HCN Tr. Ct., Jan. 20, 1998) at 4). Therefore, “[i]t  
13 follows that there is no right to grieve because a grievance is a procedure whereby a party can  
14 challenge the basis of the decision to terminate an employee as unsubstantiated in law or in fact.  
15 If no reason need be given, it seems illogical to give someone a right to challenge . . . .” *Id.* at 8.

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19           As a result, while the Court acknowledges the GRB’s concern that the petitioner’s  
20 resignation “allow[ed] supervisory management the opportunity to ‘negotiate’ the terms of  
21 separation to circumvent the disciplinary process,” it considers the concern as misplaced. *GRB*  
22 *Decision* at 1. Quite simply, a supervisor has no obligation “to engage in the disciplinary  
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<sup>6</sup> A statutory designation of “for cause” employment entitles an individual to minimum pre-deprivation procedural  
due process protection, but an at-will employee conversely lacks a property interest in his or her employment,  
thereby negating any claim to such protection. *Willard LoneTree v. Larry Garvin, in his official capacity as*  
*Executive Dir. of HCN Heritage Pres.*, CV 06-74 (HCN Tr. Ct., Mar. 9, 2007) at 15 n.10, *aff’d*, SU 07-04 (HCN S.  
Ct., Oct. 6, 2007); *see also* CONST., ART. X, § 1(a)(8). “Property interests, of course, are not created by the  
Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem  
from an independent source . . . .” *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972); *see also* *Parmenton Decorah v.*  
*HCN Legislature et al.*, CV 99-08 (HCN Tr. Ct., July 1, 1999) at 16; *Sine*, CV 97-143 at 7.

1 process, which is set in place to ensure the rights of the employee” in relation to an at-will  
2 employee’s separation from employment because the individual maintains no property interest in  
3 his or her continued employment. *Id.* at 2. The Court appropriately resolves this constitutional  
4 issue since the HCN Legislature lacks the ability to confer constitutional adjudication authority  
5 upon an executive administrative agency. *LoneTree*, SU 07-04 at 4-6.

7 Yet, this determination does not necessarily conclude the inquiry. As the petitioner  
8 somewhat correctly notes, “the concept of constructive discharge is recognized as an exception  
9 to the employment-at-will doctrine.”<sup>7</sup> *Reply Br.* at 3 (citing *Strozinsky*, 237 Wis. 2d at 39-40).  
10 However, a distinction exists in constructive discharge jurisprudence: “an employee must  
11 independently prove a breach of contract *or* tort in connection with employment termination . . .  
12 .”<sup>8</sup> *Turner*, 7 Cal. 4th at 1251 (emphasis added). The present case must involve the latter

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15 <sup>7</sup> The petitioner cites a 2002 Seventh Circuit Court of Appeals case for the proposition that a subsequent refinement  
16 in relevant foreign case law recognizes “another way for an employee to prove constructive discharge,” thereby  
17 presumably removing the need “to allege harassment or any policy violations.” *Reply Br.* at 3-4. Specifically, the  
18 petitioner directs the Court’s attention to the following passage: “When an employer acts in a manner so as to have  
19 communicated to a reasonable employee that she will be terminated, and the plaintiff employee resigns, the  
20 employer’s conduct may amount to constructive discharge.” *Id.* at 4 (quoting *EEOC v. Univ. of Chicago Hosps.*,  
21 276 F.3d 326, 332 (7th Cir. 2002)). However, the Seventh Circuit poses the foregoing as an alternative to  
22 demonstrating the presence of intolerable or aggravated working conditions. *EEOC*, 276 F.3d at 332. The Court  
does not remove public policy from the examination, and, in fact, the plaintiff alleged discrimination on the basis of  
religion, a violation of the *Civil Rights Act*. *Id.* at 330-31. Furthermore, the Seventh Circuit cites two (2) federal  
appellate decisions in support of its expansion of the single prong, and each case rests squarely upon violations of  
fundamental public policy. *Id.* at 332 (citing *Burks v. Okla. Publ’g Co.*, 81 F.3d 975 (10th Cir. 1996) (involving  
allegations of age discrimination); *Lopez v. S.B. Thomas, Inc.*, 831 F.2d 1184 (2nd Cir. 1987) (involving allegations  
of discrimination on the bases of race and national origin)). Finally, none of the referenced cases confronted the  
issue of at-will employment. The Seventh Circuit plaintiff, Victoria Levya, was employed in the capacity of a  
recruiter in the University of Chicago Hospitals. *Id.* at 328.

23 <sup>8</sup> The terms of employment for a “for cause” employee may be discerned from existing personnel policies, and,  
24 therefore, an employer may be capable of violating either an express or implied agreement. *Turner*, 7 Cal. 4th at  
25 1252. For example, the former PERSONNEL MANUAL declared that “[t]hese policies are issued as the official  
26 directive of the obligations of the HoChunk [*sic*] Nation and the employees to each other . . . .” PERS. MANUAL,  
27 Intro. at 2. Despite this contractual foundation, in *Arnett*, the plaintiff, a “for cause” employee, could not ultimately  
28 demonstrate that the employer breached any of its contractual obligations. *Arnett*, CV 00-60 (HCN Tr. Ct., Sept. 25,  
2002) at 15-17. Moreover, the plaintiff failed to act as a reasonable person under the circumstances and also failed  
to provide the employer an opportunity to remedy the alleged intolerable condition(s). *Id.* at 17-21. In the tribal  
context, contractual and statutory obligations clearly converge, and, to reiterate, a “for cause” employee must  
additionally receive pre-termination procedural due process. However, “a valid procedural due process claim  
requires the employer’s conduct to have been motivated by a desire to avoid subjecting its actions to the scrutiny of a  
termination-related hearing.” *Fowler v. Carrollton Pub. Library*, 799 F.2d 976, 981 (5<sup>th</sup> Cir. 1986). No such  
allegation was present in *Arnett*.

1 identified species of constructive discharge earlier acknowledged by the Court. An at-will  
2 employee, by definition, exercises his or her duties in the absence of a contractual arrangement.  
3 “The nature of the plaintiff’s at-will employment, authorizing termination for any reason, is  
4 incompatible with plaintiff’s claim that [her] employer could not discharge [her] by subjecting  
5 [her] to intolerable conditions” in the absence of establishing a violation of a fundamental public  
6 policy.<sup>9</sup> *Starzynski v. Capital Pub. Radio, Inc.*, 88 Cal. App. 4th 33, 41 (Cal. Ct. App. 2001).

8 The Supreme Court of California explained the justification underlying the public policy  
9 exception to at-will employment. Briefly, “an employer has no right to terminate employment  
10 for a reason that contravenes fundamental public policy as expressed in a constitutional or  
11 statutory provision.<sup>10</sup> An actual or constructive discharge in violation of fundamental public  
12 policy gives rise to a tort action in favor of the terminated employee.” *Turner*, 7 Cal. 4th at 1252  
13 (citations omitted) (footnote added). More comprehensively,

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16 at root, the public policy exception rests on the recognition that in a  
17 civilized society the rights of each person are necessarily limited by the  
18 rights of others and of the public at large; this is the delicate balance which  
19 holds such societies together. Accordingly, while an at-will employee  
20 may be terminated for no reason, or for an arbitrary or irrational reason,  
21 there can be no right to terminate for an unlawful reason or a purpose that  
22 contravenes fundamental public policy. Any other conclusion would  
23 sanction lawlessness, which courts by their very nature are bound to  
24 oppose. . . . Just as the individual employment agreement may not include  
25 terms which violate fundamental public policy, so the more general  
26 “compensation bargain” cannot encompass conduct, such as sexual or  
27 racial discrimination, “obnoxious to the interests of the state and contrary  
28 to public policy and sound morality.”

29 *Gantt v. Sentry Ins.*, 1 Cal 4th 1083, 1094-95, 1101 (Cal. 1992) (citations omitted).

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30 <sup>9</sup> The majority of state courts recognize a public policy exception to the employment-at-will doctrine, including  
31 Wisconsin, *see Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 572-73 (Wis. 1983), but several states have  
32 declined to coalesce with the majority position. *See, e.g., Murphy v. Am. Home Products Corp.*, 58 N.Y.2d 293  
33 (N.Y. 1983). This Court shall not choose a position, leaving that initial decision to the GRB.

34 <sup>10</sup> The Court later “acknowledge[d] the fact that fundamental public policy may be enunciated in administrative  
35 regulations that serve the [corresponding] statutory objective.” *Green v. Ralee Eng’g Co.*, 19 Cal. 4th 66, 80 (Cal.  
36 1998).

1           When attempting to ascertain a violation of public policy, the Court cannot concentrate  
2 upon claims “that concern merely ordinary disputes between employer and employee.” *Id.* at  
3 1090. Instead, “the policy in question must involve a matter that affects society at large rather  
4 than a purely personal or proprietary interest of the plaintiff or employer; in addition, the policy  
5 must be ‘fundamental,’ ‘substantial’ and ‘well established’ at the time of the discharge.” *Id.*  
6 (citation omitted). More specifically, “[t]ort claims for wrongful discharge typically arise when  
7 an employer retaliates against an employee for ‘(1) refusing to violate a statute . . . , (2)  
8 performing a statutory obligation . . . , (3) exercising a statutory right or privilege . . . , or (4)  
9 reporting an alleged violation of a statute of public importance.’”<sup>11</sup> *Turner*, 7 Cal 4th at 1256  
10 (citing *id.* at 1091-92).

13           As stated above, the Court shall not adjudge whether the ERA should be interpreted in  
14 such a manner so as to recognize a defense of constructive discharge. Similarly, the Court shall  
15 not pre-determine whether the GRB believes it can recognize the aforementioned public policy  
16 exception. However, the Court shall presume the existence of each for purposes of addressing  
17 the instant action because the petitioner could not prevail in the absence of either. In doing so,  
18 the Court does not appropriate the fact-finding role of the GRB. Essentially, “even if [the  
19 petitioner] could raise a triable issue of fact as to constructive discharge, h[er] case cannot reach  
20 the trier of fact unless [s]he can also show a *wrongful* discharge in violation of fundamental  
21 public policy.” *Id.* at 1256.

24           Quite clearly, the petitioner has not alleged a violation of fundamental public policy, but  
25 has rather attempted to avoid presenting such a showing. *Supra* note 7. The petitioner has  
26 nonetheless cited four (4) potential statutory provisions capable of evidencing policy violations.

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<sup>11</sup> In California, this guideline would be read to incorporate the modification pronounced in *Green*. *Supra* note 10.

1 First, the petitioner apparently claims that Executive Director Decorah failed to adhere to the  
2 principles underlying the practice of affording performance evaluations. *Reply Br.* at 5 (citing  
3 ERA, § 5.14a-b). Yet, this assertion seemingly ignores the fact that the petitioner was an at-will  
4 employee dischargeable for any reason or no reason at all. Second, the petitioner apparently  
5 claims that Executive Director Decorah engaged in harassment when he requested that the  
6 petitioner submit her resignation. *Id.* (citing ERA, § 5.6d(1)). The ERA sanctions harassment  
7 since capable of “creating an unreasonably intimidating, hostile, and objectively offensive  
8 working environment.” ERA, § 5.6d(1). The petitioner, however, can hardly contend that her  
9 supervisor’s actions constituted harassment when she states in her resignation letter that  
10 Executive Director Decorah “offer[ed] the following: Severance Pay for two weeks, Guaranteed  
11 Unemployment, Placement on a Recall List, and no notation of the discharge on my record.”  
12 *Discharge of Employment/Resignation Letter* (Feb. 5, 2008). The petitioner’s supervisor was  
13 under no obligation to offer the petitioner anything, and could have instead chosen to  
14 immediately terminate her. Third, the petitioner apparently claims that her supervisor’s actions  
15 prevented her from complying with the statutory procedure for submitting a resignation. *Reply*  
16 *Br.* at 5 (citing ERA, § 5.10b). The preceding discussion adequately addresses this contention.  
17 Finally, the petitioner apparently claims that she could not be subjected “to coercive tactics that  
18 constitute a deprivation of a legally protected right.” *Id.* (citing ERA, § 5.30e(20)). The  
19 petitioner does not identify the legally protected right in question, but, as explained above, the  
20 petitioner maintained no right to procedural due process or to grieve, with the possible exception  
21 of a wrongful discharge in violation of fundamental public policy.  
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26 “The tort of wrongful discharge is not a vehicle for enforcement of an employer’s internal  
27 policies . . . .” *Turner*, 7 Cal. 4th at 1257. Unfortunately, the petitioner pleads nothing else.  
28

1 While one may empathize with the petitioner’s plight, she voluntarily accepted this potentiality  
2 by accepting an at-will position. The Court accordingly must deny the petitioner’s request for  
3 relief, and shall not remand the case to the GRB for further consideration with instructions.

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5 The parties retain the right to file a timely post judgment motion with this Court in  
6 accordance with *HCN R. Civ. P. 58*, Amendment to or Relief from Judgment or Order.

7 Otherwise, “[a]ny final *Judgment* or *Order* of the Trial Court may be appealed to the Supreme  
8 Court. The *Appeal* must comply with the *Rules of Appellate Procedure* [hereinafter *HCN R.*  
9 *App. P.*], specifically *Rules of Appellate Procedure*, Rule 7, Right of Appeal.” *HCN R. Civ. P.*  
10 61. The appellant “shall within sixty (60) calendar days after the day such judgment or order  
11 was rendered, file with the Supreme Court Clerk, a *Notice of Appeal* from such judgment or  
12 order, together with a filing fee as stated in the appendix or schedule of fees.” *HCN R. App. P.*  
13 7(b)(1). “All subsequent actions of a final *Judgment* or Trial Court *Order* must follow the [*HCN*  
14 *R. App. P.*].” *HCN R. Civ. P.* 61.

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18 **IT IS SO ORDERED** this 22<sup>nd</sup> day of April 2009, by the Ho-Chunk Nation Trial Court  
19 located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.

20  
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22 \_\_\_\_\_  
23 Honorable Todd R. Matha  
24 Chief Trial Court Judge

