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

LORNA MAE HACH, **Motion for Summary Judgement (Granted)**

Plaintiff,

v.

**HO CHUNK CASINO &
HO-CHUNK NATION,**

Case No.: **CV 98-63**

Defendants.

Appearances: Lorna Mae Hach in pro per, Todd Matha for Ho Chunk Casino & Ho-Chunk Nation. A Hearing in this case was held on March 8, 1999 at the Ho-Chunk Nation Court House at Black River Falls, WI. At the hearing the *Motion for Summary Judgement* was argued and granted.

Introduction

The plaintiff was a black jack dealer for the Ho-Chunk Casino. She was given a verbal warning, then a written warning, one day suspension, a five-day suspension and finally terminated for excessive absenteeism. She appeals her firing on two bases, first that she had a disability of depression that caused her absenteeism and second that she did not violate a work agreement

Facts

1. Ms. Lorna Mae Hach was an employee of the Ho-Chunk Nation at its Ho-Chunk Casino wholly located upon trust lands of the Ho-Hunk Nation near Baraboo, Sauk Co. Wisconsin. She began work at the Casino March 19, 1995.

2. Ms. Hach began to have a high absenteeism rate in 1997. See Exhibit L

3. As a result of her high absenteeism, Ms. Hach was referred to the Employee Assistance Program [EAP] which sent her to a mental health clinician Dr. Rebecca Rameriz who diagnosed Ms. Hach as having a major depression. See Exhibit P, dated Sept. 26, 1997.

1 4. On October 16, 1997, Ms. Hach was disciplined via a verbal warning for excessive
2 absenteeism regardless of reason. Exhibit B.

3 5. On May 29, 1998, Ms. Hach was given a written warning for excessive absenteeism in
4 that she had only worked 37 out of 87 possible work days for the previous five months. Exhibit C.

5 6. On June 15, 1998, Ms. Hach was suspended for one day (June 19) for continuing to show
6 up late or be absent from her shift without excuse. The suspension documentation outlines that she
7 failed to show up for five days of work from the date of her written warning to the date of the suspension
8 being levied.

9 7. On August 6, 1998, Ms. Hach's supervisor entered into a written work agreement with
10 Ms. Hach requiring her to show up for work, call in at least one hour before she knew she would be
11 absent and provide a Doctor's statement about her illness or injury which prevented her from working.
12 Exhibit A. This work agreement was to last for 90 days. It was signed by Ms. Hach and her supervisors
13 and read as follows:

14 You will conduct yourself in an utmost professional manner at all times and you will not
15 miss any days of scheduled work for any reason unless approve [sic] by your supervisor
16 for the period of the next ninety days

16 If it becomes necessary for you to miss any scheduled days of work due to illness/injury,
17 you must telephone the table games department PERSONALLY at least one hour before
18 your start time. Should the above situation occur, you shall be required to provide a
19 Doctor's statement of your specific ailment/injury.

18 8. Ms. Hach was again suspended for five days effective August 14, 1998 for violating her
19 work agreement. The suspension was due to end August 22, 1998. Exhibit E. Ms. Hach did not show
20 or call in on August 22, 1998.

21 9. Ms. Hach was terminated on August 24, 1998.

22 10. Ms. Hach obtained a Doctor's statement dated August 26, 1998 which stated that she
23 was, "Currently suffering from depression on this date. She reports the same for the past weekend and is
24 probably correct but I cannot verify that." Dr. Holmen M.D. Exhibit K.

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Decision

This is an appeal from an employment termination where the plaintiff, a blackjack dealer at the Ho Chunk Casino near Baraboo WI sued to gain reinstatement to her job. The Ho-Chunk Casino is a wholly owned enterprise of the Ho-Chunk Nation located on the trust lands of the Nation and receives no operating funds from the Federal government. It was admitted by the plaintiff that she violated her work agreement and failed to call or show up for work the day in question. Pursuant to the work agreement the plaintiff was required to call in one hour before her shift if she knew she would be unable to work on a given day. Ms. Hach was also permitted to have excused absences so long as she obtained a Doctor’s slip stating why she was absent from work.

The plaintiff admitted that she was in the parking lot dressed and ready for work on the date in question. She stated that she had recently heard bad news about her sister’s health and was suffering from clinical depression that made it impossible for her to walk into the Casino to inform her shift supervisor that she was not in a fit condition to work. She asserted at oral argument on the *Motion for Summary Judgement* that she was protected by federal law she could not be fired due to illness. “My absences were for valid medical reasons and under federal law an employer cannot discriminate for an illness.” *Response to Motion for Summary Judgement* at 1, dated March 8, 1999.

In ruling on this *Motion for Summary Judgment* the Court decides all favorable inferences in favor of the nonmoving party. Here the plaintiff has asserted a right to protection under Federal law. The plaintiff did not articulate the specific federal law her right stems from. However, the Court accepts that she might have some right grounded in the *American’s with Disabilities Act*. See 42 U.S.C. § 12,107 *et. Seq.* . The *Americans with Disabilities Act* [hereafter ADA] generally protects employees who have a major life activity impaired by a disability from discrimination including hiring,

1 advancement, discharge, compensation, job training and other terms, condition and privileges of
2 employment. *See* 42 U.S.C. §12,112.

3 The Court accepts for this motion that Ms. Hach’s claim of clinical depression would be a
4 “disability” within the meaning of the ADA. The Court assumes *arguendo* that Ms. Hach would be a
5 qualified individual with a disability within the meaning of the ADA, i.e., an individual with a disability
6 who, without reasonable accommodation, can perform the essential functions of the employment
7 position that such individual holds or desires. *See* 42 U.S.C. §12,111(8). Indeed, the facts of this case
8 are that Ms. Hach performed the job she wishes to retain since 1995 until she began to suffer problems
9 with attendance related to her depression in 1997.

10 The problem with Ms. Hach’s claim of protection under the ADA is, as the defendant points out,
11 she works for a non-covered employer. As defined by the ADA only covers specific employers with the
12 proper nexus under the Act. Indian Tribes are not employers under the ADA. The ADA specifically
13 states “that the term “employer” does not include --(i) the United States, a corporation wholly owned by
14 the government of the United States, *or an Indian tribe.*” *See* 42 U.S.C. §12,111(5)(B)(i). Relying on
15 the specific language of the ADA this Court holds that Ms. Hach is not protected under the ADA.

16 The rest of the record is clear. Ms. Hach admitted to neither calling in nor showing up for work
17 as was required under her work agreement. There is ample evidence to show that there was substantial
18 evidence to find she was violating the *Personnel Policy and Procedures Manual* provision on
19 attendance. The key requirement on her work agreement was that she, “must telephone the table games
20 department PERSONALLY at least one hour before your start time.” The Court finds that the call in
21 requirement was reasonable. Therefore, the fact that Ms. Hach did not call in means that she cannot
22 benefit from the Doctor’s excuse. She could go to a Doctor who could legitimately excuse her *if and*
23 *only if* she had preserved her options by calling in one hour before work or shown up one hour early and
24 explained she was unable to work. Ms. Hach did not do that. Therefore, the Court finds against her on
25 her claim of any violation of her work agreement.

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27 *Hach v. Ho-Chunk Casino, Table Games, CV 98-63*

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1 In the alternative, if this Court were to rule on the issue of attendance under the ADA, it would
2 rule for the defendant on the basis that Ms. Hach ceased to be a qualified individual when her repeated
3 absences were no longer reasonable. Absences caused by a medical condition may be excused if the
4 employer may reasonably accommodate those requests. However, it is not the absence itself but rather
5 the excessive frequency of an employee's absences in relation to that employees' job responsibilities
6 that may lead to a finding that an employee is unable to perform the duties of his job. This court finds
7 that Ms. Hach's excessive absences made her unable to perform her job. *See Waggoner v. Olin Corp.*,
8 No. 96-782 (7th Cir. Feb. 26, 1999) *quoting with approval Haschmann v. Time Warner Entertainment*
9 *Co.* 151 F.3d 591, 602 (7th Cir. 1998). In *Waggoner*, the Seventh Circuit went to great length to explain
10 the rudimentary basics of the ADA, that an employee *who does not come to work* cannot perform the
11 essential functions of his job. *See Id. Quoting with approval Nowak v. St. Rita High School*, 142 F.3d
12 999 (7th Cir. 1998) (emphasis added).

13 That is the case here. Ms. Hach is a black jack dealer. In order to work she must be at the job
14 site, an Indian Casino on trust land. Telecommuting is not an option. Black jack is legal in Wisconsin
15 only on trust land at a Casino owned by a federally recognized Indian Tribe with an approved gaming
16 compact with the State of Wisconsin. Black jack requires the presence of both patrons and the dealer.
17 For some, the essential enjoyment of blackjack is the interaction between themselves, the dealer and
18 other players. Ms. Hach's absence requires that the Casino hire and pay another dealer to do her job or
19 it will cease to satisfy the demands of its clientele and they will leave for other more distant Casino's,
20 perhaps never to return. Being on the job and ready to perform is an essential element of Ms. Hach's job
21 that she was unable to do on the day in question. The Court finds the defendant's accommodation of the
22 plaintiff reasonable and that substantial evidence supports its decision to terminate her services.

23 The Court holds in favor of the defendant on the *Motion for Summary Judgement*. This case
24 must be and is hereby dismissed.

25 **IT IS SO ORDERED** this _____ day of April 1999 from within the sovereign lands of the Ho-

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27 *Hach v. Ho-Chunk Casino, Table Games, CV 98-63*

Page 5

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1 Chunk Nation.

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Hon. Mark Butterfield
5 HCN Chief Trial Judge

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27 *Hach v. Ho-Chunk Casino, Table Games, CV 98-63*

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