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

DONNA L. PETERSON, **ORDER (Granting Summary Judgment)**
Plaintiff,
v.
HCN COMPLIANCE DIVISION, Case No.: **CV 98-51**
Defendant.

INTRODUCTION

This case represents an appeal of an employment grievance. The plaintiff asserts discrimination based on her age in violation of the Ho-Chunk Nation (hereinafter “HCN” or “Nation”) PERSONNEL POLICIES AND PROCEDURES MANUAL (hereinafter “PPM”) and that the Nation failed to follow the PPM. The plaintiff argues the alleged discrimination took the form of an involuntary transfer and decrease in wages. The defendant filed a *Motion for Summary Judgment* asserting that the plaintiff failed to state her *prima facie* case and failed to rebut the legitimate, non-discriminatory rationale offered by the defendant. The Court has reviewed the briefs by the parties and is now prepared to **GRANT** the defendant’s *Motion*.

APPLICABLE LAW

PERSONNEL POLICIES AND PROCEDURES MANUAL, Ch. 1, p. 3, Equal Employment Opportunity,

A. Equal Employment Policy

It is the Nation's policy to employ, retain, promote, terminate, and otherwise treat any and all employees and job applicants on the basis of merit, qualifications, and competence. The Ho Chunk Nation does retain the right to exercise Native American preference in hiring Native American job applicants. This policy shall otherwise be applied without regard to any individual's sex, race, religion, national origin, pregnancy, age, marital status, sexual orientation, or physical handicap.

1 **HCN R. Civ. P. 55 Summary Judgement.**

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

6 **FINDINGS OF FACT**

7 1. Donna Peterson, the plaintiff, was born on January 12, 1934. *See Plaintiff's Amended Complaint*
8 at 1.

9 2. The defendant, the Ho-Chunk Nation Compliance Division, hired the plaintiff as a data
10 coordinator on October 4, 1995. The plaintiff was 61 at the time she was hired. *See Defendant's Motion*
11 *for Summary Judgment*, Exhibit E.

12 3. On September 17, 1997, the plaintiff was given an in-house promotion from data coordinator to
13 agent. *See Defendant's Motion for Summary Judgment*, Exhibit E.

14 4. The plaintiff generally received good evaluations but on, or about, February 25, 1998 she
15 received a verbal warning for breaches in confidentiality. *See Defendant's Motion for Summary*
16 *Judgment*, Exhibit E, G.

17 5. A severe budget cut necessitated a 43.5% reduction in force in the Compliance Division on June
18 9, 1998. *See Defendant's Motion for Summary Judgment*, Exhibit F at 8, 15. The Nation employed
19 seventeen (17) people as Compliance agents prior to the reduction in force. The reduction in force
20 affected seven (7) of those people - two were voluntarily transferred (including plaintiff), one was
21 demoted, one (1) voluntary layoff and three (3) involuntary lay-offs. Five of the seven (7) Compliance
22 Agents affected by the reduction in force were under forty (40) years of age. Five (5) of the ten (10)
23 Compliance Agents retained were under forty (40) years of age. Four (4) those five (5) agents possessed
24 more seniority than the plaintiff; one (1) of the four (4) qualified for Native American preference.

25 6. The plaintiff accepted a voluntary transfer to the Tribal Aging Unit as a Secretary I on June 9,
26 1998. The transfer form described her as a "very good, hard, dedicated employee." *See Defendant's*

1 *Motion for Summary Judgment*, Exhibit H.

2 7. The defendant presented a legitimate, non-discriminatory reason for its employment decision.
3 *Plaintiff's Brief in Response to the Defendant's Summary Judgment Motion*, page 3, filed March 11,
4 1999; *See Defendant's Motion for Summary Judgment* at 6. The rationale was the reduction in force.

5 8. In her *Complaint*, the defendant states that "she was exposed to discriminatory remarks about her
6 age in the presence of Tris Y. YellowCloud and James Lienlokken, the plaintiff's supervisor," and that
7 "Tris Y. YellowCloud directed discriminatory comments regarding Plaintiff's age to Plaintiff."
8 *Plaintiff's Brief in Response to the Defendant's Summary Judgment Motion*, page 2, filed March 11,
9 1999.

10 9. The plaintiff offered no specific factual allegations supporting the assertion that Ms.
11 YellowCloud allowed, or took no action regarding, discriminatory comments made to the plaintiff in
12 Ms. YellowCloud's presence, such as what was said, who said it and when such comments were made.

13 10. For purposes of summary judgment, the Court assumes Ms. YellowCloud made a statement that
14 the plaintiff's medication in combination with her age might be affecting the plaintiff's attitude.

15 11. The plaintiff offered no evidence comparing her performance with that of other employees.

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DECISION

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19 I. STANDARD FOR SUMMARY JUDGMENT

20 The defendant filed a *Motion for Summary Judgment*. The standard for summary judgment is
21 well settled law in the Ho-Chunk Nation Courts. *Jean Day, et al. v. HCN Personnel Dept.*, CV 96-15, 5
22 (HCN Tr. Ct. Aug. 21, 1996); *Vanasco v. National Louis University* 137 F.3d 962, 965 (7th Cir. 1998);
23 *HCN R. Civ. P. 55*; *See also Fed. R. Civ. P. 56 (c)*. *HCN R. Civ. P. 55* states, "[T]he Court will render
24 summary judgement in favor of the moving party if there is no genuine issue as to material fact and the
25 moving party is entitled to judgement as a matter of law." Summary judgment is appropriate only when,

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1 after reviewing the record in the light most favorable to the non-moving party, “the pleadings,
2 depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show
3 that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as
4 a matter of law.” *Vanasco*, 137 F.3d at 965. “This standard is applied with added rigor in employment
5 discrimination cases, where intent and credibility are crucial issues.” *Sample v. Aldi Inc.*, 61 F.3d 544,
6 547 (7th Cir. 1995), quoting *Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035 (7th Cir. 1993). Furthermore,
7 a non-moving party may not rest on its pleadings and must instead set forth specific facts showing that
8 there is a genuine issue for trial. See *Vanasco*, 137 F.3d at 965. A dispute about a material fact is
9 “genuine” only if a reasonable trier of fact could render a verdict for the non-moving party if the record
10 at trial were identical to the record compiled in the summary judgment proceeding. See *Griffen v. City of*
11 *Milwaukee*, 74 F.3d 824, 827 (7th Cir. 1996).

12 Using this standard, the Court considers each of the plaintiff’s claims. First, she claims she was
13 discriminated against on the basis of age. Second, she claims the Nation failed to comply with the PPM.
14 This second claim seems to be an argument that the plaintiff’s procedural due process rights were
15 violated with regard to her transfer. Upon review, the Court grants the defendant’s *Motion for Summary*
16 *Judgment*.

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18 **II. AGE DISCRIMINATION**

19 **A. Introduction**

20 This case is the first of its kind before the Ho-Chunk Nation Courts. Hence, the Court must first
21 address what law and rules apply. The PPM contains the only Ho-Chunk authority on the issue of age
22 discrimination. The PPM states:

23 It is the Nation's policy to employ, retain, promote, terminate, and otherwise treat any
24 and all employees and job applicants on the basis of merit, qualifications, and
25 competence. The Ho Chunk Nation does retain the right to exercise Native American
26 preference in hiring Native American job applicants. This policy shall otherwise be
27 applied without regard to any individual's sex, race, religion, national origin, pregnancy,
28 age, marital status, sexual orientation, or physical handicap.

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2 PERSONNEL POLICIES AND PROCEDURES MANUAL, Ch. 1, p. 3, Equal Employment Opportunity, A.
3 Equal Employment Policy.

4 This broad statement of law leaves the Court with little guidance to determine when age
5 discrimination occurs. While the Court wishes to follow the intent of the Legislature, it has little with
6 which to determine what that intent is. Nonetheless, a Court faced with parties seeking resolution of a
7 dispute must give an answer. This reflects the present situation. As a result, the Court turns to
8 persuasive authority for guidance.¹

9 The parties have turned to the Age Discrimination in Employment Act (hereinafter “ADEA”), a
10 federal law on which there are many federal appellate and Supreme Court opinions. *See* 29 U.S.C.
11 § 623(a). The cases lay out two routes by which a plaintiff can prove her claim. *See Vanasco*, 137 F.3d
12 962. First, a plaintiff can show direct or circumstantial proof of discrimination such as statements
13 explicitly showing a discriminatory intent in the employment decision. *See McCoy v. WGN Continental*
14 *Broadcasting Co.*, 957 F.2d 368, 371 (7th Cir. 1992). However, such proof rarely exists, and if it does,
15 the proof usually remains in the employer’s control. Therefore, the federal courts have provided a
16 second method of proving age discrimination, the burden-shifting method. *See Id.* The plaintiff
17 proceeded under the burden-shifting method of proof .

18 The burden-shifting method of proof has three steps. *See Id.* First, the plaintiff must present
19 evidence sufficient to prove each element of the basic claim. This evidence must be such that the
20 plaintiff would win the case if the defendant chose not make argue to the contrary. This is called the
21 *prima facie* case. Once made, the *prima facie* case raises a rebuttable presumption of discrimination.
22 This then shifts the burden of production, but not persuasion, to the defendant. The defendant must then
23 carry its burden by producing a legitimate, non-discriminatory reason for the adverse employment

24 ¹ The Court is forced to look at Federal guidelines on age discrimination due to the lack of tribal guidelines. If the
25 HCN Legislature is uncomfortable with this, they are free to establish clear statutory guidelines.

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1 decision. Once the defendant proffers the legitimate reason, the presumption of discrimination dissolves,
2 and the burden again shifts back to the plaintiff. The plaintiff must then present proof that the legitimate
3 reason offered is actually a pretext to mask the discriminatory reason.

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5 **B. *Prima Facie* Case**

6 The specific elements of the *prima facie* case to be applied in an age discrimination claim depend
7 on the facts under consideration. Usually, the classic ADEA claim involves the termination of the
8 plaintiff followed by the hiring of a younger replacement. However, the present case differs in that it
9 involves a reduction in force, where no replacements are sought, and a different set of elements apply.

10 The parties argue two different versions of the *prima facie* case applied by different federal
11 circuit courts. The Seventh Circuit states the *prima facie* case in ADEA reduction in force situations as:
12 1) the plaintiff belongs to the protected class², 2) the plaintiff's performance met the employer's
13 legitimate expectations, 3) the plaintiff received a demotion or discharge, and 4) similarly situated
14 employees under forty (40) years of age received more favorable treatment. *See Testerman v. EDS*
15 *Technical Products Corp.*, 98 F.3d 297 (7th Cir. 1996); The Fourth Circuit states the *prima facie* case in
16 ADEA reduction in force situations as 1) the plaintiff was protected by the ADEA, 2) the plaintiff was
17 selected for discharge from a larger group of candidates, 3) the plaintiff was performing at a level
18 substantially equivalent to the lowest level of those of the group retained and 4) the process of selection
19 produced a residual workforce of persons in the group containing some unprotected persons who were
20 performing at a level lower than that at which plaintiff was performing. *See Mitchell v. Data General*
21 *Corp.*, 12 F.3d 1310, 1315 (4th Cir. 1993).

22 The Court applies the *prima facie* case stated by the Fourth Circuit because it is narrower and

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24 ² The protected class in cases brought under the ADEA consists of employees over the age of forty (40). However,
25 that distinction was made by Congress in the ADEA itself. Ho-Chunk law does not so limit the group of people protected by
its Equal Employment Policy.

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1 more closely follows the fact pattern in this case.³ Applying this test to the present case, the Court
2 grants summary judgment to the defendant for two reasons. First, the plaintiff was not demoted or
3 discharged as contemplated by the Nation’s policy against age discrimination. The Nation’s policy
4 proscribes involuntary adverse actions, not consensual agreements to transfer. In other words, “What
5 harm has occurred?” Second, even assuming *arguendo* that the plaintiff has been harmed, the plaintiff
6 has failed to present any proof comparing her performance with the performance of other employees.
7 Hence, summary judgment is appropriate.

8 First, a consensual agreement does not constitute discrimination because it does not result in a
9 demotion or discharge as contemplated by the age discrimination clause of the PPM. Here the plaintiff
10 voluntarily gave up her property right in her job. Because the transfer at issue in this case was voluntary,
11 no demotion or discharge occurred, absent evidence of coercion. As the plaintiff agreed that the transfer
12 was voluntary and has pled no facts supporting coercion to submit to a “voluntary” layoff, summary
13 judgment is appropriate on this point.

14 Second, the plaintiff failed to submit sufficient proof of the third and fourth elements of the
15 *prima facie* case. In order to succeed in her ADEA claim, the plaintiff must show she was performing at
16 a level substantially equivalent to the lowest level of those of the group retained. Additionally, the
17 plaintiff must show that the selection process produced a residual workforce containing some
18 unprotected persons who were performing at a level lower than the plaintiff was performing. Simply

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20 ³ As a preliminary matter the Court notes that unlike the ADEA, the language of the PPM does not limit those
21 protected to employees over 40. The PPM language protects every employee. Fortunately, this distinction does not change
22 the Court’s present analysis.

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1 stated, the employer is entitled to keep its most productive workers. Both the third and fourth elements
2 compare the plaintiff's job performance with the job performance of the other employees considered for
3 removal. This comparison requires evidence of the job performance of the other employees in the
4 Compliance Division.

5 The plaintiff submitted no such evidence. She presented reviews of her own performance, which
6 are admittedly good. However, all the employees could be performing excellent work and she could still
7 be the least excellent. Without evidence of the performance of the other employees, the Court cannot
8 compare employees' relative performance. The plaintiff may not rest on her pleadings but must come
9 forth with specific facts. The plaintiff failed to meet the summary judgment challenge on this point as
10 well.

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12 **C. Pretext**

13 The plaintiff has also failed in two ways to bring forth evidence sufficient to present a genuine
14 issue of material fact as to whether the Nation's proffered legitimate reason, *i.e.*, the budget cut,
15 constitutes a pretext. First, the only relevant specific fact brought forth by the plaintiff is an isolated
16 statement by Tris YellowCloud that does not amount to age discrimination.⁴ Second, as stated above,
17 the voluntary nature of the transfer undermines the plaintiff's position that the defendant's reasoning is
18 somehow a deception.

19 The parties agree that the defendant has stated a legitimate, non-discriminatory reason for its
20 actions, namely the budget reduction of roughly 43.5%. The defendant has also stated that Ms.
21 YellowCloud made her decisions on who to retain and who to let go based on a number of non-age-
22 related criteria. These assertions shift the burden back to the plaintiff to prove that they actually
23 constitute a pretext.

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⁴ See Finding of Fact 10.

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1 In proving the employer’s reason a pretext, the employee must show that the reason is either a
2 lie, *Vanasco v. National-Louis University*, 137 F.3d 962 (7th Cir. 1988), a phony reason, *Visser v.*
3 *Packer Engineering Associates, Inc.*, 924 F.2d 655 (7th Cir. 1991), or a post-hoc rationalization,
4 *Massarsky v. General Motors Corp.*, 706 F.2d 111 (3rd Cir. 1983). “[T]he issue of pretext does
5 not address the correctness or desirability of reasons offered for employment decisions. Rather,
6 it addresses the issue of whether the employer honestly believes in the reasons it offers.” *McCoy*, 957
7 F.2d 368, 373. An erroneous, mistaken or illogical business decision does not give rise to an
8 ADEA violation. See *Furr v. Seagate Technology Inc.*, 82 F.3d 980, 986 (10th Cir. 1996). A
9 court “does not sit as a super-personnel department that reexamines an entity’s business
10 decisions.” *Chiaramonte v. Fashion Bed Group, Inc.*, 129 F.3d 391, 400 (7th Cir. 1997)
11 (quoting *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464 (7th Cir. 1986)). The discriminatory
12 motive “must be a sufficient condition, or but-for cause, of the employee’s [change in employment].”
13 *Visser*, 924 F.2d 655, 658. Age discrimination must represent the determining factor in the business
14 decision. See *Williams v. Williams Electronics, Inc.*, 856 F.2d 920, 923 (7th Cir. 1988). The
15 Seventh Circuit has ignored discriminatory comments and actions attributable to others not
16 involved in the employment decision. *Testerman*, 98 F.3d 297, 301.

17 This Court focuses only on the decision and statements of Ms. YellowCloud as it was she who
18 made the decision on the reduction in force. The only proof of pretext the plaintiff offers is that Ms.
19 YellowCloud allowed disparaging, age-related comments to be made about the plaintiff and that Ms.
20 YellowCloud made one such comment herself. The plaintiff has not sufficiently substantiated the
21 circumstances surrounding the comments Ms. YellowCloud supposedly allowed to be made in her
22 presence. As a result, the Court holds that they are insufficient to raise a genuine issue of material fact.

23 Furthermore, in considering the statement allegedly made by Ms. YellowCloud herself, the First
24 Circuit, in interpreting the ADEA, has stated that “the age statute was not meant to prohibit employment
25 decisions based on factors that sometimes accompany advancing age, such as declining health or
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1 diminished vigor and competence.” *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1016 (1st Cir. 1979). In the
2 present case, Ms. YellowCloud stated that the plaintiff’s medication in combination with her age might
3 be affecting the plaintiff’s attitude.⁵ This single statement, without more, is insufficient to rebut the
4 strong, legitimate non-discriminatory reason offered by the defendant, i.e. a severe budget cut. Plaintiff
5 might have support her assertion with such details as when the statement was made, the context in which
6 the statement was made and the number of times the statement, or one like it, was made. No reasonable
7 trier of fact could conclude that Ms. YellowCloud’s single statement calls into question “the issue of
8 whether the employer honestly believes in the reasons it offers.” *McCoy*, 957 F.2d 368. Accordingly,
9 the Court holds that these statements do not constitute an assertion sufficient to raise a genuine issue of
10 material fact. No reasonable fact finder could find for the plaintiff based on the facts she has raised.

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12 **III. FAILURE TO COMPLY WITH THE PPM**

13 The plaintiff’s *Amended Complaint* also claimed the defendant failed to comply with the PPM
14 with regard to the layoff. As neither the defendant’s *Motion for Summary Judgment* nor the plaintiff’s
15 *Response* addressed this claim, the Court does not address this issue.

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CONCLUSION

18 The Court concludes the defendant is entitled to summary judgment on the age discrimination
19 claim. The plaintiff failed to raise a genuine issue of material fact with regard to either the third and
20 fourth elements of her *prima facie* age discrimination case. The plaintiff also failed to prove that the

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⁵ See Footnote 4 *supra*. Plaintiff has offered neither the timing nor context of this statement. Without such
22 information, the Court must hold the statement insufficient to rebut the legitimate nondiscriminatory reason offered.

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1 defendant's rationale for the employment decision actually constitutes a pretext.

2 All parties have the right to appeal a final judgement or order of the Trial Court. If either party is
3 dissatisfied with the decision rendered by this Court, they may file a *Notice of Appeal* with the Ho-
4 Chunk Supreme Court within thirty (30) calendar days from the date such final judgement or order is
5 rendered. The *Notice of Appeal* must show service was made upon the opposing party prior to its
6 acceptance for filing by the Clerk of Court. The *Notice of Appeal* must explain the reason the party
7 appealing believes the decision appealed from is in error. All appellate pleadings to the Ho-Chunk
8 Supreme Court must be in conformity with the requirements set by the Ho-Chunk Supreme Court in
9 accordance with the Ho-Chunk Nation *Rules of Appellate Procedure*.

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11 **IT IS SO ORDERED** this 22nd day of June 1999 from within the sovereign lands of the Ho-
12 Chunk Nation.

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15 _____ ,
16 Hon. Mark Butterfield
17 HCN Chief Trial Judge

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