

1  
2  
3  
4  
5  
6  
7  
8

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

---

**Karen Raines,**  
Petitioner,

v.

Case No.: CV 99-32c

**Ho-Chunk Nation,**  
Respondent.

---

9  
10  
11

**ORDER  
(Motion to Dismiss: Granting in Part, Denying in Part and  
Remanding in Part)**

---

12  
13

**INTRODUCTION**

14           The Court must determine whether or not to dismiss the instant action for lack of subject  
15 matter jurisdiction and/or failure to join a necessary party. The multiple claims of the movant  
16 necessitated the application of varying standards in assessing the merits of the defendant's *Motion to*  
17 *Dismiss*. The Court's analysis of the defendant's *Motion* follows below.

18  
19  
20

**PROCEDURAL HISTORY**

21           The plaintiff, Karen Raines, initiated the current action by filing a *Complaint* with the Court  
22 on May 24, 1999. Consequently, the Court issued a *Summons* accompanied by the above-mentioned  
23 *Complaint* on May 25, 1999, and delivered the documents by certified mail to the defendant,  
24 Rainbow Casino. An agent of the defendant signed for the certified mailing on May 27, 1999 as  
25 indicated on the Domestic Return Receipt. The *Summons* informed the defendant of the right to file

1 an *Answer* within twenty (20) days of the issuance of the *Summons* pursuant to the *HCN R. Civ. P.*  
2 5(B). The *Summons* also cautioned the defendant that a *default judgment* could result from failure to  
3 file within the prescribed time period. The defendant, by and through Attorney William A.  
4 Boulware, Jr., filed the *Answer*, *Defendant's Notice and Motion to Dismiss*, and *Defendant's Brief in*  
5 *Support of Motion to Dismiss* on June 14, 1999, serving such documents on the plaintiff via first  
6 class mail. The Court subsequently entered its *Order (Motion Hearing)* on June 21, 1999  
7 accompanied by *Notice(s) of Hearing*, informing the parties of the date, time and location of the  
8 *Motion Hearing/Scheduling Conference*. Attorney Gerald R. Fox, however, filed a June 28, 1999  
9 *Notice of Entry of Appearance* on behalf of the plaintiff, and informed the Court of a prior  
10 scheduling conflict rendering it impossible to attend the July 6, 1999 *Motion Hearing/Scheduling*  
11 *Conference*. The Court accommodated the plaintiff in its June 29, 1999 *Order (Postponement)*,  
12 extending the deadline for filing a *Response* to the *Defendant's Motion to Dismiss* to July 6, 1999  
13 and requiring the plaintiff to coordinate a date and time for a *Motion Hearing/Scheduling*  
14 *Conference*. The plaintiff failed to file a timely *Response* since the Court did not receive any  
15 documentation until after business hours on July 6, 1999. The Court did convene a *Motion*  
16 *Hearing/Scheduling Conference* on July 20, 1999 at 9:00 A. M. The following parties appeared at  
17 the *Conference/Hearing*: Attorney William A. Boulware, Jr. and Law Clerk Rain Minns; Attorney  
18 Gerald R. Fox; and Karen Raines.  
19  
20  
21  
22

## 23 **APPLICABLE LAW**

24  
25  
26 **CONSTITUTION OF THE HO-CHUNK NATION**

1 Article VII. Judiciary

2 Section 5. Jurisdiction of the Judiciary

3 (a) The Trial Court shall have original jurisdiction over all cases and controversies, both  
4 criminal and civil, in law or in equity, arising under the Constitution, laws, customs and traditions of  
5 the Ho-Chunk Nation, including cases in which the Ho-Chunk Nation, or its officials and employees,  
6 shall be a party. Any such case or controversy arising within the jurisdiction of the Ho-Chunk  
7 Nation shall be filed in the Trial Court before it is filed in any other court. This grant of jurisdiction  
8 by the General Council shall not be construed to be a waiver of the Nation's sovereign immunity.

6 Article XII. Sovereign Immunity

7 Section 1. Immunity of Nation from Suit. The Ho-Chunk Nation shall be immune from suit except  
8 to the extent that the Legislature expressly waives its sovereign immunity, and officials and  
9 employees of the Ho-Chunk Nation acting within the scope of their duties or authority shall be  
10 immune from suit.

10 HO-CHUNK NATION JUDICIARY ACT OF 1995

11 Section 2. Jurisdiction

12 The Ho-Chunk Nation Judiciary shall exercise jurisdiction over all matters within the power and  
13 authority of the Ho-Chunk Nation including controversies arising out of the Constitution of the Ho-  
14 Chunk Nation; laws, statutes, ordinances, resolutions and codes enacted by the Legislature; and such  
15 other matters arising under enactments of the Legislature or the customs and traditions of the Ho-  
16 Chunk Nation. This jurisdiction extends over the Nation and its territory, persons who enter its  
17 territory, its members, and persons who interact with the Nation or its members wherever found.

16 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

17 Rule 24. Substituting, Intervening and Joining Parties

18 If a party becomes incompetent or transfers his/her interest or separates from some official capacity,  
19 another party may be substituted as justice requires. A party with an interest in an action may  
20 intervene and be treated in all respects as a named party to the action. To the greatest extent  
21 possible, all persons with an interest will be joined in an action if relief cannot be accorded among  
22 the current parties without that person, or the absent person's ability to protect their interests is  
23 impeded unless they are a party. Failure to join a party over whom the Court has no jurisdiction will  
24 not require dismissal of an action unless it would be impossible to reach a just result without the  
25 absent party. The Court will determine only the rights or liabilities of those who are a party to the  
26 action.

24 Rule 58. Amendment to or Relief from Judgement or Order

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

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

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

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

13 HO-CHUNK NATION PERSONNEL POLICIES AND PROCEDURES MANUAL

14 Chapter 12. Employment, Conduct, Discipline, and Administrative Review

15  
16 Administrative Review Process for Non-gaming. The burden of proof is on the grievant to show that  
17 what he/she is claiming actually happened. All levels of reprimands shall be forwarded to the  
18 Personnel Department promptly by the grievant. This proof may include documentation and  
witnesses.

19 1. Grieve in writing to the Supervisor and the Personnel Department within five (5) working  
20 days of the action. The Supervisor has an affirmative duty to try and resolve the problem. The  
21 Supervisor has five (5) days to respond to the grievance. She/He must meet with the person and  
document the decision.

22 2. If there is no relief or no response within five (5) days after the end of the time period of the  
23 first step, grieve in writing, on the required form, to the department director or enterprise manager  
24 and the Personnel Department. The manager or director has an affirmative duty to try and resolve  
the problem, and has ten (10) days to respond. If the grievance cannot be resolved, go to step 3.  
Manager will talk with involved people and document the decision.

25 3. Within ten (10) days of decision or notice of decision at level 2, appeal in writing to the  
26 appropriate Administrator and Personnel Department. The appropriate Administrator has fifteen  
27 (15) days for initial review and response. Administrator will investigate, document & inform

1 Grievant.

2 HO-CHUNK NATION LEGISLATURE RESOLUTION 6-9-98A

3 NOW, THEREFORE BE IT RESOLVED, that the Ho-Chunk Nation Legislature pursuant to its  
4 constitutional authority, hereby amends the Ho-Chunk Nation Personnel Policies and Procedures by  
5 inserting the following language to Chapter 12 (Employee Conduct, Discipline, and Administrative  
6 Review) following the Administrative Review Process section:

6 Tribal Court Review

7 Judicial review of any appealable claim may proceed to the Ho-Chunk Nation Tribal Court after the  
8 Administrative Review Process contained in this Chapter has been exhausted. The Ho-Chunk  
9 Nation Rules of Civil Procedure shall govern any judicial review of an eligible administrative  
10 grievance shall file a civil action with the Trial Court within thirty (30) days of the final  
11 administrative grievance review decision.

10 Limited Waiver of Sovereign Immunity

11 The Ho-Chunk Nation hereby expressly provides a limited waiver of sovereign immunity to the  
12 extent that the Court may award monetary damages for actual lost wages and benefits established by  
13 the employee in an amount not to exceed \$10,000, subject to applicable taxation. Any monetary  
14 awards granted under this Chapter shall be paid out of the departmental budget from which the  
15 employee grieved. In no event shall the Trial Court grant any monetary award compensating an  
16 employee for actual damages other than with respect to lost wages and benefits. The Trial Court  
17 specifically shall not grant any monetary award against the Nation or its officials, officers, and  
18 employees acting within the scope of their authority on the basis of injury to reputation, defamation,  
19 or other similar invasion of privacy claim; nor shall the Trial Court grant any punitive or exemplary  
20 damages.

17 The Trial Court may grant equitable relief mandating that the Ho-Chunk Nation prospectively follow  
18 its own laws, and as necessary to remedy any past violations of tribal law. Other equitable remedies  
19 shall include, but not be limited to: an order of the Court to the Personnel Department to reassign or  
20 reinstate the employee, a removal of negative references from personnel files, an award of bridged  
21 service credit, and a restoration of seniority. Notwithstanding the remedial powers noted in this  
22 Resolution, the Court shall not grant any remedies that are inconsistent with the laws of the Ho-  
23 Chunk Nation. Nothing in this Limited Waiver or within the Personnel Policies and Procedures  
24 Manual shall be construed to grant a party any legal remedies other than those included in this  
25 section.

23 **AND BE IT FURTHER RESOLVED THAT**, this amendment shall take effect as of July 1, 1998,  
24 thus providing the Nation's officials, officers, employees, and the Courts adequate notice of this  
25 amended legislation. The remedies provided herein shall not have a retroactive effect and shall not  
26 apply to civil actions filed by grieving employees in the Administrative Review Process before July  
27 1, 1998. Civil actions filed before July 1, 1998 shall be controlled by the original Resolution 3-26-  
28 98A, enacted on March 26, 1996. Employee grievances already filed within the Administrative

1 Review Process before July 1, 1998 shall also be governed by the original Resolution 3-26-98A.

2  
3 **FINDINGS OF FACT**

4 The Court makes the following findings of fact as directly and solely relevant to the issue of  
5 subject matter jurisdiction:  
6

7 1. The defendant moved to dismiss the instant action on the basis that the plaintiff failed to  
8 exhaust the administrative review process, thereby barring her claim from standing in this Court.

9 *Defendant's Brief in Support of Motion to Dismiss*, p. 2, lines 12 through 21.

10 2. The defendant elsewhere indirectly moved the Court to dismiss the instant action for failure  
11 to state a claim upon which relief can be granted. *Id.*, p. 5, lines 21 and 22. Likewise, the defendant  
12 alluded to the plaintiff's alleged failure to join a necessary party. *Id.*, p. 6, lines 1 through 3. These  
13 inarticulate, secondary motions relate only to an alleged cause of action arising from a May 10, 1999  
14 grievance filed by the plaintiff. *Answer*, p. 4, No. 4.

15 3. The parties received proper service of process for the July 20, 1999 *Motion*  
16 *Hearing/Scheduling Conference*.  
17

18 4. Four Winds Insurance Agency, LLC (hereinafter "Four Winds") Chief Executive Officer,  
19 Phil Beaverson, informed the plaintiff on December 17, 1998 that she would be fired if the plaintiff  
20 grieved an incident which occurred on December 14, 1998<sup>1</sup>. See *Complaint*, p. 2, lines 7 and 8;  
21 *Employee Grievance Form*, Level I (Attachment), p. 6; and *Affidavit of Plaintiff*, p. 3, No. 11.  
22

23 5. The defendant failed to contradict or undermine the above factual matter at the *Motion*  
24 *Hearing/Scheduling Conference* or in its *Answer* and *Defendant's Brief in Support of Motion to*  
25

---

26 1 Neither party could accurately identify Phil Beaverson's employment status at the time of the warning, but both parties  
27 i:\CV 99-32.doc Page 6 of 12

1 *Dismiss*. The defendant specifically denies the plaintiff’s position that “Policy & Procedure –  
2 violated - & Employee rights” as stated in her *Complaint*, but does not respond directly to the  
3 actions of Phil Beaverson. *Answer*, p. 1, No. 1. The defendant again generally refutes violating the  
4 plaintiff’s employee rights, but does not expressly deny the incident involving Phil Beaverson. *Id.*,  
5 p. 1, No. 3.  
6

### 7 8 **DECISION**

9 This Court has previously analyzed *Motion(s) to Dismiss* by employing federal standards  
10 utilized in reviewing motions brought pursuant to the Federal Rules of Civil Procedure (hereinafter  
11 *Fed. R. Civ. P.*), Rule 12 (b)(1). See *Decorah, Jr. v. Rainbow Casino*, CV 95-018 (HCN Tr. Ct.,  
12 March 15, 1996) pp. 1 and 2. The Court adopted the standards enunciated in *Capitol Leasing Co. v.*  
13 *FDIC*, 999 F.2d 188 (7<sup>th</sup> Cir. 1993). The Seventh Circuit advised the district courts to “accept as  
14 true all well-pleaded factual allegations and draw reasonable inferences in favor of the plaintiff.”  
15 *Id.*, p. 191. The decision also directed trial judges to “look beyond the jurisdictional allegations to  
16 the complaint and view whatever evidence has been submitted on the issue to determine whether in  
17 fact subject matter jurisdiction exists.” *Id. quoting Grafon Corp. v. Hausermann*, 602 F.2d 781, 783  
18 (7<sup>th</sup> Cir. 1979).  
19

20  
21 This Court refers to the dual standards articulated by the Seventh Circuit since each directive  
22 uniquely applies to a particular form of attack on the pleadings. The federal courts have discerned  
23 two categories of Rule 12 (b)(1) motions: facial/technical and factual/substantive. A facial attack  
24 involves a critique of the sufficiency of the pleading. For example, in a federal court, subject matter  
25

1 jurisdiction is conferred when the plaintiff properly alleges either complete diversity of citizenship  
2 and the amount in controversy exceeds \$75,000.00 **or** the case implicates a federal question of law.  
3 A federal court, therefore, would dismiss a case based on a Rule 12 (b)(1) facial attack if the  
4 petitioner pled diversity of citizenship and requested damages in the amount of \$50,000.00.  
5 Similarly, a plaintiff would succumb to a facial attack in this Court if he or she attempted to litigate  
6 an employment dispute without pleading their exhaustion of administrative remedies. In this  
7 instance, the Court would “accept as true all well-pleaded factual allegations and draw reasonable  
8 inferences in favor of the plaintiff”. Exhaustion of the administrative process, however, represents a  
9 mandatory prerequisite to subject matter jurisdiction, and this Court accordingly would grant the  
10 motion to dismiss. *See Porter v. Lowe, Jr.*, SU 96-05 (HCN S. Ct., Jan. 10, 1997) p. 5 and *Sliwicki*  
11 *v. Rainbow Casino and Ho-Chunk Nation*, SU 96-15 (HCN S. Ct., June 20, 1997) p. 3.  
12  
13

14           Alternatively, a factual attack involves a challenge to the underlying foundation of subject  
15 matter jurisdiction. For example, in a federal diversity case, a factual attack would exist if the  
16 movant questioned whether the amount in controversy would exceed the \$75,000.00 threshold. In  
17 such an instance, a district court would “look beyond the jurisdictional allegations to the complaint  
18 and view whatever evidence has been submitted on the issue to determine whether in fact subject  
19 matter jurisdiction exists.” The burden of proof would remain on the party invoking the subject  
20 matter jurisdiction of the Court.  
21

22           It is clearly improper to mix the two distinct standards of review. If the parties dispute a  
23 foundational issue, the Court cannot “accept as true all well-pleaded factual allegations.” One  
24 simply cannot impart truth to two or more contradictory statements. The *Grafon* Court recognized  
25 this impossibility when it declared that  
26

1 the district court is not bound to accept as true the allegations of the complaint which tend to establish  
2 jurisdiction where a party properly raises a factual question concerning the jurisdiction of the district  
3 court to proceed with the action. The district court may properly look beyond the jurisdictional  
4 allegations of the complaint and...

5 *Grafon*, p. 783. This Court, therefore, must distinguish between the two standards when reviewing a  
6 motion to dismiss on the grounds of lack of subject matter jurisdiction.<sup>2</sup>

7 The defendant's *Motion to Dismiss* poses both a facial and factual challenge to subject matter  
8 jurisdiction. The defendant's attack of the plaintiff's failure to exhaust administrative remedies  
9 represents a facial challenge. The plaintiff, by admission, filed only two of the required three  
10 grievance levels in relation to the December 14, 1998 incident. *See Complaint*, p. 3, line 3 and  
11 *Affidavit of Plaintiff*, pp. 3 and 4, Nos. 12 through 16. As noted above, Ho-Chunk Nation Supreme  
12 Court precedent would direct this Court to dismiss the instant action under these circumstances if  
13 standing in isolation. However, the facial challenge converges with a factual challenge at this point.

14 Phil Beaverson threatened retaliatory termination if the plaintiff grieved the December 14,  
15 1998 incident. The defendant noted at the *Motion Hearing/Scheduling Conference* that such an  
16 action violates the HO-CHUNK NATION PERSONNEL POLICIES AND PROCEDURES MANUAL [hereinafter  
17 "PERSONNEL MANUAL"], but then unrealistically concluded that the plaintiff should have ignored the  
18 threat and proceeded undaunted in spite of the potential retaliation. The defendant cannot plausibly  
19 support this argument especially when viewed against the unique employment context at hand: the  
20 formation of Four Winds. A certain degree of doubt and confusion surrounded the creation of Four  
21 Winds, and the plaintiff's apprehension proves reasonable under the circumstances. The defendant  
22  
23  
24

---

25 <sup>2</sup> Federal courts refrain from granting a Rule 12 (b)(1) motion that raises a factual attack on subject matter jurisdiction if  
26 the attack implicates the merits or an element of the action. *See Garcia v. Copenhaver, Bell & Associates*, 104 F.3d  
27 1256, 1261 (11<sup>th</sup> Cir. 1997). The Court will not elaborate upon this point since the instant, relevant factual dispute does  
28 not touch upon the elements of the plaintiff's claim.

1 proved unable to even identify the employment status or title of Phil Beaverson during the formation  
2 process. Moreover, the defendant cannot strictly hold the plaintiff to the exhaustion rule while at the  
3 same time attempting to dissuade or prevent the plaintiff from filing her Level I grievance. The  
4 Court, therefore, remands the grievance arising from the December 14, 1998 incident to the  
5 Administrative Review Process. The Court so orders to allow the administrative process the  
6 opportunity to resolve the issue; an opportunity effectively denied in the first instance. The date of  
7 entry of this *Order* shall constitute the date of the action as referenced in the PERSONNEL MANUAL,  
8 Ch. 12, No. 1, p. 50.

10 The Court also must address a facial challenge to subject matter jurisdiction in relation to the  
11 May 10, 1999 grievance of the plaintiff. The Court notes confusion over the inclusion of this matter  
12 with the seemingly non-related grievance described above. The plaintiff even chose to preclude this  
13 incident from mere mention in her *Affidavit of Plaintiff*. Regardless, the Court must dismiss this  
14 portion of the *Complaint* on the grounds of lack of subject matter jurisdiction since the plaintiff  
15 proceeded directly to this forum after filing only a Level I grievance. The plaintiff has shown  
16 nothing that might mitigate against such a ruling. The Court, therefore, shall not address the  
17 secondary motions referenced in *Finding of Fact* No. 2 since the Court grants this particular facial  
18 attack on subject matter jurisdiction.

21 Additionally, the defendant moved to dismiss on the grounds of failure to name a necessary  
22 party at the *Motion Hearing/Scheduling Conference*. The Court notes confusion over whether such  
23 motion dealt solely in relation to the May 10, 1999 grievance or both causes of action. To the extent  
24 it relates to both causes of action, the Court denies the motion to dismiss on four separate and  
25 independent grounds. First, the defendant failed to incorporate such motion or defense in either its  
26

1 *Answer or Defendant's Brief in Support of Motion to Dismiss*. Second, the plaintiff still retained the  
2 right to amend her pleadings, and thus join additional parties. Third, this Court has a policy of  
3 refusing to dismiss a case on the grounds of failure to join an indispensable party when a *pro se*  
4 litigant initiated the action. *Nichols v. Snowball*, CV 97-167 (HCN Tr. Ct., April 15, 1998) p. 3.  
5 Although the plaintiff currently has legal counsel, Attorney Gerald R. Fox appeared during the  
6 pendency of the *Motion to Dismiss*. Finally, the Court may seek to join a party *sua sponte* pursuant  
7 to *HCNR Civ. P. 24*. The Court deems such an interpretation in accordance with the language “[t]o  
8 the greatest extent possible.” The Court also takes judicial notice of the identical authority of the  
9 federal judiciary under *Fed. R. Civ. P. 19 (a)*.

11 **IN SUMMATION**, the Court grants the defendant’s *Motion to Dismiss* as it specifically  
12 relates to the plaintiff’s cause of action contained within the May 10, 1999 grievance attached to the  
13 *Complaint*. The Court denies the defendant’s motion to dismiss as it specifically relates to the  
14 plaintiff’s alleged failure to join a necessary party without whom relief cannot be granted. Lastly,  
15 the Court remands that part of the action related to the December 14, 1998 incident to the  
16 Administrative Review Process due to the defendant’s active role in previously hampering, and  
17 effectively denying, that very process. The *Findings of Fact* contained herein shall have no binding,  
18 precedential effect outside of this *Order*. Furthermore, the July 23, 1999 *Scheduling Order* shall be  
19 considered null and void.

22 The parties retain the right to file a timely post judgment motion with this Court in  
23 accordance with *HCNR Civ. P. 58*, Amendment to or Relief from Judgement or Order. Otherwise,  
24 all parties have the right to appeal a final judgment or order of the Trial Court. If either party is  
25 dissatisfied with the decision of this Court, they may file a *Notice of Appeal* with the Ho-Chunk

1 Supreme Court within thirty (30) calendar days from the date this Court renders such final judgment  
2 or order. The *Notice of Appeal* must show service was made upon the opposing party prior to its  
3 acceptance for filing by the Clerk of Court. The *Notice of Appeal* must explain the reason the party  
4 appealing believes the decision appealed from is in error. All appellate pleadings to the Ho-Chunk  
5 Supreme Court must conform with the requirements established by the Ho-Chunk Supreme Court as  
6 stated in the Ho-Chunk Nation.  
7

8 **IT IS SO ORDERED** this August 4, 1999 at the Ho-Chunk Nation Trial Court in Black  
9 River Falls, Wisconsin from within the sovereign lands of the Ho-Chunk Nation.  
10

11 Hon. Todd R. Matha,  
12 HCN Associate Trial Judge  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26