



1 Ho-Chunk Nation. The Court, however, lacks subject matter jurisdiction over a promissory estoppel  
2 claim as such a concept arises solely within the statutory and common law of foreign jurisdictions.

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## APPLICABLE LAW

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### 7 CONSTITUTION OF THE HO-CHUNK NATION

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#### 8 Article III – Organization of the Government

9 Section 2. Branches of Government. The government of the Ho-Chunk Nation shall be composed  
10 of four (4) branches: General Council, Legislature, Executive, and Judiciary.

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#### 11 Article IV – General Council

12 Section 1. Powers of the General Council. The People of the Ho-Chunk Nation hereby grant all  
13 inherent sovereign powers to the General Council. All eligible voters of the Ho-Chunk Nation are  
entitled to participate in General Council.

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15 Section 2. Delegation of Authority. The General Council hereby authorizes the legislative branch to  
16 make laws and appropriate funds in accordance with Article V. The General Council hereby authorizes  
the executive branch to enforce the laws and administer funds in accordance with Article VI. The  
17 General Council hereby authorizes the judicial branch to interpret and apply the laws and Constitution  
of the Nation in accordance with Article VII.

#### 18 Article VII – Judiciary

19 Section 4. Powers of the Judiciary. The judicial power of the Ho-Chunk Nation shall be vested in  
20 the Judiciary. The Judiciary shall have the power to interpret and apply the Constitution and laws of the  
Ho-Chunk Nation.

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#### 22 Section 5. Jurisdiction of the Judiciary.

23 (a) The Trial Court shall have original jurisdiction over all cases and controversies, both criminal  
24 and civil, in law or in equity, arising under the Constitution, laws, customs and traditions of the Ho-  
Chunk Nation, including cases in which the Ho-Chunk Nation, or its officials and employees, shall be a  
25 party. Any such case or controversy arising within the jurisdiction of the Ho-Chunk Nation shall be

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26 filed in Trial Court before it is filed in any other court. This grant of jurisdiction by the General Council

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1 shall not be construed to be a waiver of the Nation’s sovereign immunity.

2 Article XII – Sovereign Immunity

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

5 Section 2. Suit Against Officials and Employees. Officials or employees of the Ho-Chunk Nation  
6 who act beyond the scope of their duties or authority shall be subject to suit in equity only for  
7 declaratory and non-monetary injunctive relief in Tribal Court by persons subject to its jurisdiction for  
purposes of enforcing rights and duties established by this constitution or other applicable laws.

8 HO-CHUNK NATION JUDICIARY ACT OF 1995

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10 Sec. 2 Jurisdiction

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

15 HO-CHUNK NATION RULES OF CIVIL PROCEDURE

16 Rule 47. Consolidation and Separation of Action.

17 (A) Consolidation. When actions involving a common question of law or fact are pending before the  
18 court, the court may order a joint hearing or trial of all the matters in issue in the actions; the Court may  
19 order all the actions consolidated; and the court may make such orders concerning proceedings therein  
as may tend to avoid unnecessary costs or delay.

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

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

24 (B) Motion for Reconsideration. Upon motion of the Court or by motion of a party made not later than  
25 ten (10) calendar days after entry of judgement, the Court may amend its findings or conclusions or  
26 make additional findings or conclusions, amending the judgement accordingly. The motion may be  
made with a motion for a new trial. If the Court amends the judgement, the time for initiating an appeal  
commences upon entry of the amended judgement. If the Court denies a motion filed under this rule, the

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1 time for initiating an appeal from the judgement commences when the Court denies the motion on the  
2 record or when an order denying the motion is entered, whichever occurs first. If within thirty (30) days  
3 after the entry of judgement, the Court does not decide a motion under this Rule or the judge does not  
4 sign an order denying the motion, the motion is considered denied. The time for initiating an appeal  
5 from judgement commences in accordance with the Rules of Appellate Procedure.

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

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

## 15 HO-CHUNK NATION PERSONNEL POLICIES AND PROCEDURES

### 16 Introduction

#### 17 General Purposes

18 These policies are issued as the official directive of the obligations of the HoChunk (*sic*) Nation and the  
19 employees to each other and to the public. They are to ensure consistent personnel practices designed to  
20 utilize to (*sic*) the human resources of the Nation in the achievement of the desired goals and objectives.

21 This system provides means to recruit, select, develop, and maintain an effective and responsible work  
22 force. It shall include policies for employee hiring and advancement, training and career development,  
23 job classification, salary administration, retirement, fringe benefits, discipline, discharge, and other  
24 related activities.

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26 It is the responsibility of the employer and employees to abide by these policies and procedures.

### 27 Chapter 1 – 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 HoChunk (*sic*) 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

1 origin, pregnancy, age, marital status, sexual orientation, or physical handicap.

2 **RESOLUTION 02/25/97A** – *The Ho-Chunk Nation does retain the right to exercise Ho-Chunk*  
3 *preference in employment, training, and promotions.*

4 It shall be the responsibility of the employer and employees to abide by and carry out the Nation’s equal  
5 employment policy and the Federal Equal Employment Opportunity Act.

6 Chapter 2 – Sexual Harassment

7 Employees are expected to act in a positive manner and contribute to a productive work environment  
8 that is free from harassing or disruptive activity. No form of harassment will be tolerated, and special  
9 attention is called to the prohibition of sexual harassment.

10 Sexual harassment includes implicitly or explicitly making or permitting acquiescence in or submission  
11 to sexual harassment a term or condition of employment or the basis or any part of the basis for any  
12 employment decision affecting an employee; or permitting sexual harassment to substantially interfere  
13 with an employee’s work performance or to create an intimidating, hostile or offensive work  
14 environment.

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16 Any employee who believes that a supervisor’s, another employee’s, or a non-employee’s actions or  
17 words constitute unwelcome sexual harassment had a responsibility to report or complain about the  
18 situation as soon as possible. Such report or complaint should be made to the employee’s supervisor, or  
19 to the Department Head if the complaint involves the supervisor.

20 Chapter 12 – Employment Conduct, Discipline, and Administrative Review

21 Discipline Policy

22 The intent of this policy is to openly communicate the Tribal standards of conduct, particularly conduct  
23 considered undesirable, to all employees as a means of avoiding their occurrence.

24 The illustrations of unacceptable conduct cited below are to provide specific and exemplary reasons for  
25 initiating disciplinary action, and to alert employees to the more commonplace types of employment  
26 conduct violations. No attempt has been made here to establish a complete list. Should there arise  
27 instances of unacceptable conduct not included in the following list, the Nation may initiate disciplinary  
28 action in accordance with policies and procedures.

29 B. Behavior

30 1. Willful or negligent violation of the Personnel Policies and Procedures, unit operating

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rules, or related directives.

2. Failure to carry out a direct order from a superior, except where the order is illegal or the employee's safety may reasonably be jeopardized by the order.
3. Engaging in a conflict of interest activity.
4. Conduct that discredits the employee or the Nation, or willful misrepresentation of the Nation.
5. Conviction of a crime, including conviction based on a plea of nolo contendere or of a misdemeanor involving moral turpitude, the nature of which reflects the possibility of serious consequences related to the continued assignment or employment of the employee.
6. Knowingly falsifying, removal or destruction (*sic*) of information related to employment, payroll, or work-related records or reports.
7. Soliciting outside work for personal gain during business hours; engaging in off-duty employment for any business under contract with the HoChunk (*sic*) Nation; participating in any off-duty employment that adversely affects the employee's performance of work for the Nation; and engaging in unauthorized off-duty employment.
8. Discourteous treatment of the public or other employees, including harassing, coercing, threatening, or intimidating others.
9. Conduct that interferes with the management of the Tribal operations.
10. Violation or neglect of safety rules, or contributing to hazardous conditions.
11. Unauthorized removal or use of any Tribal property, or that of its clients, customers, or agents.
12. Physical altercations.
13. Any act or conduct that is discriminatory in nature toward another person's race, creed, color, national origin, sex (including sexual harassment), age, religious beliefs or political affiliations.
14. Creating a disturbance among fellow employees which would result in an adverse effect on morale, productivity, and/or the maintenance of proper discipline.
15. Making illegal claims against the government.

- 1 16. Participating in a strike, work stoppage, slowdown, sickout, or other job action.
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- 3 17. Making false, malicious, or unfounded statements against co-workers, supervisors,
- 4 subordinates, or government officials which tend to damage the reputation or undermine the authority of those concerned.
- 5 C. Performance
- 6 1. Inefficiency, incompetency, or negligence in the performance of duties, including failure
- 7 to perform assigned tasks or training or failure to discharge duties in a prompt, competent, and reasonable manner.
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- 9 2. Refusal or inability to improve job performance in accordance with written or verbal direction after a reasonable trial period.
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- 11 3. Refusal to accept reasonable and proper assignments from an authorized supervisor.
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- 13 4. Intoxication or incapacity on duty due to the use of alcohol or drugs. Unlawful
- 14 manufacture, distribution, dispensing, possession or use of a controlled substance.
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- 16 5. Driving under the influence of alcohol or drugs while on duty; suspension of driver's license where job duties require driving.
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- 18 6. Careless, negligent, or improper use of Tribal property, equipment or funds, including
- 19 unauthorized removal, or use for private purposes, or use involving damage or unreasonable risk of damage to property.
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- 21 7. Unauthorized release of confidential information or public records.
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- 23 8. Misuse of authority for personal gain.
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- 25 9. Embezzlement of tribal funds or property.
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- 27 10. Any other actions considered inappropriate, or detrimental to employee working environment.

23 Types of Discipline

24 D. Discharge for Misconduct

25 Employees should be aware that their employment relationship with the HoChunk (*sic*) Nation is

26 based on the condition of mutual consent to continue the relationship between the employee and

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1 the Nation. Therefore, the employee or Nation is free to terminate the employment relationship  
2 for misconduct, at any time. Recommendations to discharge an employee are to be made to and  
authorized by the Department Director.

3 Examples of misconduct are violations of the policies and procedures, absenteeism and  
4 tardiness, insubordination, [and] use of intoxicants and drugs.

5 Matters Covered by the Administrative Review System

6 Eligible employees who have complaints, problems, concerns, or disputes with another employee, the  
7 nature of which causes a direct adverse effect upon the aggrieved employee, may initiate an  
administrative review according to established procedures. Such matters must have to do with:

- 8 1. specific working conditions
- 9 2. safety
- 10 3. unfair treatment
- 11 4. disciplinary actions except verbal reprimands
- 12 5. compensation
- 13 6. involuntary termination
- 14 7. job classification
- 15 8. reassignment
- 16 9. any form of alleged discrimination
- 17 10. a claimed violation, misinterpretation, or inequitable application of these policies and  
procedures.

18 Hearing Levels for Non-gaming

19 Probationary or Limited Term Employees may not grieve on any matters.

- 20 1. Verbal warnings may not be grieved, but employees may add written response to their  
21 personnel file.

22 2. Performance Evaluations and written reprimands are to be grieved in sequence to:

- 23 1. Supervisor
- 24 2. Executive Director
- 25 3. Appropriate Department Administrator

26 3. Suspensions are grieved in sequence to:

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- 1. Supervisor
- 2. Executive Director
- 3. Appropriate Department Administrator
- 4. ~~Personnel Committee~~

4. Terminations in sequence to:

- 1. Supervisor
- 2. Department Head
- 3. Appropriate Department Administrator
- 4. Trial Court/~~Personnel Grievance Commission~~

Administrative Review Process for Non-gaming

The burden of proof is on the grievant to show that what he/she is claiming, actually happened. All levels of reprimands shall be forwarded to the Personnel Department promptly. Grievances shall be forwarded to the Personnel Department promptly by the grievant. This proof may include documentation and witnesses.

- 1. Grieve in writing to the Supervisor and the Personnel Department within five (5) working days of the action. The Supervisor has an affirmative duty to try and resolve the problem. The Supervisor has five (5) days to respond to the grievance. She/He must meet with the person and document the decision.
- 2. If there is no relief or no response within five (5) days after the end of the time period of the first step, grieve in writing, on the required form, to the department director or enterprise manager 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.
- 3. Within ten (10) days of the decision or notice of decision at level 2, appeal in writing to the appropriate Administrator and Personnel Department. The appropriate Administrator has fifteen (15) days for initial review and response. Administrator will investigate, document & inform Grievant.

**RESOLUTION 6-9-98A**

Tribal Court Review:

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

1 *grievance review decision.*

2 Chapter 14 – Definitions

3 Discharge: Involuntary separation or termination of employment.

4 UNITED STATES CODE

5 Title 42 – The Public Health and Welfare

6 Chapter 21 – Civil Rights

7 *Subchapter VI – Equal Employment Opportunities*

8 Section 2000e. Definitions

9 For the purposes of this subchapter –

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11 (b) The term ‘employer’ means a person engaged in an industry affecting commerce who has  
12 fifteen or more employees for each working day in each of twenty or more calendar weeks in the current  
13 or preceding calendar year, and any agent of such a person, but such term does not include (1) the  
14 United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or  
15 any department or agency of the District of Columbia subject by statute to procedures of the competitive  
16 service (as defined in section 2102 of title 5), or (2) a bona fide private membership club (other than a  
labor organization) which is exempt from taxation under section 501(c) of title 26, except that during the  
first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents)  
shall not be considered employers.

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21 Section 2000e-2. Unlawful Employment Practices

22 (a) Employer practices

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It shall be an unlawful employment practice for an employer –

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25 (1) to fail or refuse to hire or to discharge any individual, or otherwise to  
discriminate against any individual with respect to his compensation, terms, conditions,  
26 or privileges of employment, because of such individual’s race, color, religion, sex, or

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1 national origin; or

2 (2) to limit, segregate, or classify his employees or applicants for employment in any  
3 way which would deprive or tend to deprive any individual of employment opportunities  
4 or otherwise adversely affect his status as an employee, because of such individual's  
5 race, color, religion, sex, or national origin.

## 6 DECISION

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8 The Court derives its powers through a delegation of authority from the General Council.  
9 CONSTITUTION OF THE HO-CHUNK NATION [hereinafter CONSTITUTION], ART. III § 2 and ART. IV §§ 1,  
10 2. Specifically, the Court is charged with interpreting and applying the CONSTITUTION and laws of the  
11 Ho-Chunk Nation. *Id.*, ART. IV § 2 and ART. VII § 4. In this regard, the Ho-Chunk Nation Judiciary  
12 has endeavored to provide litigants guidance concerning the constitutional limitations of the Court's  
13 subject matter jurisdiction. *See Ho-Chunk Nation v. Harry Steindorf and Jess Steindorf*, SU 00-04  
14 (HCN S. Ct., Sept. 29, 2000) and *Ho-Chunk Nation v. Harry Steindorf and Jess Steindorf*, CV 99-82  
15 (HCN Tr. Ct., Feb. 11, 2000).  
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18 The Court may assert subject matter jurisdiction “over all cases and controversies . . . arising  
19 under the Constitution, laws, customs and traditions of the Ho-Chunk Nation.” CONSTITUTION, ART. VII  
20 § 5(a); *See also* HO-CHUNK NATION JUDICIARY ACT OF 1995 § 2. The Supreme Court of the Ho-Chunk  
21 Nation has determined that a litigant cannot maintain a case or controversy within the Ho-Chunk Nation  
22 Judiciary if the constituent causes of action arise outside the explicit jurisdictional grant. *Ho-Chunk*  
23 *Nation v. Steindorf*, SU 00-04 at 2-5. “A controversy is ‘the thing in dispute’; a dispute of law that  
24 grants the HCN courts subject matter jurisdiction. A dispute in law in which the HCN Trial Court can  
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1 apply.” *Id.* at 3. If the dispute or cause of action does not arise from “the Constitution, laws, customs  
2 [or] traditions of the Ho-Chunk Nation” in the first instance, then the Court lacks subject matter  
3 jurisdiction to hear the claim. CONSTITUTION, ART. VII § 5(a).

4 Furthermore, the Court may be deprived of subject matter jurisdiction if either sovereign or  
5 official immunity bars the suit.<sup>1</sup> The constitutional provision cited above does not represent a general  
6 waiver of immunity from suit. “This grant of jurisdiction by the General Council shall not be construed  
7 to be a waiver of the Nation’s sovereign immunity.” *Id.* Rather, a litigant can only proceed against the  
8 Ho-Chunk Nation, its subentities and/or officials or employees in accordance with the CONSTITUTION,  
9 ART. XII §§ 1, 2.

10 A litigant may proceed against the Ho-Chunk Nation or its subentities for monetary damages  
11 only if the Ho-Chunk Nation Legislature [hereinafter Legislature] grants an express waiver of sovereign  
12 immunity. *Id.*, ART. XII § 1. In the instant cases, such a waiver exists in the form of HO-CHUNK  
13 NATION LEGISLATIVE RESOLUTION 6/9/98A [hereinafter LEG. RES. 6/9/98A]. HO-CHUNK NATION  
14 PERSONNEL POLICIES AND PROCEDURES [hereinafter PERSONNEL MANUAL], Ch. 12, pp. 50b-51.  
15 Otherwise, a litigant may proceed against an individual official or employee if such individual acted  
16 outside the scope of their duties or authority. CONSTITUTION, ART. XII § 2. The litigant, however,  
17 would not be entitled to monetary damages, but only declaratory and non-monetary injunctive relief. *Id.*

21 **I. Does the PERSONNEL MANUAL’s inclusion of**  
22 **termination/discharge as a matter covered by the administrative**  
23 **review system incorporate the concept of constructive discharge,**  
24 **thereby constituting an appropriate grievance for administrative**  
**review and potential appeal?**

25 <sup>1</sup> Additionally, a litigant may not properly plead a justiciable claim for several reasons: lack of standing, *See Steve B.*  
26 *Funmaker v. JoAnn Jones et al.*, CV 97-72 (HCN Tr. Ct., Nov. 26, 1997) pp. 9-11; mootness, *See Chloris Lowe, Jr. and*  
*Stewart J. Miller v. Ho-Chunk Nation Legislature Members Elliot Garvin et al.*, CV 00-104 (HCN Tr. Ct., Nov. 3, 2000) pp.  
11-12; ripeness, *See Id.*; and presence of a political question, *See Id.* (HCN Tr. Ct., Nov. 13, 2000) p. 10.

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Both parties recognize that the concept of constructive discharge does not represent an independent cause of action. *See Brief in Support of Defendant’s Motion to Dismiss*, Nov. 28, 2000, pp. 5-6 and *Plaintiff’s Response to Defendant’s Motion to Dismiss*, Dec. 14, 2000, p. 2. The parties ground this contention on reference to the caselaw of foreign jurisdictions. The plaintiff directs the Court’s attention to the Michigan Court of Appeals’ declaration that “constructive discharge is not in itself a cause of action, although it is routinely alleged as a separate count in complaints for wrongful discharge. Rather, constructive discharge is a defense against the argument that no suit should lie in a specific case because the plaintiff left the job voluntarily.” *Vagts v. Perry Drug Stores*, 204 Mich. App. 481, 487 (1994). The defendant, likewise, finds external support for the above proposition.

Other jurisdictions recognize that constructive discharge is not actionable by itself. Rather, the doctrine is ancillary to an underlying claim in which an express discharge otherwise would be actionable. Constructive discharge joins the actionable claim and operates as a defense against an employer’s contention that the employee quit voluntarily.

*Strozinsky v. School District of Brown Deer*, 237 Wis.2d 19, 58 (2000).

Accordingly, the Court is not directly confronted with the issue of whether a constructive discharge arises “under the Constitution, laws, customs and traditions of the Ho-Chunk Nation,” CONSTITUTION, ART. VII § 5(a), but instead whether a reasonable and appropriate interpretation of the PERSONNEL MANUAL supports the defense of constructive discharge. *See Id.*, ART. IV § 2 and ART. VII § 4.

Constructive discharge occurs when the employer’s conduct effectively forces an employee to resign. Although the employee may say, ‘I quit,’ the employment relationship is actually severed *involuntarily* by the employer’s

1 acts, against the employee's will. As a result, a constructive discharge is  
2 legally regarded as a firing rather than a resignation.

3 *Turner v. Anheuser Busch, Inc.*, 7 Cal.4th 1238, 1244-45 (1994) (emphasis added). The PERSONNEL  
4 MANUAL permits a grievant to appeal a termination/discharge after proper exhaustion of the  
5 administrative review system. PERSONNEL MANUAL, Ch. 12, pp. 48-50, 50b. The Legislature defines  
6 'discharge' as an "involuntary separation or termination of employment." *Id.*, Ch. 14, p. 55 (emphasis  
7 added). Obviously, this definition could encompass a constructive discharge.

8 At the *Pre-trial Conference*, the defendant, by and through Ho-Chunk Nation Department of  
9 Justice Attorney Michael P. Murphy, conceded that if a sexually harassed employee "came in arguing  
10 the situation was so hostile that [she/he] had to leave, I don't think I'd say, 'Well, you're arguing  
11 constructive discharge, and there's no jurisdiction.'" Courtroom Log/Minutes, Dec. 15, 2000, pp. 9-10.  
12 The defendant attempted to distinguish such a situation on the basis that the PERSONNEL MANUAL  
13 includes a chapter devoted to sexual harassment, PERSONNEL MANUAL, Ch. 2, p. 4, but this cannot be  
14 reconciled with the defendant's repeated position that "there is no provision in the Personnel Manual  
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18 regarding constructive discharge or allowing for a grievance based on such a theory." *Brief in Support*  
19 *of Defendant's Motion to Dismiss*, p. 5.

20 Foreign courts universally recognize the defense of constructive discharge in the context of  
21 alleged discrimination on the basis of a suspect classification, including sexual harassment. *See*  
22 *Strozinsky*, 237 Wis.2d at 59; *Turner*, 7 Cal.4th at 1245, 1250-51; and *Vagts*, 204 Mich. App. at 487. A  
23 grievant may base a tortious constructive discharge upon a violation of a fundamental public policy,  
24 namely the Equal Employment Opportunity Act of 1972. *See Id.*; *see also* 42 U.S.C. § 2000e *et seq.*  
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1 The Ho-Chunk Nation has endorsed the same public policy, expressly incorporating the federal Equal  
2 Employment Opportunity Act and expanding upon it in the area of gender discrimination. PERSONNEL  
3 MANUAL, Chs. 1 and 2, pp. 3-4.

4 The Court deems that the Legislature intended to announce fundamental public policies through  
5 the adoption of the PERSONNEL MANUAL. In the *Introduction*, the Legislature emphasizes that “[t]hese  
6 policies are issued as the official directive of the obligations of the HoChunk (*sic*) Nation and the  
7 employees to each other and to the public.” *Id.*, *Introduction*, p. 2. The *Equal Employment Policy*  
8 discussed above clearly represents the “Nation’s policy.” *Id.*, Ch. 1, p. 3. Similarly, the discipline  
9 policy serves “to openly communicate the *Tribal standards* of conduct, particularly conduct considered  
10 undesirable, to all employees as a means of avoiding their occurrence.” *Id.*, Ch. 12, p. 44 (emphasis  
11 added).  
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14 The Court hereby adopts the test for tortious constructive discharge as articulated by the courts  
15 of the State of California. *Turner*, 7 Cal.4th at 1245, 1250-51; *Casenas v. Fujisawa USA, Inc.*, 58  
16 Cal.App.4th 101 (1997); and *Brady v. Elixir Industries*, 196 Cal.App.3d 1299, 1306 (1987). The Court  
17 looks for guidance from this jurisdiction due to the thoroughness of examination and compatibility of  
18 the resulting standards with the PERSONNEL MANUAL. For example, the requirement that the employer  
19 possess actual knowledge of the intolerable conditions comports with the responsibility to report found  
20 in the PERSONNEL MANUAL. PERSONNEL MANUAL, Ch. 2, p. 4 and Ch. 12, pp. 49-50. A grievant,  
21 therefore, must prove:  
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- 23 (1) the actions and conditions that caused the employee to resign were  
24 violative of [fundamental] public policy;
- 25 (2) these actions and conditions were so intolerable or aggravated at the time  
26 of the employee’s resignation that a reasonable person in the employee’s  
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1 position would have resigned; and

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

4 *Brady*, 196 Cal.App.3d at 1306; *see also Turner*, 7 Cal.4th at 1250-51.

5 At *Trial*, the plaintiffs must identify the specific fundamental policy contravened by the  
6 defendants. The plaintiffs maintain the burden of satisfying the test for tortious constructive discharge  
7 by a preponderance of the evidence. *See Turner*, 7 Cal.4th at 1251. The Court shall require the parties  
8 to file post-Trial briefs in the instant cases due to the intervening interpretation of the Court.

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10 **II. In *Arnett*, does the doctrine of promissory estoppel constitute a**  
11 **recognizable cause of action arising under the CONSTITUTION,**  
12 **laws, customs or traditions of the Ho-Chunk Nation?**

13 The PERSONNEL MANUAL does not identify promissory estoppel as a recognized cause of action.

14 The Court, in *dicta*, dispensed with a claim of promissory estoppel in a case involving an invalid  
15 attorney contract. *David M. Ujke v. Ho-Chunk Nation*, CV 96-63 (HCN Tr. Ct., Aug. 17, 1998). The  
16 plaintiff argued promissory estoppel, requesting monetary damages for reliance on his employment  
17 contract with the Ho-Chunk Nation. *Id.* at 13-14. The Court denied relief based upon its holding that  
18 the contract was unenforceable since the Secretary of Interior failed to approve its final terms as then  
19 required by 25 U.S.C. § 476(e). *Id.* at 11-13, 15-16. In a footnote, the Court “[e]ven open the *possibility*  
20 that promissory or equitable estoppel might be asserted in another fact situation.”<sup>2</sup> *Id.* at 14, fn. 3  
21 (emphasis added).

22 The Court has derived subject matter jurisdiction on the basis of traditional and customary law in  
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25 <sup>2</sup> The Court utilized the definition of promissory estoppel found within the Second Restatement of Contracts § 90: “A  
26 promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee . . .and  
27

1 a line of cases addressing the sanctity of personal agreements. *See Michelle Wood v. Vickie Hindsley*,  
2 CV 00-86 (HCN Tr. Ct., Dec. 28, 2000); *Tamara Scoles v. Michael Thompson*, CV 00-100 (HCN Tr.  
3 Ct., Dec. 28, 2000); *Ho-Chunk Nation v. Ross Olsen*, CV 99-81 (HCN Tr. Ct., Sept. 18, 2000); and  
4 *Gerald F. Conley v. Christopher Cloud et seq.*, CV 00-37 (HCN Tr. Ct., Aug. 2, 2000). The Ho-Chunk  
5 Nation Traditional Court [hereinafter Traditional Court] recognized that in the tradition and custom of  
6 the Ho-Chunk Nation, agreements between parties for the exchange of goods and services were  
7 recognized as binding, and that it proved wrong for one party to retain a benefit obtained from an  
8 agreement without providing the agreed upon compensation.<sup>3</sup> On January 8, 2001, the Court certified a  
9 question of law to the Traditional Court, inquiring whether the above principle extended to embrace the  
10 doctrine of promissory estoppel.<sup>4</sup> The Traditional Court reemphasized the expectation of  
11 trustworthiness among individuals voluntarily entering into an agreement, but could not discern an  
12 analogy to the concept of promissory estoppel within Ho-Chunk tradition or custom. Therefore, the  
13 Court lacks subject matter jurisdiction over this cause of action since promissory estoppel does not  
14 “aris[e] under the Constitution, laws, customs [or] traditions of the Ho-Chunk Nation.” CONSTITUTION,  
15 ART. VI § 5 (a).

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18 The parties retain the right to file a timely post judgment motion with this Court in accordance  
19 with *HCNR. Civ. P. 58, Amendment to or Relief from Judgement or Order*. Otherwise, if either party is  
20 dissatisfied with the decision of this Court, they may file an interlocutory appeal (Petition for Permission  
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22  
23 which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The  
remedy granted for breach may be limited as justice requires.” *Id.* at 13.

24 <sup>3</sup>The Traditional Court is a body of the Ho-Chunk Nation Judiciary comprised of tribal elders. The court hears issues  
voluntarily brought before them and resolves conflicts based on their expertise in the customs and traditions of the Ho-  
25 Chunk Nation.

26 <sup>4</sup>When questions of Ho-Chunk tradition and custom arise in cases before the Ho-Chunk Nation Trial or Supreme Courts,  
Judges and Justices may seek the input and expert opinion of the Traditional Court. The procedure is analogous to the  
27

1 to Appeal) with the Ho-Chunk Nation Supreme Court within ten (10) calendar days from the date this  
2 Court renders this *Order*. The *Petition for Permission to Appeal* must show service was made upon the  
3 opposing party prior to its acceptance for filing by the Clerk of Court. The *Petition for Permission to*  
4 *Appeal* must contain a statement of the facts necessary for an understanding of the controlling question  
5 of law determined by the order of the Trial Court; a statement of the question itself; and a statement of  
6 the reasons why substantial basis exists for a difference of opinion on the question and why an  
7 immediate appeal may materially advance the termination of the litigation. In addition, the *Petition for*  
8 *Permission to Appeal* must contain, or have annexed to it, a copy of the Trial Court order from which  
9 appeal is sought. All appellate pleadings to the Ho-Chunk Nation Supreme Court must be in accordance  
10 with the Ho-Chunk Nation *Rules of Appellate Procedure*.  
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12 **IT IS SO ORDERED** this 8<sup>th</sup> day of January, 2001 at the Ho-Chunk Nation Trial Court in Black  
13 River Falls, Wisconsin from within the sovereign lands of the Ho-Chunk Nation.  
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Hon. Todd R. Matha  
HCN Associate Trial Judge  
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“certification of questions of law” that often occurs between federal and state courts. *See* 5 Am. Jur. 2d Appeal & Error  
26 § 1025.  
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