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

3
4 **Maureen Arnett,**
5 Plaintiff,

6 v.

Case No.: **CV 00-60**

7 **Ho-Chunk Nation Department of**
8 **Administration,**
9 Defendant.

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**ORDER
(Final Judgment)**

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INTRODUCTION

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17 The Court must determine whether the plaintiff has proven facts necessary to show a
18 constructive discharge. The Court recently adopted a test to guide this analysis. The Court
19 denies the plaintiff's request for relief due to her failure to satisfy any of the constituent parts of
20 that test.
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PROCEDURAL HISTORY

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26 The plaintiff, Maureen Arnett, by and through Attorney William F. Gardner, initiated the
27 current action by filing a *Complaint* with the Court on July 5, 2000. Consequently, the Court
28 issued a *Summons* accompanied by the above-mentioned *Complaint* on July 6, 2000, and

1 delivered the documents by certified mail to the defendant's representative, Ho-Chunk Nation
2 Department of Justice [hereinafter DOJ].¹ One Marie (illegible) signed for the certified mailing
3 on July 10, 2000, as indicated on the Domestic Return Receipt. The *Summons* informed the
4 defendant of the right to file an *Answer* within twenty (20) days of the issuance of the *Summons*
5 pursuant to *HCN R. Civ. P. 5(B)*. The *Summons* also cautioned the defendant that a *default*
6 *judgment* could result from failure to file within the prescribed time period.
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8 The defendant, by and through DOJ Attorney Michael P. Murphy, timely filed its *Answer*
9 on July 26, 2000. The Court reacted by mailing *Notice(s) of Hearing* to the parties, informing
10 them of the date, time and location of the *Scheduling Conference*. The Court convened the
11 *Scheduling Conference* on September 6, 2000 at 10:00 a.m. CST. The following parties
12 appeared at the *Conference*: Maureen Arnett, plaintiff; Attorney William F. Gardner, plaintiff's
13 counsel; and DOJ Attorney Michael P. Murphy, defendant's counsel. The Court entered the
14 *Scheduling Order* later that day, setting forth the applicable timeline of the instant case.
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17 On November 28, 2000, the defendant submitted the *Defendant's Notice & Motion to*
18 *Dismiss* accompanied by the *Brief in Support of Defendant's Motion to Dismiss*. The defendant
19 later supplied referenced State of Wisconsin case law to the Court in a December 5, 2000 filing.
20 The Court entered a December 6, 2000 *Order (Motion Hearing)*, indicating that it would
21 entertain oral arguments on the motion at the scheduled December 15, 2000 *Pre-Trial*
22 *Conference*. In accordance with the *HCN R. Civ. P.*, the plaintiff filed the *Plaintiff's Response to*
23 *Defendant's Motion to Dismiss* on December 14, 2000. *Id.*, Rule 19(A).
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28 ¹ The *Ho-Chunk Nation Rules of Civil Procedure* [hereinafter *HCN R. Civ. P.*] permit the Court to serve the *Complaint* upon the DOJ when the plaintiff/petitioner names as a party a unit of government or enterprise. *HCN R. Civ. P. 27(B)*.

1 The following parties appeared at the *Pre-Trial Conference*: Attorney William F.
2 Gardner, plaintiff's counsel, and DOJ Attorney Michael P. Murphy, defendant's counsel. The
3 Court determined to postpone the *Trial* after presentation of arguments, and scheduled a *Status*
4 *Hearing* to occur on December 28, 2000 at 9:00 a.m. CST. *Pre-Trial Conference Courtroom*
5 *Log/Mins.* at 24-25 (Dec. 15, 2000). Legal counsel of each party appeared by telephone at the
6 *Status Hearing*, and the Court apprised the parties of its progress on rendering a decision on the
7 *Defendant's Motion to Dismiss*.

9 On January 8, 2001, the Court entered its *Order (Determination of Subject Matter*
10 *Jurisdiction)*, and the defendant promptly filed an interlocutory appeal of the judgment on
11 January 15, 2001. In the absence of a ruling from the Ho-Chunk Nation Supreme Court, the
12 Court convened *Trial* on January 17, 2001 at 9:00 a.m. CST. The following parties appeared at
13 the *Trial*, which extended to January 18, 2001: Maureen Arnett, plaintiff; Attorney William F.
14 Gardner, plaintiff's counsel; and DOJ Attorney Michael P. Murphy, defendant's counsel. After
15 the *Trial*, the Supreme Court denied the interlocutory appeal, noting that "the merits of the case
16 are intertwined within the [interlocutory] appeal and may have been filed prematurely."
17 *Maureen Arnett et al. v. HCN Dep't of Admin. et al.*, SU 01-01 (HCN S. Ct., Feb. 1, 2001) at 2
18 (quoting *Michelle M. Ferguson v. HCN Ins. Review Comm'n/Div. of Risk Mgmt.*, SU 00-13
19 (HCN S. Ct., Oct. 14, 2000) at 1.

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23 At *Trial*, the Court invited the parties to submit post-trial briefs on or before March 2,
24 2001. *Trial Courtroom Log/Mins.* at 16 (Jan. 18, 2001). The parties mutually agreed to extend
25 this deadline to March 9, 2001, and the Court agreed to this stipulation in its March 2, 2001
26 *Order*. Both parties consequently filed post-trial briefs on March 9, 2001.²

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² The Court recognizes that over eighteen (18) months have elapsed since the parties' last filings. During this

1 **APPLICABLE LAW**

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

4 **Article VI - Executive**

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

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

12 **DEPARTMENT OF ADMINISTRATION ESTABLISHMENT AND ORGANIZATION ACT**

13 **Sec. 3. Mission**

14 (a) It is the mission of the Ho-Chunk Nation Department of Administration to provide
15 the support services and staff necessary for the effective and efficient operation of all Executive
16 Branch, Legislative Branch and Judicial Branch activities. The Department of Administration
17 will also provide high-quality, systematic planning and development based on rationality and
18 technical excellence in order to promote the general welfare of Ho-Chunk Members, safeguard
the interests of the Ho-Chunk Nation, uphold the historical traditions and culture of the Ho-
Chunk Nation, and enhance the sovereignty of the Ho-Chunk Nation.

19 (b) The Department of Administration will:

20 6. Maintain all facilities of the Nation in a safe, clean and orderly condition
21 consistent with established standards of the Nation.

22 **Sec. 4. Executive Director and Board**

23 (a) The Department of Administration shall consist of the Executive Director, a Board of
24 Directors, and such divisions and offices as shall be necessary for the execution of the mission
25 and mandates of the Department.

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28 timeframe, the Court experienced great uncertainty concerning the retention of judicial officers, resulting in
dramatic shifts in workload. In addition, certain factors in the instant case, as discussed below, contributed to the
prolonged decision-making process.

1 HO-CHUNK NATION PERSONNEL POLICIES AND PROCEDURES MANUAL

2 Introduction

3 General Purposes

[p. 2]

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5 These policies are issued as the official directive of the obligations of the HoChunk [sic] Nation
6 and the employees to each other and to the public. They are to ensure consistent personnel
7 practices designed to utilize to [sic] the human resources of the Nation in the achievement of the
8 desired goals and objectives.

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

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

15 Chapter 11 - Safety

[p. 40]

16 It is a pre-eminent concern of the HoChunk [sic] Nation that every employee has a safe working
17 environment. Prevention of occupational illnesses and injuries are our primary objectives.
18 Important but secondary objectives are the protection of property from damage and the
19 maintenance of conditions which will assure uninterrupted operation of our facilities.

20 Rules cannot be written to cover every possible situation that may arise in connection with each
21 and every individual task related to your work; therefore, certain definite responsibilities rest
22 upon you.

23 1. Protection of yourself.

24 4. Reporting to those in authority any dangerous conditions or unsafe practices when and
25 where such is found to exist.

26 Responsibilities:

27 1. Management: To ensure that every employee has a safe working environment.

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

General Conduct of Employees

[p. 42]

An obligation rests with every employee of the HoChunk [sic] Nation to render honest, efficient,
and courteous performance of duties. Employees will therefore be responsible and held

1 accountable for adhering to all Tribal policies, rules, directives, and procedures prescribed by the
2 Nation through supervisory or management personnel.

3 A. All employees have a duty to report, in writing, promptly and confidentially, any
4 evidence of any improper practice of which they are aware. As used here, the term
5 "improper practice" means any illegal, fraudulent, dishonest, negligent, or otherwise
unethical action arising in connection with Tribal operations or activities.

6 B. Reports of improper practice should be submitted through the line of administrative
7 supervision except that when the alleged impropriety appears to involve a management
8 employee. In such cases, reports should be referred to the next higher level management
employee.

9 Discipline Policy [pp. 44-46]

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

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

16 B. Behavior

17 2. Failure to carry out a direct order from a superior, except where the order is illegal
18 or the employee's safety may reasonably be jeopardized by the order.

19 5. Conviction of a crime, including conviction based on a plea of nolo contendere or
20 of a misdemeanor involving moral turpitude, the nature of which reflects the
21 possibility of serious consequences related to the continued assignment or
employment of the employee.

22 8. Discourteous treatment of the public or other employees, including harassing,
23 coercing, threatening, or intimidating others.

24 9. Conduct that interferes with the management of the Tribal operations.

25 10. Violation or neglect of safety rules, or contributing to hazardous conditions.

26 12. Physical altercations.

27 14. Creating a disturbance among fellow employees which would result in an adverse
28 effect on morale, productivity, and/or the maintenance of proper discipline.

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

- 5 1. specific working conditions
- 6 2. safety
- 7 6. involuntary termination
- 8 10. a claimed violation, misinterpretation, or inequitable application of these policies
and procedures.

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10 HO-CHUNK NATION RULES OF CIVIL PROCEDURE (adopted Feb. 22, 1997)

11 Rule 5. Notice of Service of Process.

12 (B) *Summons*. The *Summons* is the official notice to the party informing him/her that he/she is
13 identified as a party to an action or is being sued, that an *Answer* is due in twenty (20) calendar
14 days (*See, HCN R. Civ. P. 6*) and that a *Default Judgement* may be entered against them if they
do not file an *Answer* in the limited time. It shall also include the name and location of the
15 Court, the case number, and the names of the parties. The *Summons* shall be issued by the Clerk
of Court and shall be served with a copy of the filed complaint attached.

16 Rule 19. Filing and Responding to Motions.

17 (A) *Motion*. *Motions* may be filed by a party with any pleading or at any time after their first
18 pleading has been filed. A copy of all written *Motions* shall be delivered or mailed to other
19 parties at least five (5) calendar days before the time specified for a hearing on the *Motion*. A
Response to a written *Motion* must be filed at least one day before the hearing. If no hearing is
20 scheduled, the *Response* must be filed with the Court and served on the other parties within ten
(10) calendar days of the date the *Motion* was filed. The party filing the *Motion* must file any
21 *Reply* within three (3) calendar days.

22 Rule 27. The Nation as a Party.

23 (B) *Civil Actions*. When the Nation is filing a civil suit, a writ of mandamus, or the Nation is
24 named as a party, the *Complaint*, in the case of an official or employee being sued, should
25 indicate whether the official or employee is being sued in his or her individual capacity. Service
26 can be made on the Ho-Chunk Nation Department of Justice and will be considered proper
unless otherwise indicated by these rules, successive rules of the Ho-Chunk Nation Court, or Ho-
27 Chunk Nation Law.

1 Rule 31. Required Disclosures.

2 (5) judicial notice shall be taken of and required disclosures shall be made of official
3 documents, public documents, documents subject to public inspection, document and materials
4 of non-executive session, governmental minutes and recordings of a governmental body pursuant
to the HCN OPEN MEETINGS ACT OF 1996.

5 HO-CHUNK NATION RULES OF CIVIL PROCEDURE (amended Apr. 13, 2002)

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

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8 (A) Relief from Judgement. A *Motion to Amend* or for relief from judgement, including a request
9 for a new trial shall be made within ten (10) calendar days of the filing of judgement. The
10 *Motion* must be 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.

11 (B) Motion for Reconsideration. Upon motion of the Court or by motion of a party made not
12 later than ten (10) calendar days after entry of judgment, the Court may amend its findings or
13 conclusions or make additional findings or conclusions, amending the judgment accordingly.
14 The motion may be made with a motion for a new trial. If the Court amends the judgment, the
15 time for initiating an appeal commences upon entry of the amended judgment. If the Court
16 denies a motion filed under this rule, the time for initiating an appeal from the judgment
17 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 filing of such
motion, and 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
judgment commences in accordance with the Rules of Appellate Procedure.

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

25 (D) Erratum Order or Reissuance of Judgment. Clerical errors in a court record, including the
26 *Judgment* or *Order*, may be corrected by the Court at any time.

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

1 requesting party was not personally served in accordance with Rule 5(c)(1)(a)(i) or (ii); did not
2 have proper service and did not appear in the action; or (4) the judgment has been satisfied,
released, discharged or is without effect due to a judgment earlier in time.

3 Rule 61. Appeals.

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

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9 **FINDINGS OF FACT**

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11 1. The parties received proper notice of the January 17-18, 2001 *Trial*.

12 2. The plaintiff, Maureen E. Arnett, is an enrolled member of the Ho-Chunk Nation, Tribal
13 ID #439A005247, and was employed as an Administrative Assistant at Nįtani Hocira, a facility
14 owned and operated by the Ho-Chunk Nation located at 724 Main Street, La Crosse, WI, from
15 January 10, 2000 to April 14, 2000. *See Br. in Supp. of Def.'s Mot. to Dismiss*, Ex. A (Fax Cover
16 Sheet, Pl.'s Ex. 6; HCN Employee Status Change Notice, Pl.'s Ex. 4).

17 3. The defendant, Ho-Chunk Nation Department of Administration [hereinafter
18 Administration Department], is a sub-entity of the Ho-Chunk Nation, a federally recognized
19 Indian tribe, with its principal headquarters located on trust land in Black River Falls, WI. *See*
20 CONST., ART. VI, § 1(b); *see generally* DEP'T OF ADMIN. ESTABLISHMENT AND ORG. ACT
21 [hereinafter ADMIN. ORG. ACT].

22 4. Nįtani Hocira celebrated its grand opening on October 8, 1999, with the intention of
23 serving as a District II community center and branch office. The building also houses health and
24 social services and education offices. Tracey Lonetree, *Ni Tani Hocira (Three Rivers House): a*
25 *historical site*, HOČAK WORAK, Nov 8, 1999, at 1.

1 5. Prior to the plaintiff's employment, Branch Office Coordinator Gladys L. Morgan
2 approached the Ho-Chunk Nation Legislature [hereinafter Legislature] in an effort to secure
3 funding for the purpose of installing a building security system. *Trial Tr.* (Jan. 17-18, 2001) at
4 32-33. Nĭtanĭ Hocira has no alarm or video surveillance system. *Id.* at 24, 30.

6 6. Nĭtanĭ Hocira business hours conclude at 4:30 p.m., but the facility remains open with
7 doors unlocked until closing at or around 8:00 p.m. *Id.* at 29.

8 7. The plaintiff, Ms. Morgan and the maintenance worker routinely rotated shifts to
9 accommodate the late closing time. *Id.* Ms. Morgan and the maintenance worker accepted this
10 responsibility more often than the plaintiff. *Id.* at 50.

12 8. The plaintiff previously expressed her unease to Ms. Morgan concerning remaining alone
13 until closing, fearing the possibility of a physical attack. *Id.* at 31.

14 9. On Tuesday, April 4, 2000, the plaintiff decided to travel to Tribal Headquarters in Black
15 River Falls, WI, to speak directly to Sandra L. Martin, Director of Executive Facilities, regarding
16 working conditions. *Pl.'s Dep.* (Nov. 17, 2000) at 44. At such meeting, the plaintiff did not
17 indicate that she found the conditions intolerable. *Id.* at 53.

19 10. Peter Stephan, maintenance worker, began employment on either Thursday, April 6, 2000
20 or Monday, April 10, 2000. *Id.* at 68. The plaintiff interacted well with Mr. Stephan until she
21 became apprised of his background. *Id.*

23 11. The plaintiff learned "through the grapevine" that Mr. Stephan had a criminal history. *Id.*
24 at 58. The plaintiff and many District II members forwarded this information onto Ms. Martin.
25 *Id.* at 58.

26 12. On Wednesday, April 12, 2000, Ms. Martin confirmed to the plaintiff in an evening
27 telephone conversation that Mr. Stephan possessed a criminal background, and had been
28

1 implicated in a murder investigation. *Trial Tr.* (Jan. 17-18, 2001) at 136. However, neither party
2 produced any substantiating evidence as to the latter assertion.

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4 13. On Thursday, April 13, 2000, Ms. Martin proposed that the plaintiff receive a promotion
5 to the position of Building Facilities Manager, which would make the plaintiff primarily
6 responsible for building security. *Pl.'s Dep.* (Nov. 17, 2000) at 71. In response, the plaintiff
7 recalled remarking that "if that was what she was going to decide, then that was what I was going
8 to do." *Id.* The plaintiff "felt like [she] could be professional enough to handle the situation."
9 *Id.* at 72-73.

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11 14. Shortly thereafter, Ms. Martin released Mr. Stephan from his position as maintenance
12 worker, triggering Mr. Stephan's comment to the plaintiff: "You better watch yourself girl, and
13 quit stabbing people in the back." *Id.* at 73. Ms. Morgan overheard the foregoing remark, but
14 did not consider it threatening in nature. *Trial Tr.* (Jan. 17-18, 2001) at 75.

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16 15. Consequently, the plaintiff departed work early on April 13, 2000. *Id.* at 141.

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18 16. On Thursday, August 13, 2000, the plaintiff left a voicemail message for Ms. Martin,
19 relating that Mr. Stephan had threatened her and that she intended to leave work early. *Id.* at
20 188, 253.

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22 17. On Thursday, April 13, 2000, the plaintiff phoned Cecil R. Garvin, Sr., Executive
23 Director of the Department of Administration, in the evening to relate the day's events. *Pl.'s*
24 *Dep.* (Nov. 17, 2000) at 77. Mr. Garvin reacted by indicating that the matter required further
25 discussion, but the plaintiff instead informed him that she would resign. *Id.* at 78. Mr. Garvin
26 then directed the plaintiff to submit the resignation in writing. *Id.* The plaintiff recalled the
27 discussion as follows:

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Pl.: I told [Mr. Garvin] exactly what had happened, from
beginning to end.

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Def.'s Att'y: It says you had a conversation with him yesterday, so that would have been the thirteenth?

Pl.: That was a Thursday. I felt I wasn't getting any response, so I wanted to talk to him.

Def.'s Att'y: And that was after your phone call with [Ms. Martin] then?

Pl.: I believe so. No, I talked to [Mr. Garvin] on Thursday, and I spoke to [Ms. Martin] on Friday.

Def.'s Att'y: What did Cecil say?

Pl.: He said, "It is something that needs to be discussed."

Def.'s Att'y: So, did he set up an appointment?

Pl.: I said, "I am resigning." I told him I was resigning, and he said, "Well, send it to me in letter form," because he said, "We can't really talk about it over the phone." He said, "Send it to me in letter form," so I did.

*Id.*³

18. The plaintiff had decided to resign shortly following the utterance of the perceived threat.
Id. at 176.

19. On Friday, August 14, 2000, the plaintiff inquired about obtaining a temporary restraining order against Mr. Stephan at La Crosse County Courthouse & Law Enforcement Center, but refrained from beginning the formal process due to concerns over lack of anonymity. *Id.* at 142. La Crosse County Courthouse & Law Enforcement Center maintains business hours of 8:30 a.m. to 5:00 p.m. weekdays.⁴ <http://www.co.la-crosse.wi.us> (last visited on Sept. 6, 2002).

20. On Friday, August 14, 2000, the plaintiff recounts speaking with Ms. Martin at 8:00 a.m. by cellular phone. The plaintiff states that she placed this call after making inquiries at La

³ The plaintiff reiterated at *Trial* that she spoke with Mr. Garvin on Thursday, April 13, 2000. *Trial Tr.* (Jan. 17-18, 2001) at 256, 259. However, she later discounted this assertion, stating instead that she talked with Mr. Garvin the following day. *Id.* at 258, 263. In either event, the plaintiff maintains that the Garvin discussion occurred prior to

1 Crosse County Courthouse and prior to driving to Nĭtani Hocira. *Trial Tr.* (Jan. 17-18, 2001) at
2 248-49, 254.

3 21. Concerning this conversation, the plaintiff indicates that she informed Ms. Martin of the
4 content of the perceived threat. "I told her that I felt threatened and that I didn't feel comfortable
5 being in the building alone, knowing that he could come and go freely as he wished." *Id.* at 140.
6 According to the plaintiff, Ms. Martin responded, "I don't know what you want me to do about
7 it." *Id.* at 141. Also, the plaintiff noted that Ms. Martin suggested the option of resigning. *Id.* at
8 172-73. Consequently, the plaintiff alerted Ms. Martin of her decision to resign. *Id.* at 142-43.

9 22. Ms. Martin relates a dramatically different rendition of the chain of events leading up to
10 the conversation. Ms. Martin recalled not arriving to work until between 9:30 and 10:00 a.m. on
11 April 14, 2000. *Id.* at 270. Upon entering the office, Ms. Martin's staff informed her that the
12 plaintiff had earlier spoken with Mr. Garvin. *Id.* Ms. Martin then received the plaintiff's
13 resignation by facsimile transmission at 9:37 a.m. prior to the conversation. *Id.* at 189, 210. In
14 the ensuing discussion, the plaintiff did not emphasize the security issue as her primary concern.
15 *Id.* at 213-14. Ms. Martin reports not learning the content of the perceived threat until an April
16 17, 2000 conversation with Ms. Morgan. *Id.* at 190, 195.

17 23. The faxed resignation dated April 14, 2000, and bearing a time stamp of 9:37 a.m., reads
18 as follows:

19 I spoke w/ Cecil re: the situation yesterday. I will write up a formal
20 statement. I am resigning today. And I am getting legal representation
21 regarding this personnel issue.

22 [Plaintiff's Signature]

23 the Martin discussion, which she contends occurred at 8:00 a.m. on Friday, April 14, 2000. *Id.* at 254.
24 ⁴ The Court may take judicial notice of "documents subject to public inspection." *HCN R. Civ. P. 31(A)(5).*

1 See *Br. in Supp. of Def.'s Mot. to Dismiss*, Ex. A (Fax Cover Sheet, Pl.'s Ex. 6). The plaintiff
2 intended the above statement to represent an immediately effective resignation. *Pl.'s Dep.* (Nov.
3 17, 2000) at 37.

4
5 24. On Friday, August 14, 2000, the staff at Nitanj Hocira received confirmation from the
6 Ho-Chunk Nation Department of Education regarding Mr. Stephan's criminal history. *Trial Tr.*
7 (Jan. 17-18, 2001) at 97, 100-01. Mr. Stephan was convicted in 1989 on three (3) counts of
8 delivery of cocaine. *Pl.'s Ex. 17* (J. of Conviction).

9
10 25. At *Trial*, Ms. Martin testified that she would have taken additional measures if adequately
11 alerted to the perceived threat. *Trial Tr.* (Jan. 17-18, 2001) at 207.

12 13 DECISION

14
15
16 The Court earlier established the test for constructive discharge. The plaintiff's case must
17 adequately demonstrate:

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

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

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

25 *Order (Determination of Subject Matter Jurisdiction)*, CV 00-60, -65 (HCN Tr. Ct., Jan. 8, 2001)
26 at 16 (citations omitted). In addition, the Court specifically informed the plaintiff that she would
27 need to "identify the specific fundamental policy contravened by the defendant[]" at *Trial. Id.*
28 For reasons discussed below, the plaintiff clearly fails to satisfy each prong of the test.

1 I. DOES THE UTTERANCE OF A THREAT AT THE
2 WORKPLACE SIGNIFY A VIOLATION OF A
3 FUNDAMENTAL HO-CHUNK PUBLIC POLICY?

4 Despite the Court alerting the plaintiff to her need to identify a specific violation of
5 fundamental public policy, the plaintiff failed to do so. Although "the plaintiff searched for a
6 fundamental public policy violation . . . ," *Pl.'s Post-Trial Br.* (Mar. 9, 2001) at 1, the plaintiff
7 could only "direct[] the Court specifically to the Personnel Policies and Procedures Manual
8 [hereinafter PERSONNEL MANUAL], and the [ADMIN. ORG. ACT], which . . . was in effect at the
9 time of this discharge; when considering whether or not a public policy was violated under the
10 circumstances testified to by the plaintiff." *Id.* at 1-2. This manner of direction is analogous to
11 decrying the unconstitutionality of an action, while pointing the Court to no single constitutional
12 provision at issue.

13
14 However, the Supreme Court of the Ho-Chunk Nation has indicated in another context
15 that the Court must proceed to address even inarticulately raised arguments if generally
16 discernible. *See Roy J. Rhode v. Ona M. Garvin, as Gen. Manager of Rainbow Casino*, CV 00-
17 39 (HCN Tr. Ct., Aug. 24, 2001) at 20 n.6 (*citing Louella A. Kelty v. Jonette Pettibone et al.*, SU
18 99-02 (HCN S. Ct., July 27, 1999) at 3). In such an instance, the plaintiff implicitly accepts the
19 risk that the Court will not intently labor upon constructing the party's legal argument. The Court
20 acknowledges the presence of several statutory provisions implicating matters related to safety,
21 *see supra*, but the Court will only examine the most apparent line of reasoning.

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24 The Legislature directed the Administration Department to abide by a *mandate* to
25 "[m]aintain all facilities of the Nation in a safe, clean and orderly condition consistent with
26 established standards of the Nation." ADMIN. ORG. ACT, §§ 3(b)(6), 4(a). This mandate logically
27 refers to the condition of the physical plant, and not the general behavior of the workforce due to
28

1 the presence of the adjective, "clean." *Id.* The alleged conduct of Mr. Stephan had no impact on
2 the Nītanī Hocira facility. Therefore, the ADMIN. ORG. ACT contains no relevant statements of
3 fundamental tribal public policy.
4

5 The PERSONNEL MANUAL's chapter on safety succumbs to the same criticism. *See*
6 PERSONNEL MANUAL, Ch. 11 at 40-41. The wording evidences an intention to focus upon the
7 physical aspects of the workplace and not the actions within it. For example, the drafters
8 declined to enumerate specific safety rules "connect[ed] with each and every individual task
9 related to [an employee's] work." *Id.* at 40. One cannot plausibly contend that the Legislature
10 intended this proviso to encompass threatening behavior connected with individual work-related
11 responsibilities.
12

13 Conversely, the Legislature did intend that the PERSONNEL MANUAL serve "as the official
14 directive of the obligations of the HoChunk [*sic*] Nation and the employees to each other."
15 PERSONNEL MANUAL, Intro. at 2. Therein, the Legislature erected "standards of conduct" by
16 emphasizing certain types of "unacceptable conduct," including the "employment conduct
17 violation[]" of threatening fellow employees. PERSONNEL MANUAL, Ch. 12, § B(8) at 44-46.
18 Each and every employee must refrain from violating the prevailing standard, but does its
19 inclusion in the PERSONNEL MANUAL elevate the admonition to a fundamental public policy?
20 Arguably no, with the exception that the behavior may also offend a greater overriding policy.
21 For example, a threat may represent unwelcome sexual conduct. In that instance, the Legislature
22 has clearly articulated a strong public policy against the presence of sexual harassment in the
23 workplace. *Id.*, Ch. 2 at 4.
24
25

26 Absent such a connection, a single proscription against threats in the PERSONNEL
27 MANUAL is not capable of satisfying the requirement of the first prong. Otherwise, one could
28

1 potentially attach fundamental public policy significance to most provisions in the PERSONNEL
2 MANUAL. It simply strains credulity to argue that the Legislature has announced a fundamental
3 public policy against "[d]iscourteous treatment," of which threatening behavior is a type. *Id.*,
4 Ch. 12, § B(8) at 46. Therefore, the Court must hold that the plaintiff has failed to demonstrate a
5 violation of a fundamental public policy.
6

7 II. DID THE PLAINTIFF'S RESIGNATION CONSTITUTE A
8 REASONABLE REACTION TO THE PERCEIVED THREAT?

9 The Court provided the plaintiff the opportunity to present analogous foreign case law to
10 the Court in support of her claim that a fear of bodily harm inflicted by another might serve as
11 the basis for a defense of constructive discharge. *Trial Tr.* (Jan. 17-18, 2001) at 177-78, 272-73.
12 The plaintiff, however, declined this opportunity. Rather, "[a]s to the remaining elements set out
13 by the Court, the plaintiff stands upon the testimony and the evidence received by the Court
14 during the trial of this matter." *Pl.'s Post-Trial Br.* (Mar. 9, 2001) at 3. Yet, neither the
15 testimony nor the evidence provides any insight as to state constructive discharge jurisprudence,
16 and the Court has derived its test from state court judgments.
17

18 The Court, therefore, searched for analogous fact situations within state court opinions,
19 and could locate only two (2) decisions in which litigants based their defense of constructive
20 discharge upon fear generated by intimidation and/or threats. Prior to discussing those cases, the
21 Court must explain why it has limited its focus to the solitary alleged threat and not the
22 preceding administrative conduct. Only ten (10) days prior to the resignation, the plaintiff made
23 no mention of the intolerability of the working conditions to Ms. Martin. This fact proves
24 particularly important since the plaintiff had sought out Ms. Martin specifically to discuss such
25 conditions. Then, on the day of the alleged threat, the plaintiff did not react adversely to news of
26 her promotion. Instead, she appeared willing and able to accept the added responsibilities
27
28

1 despite already having misgivings about Mr. Stephan's criminal record. The plaintiff only
2 decided to resign after Mr. Stephan's statement, and did not previously contemplate this action.
3 Based on the record, the plaintiff cannot contend that her resignation resulted from pre-existing
4 intolerable conditions, culminating in the alleged threat.
5

6 Other plaintiffs have failed to prove constructive discharge even in significantly more
7 egregious circumstances.⁵ The Maryland Court of Special Appeals declined to find a
8 constructive discharge even though the employee's supervisor had earlier approved a four (4) day
9 administrative leave in recognition that the employee's "safety was at stake." *Beye v. Bureau of*
10 *Nat'l Affairs*, 59 Md. App. 642, 647 (1984). The plaintiff had served as an informant in toppling
11 a marijuana trafficking ring in the workplace. Several employees were ultimately convicted of
12 drug-related offenses with some indictments for unlawful transportation of a handgun. *Id.* at
13 646. However, the employees returned to work on bond after the arrests, and one proceeded to
14 threaten the plaintiff. *Id.*
15

16
17 The plaintiff declined to return to work after the administrative leave since the employer
18 refused to provide assurances of safety or, in the alternative, a transfer or indefinite annual leave.
19 *Id.* at 647. In its ruling, the court found that the plaintiff failed to allege that the employer
20 possessed the ability to fulfill any of the foregoing conditions. *Id.* at 655. Still, the court
21 entertained
22

23 no doubt that [the employee's] apprehension about returning to work with
24 the people he reported was both genuine and reasonable, and that his
25 decision not to return may well have been a prudent one from his
26 perspective. But the burden or consequence of that apprehension,
27 however justified it may be, cannot be thrust upon an otherwise innocent
28 and neutral employer. Although an employer has a general obligation to
provide a safe workplace for his employees, aside from his obligations

⁵ In these cases, the analyses of the separate prongs oftentimes converge, and the Court will note the intermingling of elements when it occurs.

1 under the workmen's compensation act, we know of no law that makes
2 him an insurer against personal attacks by fellow employees

3 *Id.* (citation omitted). In short, "[t]he employer cannot be expected to police the workplace to
4 that degree, and he cannot be held to have coerced a resignation by refusing to undertake such a
5 duty." *Id.* at 655-56.

6 In the second case, a Washington County Deputy Sheriff attended a stag party hosted by
7 other deputies within his department, and was forced to have lewd physical interaction with a
8 stripper in public view. *Leaon v. Washington County*, 397 N.W.2d 867, 869 (Minn. 1986). The
9 plaintiff voiced his dissatisfaction with the evening's events the next morning, and consequently
10 received a threat of physical violence from two (2) of the hosts. *Id.* Fearing for his safety, the
11 plaintiff used accumulated leave time followed by a prolonged unpaid leave of absence. After
12 the passage of six (6) months, the county ruled that the plaintiff had resigned from his position.
13
14
15 *Id.*

16 The Minnesota Supreme Court focused upon the final prong in rendering its decision, but
17 both of the summarized state cases provide helpful insight concerning the second prong. In the
18 instant case, Mr. Stephan made the following comment to the plaintiff shortly after receiving
19 news of his transfer: " You better watch yourself girl, and quit stabbing people in the back." The
20 plaintiff equated this comment with a threat, but the statement is ambiguous on its face. Mr.
21 Stephan did not make an overt threat of physical violence as acknowledged in the cited state
22 cases. Also, unlike the above cases, Mr. Stephan did not remain in the workplace where the
23 statement would retain a greater degree of immediacy.
24
25

26 The plaintiff argues that the perceived threat remained an urgent matter due to the
27 absence of security at Nīṭani Hocira, but, as noted in *Beye*, an employer typically does not have a
28 legal obligation to provide impregnable facilities and police protection for its employees. Local

1 law enforcement is responsible for addressing the latter security concern, but the plaintiff
2 voluntarily declined to utilize those resources available to her. An employer may still attempt to
3 allay the fears of its employees through other precautionary measures, but neither the *Beye* court
4 nor this Court could identify statutory law capable of compelling the employer to act in
5 accordance with the plaintiffs' wishes. In this regard, both courts recognize the inability of the
6 plaintiffs to prove a breach of a fundamental public policy.
7

8 Returning to the second prong, the Court holds that the plaintiff unreasonably reacted to
9 the perceived threat. First, the plaintiff determined that the comment did not merit law
10 enforcement involvement. The plaintiff indicated that she wanted to remain anonymous, but the
11 Court cannot conceive how she believed this was a possibility. Second, the plaintiff sought no
12 leave time in which to further discuss the matter with her employer. In both reported cases, the
13 plaintiffs utilized periods away from work to hopefully decrease any potential volatility. Third,
14 the plaintiff did not seek administrative redress concerning either the actions of Mr. Stephan or
15 the employer prior to resigning. This final point leads the Court into the discussion of the last
16 prong.
17
18

19 III. DID THE PLAINTIFF AFFORD THE EMPLOYER AN
20 ADEQUATE OPPORTUNITY TO ADDRESS THE
21 SITUATION?

22 Factual discrepancies surround the sequence of events immediately prior to the plaintiff
23 delivering her faxed resignation. In particular, the plaintiff and Ms. Decorah dispute the dates
24 and times of the telephone calls, but neither party disputes that the conversation with Mr. Garvin
25 occurred prior to any conversation with Ms. Decorah. The plaintiff recounts that upon Mr.
26 Garvin's suggestion that the matter deserved further discussion, she responded by indicating that
27 she would resign. In fact, the plaintiff had decided to resign just after Mr. Stephan's statement
28

1 according to her deposition testimony. This explains why she quickly expressed her intention
2 during the first conversation with supervisory personnel.

3
4 In *Leaon*, the plaintiff similarly avoided exhausting administrative remedies prior to
5 abandoning his deputy position. *Id.* at 874. The Minnesota Supreme Court viewed this failure as
6 determinative on whether the defense of constructive discharge should succeed. *Id.* Essentially,
7 the plaintiff had not provided the employer the chance to address his claims prior to unilaterally
8 deciding the matter by resigning.

9
10 The same criticism attaches to the case at bar. Moreover, the plaintiff made her decision
11 prior to any meaningful discussion of the perceived threat. Ms. Decorah testified that she would
12 have attempted to rectify the situation if provided proper notice, but the plaintiff had already
13 taken final action.

14
15 **THEREFORE**, based upon the preceding facts and analysis, the Court holds in favor of
16 the defendant. The plaintiff failed to prove a single prong of the recently adopted test for
17 determining the existence of a constructive discharge. The Court hopes that the defendant
18 recognizes the wisdom and necessity of having such a defense available to address egregious
19 situations. This, however, is not such a situation.

20
21 The parties retain the right to file a timely post judgment motion with this Court in
22 accordance with *HCN R. Civ. P. 58*, Amendment to or Relief from Judgment or Order.
23 Otherwise, “[a]ny final *Judgment* or *Order* of the Trial Court may be appealed to the Ho-Chunk
24 Nation Supreme Court.⁶ The *Appeal* must comply with the Ho-Chunk Nation *Rules of Appellate*

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27 ⁶ The Supreme Court earlier emphasized that it “is not bound by the federal or state laws as to standards of review.”
28 *Louella A. Kelty v. Jonette Pettibone et al.*, SU 99-02 (HCN S. Ct., Sept. 24, 1999) at 2. The Supreme Court,
therefore, has voluntarily adopted an abuse of discretion standard “to determine if an error of law was made by the
lower court.” *Daniel Youngthunder, Sr. v. Jonette Pettibone et al.*, SU 00-05 (HCN S. Ct., July 28, 2000) at 2; *see also Coalition for a Fair Gov’t II v. Chloris A. Lowe, Jr. et al.*, SU 96-02 (HCN S. Ct., July 1, 1996) at 7-8; and *JoAnn Jones v. HCN Election Bd. et al.*, CV 95-05 (HCN S. Ct., Aug. 15, 1995) at 3. The Supreme Court accepted

1 Procedure [hereinafter *HCN R. App. P.*], specifically [*HCN R. App. P.*], Rule 7, Right of
2 Appeal.” *HCN R. Civ. P.* 61. The appellant “shall within thirty (30) calendar days after the day
3 such judgment or order was rendered, file with the [Supreme Court] Clerk of Court, a Notice of
4 Appeal from such judgment or order, together with a filing fee of thirty-five dollars (\$35 U.S.).”
5 *HCN R. App. P.* 7(b)(1). “All subsequent actions of a final *Judgment* or *Trial Court Order* must
6 follow the [*HCN R. App. P.*].” *HCN R. Civ. P.* 61.
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10 **IT IS SO ORDERED** this 25th day of September, 2002, by the Ho-Chunk Nation Trial
11 Court located in Black River Falls, WI within the sovereign lands of the Ho-Chunk Nation.
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14 _____
15 Honorable Todd R. Matha
16 Associate Trial Court Judge
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26 the following definition of abuse of discretion: “any unreasonable, unconscionable and arbitrary action taken
27 without proper consideration of facts and law pertaining to the matter submitted.” *Youngthunder, Sr.*, SU 00-05 at 2
28 (quoting BLACK’S LAW DICTIONARY 11 (6th ed. 1990)). Regarding findings of fact, the Supreme Court has required
an appellant to “demonstrate[] clear error with respect to the factual findings of the trial court.” *Coalition II*, SU
96-02 at 8; but see *Anna Rae Funmaker v. Kathryn Doornbos*, SU 96-12 (HCN S. Ct., Mar. 25, 1997) at 1-2.

