

BEFORE THE ARBITRATOR

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In the Matter of the Arbitration of a Dispute Between  
**WISCONSIN PROFESSIONAL POLICE ASSOCIATION/  
LAW ENFORCEMENT EMPLOYEE RELATIONS DIVISION**

and

**SAUK COUNTY**

Case 174  
No. 68174  
MA-14146

(Tammy Moungey Grievance)

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**Appearances:**

**Attorney Roger W. Palek**, Staff Counsel, Wisconsin Professional Police Association, 660 John Nolen Drive, Suite 300, Madison, Wisconsin, appeared on behalf of the Union.

**Attorney Alene J. Kleczek**, Sauk County Corporation Counsel, 505 Broadway, Baraboo, Wisconsin appeared on behalf of the County.

**ARBITRATION AWARD**

At all times pertinent hereto, the Wisconsin Professional Police Association/Law Enforcement Employee Relations Division (herein the Union) and Sauk County (herein the Company) were parties to a collective bargaining agreement dated March 17, 2008, covering the period January 1, 2007, to December 31, 2008, covering a bargaining unit of Sauk County Courthouse employees and providing for binding arbitration of certain disputes between the parties. On July 28, 2008, the Union filed a request with the Wisconsin Employment Relations Commission (WERC) to initiate grievance arbitration over the alleged constructive termination of Tammy Moungey, a member of the bargaining unit, and requested a panel of the WERC staff from which to select an arbitrator to decide the issue. The undersigned was subsequently selected to hear the dispute. The hearing was conducted on July 23 and August 27, 2009 and the proceedings were transcribed. The parties filed initial briefs by November 20, 2009 and reply brief by December 14, 2009, whereupon the record was closed.

**ISSUES**

The parties stipulated to the framing of the issues, as follows:

Did the Grievant resign, or was she constructively discharged without cause?

If she was constructively discharged without cause, what is the remedy?

**PERTINENT CONTRACT PROVISIONS**

**ARTICLE III – MANAGEMENT RIGHTS**

The Employer possesses the sole right to operate the County and all management rights reposed in it, subject only to the express terms of this Agreement. These rights include, but are not limited to, the following:

- A. To direct all operations of the Employer;
- B. To establish reasonable work rules and schedules of work;
- C. To hire, promote, transfer, schedule and assign employees in positions within the County;
- D. To suspend, demote, discharge and take other disciplinary action against employees for cause;

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- F. To maintain efficiency of Employer operations;
- G. To take whatever action is necessary to comply with state or federal law;

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- L. To determine the methods, means and personnel by which Employer operations are to be conducted:

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**ARTICLE VIII – GRIEVANCE AND ARBITRATION PROCEDURE**

**Section 1. Grievance** – A grievance is defined to be a controversy between the Union and the Employer, or between any employee or employees and the Employer, as to a matter involving the interpretation and application of a specific provision of this Agreement.

**Section 2. Procedure** – Grievances shall be processed in the following manner (time limits set forth shall be exclusive of Saturdays, Sundays and holidays).

**Step 1.**

The employee and/or Business Representative shall take the grievance up verbally with the employee's immediate supervisor within five (5) days of their knowledge of the occurrence of the event causing the grievance, which shall not be more than fourteen (14) days after the event.

**ARTICLE XI – VACATIONS AND HOLIDAYS**

**Section 3. Schedule** – Requests for two (2) or more consecutive days of vacation time shall be submitted at least thirty (30) workdays in advance. At the discretion of the department head, vacation requests may be considered upon less notice. Such requests shall be made in writing to the department head. The Employer shall determine the number of employees on vacation at any given time.

**ARTICLE XII – LEAVES OF ABSENCE**

**Section 1. Eligibility** – Employees must have passed their probationary period to be eligible for a written leave of absence.

**Section 2. Procedure** – Employees shall make written application for leaves to the Employer and shall, except in the case of illness or injury, make application ten (10) days prior to the desired starting date of the leave.

**Section 3. Types of Leave** –

**A. General** – Upon written application by the employee, the Employer may grant a leave of absence for any reason deemed acceptable to the Employer for a period not to exceed ninety (90) calendar days. An employee may request an extension of such leave by making written application five (5) days prior to the expiration of the original leave, supported by appropriate reasons.

**B. For Medical Reasons** – A leave of absence without pay shall be granted for personal illness or disability of a non-probationary employee for a period of up to twelve (12) months. After this twelve (12) month period, the employee will be placed on layoff status. A leave of absence without pay may also be granted for illness of a member of the immediate family for a period of time not to exceed three (3) months. An employee shall be required to give a minimum of five (5) workdays notice of anticipated return to County employment. An extension of the one-year limit may be granted by mutual consent of the department head and employee, provided further medical information substantiates the continued disability.

## **BACKGROUND**

Tammy Moungey, the Grievant herein, worked for Sauk County for twelve years prior to April 7, 2008. She ultimately worked as a Personal Care Worker and was a member of the Courthouse bargaining unit represented by the Union herein.

In the late summer of 2007, Moungey began experiencing symptoms of clinical depression. On September 7, 2007, she was diagnosed with depression by her physician and given a prescription for antidepressant medication. She continued to experience symptoms of depression throughout September and, on September 24, on her doctor's advice, she requested a medical leave of absence under Article XII, Sec. 3(b) of the collective bargaining agreement and the Family and Medical Leave Act (FMLA). On September 27, she was informed by the County Personnel Department that she was not eligible for leave under the FMLA and that her request was denied. On October 1, Moungey requested a one month general leave of absence under Article XII, Sec. 3(a) of the collective bargaining agreement from her department head, Human Services Director Bill Orth, again citing her diagnosis of depression and her doctor's recommendation. Orth discussed the matter with Moungey's supervisors, Sue Hebel and Barb Walsh, who felt that because of the needs of the department it would not be feasible to grant her request. On October 3, Orth sent Moungey a letter denying her request "because of program service considerations," but offered to allow her to take as much vacation time as possible during October instead.

Subsequent to the denials of her leave requests, Moungey's work situation continued to deteriorate. On October 30, she received a letter from Walsh and Hebel detailing deficiencies in her work performance and warning her that continued infractions would result in discipline. On November 26, she made a request to take vacation from December 28 through January 3. On December 26, Walsh denied her request. In January 2008, Moungey was placed on a protocol of quarterly performance evaluations, citing her inability to improve her performance following her annual review in September. She also had regular meetings with Walsh and Hebel during this period to address her performance issues. On March 12, 2008, Walsh issued Moungey a written reprimand for improperly documenting her work time. Moungey did not grieve the discipline, but noted that she believed her mistakes were due to stress as a result of months of harassment. In response thereto, Hebel gave Moungey a form to fill out in the event she wanted to file harassment charges, but Moungey apparently did not do so.

On March 23, 2008, Moungey transmitted the following letter to Orth, Hebel, Personnel Director Michelle Koehler, the County Human Services Board and the Union:

To all whom it concerns:

I am writing this letter with great sorrow. After a rewarding 12-year career of serving elderly and disabled residents of Sauk County, I am regretfully, being forced to terminate my employment with the PCW program. My last day of work will be April 7, 2008.

The hostile work environment I've been subjected to and the constant harassment I've been made to endure have resulted in several debilitating, stress-related illnesses. My treating physician concurs the physical symptoms I'm experiencing are a direct result of my current job conditions. She has advised me that, in the best interest of my health, I need to remove myself from this harmful working environment.

Sincerely,  
Tammy Moungey

In response, on March 27, Koehler sent Moungey the following response:

Dear Ms. Moungey:

I am in receipt of a document from you dated March 23, 2008. Please be advised that Sauk County Department of Human Resources accepts your resignation effective April 7, 2008.

In addition, I will take this opportunity to reiterate your immediate supervisor provided you with information regarding what process to follow if you file a formal complaint. If you plan to pursue a formal complaint you will need to file said complaint in writing regarding your allegations.

For your convenience I have enclosed an additional copy of the policy regarding harassment, as well as a brochure for the Sauk County Employee Assistance Program.

Sincerely,  
Michelle Koehler  
Personnel Director

At some time after receipt of Koehler's letter, Moungey had a change of heart and approached her Union representative, Paul Negast, about rescinding her resignation, however, the County was unwilling to allow Moungey to do so. On April 7, Moungey's last day of employment, she filed the instant grievance alleging that she was forced to resign due to a hostile work environment, which was, in effect, a constructive discharge, and, further, that the County wrongfully refused to allow her to rescind her resignation. The grievance was denied and the matter proceeded through the contractual grievance process to arbitration. Additional facts will be reference, as necessary, in the DISCUSSION section of this award.

## POSITIONS OF THE PARTIES

### The Union

The Union asserts that the Count violated the Grievant's contractual and statutory rights by denying her Family and Medical leave to which she was entitled. Arbitrators have held that where the parties have incorporated an external statute into the contract an arbitrator should consider it. Here, the FMLA is clearly incorporated into Article 12, Section 7 of the contract and the County concedes it is covered by it and that the Grievant was a covered employee. The arbitrator is, therefore, obligated to consider it. The FMLA makes it unlawful to interfere with, restrain, or deny the exercise of any of its rights. Under the FMLA an employee is entitled to leave if afflicted with a "serious health condition," defined as "an illness, injury, impairment, or physical or mental condition that involves inpatient care in a hospital, hospice, or residential medical care facility; or continuing treatment by a health care provider," that makes her unable to perform the functions of her job. Once the employee states a qualifying reason for the leave, the burden is on the employer to seek additional information and determine whether the request is justified.

Here, the Grievant provided the County with a properly filled out leave request, with a certification from her physician. There is no question she met the requirements of the statute in applying for the leave. Thereafter, the Personnel Director, Michelle Koehler, and her assistant, Mary Jane Szweda, did no further inquiry into the Grievant's condition before denying her request. Instead, they explained the denial in part on the basis of the Grievant checking the wrong box on the application form. Koehler also attempted to deny any involvement in the denial of the request and claimed she could not recall even seeing it. Szweda further claimed that depression did not constitute a serious health condition, but also stated that the application was reviewed by Koehler before it was denied. After the denial, there was no follow up. Koehler would not meet with the grievant or return her phone calls and cannot absolve herself from responsibility for what occurs in her office by claiming lack of knowledge.

The County unlawfully denied the Grievant FMLA leave for which she was clearly eligible. She had certification of a serious medical condition and the Seventh Circuit has held that depression may qualify under the FMLA. (*citations omitted*). Koehler testified that the opinion was that depression "wasn't necessarily a serious health condition," although it clearly falls within the definition adopted by the Seventh Circuit. By making such a decision without making any effort to follow-up or obtain further information, Koehler put the County at risk in the event that she was wrong, which clearly was the case. By refusing the Grievant's leave request, Koehler put her and the citizens she served at risk and it is only due to good fortune that it did not result in injury to her or a client.

As a result of the denial of her contractual and statutory rights, the Grievant was constructively discharged without cause. There is no dispute that if the Grievant voluntarily resigned her position she has no claim. What actual happened, however, was that the denial of her statutory rights led to a situation so intolerable that the Grievant was forced to leave her

job against her will in order to preserve her health. Her letter of March 23 makes it clear this was not what she wanted to do. The concept of constructive discharge and the standard for finding it were set forth by Arbitrator Gordon in SAUK COUNTY, WERC, MA-14017 (Gordon, 1/28/09). In effect, constructive discharge occurs when conditions become so intolerable that a reasonable employee would be caused or compelled to quit or resign. That is exactly the case here – the Grievant was compelled to resign in order to preserve her health. Her physician’s treatment plan called for an extended leave from work and she was unable to comply due to the County’s denial of her leave request. Further, after the denial the Grievant’s supervisors, Walsh and Hebel, increased the pressure on her, making her situation even more intolerable. Thus, there is no question that she was forced to quit and that this constituted constructive discharge.

The only remaining question is whether the County had just cause for discharge. It did not. Other than the reprimand she received on March 12, 2008, there is no discipline in the Grievant’s record. Hebel, Walsh and Koehler all denied trying to terminate the Grievant and the County tacitly admitted lack of cause when it permitted the Grievant to work the remaining two weeks after she gave notice. Ordinarily a case such as this would merit compensatory damages for pain and suffering, but such is not available in arbitration, therefore, the Grievant should be reinstated and made whole for all lost wages and benefits.

### **The County**

The County asserts that the Grievant voluntarily resigned from her job and was not constructively discharged. The standard for constructive discharge is “that conditions were so intolerable that a reasonable person confronted with the same circumstances would have been compelled to resign. The level of intolerability must be unusually aggravating and surpass isolated incidents of misconduct, injustice or disappointment.” LAIDLAW TRANSIT, INC., A-6217 (Levitan, 1/5/07), *citing* STROZINSKY V. SCHOOL DISTRICT OF BROWN DEER, 237 W2D 19, 614 N.W.2D 443. Here, there were no negative employment actions taken against the Grievant and a reasonable person would have taken steps to resolve her problems rather than resigning.

A reasonable person would not have felt compelled to terminate her employment under these circumstances. Nowhere in the grievance did the Grievant cite the denial of FMLA, general leave, or vacation as a basis for her resignation, rather she resigned due to what she termed harassment. Harassment is defined as “words, conduct, or action (usu. repeated or persistent) that, being directed at a specific person, annoys, alarms, or causes substantial emotional distress in that person and serves no legitimate purpose.” *Black’s Law Dictionary* 721 (7<sup>TH</sup> Ed., 1999) What the Grievant considered harassment was interventions by her supervisors that had a legitimate purpose and is a management right. She had other options, but did not avail herself of them. She could have grieved the denial of the FMLA or general leave, but did not. Neither did she file a complaint with the state over the denial of her FMLA. Instead, she resigned six months after the denial of her leave request, which was not a reasonable act.

The County gave the Grievant poor performance evaluations and a written reprimand, but these are not considered job actions for purposes of constructive discharge. Fear of termination due to poor performance evaluations is also not a basis for constructive discharge. She also received no negative employment actions. Her hours and working conditions remained the same and she was not subjected to any treatment different than that accorded to her co-workers.

The County also cannot be held liable when an employee becomes overly attached and emotional regarding her job. The Grievant was accused of elder abuse and received negative performance evaluations, which she blamed on her supervisors. She took professional criticism, which served a legitimate purpose, as personal attacks. She felt mentally threatened by her supervisors for negative performance evaluations, but if negative performance evaluations are considered harassment then the County has lost its ability to supervise its employees and direct its operations. The County made no statements and took no actions that could be construed as constructive discharge, even if it mistakenly denied her FMLA request. Therefore, the grievance should be denied.

### **The Union in Reply**

The Union maintains that the County's denial of the Grievant's FMLA request was directly responsible for her medical condition being untreated, which, when coupled with the increasing pressures she was subjected to at work, led to her constructive discharge without cause. She had no other options than to leave her employment.

The County argues that a reasonable person would not have resigned and that other options were available. The problem with this logic is that it assumes that the Grievant was capable of functioning as a reasonable person. Her physician recommended that she be removed from the work environment for a minimum of thirty days. Due to the County's unlawful behavior, this did not occur. As a result, she was not functioning at her best cognitively or emotionally and not capable of functioning as a reasonable person.

Even were she able to so function, however, she had exhausted all reasonable options. She attempted to resolve her issues with Walsh. When that was unsuccessful, she went up the supervisory chain to Hebel and Orth. None of them gave her the needed relief, either in granting her the needed time off or in addressing the pressure between her and Walsh. Her only available option was to go to the Human Resources Director, which she did, notwithstanding that the HR Director had denied her FMLA request. Koehler, however, ignored her initially and ultimately only responded by directing Hebel to give her information on filing a sexual harassment complaint. Clearly she had no further reasonable options short of appealing directly to the County Board, which would have likely increased her problems. The County points out that the Grievant did not file a complaint with the Department of Workforce Development over the denial of her FMLA request, but the fact remains that it was the denial of her request that led to her untenable work situation, and her failure to file a complaint does not change that fact. Her physician required her to be off work for the treatment regimen to succeed and, in



effect, declared her unfit for duty. The County ignored that opinion and forced her to continue working even though she was technically unfit for duty. Under those conditions she cannot be held to a standard of what a reasonable person should have or would have done. Finally, she reached a breaking point where she could no longer function and was forced to resign to protect her health. She was not in danger of termination and no such concern motivated her. The County should have seen to it that she got the needed treatment and foregone interventions about her relationships with her clients until after that was resolved. Instead Walsh used it as another basis for pressuring her further at a time when she could least afford it.

### **The County in Reply**

The County disputes certain of the Union's statements of fact. It asserts that the Union overstates the seriousness of the Grievant's condition and level of treatment necessary for it. The record shows the Grievant suffered from depression, not severe depression, as the Union maintains. There is no evidence that the Grievant's condition was severe and debilitating, or upon what the diagnosis was based. It is also a misstatement that the physician said she needed thirty days' leave. He actually only recommended two weeks off, and not due to treatment, but rather because of the Grievant's alleged incapacity and inability to perform her job functions. The Union also misunderstands the nature of the Grievant's job and the seriousness of the consequences arising from her inability to maintain clearly defined boundaries with her clients.

The Union's claim of constructive discharge is based on one incident – the denial of the Grievant's FMLA leave request. The problems with this argument are that one mistake does not constitute constructive discharge, the Grievant had other options besides FMLA, such as unpaid leave, which she did not exercise, and there was a six month gap between the leave denial and her resignation. FMLA cases dealing with depression show that many employees call in sick when they are so overwhelmed by depression that they cannot work. In fact, the law does not require permission from the employer to take leave, but anticipates that the employee cannot work due to a serious health condition and simply protects the employee's right to return to work later. The Union asserts that the Grievant had a choice between leaving a job she loved or continuing to work knowing she was incapable of performing the duties of the position. In fact she was never threatened with termination and she had many other options, such as staying home, filing a claim with a government agency, taking the thirty days' leave she was offered, or filing a grievance

The Union maintains that she did her job competently until her health deteriorated. There is no evidence of her health deteriorating. In fact, she told Orth she was feeling better. Further, the County did not have access to her medical record, but only her own assertion that she was always crying. The County acted in good faith and attempted to accommodate her leave request by giving her intermittent breaks until a longer leave could be accommodated. The Grievant characterizes her supervisors' treatment of her as punitive and retaliatory, but the record shows that Walsh, Hebel and Orth tried to work with the Grievant's leave needs and resolve the issues her absence would cause for the program.

## DISCUSSION

The Union asserts that the Grievant, Tammy Moungey, was constructively discharged, without cause, on April 7, 2008, when the resignation letter she had filed with the County on March 23 took effect. The Union concedes that if Moungey's resignation is found to be voluntary, then the grievance has no merit and should be denied. It is the Union's position, however, that Moungey's work situation became so intolerable during the months preceding her resignation, largely due to incompetence and harassment by County management, that she had no alternative but to quit as a means of preserving her emotional and physical health, which had declined substantially over that period of time. The County denies that its management employees acted incompetently or in any way harassed Moungey. It further challenges the assertion that Moungey had no alternatives to resignation, or that her resignation was necessary.

One of the principal difficulties of this case from the Union's standpoint is the fact that many of the different events that the Union contends contributed to Moungey's ultimate resignation occurred several months prior to the resignation itself. These include the generally negative performance evaluation she received on September 24, 2007, which she felt was the result of a personal vendetta against her and harassment by her supervisor, Barb Walsh, the denial of her FMLA request on September 27, 2008, the denial of her general leave request on October 3, 2007 and the denial of her vacation request on December 26, 2007. Article VIII, Sec. 2 of the contract specifies that a grievance must be filed within five days of knowledge of the occurrence of the event, but in no case later than fourteen days after the event. Moungey filed no grievances regarding any of the foregoing events, timely or otherwise. The Union seeks to circumvent this problem by the rather facile tactic of making the allegedly forced resignation, which resulted in large part from the foregoing events, the grievable event, thereby eliminating the timeliness difficulties.

The record reveals that Moungey's FMLA request was handled poorly, at best. She filled out an FMLA request on September 24, 2007 seeking medical leave for an unspecified period of time. To the request she attached notes from her physician indicating she suffered from clinical depression, was taking prescribed anti-depressant medication, which had had limited effect to that point, and recommending that she be off work until October 8. The request was given to the Human Resources Department and was summarily denied, apparently on the basis that Moungey had failed to check the box indicating she had a serious health condition. Human Resources Director Michelle Koehler claimed to have had no knowledge of the request and that it had been handled by her assistant Mary Jane Szweda, who applied Koehler's signature stamp as a matter of course. Szweda, however, stated that she had discussed the request with Koehler and had issued the denial with Koehler's approval. In any event, no follow up was conducted by Szweda or Koehler to seek more information from Moungey or her physician and attempts by Moungey to discuss the denial with Koehler were ignored. Moungey did not grieve the denial, however, nor did she file any complaint under the state or federal family medical leave statutes. Moungey then filed a request for a one month general leave of absence with Human Services Director Bill Orth, who apparently was aware

of the FMLA denial, but not the details. Orth, after discussing the matter with Moungey's supervisors, Sue Hebel and Walsh, denied the request on the basis that granting the leave would create staffing problems for the department. He did, however, agree to facilitate Moungey using vacation as needed to provide her with time off. Again, Moungey did not grieve the denial. On November 26, 2007, Moungey put in a request for vacation from December 28 through January 3. On December 26 Walsh denied the request, although stating the County would try to accommodate as much time off for Moungey as feasible. Moungey ultimately was granted a portion of the vacation. Walsh was unable to explain why she waited a month to act on the request and only denied it two days before the vacation was due to begin. Once again, however, Moungey failed to grieve the County's action.

A review of the foregoing sequence of events reveals much. On the one hand, it reveals an indifference practically to the point of callousness toward Moungey's situation on the part of the County. Every request by Moungey was met with resistance and, for all the references in documents to a commitment to provide her with relief, there is no evidence in the record of any serious attempts being made to do so. Rather, the impression given is that her supervisors considered Moungey a "chronic complainer" who was trying to manipulate the system. On the other hand, however, Moungey made no timely efforts to seek redress for the County's arguably grievable behavior and the contract is clear that grievances for specific acts must be brought within specified time limits or they are barred. Whatever the merits of her allegations regarding the County's handling of her requests for leave and vacation, therefore, I am prohibited from addressing them by the language of the contract.

The same may be said of the various other actions which the Union asserts contributed to Moungey's decision to resign. These include Walsh's decision to place Moungey on a cycle of quarterly performance reviews to attempt to improve her job performance, the regular meetings Hebel and Walsh scheduled with Moungey to discuss her deficiencies and the reprimand she received on March 12, 2008 for failure to properly report her time. Moungey did not grieve these actions and, therefore, they are not subject to arbitral review.

It remains, therefore, to be determined whether Moungey's resignation, itself, although allegedly caused by conduct that is not independently arbitrable, is reviewable. I find that it is, because the standard of review, as agreed by the parties is whether "conditions were so intolerable that a reasonable person confronted with the same circumstances would have been compelled to resign." This standard permits the arbitrator to consider the total environment within which the decision to resign was made in order to determine whether a reasonable person, confronted with the same circumstances, would have been compelled to do likewise. The caveat, however, is that the standard is an objective one requiring the arbitrator to evaluate the grievant's actions over against what an ordinary reasonable person would have or should have done.

The County points out with some force that Moungey did not act reasonably throughout the entire course of events, in particular by foregoing other options that were available to her, and that, it is asserted, a reasonable person would have pursued. These include filing

grievances or taking legal action against the County for its failure to properly address her leave requests, or for actions that she considered harassment. Not only did she not seek to take action, but she did not apparently even seek advice from her Union leadership about what rights she had or what options were available to her until after her resignation. The County also argues that, whatever Moungey's personal feelings might have been, her actual work situation was not one that would have compelled an ordinary person to resign. She was not threatened with termination, nor is there evidence of an organized campaign to make her quit. She was not subjected to abusive treatment by her supervisors or co-workers and the interventions that were done were not unusual management techniques in addressing an underperforming employee. Moungey even conceded that the reprimand she received was warranted, although she attributed her mistakes to the harassing behavior of her supervisors. The County concedes that it may have improperly handled the FMLA request, but points out that this occurred six months before Moungey's resignation and asserts that one unintended mistake, even a serious one, does not rise to the level of creating an intolerable work environment.

The Union counters by arguing that Moungey's medical condition impaired her judgment and ability to function, making it impossible for her to engage in the kinds of self-help that a normal, emotionally healthy, person might be expected to pursue. It argues, therefore, that the arbitrator should take into account Moungey's incapacity when determining whether, under all the facts and circumstances, she was compelled to resign. There are problems with this proposition. First, and foremost, the existence, or degree, of incapacity at the time of her resignation is not established in the record. No medical testimony was offered at the hearing. The last medical note from her nurse practitioner was dated March 4, 2008. In it, the practitioner notes that she has a diagnosis of depression, but does not state she is unable to work, although she does state "...perhaps finding a new job would be a good idea." It should also be noted that the practitioner records Moungey telling her that "her boss continually writes her up for infractions" when, in fact, Moungey received no formal discipline until March 12, eight days after the note was written, which suggests a penchant for exaggeration. Further, she continued to work without incident up to the time of her resignation. While there were notes regarding substandard performance, these referred primarily to issues of relationships between her and her clients and other staff members, which were issues prior to the development of her depression symptoms, suggesting that they were not caused by, but were independent of, the depression. To say that her performance problems were the result of her depression, or the actions of management, misstates the record. I cannot on this record, therefore, assume that Moungey is entitled to be held to a lower standard simply because the Union asserts without evidence that her condition deprived her of the ability to make appropriate decisions or prevented her from acting rationally.

There is no question that Moungey's work situation was an unpleasant one and one that might well have induced the ordinary employee to seek redress through the grievance process or to even perhaps consider other employment. That is not the same as saying, however, that her work situation was so intolerable that an ordinary person could not be expected to endure it, which is the standard for a finding of constructive discharge. Insensitive supervisors, action

plans for improvement of substandard performance and discipline for work rule infractions are not pleasant, but neither are they outside the realm of many a workplace. As stated by the arbitrator in LAIDLAW TRANSIT, INC., A-6217 (Levitan, 1/5/07), cited by both parties as controlling on the definition of constructive discharge, “(t)he level of intolerability must be unusually aggravating and surpass isolated incidents of misconduct, injustice or disappointment.” On this record I am unable to say that the Grievant’s workplace environment rose to that threshold.

For the reasons set forth above and based upon the record as a whole, I hereby enter the following

**AWARD**

The Grievant was not constructively discharged without cause. The grievance is denied.

Dated at Fond du Lac, Wisconsin, this 11th day of March, 2010.

John R. Emery /s/

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John R. Emery, Arbitrator