For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

IRVIN POWELL, Appellant/Plaintiff, v. **FAM PROTECTIVE SERVICES, INC.,** Appellee/Defendant.	)))))))))	**S. Ct. Civ. No. 2019-0034** Re: Super. Ct. Civ. No. 081/2010 (STX)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Croix
Superior Court Judge: Hon. Douglas A. Brady

Argued: November 12, 2019
Filed: April 16, 2020

Cite as: 2020 VI 3

BEFORE: **RHYS S. HODGE**, Chief Justice; **MARIA M. CABRET**, Associate Justice; and **IVE ARLINGTON SWAN**, Associate Justice.

APPEARANCES:

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OPINION OF THE COURT

CABRET, Associate Justice.

¶ 1 Pursuant to title 4, section 33(c) of the Virgin Islands Code, in a March 13, 2019 opinion and order the Superior Court certified a single issue for immediate appellate review: Whether a

corporate employer sued for wrongful discharge was required to specifically plead as an affirmative defense in its initial answer each permissible ground for discharge under 24 V.I.C. § 76(a)-(c)[1] or be deemed to have waived such defenses. For the reasons that follow, we answer the certified question in the affirmative. We further confirm that the Superior Court generally retains discretion (considering well-recognized factors) to allow later amendment of the pleadings to assert an affirmative defense, but that in this instance, that court abused its discretion in allowing late assertion of such defenses eight years after the case began; accordingly we vacate the Superior Court's opinion and order, and remand this case for further proceedings consistent with this opinion..

I. FACTUAL AND PROCEDURAL BACKGROUND

¶ 2 On February 22, 2010, Irvin Powell filed a complaint in the Superior Court alleging, among other things, that FAM Protective Services, Inc. ("FAM") terminated his employment in violation of the Virgin Islands Wrongful Discharge Act ("WDA"). Although FAM's initial answer generally denied Powell's allegation that its conduct constituted a violation of the WDA, FAM failed to

[1] (a) Unless modified by union contract, an employer may dismiss any employee:
(1) who engages in a business which conflicts with his duties to his employer or renders him a rival of his employer;
(2) whose insolent or offensive conduct toward a customer of the employer injures the employer's business;
(3) whose use of intoxicants or controlled substances interferes with the proper discharge of his duties;
(4) who wilfully and intentionally disobeys reasonable and lawful rules, orders, and instructions of the employer; provided, however, the employer shall not bar an employee from patronizing the employer's business after the employee's working hours are completed;
(5) who performs his work assignments in a negligent manner;
(6) whose continuous absences from his place of employment affect the interests of his employer;
(7) who is incompetent or inefficient, thereby impairing his usefulness to his employer;
(8) who is dishonest; or
(9) whose conduct is such that it leads to the refusal, reluctance or inability of other employees to work with him.
(b) The Commissioner may by rule or regulation adopt additional grounds for discharge of an employee not inconsistent with the provisions enumerated in subsection (a) of this section.
(c) Any employee discharged for reasons other than those stated in subsection (a) of this section shall be considered to have been wrongfully discharged; however, nothing in this section shall be construed as prohibiting an employer from terminating an employee as a result of the cessation of business operations or as a result of a general cutback in the work force due to economic hardship, or as a result of the employee's participation in concerted activity that is not protected by this title.

specifically assert the statutorily permissible reasons for discharge as affirmative defenses. Eight years later, FAM first indicated its intention to amend its answer to assert these defenses when it submitted its portion of the joint final pretrial order in March 2018, but FAM did not actually move to amend its answer to include the statutorily permissible reasons for discharge until October 22, 2018, one day before the scheduled final pretrial conference.

¶ 3 At that conference, the court considered FAM's motion to amend and granted the motion over Powell's oral objection. Additionally, the Superior Court continued the trial and permitted Powell to conduct supplemental depositions of two of FAM's fact witnesses. Powell subsequently filed a motion for reconsideration of the court's decision to grant FAM leave to amend its answer, which the court denied from the bench at a February 28, 2019 pretrial conference – a ruling it memorialized in a written order the following day. On March 5, 2019, the parties filed a joint motion to amend that order to provide for an interlocutory appeal under 4 V.I.C. § 33(c). By opinion and order entered March 13, 2019, the Superior Court granted the parties' motion and certified the following question for appeal: whether Defendant was required to specifically plead as an affirmative defense in its initial answer each applicable permissible ground for discharge under 24 V.I.C. § 76(a)-(c) or be deemed to have waived such defense.

¶ 4 Powell timely filed a petition for permission to appeal with this Court on March 25, 2019, and this Court, in an April 12, 2019 order, granted the petition and set this matter for expedited review.

II. JURISDICTION AND STANDARD OF REVIEW

¶ 5 "Whenever [a] Superior Court judge, in making a civil action or order not otherwise appealable . . . is of the opinion that the order involves a controlling question of law as to which

there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of litigation, the judge shall so state in the order" and "[t]he Supreme Court of the Virgin Islands may thereupon, in its discretion, permit an appeal to be taken from the order, if application is made to it within ten days after entry of the order." 4 V.I.C. § 33(c). Because the Superior Court amended its order to include the requisite certification, and Powell timely filed his petition, this Court possesses jurisdiction over this appeal by permission, based on this Court's April 12, 2019 order granting the petition. *See Island Tile & Marble, LLC v. Bertrand,* 57 V.I. 596, 607 (V.I. 2012). Generally, we review the Superior Court's decision to grant or deny a motion for reconsideration for abuse of discretion, but when the trial court's decision is based upon the application of a legal precept, our review is plenary. *See Daley-Jeffers v. Graham,* 69 V.I. 931, 935 (V.I. 2018).

III. DISCUSSION

¶ 6 On appeal, Powell argues that the Superior Court erred in denying his motion to reconsider the court's decision to permit FAM to amend its complaint to list seven of the statutorily permissible grounds for discharge as affirmative defenses. Specifically, Powell argues that the Superior Court was required to disallow the amendment because, by failing to include the permissible grounds for discharge as affirmative defenses in its original answer, FAM waived its right to present them. We agree that the grounds for discharge are affirmative defenses that must be pleaded in the first responsive pleading or they may be waived. However, we disagree with Powell's unstated assumption that the waiver of an affirmative defense is perpetual and irrevocable; a matter wholly removed from the discretion of the trial court judge.

A. Grounds for Discharge under the WDA as Affirmative Defenses

¶ 7 As Powell correctly observes, we have repeatedly held that the permissible grounds for discharge under the WDA constitute affirmative defenses. First in *Rennie v. Hess Virgin Islands Oil Corporation*, 62 V.I. 529 (V.I. 2015) and again in *Pedro v. Ranger American of the Virgin Islands, Inc.*, 63 V.I. 511 (V.I. 2015), we held that "a plaintiff only has 'the burden of pleading—and ultimately proving—that he was discharged, while the permissible grounds for discharge set forth in sections 76(a)(1)-(9) and 76(c) [are] affirmative defenses that the defendant [is] required to plead and prove.'" *Pedro*, 63 V.I. at 518 (quoting *Rennie*, 62 V.I. at 543).

¶ 8 Additionally, Virgin Islands Rule of Civil Procedure 8(c)(1) provides that "[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense. . . ."[2] Consistent with the requirements of Rule 8, this Court "has repeatedly held that affirmative defenses may be waived if not timely asserted by the defendant." *Gumbs v. Koopmans*, 66 V.I. 42, 432 (V.I. 2017) (collecting cases). As we have explained, courts generally "impose waiver because the 'defendant should not be permitted to 'lie behind a log' and ambush a plaintiff with an unexpected defense.'" *Coastal Air Transport v. Royer*, 64 V.I. 645, 657 (V.I. 2016) (quoting *Ingraham v. United States*, 808 F.2d 1075, 1079 (5th Cir. 1987)).

¶ 9 It is clear that the Superior Court's holding—that FAM's general denial sufficiently preserved each of the nine affirmative defenses available under the WDA—is facially at odds with

[2] FAM's initial answer was first filed on September 30, 2010, under the heightened federal pleading standard previously in effect. *See Mills-Williams v. Mapp*, 67 V.I. 574, 585 (V.I. 2017). However, in *Basic Services, Inc. v. Gov't of the V.I.*, 2019 VI 21, this Court held that a grant of summary judgment issued after the Virgin Islands Rules of Civil Procedure took effect should apply the more lenient rule when examining pleadings entered when the previous standard applied, because "[the] case was still pending in the Superior Court when the civil procedure rules became effective," and V.I. R. CIV. P. 1-1(c) permits the application of the rules "if doing so would not be infeasible or work an injustice." *Basic Services*, ¶11. Similarly, this case was pending in the Superior Court when the Rules took effect, and so the Court may apply the more liberal standard.

the mandate of Rule 8(c). Indeed, the federal courts of appeal have reached the same conclusion. *See, e.g., Trinity Carton Co. v. Falstaff Brewing Corp.,* 767 F.2d 184, 193–94 (5th Cir. 1985) ("The Federal Rules of Civil Procedure require that such defenses 'shall be set forth affirmatively.' A general denial does not serve to raise such defenses.") (citing *Jackson v. Seaboard Coastline R.R. Co.*, 678 F.2d 992, 1010–11 (11th Cir.1982); *Satchell v. Dilworth*, 745 F.2d 781, 784 (2d Cir.1984) (holding that a general denial of allegations is insufficient to plead an affirmative defense); *see also* 5 CHARLES ALAN WRIGHT & ARTHUR MILLER, FED. PRAC. & PROC. -- CIV. § 1265 (3d ed. 2019) ("Finally, a pleader must remember that a general denial will not permit the introduction of evidence on any of the matters that must be raised by an affirmative defense under Rule 8(c)."). Thus, Powell is correct that the Superior Court erred in holding that "[FAM's] general denial to the allegation of a violation of the WDA put in play all of the statutorily acceptable grounds for termination, consistent with Virgin Islands 'notice pleading' standards and all defenses under the WDA were preserved by [Powell's] initial Answer, fully subject to discovery, permitting the case to be determined by the finder of fact on the merits."

¶ 10 Accordingly, we conclude that the Superior Court erred to the extent that it held that FAM's general denial of Powell's allegation that FAM violated the WDA was, by itself, sufficient to preserve all permissible grounds for discharge listed in the WDA as affirmative defenses in this action. Rather, by failing to assert the permissible reasons for discharge in the WDA as affirmative defenses in its earliest responsive pleading, FAM waived its right to assert them in this case. *See Gumbs,* 66 V.I. at 432. Thus, we do not hesitate to answer the certified question in the affirmative and hold that a defendant is required to specifically plead as an affirmative defense in its initial answer each applicable permissible ground for discharge under 24 V.I.C. § 76(a)-(c) or be deemed to have waived such defenses. *See Coastal Air Transp. v. Royer,* 64 V.I. 645, 657-58 (V.I. 2016)

(holding that a defendant must plead an affirmative defense in the first responsive pleading or it is waived).

B. Intersection of V.I. R. Civ. P. 15 and Waiver Doctrine

¶ 11 We have never held, however, that waiver of an affirmative defense is perpetual or irrevocable as Powell suggests. Nor have we held that the waiver rule categorically precludes the trial court from exercising its discretion to permit a defendant to amend its answer to include additional affirmative defenses. Indeed, the great weight of authority compels the opposite conclusion. To understand why, we must examine the intersection of Virgin Islands Rule of Civil Procedure 8(c)—the basis of our waiver decisions—and Rule 15—governing amendments to pleadings.

¶ 12 As we have previously observed, the Virgin Islands, along with many other jurisdictions nationwide, "have adopted affirmative defense pleading rules that echo FED. R. CIV. P. 8(c)…." *Whyte v. Bockino*, 69 V.I. 749, 754 (V.I. 2018). Consequently, this Court's jurisprudence concerning the waiver of affirmative defenses has, from the beginning, largely been influenced by and adopted from the federal courts. *See, e.g., Maduro v. American Airlines, Inc.*, 2008 WL 901525, at *3 n.4 (V.I. February 28, 2008) (unpublished) (applying the "waiver of waiver" doctrine as articulated by the Third Circuit in *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1374 n.10 (3d Cir.1993)). Both Rule 8(c) and Rule 15 of the Virgin Islands Rules of Civil Procedure are substantively identical in all relevant respects to their counterparts in the Federal Rules. And while this Court has never expressly considered whether Rule 15 permits the Superior Court to grant leave to amend a party's answer to include affirmative defenses that would otherwise be deemed waived under Rule 8, the federal courts have produced a wealth of highly persuasive decisions directly addressing this issue.

¶ 13 In describing the effect of a defendant's failure to plead an affirmative defense, Professors Wright and Miller explain: "It is a frequently stated proposition of virtually universal acceptance by the federal courts that a failure to plead an affirmative defense as required by Federal Rule 8(c) results in the waiver of that defense and its exclusion from the case…" 5 WRIGHT & MILLER, *supra*, § 1278. However, "the waiver rule that has developed in the practice under Rule 8(c) is not applied automatically with regard to omitted affirmative defenses and as a practical matter there are numerous exceptions to it based on the circumstances of particular cases. . . ." *Id.* Most relevant here, under Federal Rule of Civil Procedure 15(a)(2), the trial court is granted discretion "to permit the amendment of the pleadings over objection when doing so will promote the presentation of the merits of the action, the adverse party will not be prejudiced by the sudden assertion of the defense, and will have ample opportunity to defend against the substance of the issue." *Id.; see also Glob. Tech. & Trading, Inc. v. Tech Mahindra Ltd.*, 789 F.3d 730, 733 (7th Cir. 2015) ("District judges have authority to authorize a litigant to assert an affirmative defense despite its omission from the answer."); *Talbert v. Am. Risk Ins.* Co., 405 Fed. Appx. 848, 851 (5th Cir. 2010) ("[W]here the matter is raised by the trial court [or the litigants and] does not result in unfair surprise, technical failure to comply precisely with Rule 8(c) is not fatal, and in such a situation a court may hold that the defense is not waived."); *Sompo Japan Ins. Co. of Am. v. Norfolk S. Ry. Co.*, 762 F.3d 165, 176 (2d Cir. 2014) ("[A] district court may entertain unpleaded affirmative defenses at the summary judgment stage in the absence of undue prejudice to the plaintiff, bad faith or dilatory motive on the part of the defendant, futility, or undue delay of the proceedings.") (citations omitted).

¶ 14 Just like its federal counterpart, Virgin Islands Rule of Civil Procedure 15(a)(2) provides that, in general, once the initial 21 days after service of a pleading has transpired, "a party may

amend its pleading only with the opposing party's consent or the court's leave. The court should freely give leave when justice so requires." As we have previously explained, the decision to permit an amendment is vested in the sound discretion of the Superior Court. *Reynolds v. Rohn,* 2019 VI 8, ¶25. In ruling on a motion to amend, appropriate considerations include, but are not limited to, "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of the amendment." *Basic Services, Inc. v. Gov't of the V.I.,* 2019 VI 21, ¶26 (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962)). And, under Rule 15(b)(1), even as late as trial, "[t]he court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence [relevant to the newly raised issue] would prejudice that party's action or defense on the merits."

¶ 15 Powell effectively asks us to hold that the plain language of Rule 15 does not apply if the proposed amendment seeks to include new affirmative defenses. However, nothing in Rule 8—which states that a defending party "must" state affirmative defenses—mandates irrevocable waiver, and Rule 15 governs amendment of pleadings. Indeed, neither the text of the rule itself, nor our own cases interpreting Rule 15, nor the voluminous body of persuasive federal caselaw supports this conclusion. On its own terms, Rule 15 plainly governs all amendments of all kinds to pleadings in the Superior Court. Applying the substantively identical federal rule, the federal courts have consistently held that amendments seeking to add new affirmative defenses are treated like any other proposed amendment, and that the decision to grant or deny such an amendment is vested in the discretion of the trial court in accordance with Rule 15. *See, e.g. Phelps v. McClellan,* 30 F.3d 658, 663 (6th Cir. 1994) ("Simply put, Rule 15(a) allows a party to amend his pleading to assert an omitted affirmative defense. . . ."). Given that Virgin Islands Rule of Procedure 15 is

identical, in all relevant respects, to Federal Rule of Civil Procedure 15, and that this Court's jurisprudence concerning both the waiver of affirmative defenses and the amendment of pleadings is adopted, in large part, from the federal courts, we see no cause to depart from the well-reasoned approach of the federal courts on this issue.[3] This approach is consistent with the plain language of Rule 15, with relevant caselaw, and with our longstanding preference in this jurisdiction "that cases be disposed of on the merits whenever practicable." *See Bright v. United Corp.*, 50 V.I. 215, 231 (V.I. 2008) (citing *Hritz v. Woma Corp.*, 732 F.2d 1178, 1181 (3d Cir .1984)).

¶ 16 Thus, finding no support, either in the law of this jurisdiction, or in federal law interpreting identical, relevant rules, we reject Powell's argument that the Superior Court lacked the discretion to permit FAM to amend its answer to include the previously omitted statutorily permissible grounds for discharge under the WDA. Instead, we reaffirm our precedent holding that the decision to grant or deny leave to amend a pleading—including a proposed amendment to assert additional affirmative defenses—is vested in the sound discretion of the trial court in accordance with Virgin Islands Rule of Civil Procedure 15. Consequently, although we answer the certified question in the affirmative, we do so subject to the important caveat that the Superior Court retains discretion, in accordance with Rule 15, to permit parties to amend their pleadings to state previously omitted affirmative defenses, even where those affirmative defenses would otherwise be deemed waived. However, this does not end our inquiry.

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[3] Given that a great number of state courts have adopted pleading rules patterned off of the federal rules, it is unsurprising that a majority of state courts allow a defendant to amend its answer to assert new affirmative defenses as well. As summarized in American Jurisprudence: "Failure to raise an affirmative defense by responsive pleading does not always result in waiver… the failure to plead a defense consisting of an affirmative avoidance does not waive that defense if either (1) the trial court permits the pleadings to be amended to include the defense, or (2) the issue is tried by implied or actual consent of the parties." 61A AM. JUR. 2D *Pleading* § 275; *see also Jontony v. Colegrove*, 984 N.E.2d 368, 374 (Ohio 2012) ("Although failure to adhere to this requirement exposes the party to forfeiture of the defense, [i]n the real world failure to plead an affirmative defense will rarely result in [forfeiture] because of the protection of Civ. R. 15(A).") (internal quotation marks omitted).

C. Motion to Amend

¶ 17 Although the Superior Court certified only a single question for interlocutory review, as we have previously explained, "this Court is not limited solely to the questions as phrased by the Superior Court in its certification order, but may consider other legal questions that are fairly related to or intertwined with the questions so certified." *Edward v. GEC, LLC*, 67 V.I. 745, 759 (V.I. 2017) (collecting cases). One question inextricably intertwined with the certified question presented here is whether the Superior Court abused its discretion in this case by granting FAM leave to amend its answer to state new affirmative defenses under Virgin Islands Rule of Civil Procedure 15. Indeed, Powell argues that the Superior Court erred by permitting FAM to amend its answer to state seven new affirmative defenses under the WDA, eight years into the litigation and on the eve of trial, when FAM must have known of the existence of these purported reasons for discharge at the time it initially answered the complaint in this action. Accordingly, we conclude that this issue as raised by Powell is "fairly related" to the question certified by the Supreme Court, and in the interests of justice and judicial economy, we will address it here. *See Hard Rock Café v. Lee*, 54 V.I. 622, 640 (V.I. 2011).

¶ 18 Powell's original answer asserted as affirmative defenses that Powell was "continually absent from his employment" and that Powell "committed fraud" against FAM. Under the liberal notice pleading standards of this jurisdiction, these assertions were sufficient to preserve FAM's right to raise the affirmative defenses provided in 24 V.I.C. §§ 76(a)(6) and 76(a)(8)—continuous absence affecting employer's business and dishonesty, respectively. Although Powell argues that these affirmative defenses were not stated correctly, "dismissal of claims 'on the basis of [] mere technicalities' is to be avoided. Courts should look beyond the nominal label given by a party to the substance of what is being asked." *Toussaint v. Stewart*, 67 V.I. 931, 947 (V.I. 2017) (citing

Foman, 371 U.S. at 181) (internal citations omitted); *see also Basic Services*, ¶12 ("Even if a complaint is 'vague,' [or] 'inartfully drafted' . . . the complaint may still be adequate so long as it can reasonably be read as supporting a claim for relief.") (internal citations omitted). Additionally, FAM's answers to Powell's interrogatories, filed in April 2012, indicate that Powell's employment was terminated because he failed to show up for work and fraudulently claimed that he was injured on the job. Thus, the inclusion of the affirmative defenses of "continual absence" and "fraud" in both FAM's original answer and Fam's answers to Powell's interrogatories was sufficient to put Powell on notice that FAM might raises the defenses listed in 24 V.I.C. §§ 76(a)(6) and 76(a)(8).

¶ 19 Accordingly, our inquiry will focus on whether the Superior Court abused its discretion in granting FAM leave to amend its answer to include the remaining five permissible reasons for discharge listed in FAM's first amended complaint as affirmative defenses 2-6, corresponding to 24 V.I.C. §§ 76(a)(1)-76(a)(5).

¶ 20 Although we affirm the well-settled rule that the trial court retains discretion under Rule 15 to consider amendments to assert new affirmative defenses even where those defenses might otherwise be deemed waived for failure to raise them at the earliest possible stage of proceedings, we must still consider whether the Superior Court abused its discretion by allowing FAM to belatedly amend its answer in this case. Virgin Islands Rule of Civil Procedure 15 provides that the Superior Court should "freely give leave" for a party to amend a pleading "where justice so requires." Appropriate justifications for deviating from the norm of freely granting leave to amend include undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, and futility of the amendment. *Basic Services, Inc. v. Gov't of the V.I.*, 2019 VI 21, ¶ 26.

¶ 21 Delay may be deemed undue when the moving party has no justification for the delay and appears to be "dilatory" or acting in bad faith, or when the moving party knew the facts at issue at the time of the complaint yet repeatedly failed to amend. *Arthur v. Maersk, Inc.*, 434 F.3d 196, 205-06 (3d Cir. 2006) ("When a party fails to take advantage of previous opportunities to amend, without adequate explanation, leave to amend is properly denied."); s*ee also Coastal Air Transp.*, 64 V.I. at 658 ("[W]e are concerned with such attempts by parties to circumvent the procedural rules resulting in prejudice to opposing parties when they do not timely raise appropriate defenses."); *Lorenz v. CSX Corp.*, 1 F.3d 1406, 1414 (3d Cir. 1993) (finding undue delay when "[m]ost of the facts were available to plaintiff Savin before she filed her original complaint" and plaintiff failed to amend despite numerous opportunities over three years); *Adams v. Gould, Inc.*, 739 F.2d 858, 868 (3d Cir. 1984) (noting that "delay can itself be evidence of bad faith justifying denial of leave to amend," but failing to find it so because plaintiff had a "colorable excuse" for not amending earlier). And while parties should be afforded liberal freedom to amend, to satisfy this Court's "strong preference for trial courts to decide doubtful cases on their merits rather than dismiss them for a failure to strictly follow purely procedural rules," *Joseph v. Bureau of Corr.*, 54 V.I. 644, 650 (V.I. 2011), "[l]iberality in pleading does not bestow on a litigant the privilege of neglecting her case for a long period of time." *Daves v. Payless Cashways, Inc.*, 661 F.2d 1022, 1025 (5th Cir. 1981).

¶ 22 Delay is not only undue but also prejudicial when it impedes a party's ability to effectively prosecute or defend his case. This occurs when amendments add "'new concepts or theories' that would require extensive additional discovery" and create a risk that trial would need to be delayed. *Adams*, 739 F.2d at 869 (citations omitted). Prejudice may also arise in cases where a party's delay in moving to amend makes it significantly harder for the non-moving party to find the evidence

required to counter the amended pleadings. *See Durrett v. C.I.R.*, 71 F.3d 515, 518 (5th Cir. 1996) (finding prejudice where "[a] motion for leave to amend was filed eight days before trial; taxpayers offered no valid reasons for such a delay" and allowing the amendment would have required the opposing party to conduct discovery on "10-year old transactions"); *Cornell & Col. v. OSHRC*, 573 F.2d 820, 824 (3d Cir. 1978) (finding that a delay of four months was prejudicial when witnesses were transients and could not be located); *Pessotti v. Eagle Mfg. Co.*, 946 F.2d 974 (1st Cir. 1991) (finding prejudice when a four-year delay in raising an issue led to a witness testifying eleven years after the event in question); *contra Toussaint*, 67 V.I. at 949 (finding no prejudice when appellee had "over two years after the amended answer and counterclaim were filed on May 27, 2011, to conduct discovery").

¶ 23 Additionally, while the decision to grant or deny a motion to amend is soundly vested in the discretion of the trial court, in exceptional cases appellate courts will find that the trial court has abused its discretion in granting an amendment "when required by the demands of justice in the particular case." *Evans v. Syracuse City Sch. Dist.*, 704 F.2d 44, 47 (2d Cir. 1983). In reversing a district court's decision to grant a defendant leave to file an amended answer after two pretrial conferences and two years and nine months after the defense could properly have been asserted, the Second Circuit Court of Appeals observed: "While it is generally true that leave to file amendments should be freely given, 'amendments should be tendered no later than the time of pretrial, unless compelling reasons why this could not have been done are presented.'" *Id.* (quoting *Nevels v. Ford Motor Co.*, 439 F.2d 251, 257 (5th Cir. 1971)). The court further observed that "any delay in asserting an affirmative defense for a significant period of time will almost invariably result in some 'prejudice' to the nonmoving party. . . . the proper standard is one that balances the

length of the delay against the resulting prejudice." Id. (citing *Advocat v. Nexus Industries, Inc.*, 497 F. Supp. 328, 331 (D. Del. 1980)).

¶ 24 In this case, the Superior Court found that Powell would suffer no prejudice by the allowance of FAM's proposed amendments on the eve of trial for three reasons: (1) the proposed amended answer had been filed seven months prior to the pretrial conference as an attachment to FAM's portion of the joint final pretrial order, albeit without accompanying motion; (2) extensive discovery, including discovery pertaining to FAM's factual basis for its denial of Powell's WDA claim, had occurred during the eight years the litigation was pending; and (3) the court permitted Powell to conduct additional limited discovery after the filing of the amended answer if deemed necessary. However, a close inspection of the record in this case reveals concerning discrepancies in the court's analysis.

¶ 25 While it is true that Powell sought information concerning the factual basis for his termination from FAM from the beginning of the discovery period, FAM's initial disclosures in 2012 identified three individuals only as "individuals likely to have discoverable information relative to Plaintiff's Complaint." It was not until FAM filed its first amended voluntary disclosures in March of 2018 that FAM first identified these individuals as "employees of Defendant" who were "likely to have information regarding the reasons Plaintiff was terminated/quit." And, as previously discussed, FAM's answers to Powell's interrogatories indicated only that Powell's employment was terminated because he failed to show up for work and fraudulently claimed that he was injured on the job—defenses already asserted in FAM's original complaint. Nothing in any of the discovery materials included in the record clearly indicates FAM's intent to assert any of the remaining permissible reasons for discharge under the WDA as affirmative defenses.

¶ 26 Additionally, as Powell argued in his motion for reconsideration of the Superior Court's decision to grant FAM leave to amend, in the eight years this matter was pending before the Superior Court, Powell relocated to the mainland United States and is unable to find witnesses to rebut FAM's affirmative defenses. Moreover, due to the displacement caused by hurricanes Irma and Maria in 2017 and the general passage of time, various individuals who could have testified as witnesses with respect to FAM's new affirmative defenses have either moved and left St. Croix or may have no recollection of the events sufficient to aid Powell in his defense. This type of prejudice, an invariable consequence of the passage of such a substantial length of time, was not ameliorated by FAM's filing of its proposed amended answer as part of its pretrial brief in March 2018 and is unlikely to be cured by granting Powell additional limited discovery at this late hour.

¶ 27 Critically, nowhere in the record has FAM ever provided any attempt at justification or excuse for its eight-year delay in raising the remaining five permissible reasons for discharge under the WDA as affirmative defenses in its answer. Rather, FAM argues, contrary to our decisions in *Rennie* and *Pedro* discussed above, that the permissible grounds for discharge under the WDA are not affirmative defenses at all, and that its general denial of the allegations was sufficient to put Powell on notice. The Superior Court seemed hesitant to deny FAM's motion to amend as untimely and prejudicial because otherwise Powell would be entitled to a verdict directing judgment in his favor upon a mere showing that he was employed by FAM and that FAM terminated his employment. However, FAM was necessarily put on notice, by the very nature of the WDA claim against it, that these affirmative defenses—the permissible reasons for discharge under the WDA—would be not only relevant to, but dispositive of, the determination of liability in this case. In turn, FAM does not contend, and the record does not suggest, that FAM was unaware of the factual bases for its assertion of these defenses from the inception of this case. Indeed, given that

the affirmative defenses in question are the permissible reasons for discharge under the WDA, any attempt to argue that FAM was unaware of the factual bases for these defenses at the outset of litigation could give rise to an inference that FAM terminated Powell's employment without permissible reason, and that any reasons offered after the fact constitute mere pretext, in violation of the WDA.

¶ 28 Thus, in view of the likelihood of substantial prejudice to Powell, and in the absence of any attempt at justification or excuse for FAM's extreme delay in asserting its new affirmative defenses, the Superior Court abused its discretion in granting FAM leave to amend its answer to include the five previously un-raised affirmative defenses. Accordingly, we vacate both the Superior Court's March 1, 2019 amended order denying Powell's motion for reconsideration and the Superior Court's October 26, 2018 order accepting FAM's amended answer and remand this matter for further proceedings.

IV. CONCLUSION

¶ 29 For the reasons stated above, we answer the certified question in the affirmative and hold that a defendant is required to specifically plead as an affirmative defense in its initial answer each applicable permissible ground for discharge under 24 V.I.C. § 76(a)-(c) or be deemed to have waived such defense. However, we reject Powell's argument that the Superior Court categorically lacks discretion to permit any amendment asserting affirmative defenses previously omitted from a defendant's answer and hold that the Superior Court retains discretion to consider such amendments in accordance with Virgin Islands Rule of Civil Procedure 15. Nonetheless, because the court abused its discretion by permitting FAM to amend its answer to state five new affirmative defenses after an unexcused, eight-year delay, we vacate both the Superior Court's March 1, 2019 amended order denying Powell's motion for reconsideration and the Superior Court's October 26,

2018 order accepting FAM's amended answer, and remand this matter to the Superior Court for further proceedings consistent with this opinion.

Dated this 16th day of April, 2020.

BY THE COURT:

/s/ Maria M. Cabret

MARIA M. CABRET
Associate Justice

ATTEST:

VERONICA J. HANDY, ESQ.
Clerk of the Court