IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN

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ALANA PICKERING,	)	**Case No. ST-2015-CV-313**
	)	
Plaintiff,	)	**ACTION FOR DAMAGES**
	)	
v.	)	**JURY TRIAL DEMANDED**
	)	
ARCOS DORADOS PUERTO RICO, INC. and JOHN P. DEJONGH, JR.,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

Before the Court is a motion to dismiss (the "Motion") filed by Defendant Arcos Dorados Puerto Rico, Inc. ("Arcos Dorados") on August 24, 2015. Plaintiff Alana Pickering ("Pickering") filed a response in opposition to Arcos Dorados' Motion on September 24, 2015, and Arcos Dorados filed a reply thereto on October 14, 2015. Some of the putative causes of action contained in Pickering's Complaint state claims upon which relief can be granted. Some do not. Therefore, Arcos Dorados' Motion will be granted in part, and denied in part.

BACKGROUND

This case concerns the allegedly-wrongful termination of Pickering from her job at a local fast food restaurant due to a statement she made to then-Governor John P. deJongh, Jr. ("deJongh") while she was working. Arcos Dorados operates the restaurant where Pickering worked before she was terminated.[1]

Pickering alleges that, on July 3, 2013, deJongh entered the restaurant while Pickering was working.[2] Pickering claims that, as deJongh approached the counter, she

> said to [deJongh] to the effect of "aye wha [sic] going on man when we going get [sic] our tax money, people need their money, people working hard for their money, some standing up working hard and some sitting down behind a desk working hard. You done take 8% from the government money and you look like you going to take more money from the tax. People need their money, people poor, people have bills to pay."[3]

[1] Compl. ¶ 4, 6.
[2] *Id.* ¶ 13.
[3] *Id.* ¶ 14.

DeJongh complained to Pickering's manager.[4] Pickering called her boss the next day and was told that she was not allowed to come into work that day.[5] Pickering claims that she continued to call the restaurant, "but . . . was not given any information about coming back work [sic] and was told repeatedly only 'no' that [she] could not come back to work yet . . . ."[6] On July 15, 2013, Pickering met with Mildred Quiles, an "Operations Supervisor from Puerto Rico,"[7] Mr. Hodge, a local human resources representative,[8] Plaintiff's boss Bernadette,[9] "and another lady who appeared to be Puerto Rican and over Ms. Quiles in the chain of command."[10] Pickering claims that she explained her version of the exchange with deJongh to these people,[11] and was then excused from the meeting.[12] Pickering was subsequently called back into the meeting and "presented with a piece of paper that falsely claimed [that she] was yelling, rude, and disrespectful to [deJongh]."[13] Pickering claims that she "was wrongfully discharged without due process."[14]

Pickering filed her Complaint on July 1, 2015. Arcos Dorados now moves to dismiss all claims asserted by Pickering against it.

STANDARD FOR A MOTION TO DISMISS

"The adequacy of a complaint is governed by Rule 8 of the Federal Rules of Civil Procedure."[15] A complaint must set forth "a short and plain statement of the claim showing that the pleader is entitled to relief."[16] To survive a motion to dismiss for failure to state a claim upon which relief can be granted, "a complaint must contain sufficient factual matter, accepted as true, 'to state a claim for relief that is plausible on its face.'"[17] All material allegations in the complaint are taken as true, and the Court must construe all facts in a light most favorable to the non-moving party.[18] However, a plaintiff is obliged to provide "more than labels and conclusions."[19] Determining whether a complaint states "a plausible claim for relief" is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[20] In making the plausibility determination, the Supreme Court of the Virgin Islands instructs that:

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[4] *Id.* ¶ 17.
[5] *Id.* ¶ 23.
[6] *Id.* ¶ 25.
[7] *Id.* ¶¶ 23, 31.
[8] *Id.* ¶ 31.
[9] *Id.* ¶¶ 23, 31.
[10] *Id.* ¶ 31.
[11] *Id.* ¶ 33
[12] *Id.* ¶ 34.
[13] *Id.* ¶ 43.
[14] *Id.* ¶ 56.
[15] *Brady v. Cintron*, 55 V.I. 802, 822 (V.I. 2011). Federal Rule of Civil Procedure 8 applies to this proceeding through the operation of Superior Court Rule 7.
[16] FED. R. CIV. P. 8(a)(2).
[17] *Ashcroft v. Iqbal*, 559 U.S. 662, 677 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2002)).
[18] *L'Henri, Inc. v. Vulcan Materials Co.*, Civ. No. 206–170, 2010 WL 924259, at *1 (D.V.I. Mar. 11, 2010) (citing *Christopher v. Harbury*, 536 U.S. 403, 406 (2002)).
[19] *Twombly*, 550 U.S. at 555.
[20] *Iqbal*, 559 U.S. at 679.

> First, the Court must take note of the elements a plaintiff must plead to state a claim so that the court is aware of each item the plaintiff must sufficiently plead. Second, the court should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. These conclusions can take the form of either legal conclusions couched as factual allegations or naked assertions devoid of further factual enhancement. Finally, where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief.[21]

If the remaining facts are sufficient enough for the court to draw a reasonable inference that the defendant is liable based on the elements the plaintiff must plead, then the claim is considered plausible.[22]

ANALYSIS

Pickering's Complaint purports to state seven causes of action: (I) Violation of the Virgin Islands Wrongful Discharge Act by Arcos Dorados; (II) Violation of Title VII of the Civil Rights Act by Arcos Dorados; (III) Violation of the Age Discrimination in Employment Act by Arcos Dorados; (IV) Intentional infliction of emotional distress by Arcos Dorados; (V) "Violation of Virgin Islands Wage and Hour Laws" by Arcos Dorados (VI) Tortious interference by deJongh; and (VII) Punitive Damages against all Defendants.

Pickering has withdrawn her claim for violation of Title VII of the Civil Rights Act, and has dismissed all claims against deJongh with prejudice. Consequently, the Court need not analyze Counts II or VI of Pickering's Complaint. This Court also need not analyze Count VII, as "punitive damages" is not an independent cause of action in this jurisdiction.[23] Finally, Arcos Dorados has not moved to dismiss Count I of Pickering's Complaint. Therefore, this Court need only analyze whether Pickering has stated claims on which relief can be granted under Counts III, IV, and V of her Complaint.

I. COUNT III: VIOLATION OF THE AGE DISCRIMINATION IN EMPLOYMENT ACT

"To prevail on an intentional age discrimination claim under . . . the ADEA . . . a plaintiff must show that his or her age 'actually motivated' or 'had a determinative influence on' the employer's adverse employment decision."[24] "A plaintiff can meet this burden (1) by presenting direct evidence of discrimination . . . or (2) by presenting indirect evidence of discrimination that satisfies the familiar . . . framework of *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 36 L.

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[21] *Brady v. Cintron*, 55 V.I. 802, 822-23 (2011) (citing *Joseph v. Bureau of Corrections*, 54 V.I. 644, 649–50 (2011)).
[22] *Id.*
[23] *See Bertrand v. Mystic Granite & Marble*, S. Ct. Civil No. 2013-0130, 2015 V.I. Supreme LEXIS 36, at *16–17 n.6 (V.I. Oct. 27, 2015) (citing *Molloy v. Indep. Blue Cross*, 56 V.I. 155, 176 n.5 (V.I. 2012)) (observing that "the Superior Court . . . correctly held that a request for punitive damages is not an independent cause of action").
[24] *Fasold v. Justice*, 409 F.3d 178, 183–84 (3d Cir. 2005) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000)).

Ed. 2d 668, 93 S. Ct. 1817."[25] To state a prima facie case under the *McDonnell Douglas* framework, a plaintiff must plead factual content that, when taken as true, establishes (i) that the plaintiff was a member of the class protected by the ADEA at the time of termination; (ii) that the plaintiff was otherwise qualified for the position from which he or she was terminated; (iii) that the plaintiff was terminated; and (iv) that the defendant subsequently hired younger employees to fill the plaintiff's position.[26]

Before determining whether Pickering has stated a claim for which relief may be granted under the ADEA, the Court must address Arcos Dorados' contention that Pickering's failure to allege receipt of a right-to-sue notice necessitates the dismissal of her Complaint.[27] Arcos Dorados cites to an opinion issued by the District Court of the Virgin Islands in a Title VII action in which a plaintiff's claim was dismissed because the plaintiff failed to plead receipt of a right-to-sue letter and had not received such a letter at the time the case was dismissed.[28] Pickering cites to precedent from the United States Court of Appeals for the Third Circuit to support the proposition that a right-to-sue letter is not necessary to maintain an ADEA action.[29]

Although Pickering is correct, each party's legal analysis is flawed because each party relies on case law interpreting Title VII, not the ADEA. Although the two sources of law pursue a similar purpose, they differ in implementation. The ADEA permits "[a]ny aggrieved person" to "bring a civil action in a court of competent jurisdiction for such . . . relief as will effectuate the purpose of [the ADEA],"[30] but "[n]o civil action may be commenced by an individual . . . until 60 days after a charge alleging unlawful discrimination has been filed with [the Equal Employment Opportunity Commission ("EEOC")]." "If the charge filed with the [EEOC] . . . is dismissed or the proceedings of the [EEOC] are otherwise terminated . . . the [EEOC] shall notify the person aggrieved."[31] Concerning these time periods, one federal court has explained that "the window for filing an ADEA suit begins sixty days after filing the EEOC charges and ends ninety days after receipt of the EEOC right-to-sue notice."[32]

The United States Court of Appeals for the Third Circuit has explained that, like under Title VII, suits by the EEOC "are the preferred enforcement mechanism" under the ADEA.[33] "Unlike Title VII however, [the] ADEA does not require that a 'right-to-sue' letter be first obtained. Rather, a complainant must simply file a charge with the EEOC not less than 60 days

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[25] *Id.* (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 271 (1989)).
[26] *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 142 (2000).
[27] Def.'s Mot. to Dismiss Pl.'s Compl. 5.
[28] Def.'s Reply in Supp. of Def. Arcos Dorados Puerto Rico, Inc.'s Mot. to Dismiss Pl.'s Compl. 8–11 (citing *Anjelino v. New York Times Co.*, 200 F.3d 73 (3d Cir. 1999) and *Glasgow v. Veolia Water N. Am., Operating Services, LLC*, CIVIL NO. 2009/019, 2010 U.S. Dist. LEXIS 99570 (D.V.I. Sept. 21, 2010)).
[29] Pl.'s Resp. to Mot. to Dismiss of Def. Arcos Dorados Puerto Rico, Inc. 11–12 (citing *Anjelino*, 200 F.3d at 96; *Vitalis v. Sun Constructors, Inc.*, No. 05-101, 2009 U.S. Dist. LEXIS 75079, at *2–3 (D.V.I. Aug. 24, 2009); and *Burke-Ventura v. VITELCO*, Civil No. 06-141, 2009 U.S. Dist. LEXIS 47752, at * 3–9 (D.V.I. June 5, 2009)).
[30] 29 U.S.C. § 626(c)(1).
[31] *Id.* § 626(e).
[32] *Adams v. Burlington N. R.R.*, 838 F. Supp. 1461, 1468 (D. Kan. 1993).
[33] *Seredinski v. Clifton Precision Products Co., Div. of Litton Systems, Inc.*, 776 F.2d 56, 62–63, (3d Cir. 1985).

before commencing suit . . . ."[34] Other federal circuits agree.[35] Consequently, Pickering's failure to allege that she received a right-to-sue letter from the EEOC is not fatal to her ADEA claim.

Turning to the discussion of whether Pickering has stated a claim for which relief can be granted under the ADEA, Pickering has pled facts which, if true, establish a prima facie case under the *McDonnell Douglas* framework. First, in paragraph 81 of her Complaint, Pickering alleges that she is over 40 years old, and is thus a member of the class protected by the ADEA. Second, in paragraph 60 Pickering alleges that she was qualified to hold her position due to the fact that she was "an exemplary employee having received many commendations over the years for her hard work including on J'Ouvert morning and many other occasions where [she] would have to open the store alone, even while working with a sick leg." Third, Pickering alleges that she was terminated in paragraphs 56 and 87.

Pickering has not pled that she was replaced by a younger employee. Arcos Dorados contends that this amounts to a "fatal shortcoming" in Pickering's ADEA claim.[36] However, the Third Circuit has recognized that the *McDonnell Douglas* framework "must be relaxed in certain circumstances."[37] It is sufficient to allege that a younger employee was retained despite the plaintiff's termination,[38] or that members outside of the protected class were treated more favorably in general.[39] Here, Pickering has alleged that Arcos Dorados had a policy "that only young individuals, under the age of 24, should be hired,"[40] and that "Crew Member positions should not be used as a 'means to survive' for older people 'over the age of 25' but should be used as a 'means of progression for younger individuals' in life."[41] If proven, these allegations constitute evidence that Arcos Dorados treated employees younger than 40 more favorably than employees that fall under the class protected by the ADEA. These allegations are sufficient to satisfy the *McDonnell Douglass* framework and nudge Pickering's ADEA claim across the line from possible to plausible. Therefore, Pickering's ADEA claim will not be dismissed.

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[34] *Id.* The Third Circuit has observed that the purpose of the pre-suit filing requirement contained in 29 U.S.C. § 626(d)(1) is "to permit EEOC to attempt 'to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion'"). *Id.* (quoting 29 U.S.C. § 626(d)).

[35] *See, e.g., McPherson v. N.Y. City Dep't of Educ.*, 457 F.3d 211, 214–15 (2d Cir. 2006) (observing that "[n]o 'right-to-sue' letter is needed in ADEA cases"); *Julian v. City of Houston*, 314 F.3d 721, 727 (5th Cir. 2002) (declining to "create an additional requirement" that a plaintiff receive a right-to-sue letter before filing a claim under the ADEA); *Shikles v. Sprint/United Mgmt. Co.*, 426 F.3d 1304, 1310 (10th Cir. 2005) (stating that "a right to sue letter is not a prerequisite to suit under the ADEA"); *Grayson v. K Mart Corp.*, 79 F.3d 1086, 1100 (11th Cir. 1996) ("Unlike Title VII, the ADEA does not require that the plaintiff first receive a right to sue notice from the EEOC prior to commencing suit.").

[36] Def.'s Reply in Supp. of Def. Arcos Dorados Puerto Rico, Inc.'s Mot. to Dismiss Pl.'s Compl. 5.

[37] *Torre v. Casio, Inc.*, 42 F.3d 825, 831 (3d Cir. 1994).

[38] *Billet v. CIGNA Corp.*, 940 F.2d 812, 816 n.3 (3d Cir. 1991); *Healy v. New York Life Ins. Co.*, 860 F.2d 1209, 1214 n.1 (3d Cir. 1988).

[39] *Massarsky v. General Motors Corp.*, 706 F.2d 111, 118 (3d Cir. 1983).

[40] Compl. ¶ 83.

[41] *Id.* ¶ 84.

II. COUNT IV: INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The Supreme Court of the Virgin Islands has not yet issued an opinion that defines the elements of a claim for intentional infliction of emotional distress. In the case of *Joseph v. Sugar Bay Club & Resort Corp.*,[42] the Superior Court of the Virgin Islands, Francois, J., conducted the three-part analysis mandated by *Banks v. International Rental & Leasing Corp.*,[43] and concluded that the principles of law summarized in the Restatement (Second) of Torts § 46 represented the soundest rule of law for this jurisdiction.[44] The Superior Court revisited this analysis in the case of *Donastorg v. Daily News Publishing Co. Inc.*,[45] and reached the same conclusion. Being satisfied with the conclusions from both *Joseph* and *Donastorg*, this Court adopts the analyses of each as though they were fully set forth in this Memorandum Opinion.

Therefore, in order to survive Arcos Dorados' Motion, Pickering must plead facts that, when assumed to be true, establish that Arcos Dorados (1) intentionally or recklessly; (2) engaged in extreme and outrageous conduct that exceeds all possible bounds of decency such that it is regarded as atrocious and utterly intolerable in a civilized society; that (3) caused Pickering to suffer severe emotional distress.

Pickering's factual allegations establish each of these elements. Paragraphs 93–95, among others, contain allegations that Arcos Dorados acted either intentionally or recklessly. Paragraph 95 alleges that Arcos Dorados justified terminated Pickering by claiming that Pickering used foul language and was rude to deJongh, despite the fact that Pickering used no such words and expressed no disrespect to deJongh. In other words, paragraph 95 suggests that Arcos Dorados' reason for terminating Pickering was fabricated. This constitutes an allegation of conduct so extreme and outrageous that it exceeds all possible bounds of decency, such that it is regarded as atrocious and utterly intolerable in a civilized society. Finally, in paragraph 97, Pickering alleges that Arcos Dorados' conduct "caused severe emotional distress that caused physical injuries." Based on these allegations, Pickering has stated a claim for intentional infliction of emotional distress. Count IV of Pickering's Complaint shall not be dismissed.

Arcos Dorados has cited case law from the Superior Court to support the proposition that the question of whether a defendant's conduct is so extreme as to permit recovery for intentional infliction of emotional distress is initially a question of law for the court.[46] Other case law from the Superior Court has observed that

> [r]ecovery [for intentional infliction of emotional distress in the employment context] has been denied for: "evidence of an unpleasant work place experience and termination;" defamatory remarks made by management that Plaintiff was "a disgruntled former employee who had committed bad acts and had been

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[42] ST-2013-CV-491, 2014 V.I. LEXIS 14 (V.I. Super. Ct. Mar. 17, 2014), *overruled on other grounds*, 2015 V.I. Supreme LEXIS 4 (V.I. 2015).
[43] 55 V.I. 967 (V.I. 2011).
[44] 2014 V.I. LEXIS 14, at *8–9.
[45] ST-2002-CV-117, 2015 V.I. LEXIS 105 (V.I. Super. Ct. Aug. 19, 2015).
[46] Def.'s Mot. to Dismiss 17 (quoting *Joseph*, 2014 V.I. LEXIS 14, at *9.

> terminated" and that he "wanted to unionize the employees so he could use their dues to pay his bills;" termination in retaliation for cooperating with federal officials; discriminatory actions favoring white stateside employees over a black West Indian plaintiff; and an employer's refusal to allow plaintiff to return to work after plaintiff became ill, humiliating plaintiff.[47]

However, the Court is convinced that the allegations set forth by Pickering are sufficiently distinct from the examples cited in the preceding paragraph. In none the examples referenced above was the plaintiff's claim for intentional infliction of emotional distress premised on an allegations that the employer propounded an intentionally-falsified version of events in order to justify terminating the plaintiff.[48] Such an allegation is sufficiently outrageous that Pickering should be permitted to conduct discovery in order to establish the veracity of her claim. Therefore, Pickering's intentional infliction of emotional distress claim will not be dismissed.

III. COUNT V: VIOLATION OF VIRGIN ISLANDS' WAGE AND HOUR LAWS

Pickering alleges that, even though she worked on local Holidays "and was therefore entitled to double time pay on local Holidays . . . [,] [she] was not given double pay for her work on local holidays, which is unlawful."[49]

The allegedly-unlawful act complained of is that Pickering did not receive double pay for the times she worked on holidays. Pickering has not set forth legal authority to support her claim. Under the Virgin Islands Code Title 3, Section 560 provides for double time pay. Under Section 560(e), "[a]n employee who is required to work on a holiday shall receive as compensation his regular daily pay, plus an amount equal to his regular base rate for all authorized work performed on the holiday . . . ."[50] This policy applies to positions covered by Title 3, Subchapter III of the Code.[51] The position classification system set forth in subchapter III, in turn, applies to positions in the Executive Branch of the Virgin Islands Government, subject to exceptions that are not relevant in this case.

Here, Pickering has alleged that she was an employee of Arcos Dorados, and that Arcos Dorados "is an international corporation and is the largest operator of McDonalds restaurants in Latin America and the Caribbean, and the world's largest McDonald's franchise."[52] Pickering's position with "the largest operator of McDonalds restaurants in Latin America and the Caribbean" does not constitute a "position[] in the Executive Branch of the Virgin Islands Government" that

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[47] *Webster v. CBI Acquisitions, LLC*, CASE NO. ST-11-CV-558, 2012 V.I. LEXIS 9, at *15 (V.I. Super. Ct. Mar. 5, 2012) (citations omitted). *See also id.* (collecting cases).

[48] *See Greene v. V.I. Water and Power Authority*, 1:06-cv-11, 2011 U.S. Dist. LEXIS 80325, at *40 (D.V.I. July 22, 2011) (containing no such allegation); *Nicholas v. Grapetree Shores, Inc.*, Civil No. 2005-119, 2011 U.S. Dist. LEXIS 67494, at *3 (D.V.I. June 23, 2011) (same); *Smith v. Virgin Islands Housing Authority*, Civil No. 09-cv-00011, 2011 U.S. Dist. LEXIS 19409, at *19 (D.V.I. Feb. 28, 2011) (same); *Berrios v. Hovic*, Civil No. 2005-192, 2010 U.S. Dist. LEXIS 77525, at *4 (D.V.I. July 29, 2010) (same).

[49] Compl. ¶ 102.

[50] V.I. CODE ANN. tit 3 § 560(e).

[51] *Id.* § 551.

[52] Compl. ¶ 4.

is entitled to double time pay on holidays under 3 V.I.C. 560(e). Therefore, Pickering has not stated a cause of action upon which relief can be granted under count five of her Complaint.[53]

CONCLUSION

Counts III and IV of Pickering's Complaint state claims upon which relief can be granted, and thus survive Arcos Dorados' Motion. Count V of Pickering's Complaint does not state a claim upon which relief can be granted, and must be dismissed. Therefore, Arcos Dorados' Motion will be granted in part and denied in part. An appropriate order shall follow.

Dated: November 9, 2015

Denise M. Francois
DENISE M. FRANCOIS
Judge of the Superior Court
of the Virgin Islands

ATTEST:
Estrella H. George
Acting Clerk of the Court
By: Lori B. Tyson
Lori Boynes-Tyson
Court Clerk Supervisor 11/10/15

[53] Although Pickering has not alleged its applicability, the Fair Labor Standards Act of 1938 only provides for payment at a rate equal to one and one half times the employee's normal rate once certain thresholds have been exceed. *See* 29 U.S.C. § 207 (setting forth the maximum hours an employee may work before being entitled to compensation at one and one half times the employee's normal rate).