

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

MARJORIE EVANS BELLOT,	)	CASE NO. ST-2012-CV-0000297
PAULITA ANDREW, THERESA	)	
THOMAS, and JANET PIERRE,	)	
	)	
Plaintiffs,	)	ACTION FOR WRONGFUL
	)	DISCHARGE AND DAMAGES
	)	
v.	)	
	)	JURY TRIAL DEMANDED
CARDOW, INC. d/b/a CARDOW,	)	
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendant Cardow, Inc. (“Cardow”)’s Motion to Dismiss Plaintiffs’ Second Amended Complaint (Cardow’s “Motion”), which was filed on September 19, 2013.¹ The Plaintiffs filed their opposition to Cardow’s Motion on October 25, 2013. Cardow did not file a reply. Having reviewed the parties’ submissions and heard the parties’ oral argument on July 2, 2014, the Court will grant Cardow’s Motion and dismiss the Plaintiffs’ Second Amended Complaint. However, the Plaintiffs shall be allowed twenty one days to file a Third Amended Complaint.

PROCEDURAL HISTORY

The case started as an action in debt for severance pay allegedly due to the Plaintiffs after they were terminated by Cardow. The Court dismissed the Plaintiffs’ original Complaint without prejudice, but stayed dismissal for 21 days so that the Plaintiffs could amend their Complaint. Twenty one days passed. On March 6, 2013, the Plaintiffs filed their Amended Complaint. The Court initially rejected the Amended Complaint because the Plaintiffs did not file a redline copy, as required under Local Rule of Civil Procedure 15.1.² The Court granted additional time to the Plaintiffs to cure this deficiency. The Plaintiffs subsequently filed a redline copy of the Amended Complaint, but erroneously titled it as a “second” amended complaint.³ The Court accepted the Amended Complaint by Order dated May 10, 2013.

¹ Attorney Clive Rivers represents the Plaintiffs. Attorney Bennett Chan and Michelle T. Meade represent the Defendant.

² LRCi 15.1 applies to this proceeding through the operation of Super. Ct. R. 7, which states that “[t]he practice and procedure in the Superior Court shall be governed by the Rules of the Superior Court and, to the extent not inconsistent therewith, by the Rules of the District Court”

³ See Order, 2 (June 20, 2013) (explaining that the Amended Complaint was “improperly captioned” as a second amended complaint).

The Plaintiffs were given a second opportunity to amend their Complaint when they retained new counsel. Because their original attorney was on disability leave, the Plaintiffs retained a new attorney, who entered his appearance on August 29, 2013. By Order dated August 30, 2013, the Court allowed Plaintiffs' new attorney to amend the Complaint again. He took this opportunity, and filed the Plaintiffs' Second Amended Complaint on September 19, 2013.

Unlike the original or the Amended Complaint, the Second Amended Complaint contains no request for severance pay. Instead, Count I alleges that Cardow terminated the Plaintiffs "because they are all older employees," and that these terminations "violate the law and amount to discrimination based on age."⁴ Count II alleges that Cardow violated the WDA because Cardow fired the Plaintiffs due their age.⁵ Cardow now moves to dismiss Plaintiffs' Second Amended Complaint.

ANALYSIS

Cardow argues that the Second Amended Complaint should be dismissed for three reasons. First, Cardow argues that the scope of the Second Amended Complaint exceeds the "law of the case" allegedly established by this Court's February 8, 2013 Order.⁶ Second, Cardow argues that the Second Amended Complaint's two causes of action are futile because the first cause of action fails to state a claim on which relief can be granted and the second cause of action violates the applicable statute of limitations.⁷ Third, Cardow argues that the filing of Plaintiffs' Second Amended Complaint it is prejudicial to Cardow.⁸

I. Plaintiffs' Second Amended Complaint does not violate this Court's February 8, 2013 Order.

Cardow claims that this Court's February 8, 2013 Order was "narrowly tailored" and only permitted the Plaintiffs to amend their Complaint in order to state claims under the Virgin Islands Plant Closing Act ("PCA"), 24 V.I.C. §§ 471–78.⁹ Plaintiffs respond that their Second Amended Complaint does not violate the Court's February 8, 2013 Order because this Court's August 30, 2013 Order granted them permission to further amend their Complaint.¹⁰

The law-of-the-case doctrine "posits that, when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages of the same case."¹¹ Importantly, the law-of-the-case doctrine "directs the court's discretion, it does not limit the tribunal's power."¹²

⁴ Second. Am. Compl. ¶¶ 13–14.

⁵ *Id.* ¶¶ 17–19.

⁶ Def.'s Mot. to Dismiss, 4.

⁷ *Id.* at 6–10.

⁸ *Id.* at 11.

⁹ *Id.* at 5–6.

¹⁰ Pls.' Opp. to Def.'s Mot. to Dismiss, 4.

¹¹ *Pepper v. U.S.*, 131 S. Ct. 1229, 1250 (2011) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)).

¹² *Arizona*, 460 U.S. at 615.

The law-of-the-case doctrine does not apply here because the Court's February 8, 2013 Order did not identify a rule of law that would govern the remainder of this case. Although much of the Court's February 8, 2013 Order explains why the Plaintiffs did not state a claim under the PCA, the Court did not state that the PCA would govern all further proceedings in this case. Rather, the Plaintiffs were given the option "to file an Amended Complaint if they so choose."¹³ The Order contained no language limiting how Plaintiffs might exercise this option. Thus, the Court's February 18, 2013 Order does not trigger the application of the law-of-the-case doctrine.

Further, application of the law-of-the-case doctrine to this case produces a result inconsistent with the doctrine's purpose. The law-of-the-case doctrine exists to guide discretion, not to limit a court's power.¹⁴ Under Superior Court Rule 8, the Superior Court may grant leave to amend pleadings.¹⁵ The Court exercised this discretion on February 8, 2013 when it allowed the Plaintiffs to file an Amended Complaint. The Court again exercised this discretion when it granted Plaintiffs' new attorney an opportunity to amend the Complaint again. Yet, if Cardow's application of the law-of-the-case were correct, the Court would be precluded from exercising its discretion and granting Plaintiffs' new attorney a chance to amend the Complaint. The law-of-the-case doctrine does not exist to produce such a result, and thus does not apply here. Consequently, the law-of-the-case doctrine does not mandate the rejection of Plaintiffs' Second Amended Complaint.

II. Plaintiffs' Second Amended Complaint fails to state claims on which relief may be granted.

Because Cardow has requested that this Court dismiss Plaintiffs' Second Amended Complaint, the appropriate inquiry is whether the factual allegations of the Plaintiffs' Second Amended Complaint state plausible claims on which relief can be granted.¹⁶

Rule 8 of the Federal Rules of Civil Procedure¹⁷ requires that a pleading contain "a short and plain statement of the claim showing that the pleader is entitled to relief."¹⁸ 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.¹⁹ However, a plaintiff is obliged to provide "more than labels and conclusions."²⁰ To survive a motion to dismiss under Rule 12(b)(6) of the Federal Rules of Civil Procedure, "a complaint must contain sufficient factual matter, accepted as true, 'to state a claim for relief that is plausible on its face.'"²¹ Determining whether a complaint states "a

¹³ Order, 2 (Feb. 8, 2013).

¹⁴ *Arizona*, 460 U.S. at 615.

¹⁵ Super. Ct. R. 8.

¹⁶ FED. R. CIV. P. 8; *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

¹⁷ See Super. Ct. R. 7 ("The practice and procedure in the Superior Court shall be governed by the Rules of the Superior Court and, to the extent not inconsistent therewith . . . the Federal Rules of Civil Procedure . . .").

¹⁸ FED. R. CIV. P. 8(a)(2).

¹⁹ *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)).

²⁰ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

²¹ *Ashcroft*, 556 U.S. at 677 (quoting *Twombly*, 550 U.S. at 570).

plausible claim for relief” is “a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”²² In making the plausibility determination:

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.²³

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.²⁴

a. Plaintiffs’ first cause of action fails to state a claim on which relief may be granted.

Count I of Plaintiffs’ Second Amended Complaint alleges that the Plaintiffs’ termination “violate[s] the law and amount[s] to discrimination based on age.” The Second Amended Complaint does not specify which law Cardow has allegedly broken. During oral arguments on Cardow’s Motion, however, the Plaintiffs claimed that Count I was brought under the Age Discrimination in Employment Act (“ADEA”).²⁵

In *McDonnell Douglas Corp. v. Green*,²⁶ the United States Supreme Court established a framework for pleading a prima facie case of discrimination under Title VII of the Civil Rights Act.²⁷ Although the United States Supreme Court has never held that the *McDonnell Douglas* framework applies to pleading causes of action under the ADEA, the Federal Courts of Appeals all apply some variation of the *McDonnell Douglas* framework when evaluating alleged violations of the ADEA.²⁸ Under this framework, a plaintiff establishes a prima facie case under the ADEA

²² *Iqbal*, 559 U.S. at 679.

²³ *Brady v. Cintron*, 55 V.I. 802, 822-23 (V.I. 2011) (citing *Joseph v. Bureau of Corrections*, 54 V.I. 644, 649-50 (V.I. 2011)).

²⁴ *Id.*

²⁵ 29 U.S.C. §§ 621–34 (West 2014).

²⁶ 411 U.S. 792 (1973).

²⁷ *O’Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308, 311 (1996).

²⁸ *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 141 (2000). *E.g.*, *Smith v. Borough of Wilkesburg*, 147 F.3d 272, 278 (3rd Cir. 1998); *O’Connor v. Consolidated Coin Caterers Corp.*, 56 F.3d 542, 546 (4th Cir. 1995); *Roper v. Peabody Coal Co.*, 47 F.3d 925, 926–27 (7th Cir. 1995); *Reinhart v. Independence*, 35 F.3d 1263, 1265 (8th Cir. 1994); *Roush v. KFC National Management Co.*, 10 F.3d 392, 396 (6th Cir. 1993); *Lindsay v. Prive Corp.*, 987 F.2d 324, 326 n.5 (5th Cir. 1993); *Goldstein v. Manhattan Industries, Inc.*, 758 F.2d 1435, 1442 (11th Cir. 1985); *Haskell v. Kaman Corp.*, 743 F.2d 113, 119, and n.1, (2nd Cir. 1984); *Douglas v. Anderson*, 656 F.2d 528, 531–32

by pleading: 1.) that she is a member of a protected class; 2.) that she was otherwise qualified for her position; 3.) that she was terminated by the defendant; and 4.) that the defendant subsequently hired younger employees to fill the plaintiff's position.²⁹

Applying this standard, Count I of the Plaintiffs' Second Amended Complaint fails to state a plausible claim for relief because the Plaintiffs do not plead facts that, if assumed to be true, establish that the Plaintiffs are members of a protected class. A plaintiff belongs to a protected class of individuals under the ADEA if they are forty years old or older.³⁰ Yet the Plaintiffs' Second Amended Complaint does not identify the Plaintiffs' ages, and thus does not establish that the Plaintiffs are members of the class that the ADEA was enacted to protect. As a result, Count I does not state a claim on which relief can be granted under the ADEA.

b. Plaintiffs' second cause of action is not barred by the statute of limitations.

Cardow argues that Plaintiffs' second cause of action was not filed within the applicable statute of limitations period,³¹ does not properly relate back to the Plaintiffs' original Complaint, and must thus be dismissed.³² The Superior Court of the Virgin Islands may look to Federal Rule of Civil Procedure 15 to determine when amendments to a complaint related back to the original complaint.³³ Under Federal Rule 15, the factual allegations of an amended complaint relate back to the date of an original pleading when "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading."³⁴

Here, the conduct complained of in Plaintiffs' Second Amended Complaint arises out of the same conduct set out in the Plaintiffs' original Complaint. Specifically, the allegations of

(9th Cir. 1981); *Loeb v. Textron, Inc.*, 600 F.2d 1003, 1014–16 (1st Cir. 1979); *Schwager v. Sun Oil Co. of Pennsylvania*, 591 F.2d 58, 60–61 (10th Cir. 1979).

²⁹ *Reeves*, 530 U.S. at 142. *Accord Hutt v. AbbVie Products LLC*, ___ F.3d ___, 2014 WL 3033136, at *5 (7th Cir. July 7, 2014) (observing that a plaintiff may establish a prima facie case for age discrimination in violation of the ADEA by showing that she was a member of a protected class, that she was performing her job satisfactorily, that she suffered an adverse employment action, and that the employer treated younger employees more favorably) (citing *Bass v. Joliet Public Schools*, 746 F.3d 835, 841 (7th Cir. 2014)); *Deleon v. Kalamazoo County Road Commission*, 739 F.3d 914, 919 (6th Cir. 2014) (observing that a plaintiff may establish a prima facie case for age discrimination in violation of the ADEA by showing that he is a member of a protected class, that he suffered an adverse employment action; that he was otherwise qualified for his position; and that he was replaced by a substantially younger employee, or additional evidence shows that the employer was motivated by age); *Sarullo v. U.S. Postal Service*, 352 F.3d 789, 797 (3rd Cir. 2003) (observing that a plaintiff may establish a prima facie case for age discrimination in violation of the ADEA by showing that he is a member of a protected class, was qualified for his position, was subject to adverse employment action despite being qualified, and that the employer, under circumstances that raise an inference of discriminatory action, continued to seek out individuals with qualifications similar to the plaintiff).

³⁰ 29 U.S.C. § 631(a).

³¹ The statute of limitations for civil claims arising under the WDA is two years. *Krimmel v. Hovensa, LLC*, Civ. No. 2002-0028, 2007 WL 6027821, at *5 (D.V.I. Nov. 28, 2007) (citing 24 V.I.C. § 79); *Canonier v. Mahogany Run Condominium Association, Inc.*, Case No. St-09-CV-390, 2011 WL 635295, at *4 (V.I. Super. Ct. Feb. 7, 2011).

³² Def.'s Mot. to Dismiss, 10.

³³ *Santiago v. Virgin Islands Housing Authority*, 57 V.I. 256, 275–76 (V.I. 2012)

³⁴ FED. R. CIV. P. 15(c)(1)(B).

wrongdoing found in both the original and the Second Amended Complaint stem from Cardow's termination of the Plaintiffs, which occurred on July 5, 2010.³⁵ Consequently, the amendments in Plaintiffs' Second Amended Complaint relate back to the original Complaint, and Count II of Plaintiffs' Second Amended Complaint is not barred by the two-year statute of limitations.³⁶

c. Plaintiffs' second cause of action fails to state a claim on which relief can be granted.

Count II of the Plaintiffs' Second Amended Complaint is brought under the WDA.³⁷ To establish a prima facie case for wrongful termination under the WDA, local courts have held that a plaintiff must plead four elements: 1.) that the plaintiff was an employee; 2.) of a covered employer; 3.) that the plaintiff was discharged; and 4.) that the plaintiff's discharge was wrongful.³⁸ Under the WDA, a covered employer "includes any person acting in the interest of an employer directly or indirectly that has employed five (5) or more employees for each working day in each of the twenty (20) or more calendar weeks in the two (2) year period preceding a discharge."³⁹ Courts have dismissed cases for failure to plead that a defendant is a covered employer under the WDA.⁴⁰

In the case of *Glasgow v. Veolia Water North America Operating Services, LLC*,⁴¹ the United States District Court for the Virgin Islands dismissed a plaintiff's WDA claim because the plaintiff did not plead that the defendant was a covered employer under the WDA.⁴² The District Court observed that, although "it is likely that [the defendant] fits the description of an 'employer' as used by the WDA, the Court cannot infer this."⁴³ Although the District Court's decision does not constitute binding precedent on this Court, it represents persuasive authority as to how this Court should analyze Count II of Plaintiffs' Second Amended Complaint.

Like in *Glasgow*, the Plaintiffs here have not alleged that Cardow was an employer as defined under the WDA. Although Cardow may fall within the WDA's definition of employer, there are no factual allegations in the Second Amended Complaint that permit such an inference.

A motion under Rule 12(b)(6) of the Federal Rules of Civil Procedure tests the sufficiency of a complaint, so the Court's consideration at this stage is limited to the contents of the Plaintiffs'

³⁵ Compare Second Am. Compl. ¶ 11 (stating that, "[o]n or about July 5, 2010, Defendant summarily discharged the Plaintiffs"), with Compl. ¶¶ 1–4 (identifying each Plaintiff and alleging that she was terminated on July 5, 2010).

³⁶ Cardow has not alleged that Count I of Plaintiffs' Second Amended Complaint is barred by the statute of limitations.

³⁷ 24 V.I.C. §§ 61–79.

³⁸ *Mendez v. Hovens, LLC*, 49 V.I. 826, 836 (D.V.I. 2008); *Hospedales v. St. Croix Eye Group, Inc.*, Civ. No. SX-08-CV-320, 2012 WL 2866749, at *2 (V.I. Super. Ct. June 22, 2012); *Fenton v. C&C Construction and Maintenance, Inc.*, 48 V.I. 263, 273 (V.I. Super. Ct. April 4, 2007).

³⁹ 24 V.I.C. § 62.

⁴⁰ E.g., *Glasgow v. Veolia Water North America Operating Services, LLC*, Civ. No. 2009/019, 2010 WL 3780966, at *10 (D.V.I. Sept. 21, 2010) (United States District Court of the Virgin Islands); *Joseph v. Sugar Bay Resort Club*, Civ. No. ST-13-CV-491, 2014 WL 1133416, at *2 (V.I. Super. Ct. March 17, 2014) (Superior Court of the Virgin Islands).
⁴¹ 2010 WL 3780966.

⁴² See *Glasgow*, 2010 WL 3780966, at *10 (also observing that the plaintiff failed to allege that his discharge was wrongful, as required by the WDA).

⁴³ *Id.*

Second Amended Complaint.⁴⁴ Because Plaintiffs failed to plead facts from which the Court can determine that Cardow was a covered employer, Count II of Plaintiffs' Second Amended Complaint does not state a claim on which relief can be granted under the WDA.

III. Plaintiffs Second Amended Complaint is not prejudicial to Cardow.

Lastly, Cardow argues that the revisions in Plaintiffs' Second Amended Complaint prejudice Cardow because they are "changing the entire game midstream."⁴⁵ Cardow claims its liability exposure is "greatly increased" due to Plaintiffs' claims of age discrimination and wrongful termination, that these are more complicated causes of action than Plaintiffs' original request for severance pay, and that Cardow will have to begin discovery anew if the Plaintiffs are allowed to proceed.⁴⁶

The Plaintiffs had alleged that their discharge was wrongful prior to the filing of the Second Amended Complaint. The Plaintiffs' Amended Complaint purported to be both an action in debt and a claim for wrongful discharge.⁴⁷ It alleged that the Plaintiffs' terminations were wrongful, in violation of WDA.⁴⁸ The Plaintiffs filed their Amended Complaint on March 6, 2013, although it would not be accepted by the Court until May 10, 2013 because the Plaintiffs had not submitted a redline copy of their proposed amendments. Thus, since May 10, 2013 at the latest, Cardow has known that the Plaintiffs were alleging wrongful discharge under the WDA.

Both parties will bear the burden of additional discovery. Further, neither the complication of defending a claim under the WDA nor the fact that Cardow's liability exposure may be greater under such a claim justifies denying Plaintiffs the opportunity to prove their claim. Finally, as discussed earlier, Plaintiffs' Second Amended Complaint relates back to the original Complaint. Consequently, Cardow is not prejudiced by the amendments contained in Plaintiffs' Second Amended Complaint.

CONCLUSION

This Court's February 18, 2013 Order did not determine that all future proceedings in this case would be governed by the PCA, so the Plaintiffs were free to amend their Complaint to state claims for age discrimination and wrongful discharge. The statute of limitations does not bar Plaintiffs' WDA claim because the Second Amended Complaint relates back to the original Complaint. But because neither of Plaintiffs' two causes of action state plausible claims on which relief can be granted, each must be dismissed.

Plaintiffs' first cause of action shall be dismissed with prejudice because the Plaintiffs made no attempt to comply with the statutory requirements of the ADEA. The ADEA requires

⁴⁴ *Miller v. Fortis Benefits Insurance Co.*, 475 F.3d 516, 519 (3rd Cir. 2007); *Manns v. Leather Shop Inc.*, 960 F. Supp. 925, 927–28 (D.V.I. 1997).

⁴⁵ Def.'s Mot. to Dismiss, 12.

⁴⁶ Def.'s Mot. to Dismiss, 11–12.

⁴⁷ See Am. Compl., 1 (the caption indicates that the case is both an action in debt and a claim for wrongful discharge).

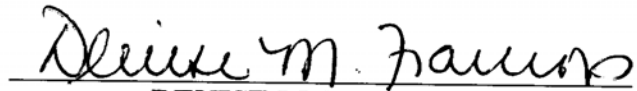
⁴⁸ See Am. Compl. Preliminary Statement, ¶¶ 1–4 (alleging that Plaintiffs' termination violated 24 V.I.C. § 76).

that a complainant file a charge alleging unlawful discrimination with the Equal Employment Opportunity Commission no later than 300 days after the occurrence of an allegedly discriminatory act.⁴⁹ Failure to comply precludes a civil action under the ADEA.⁵⁰ Here, there is no evidence that the Plaintiffs served such a notice. The 300-day window has long since closed, and was closed at the time the Plaintiffs filed their Second Amended Complaint. As a consequence, Plaintiffs are statutorily precluded from bringing an action under the ADEA.

However, Plaintiffs' second cause of action shall be dismissed without prejudice. The Second Amended Complaint relates back to the original Complaint, and does not prejudice Cardow. Further, Plaintiffs' second cause of action is being dismissed because the Plaintiffs did not plead that Cardow is a covered employer under the WDA. Consequently, the Plaintiffs shall have an opportunity to file a Third Amended Complaint.

An appropriate order shall follow.

Dated: August 18, 2014



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

ATTEST:
ESTRELLA H. GEORGE
Acting Clerk of the Court

BY 
LORI BOYNES-TYSON
Court Clerk Supervisor 08 / 19 / '14

⁴⁹ 29 U.S.C. § 626(d)(1).

⁵⁰ *Id.*