

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

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|------------------------------------------------------------------------------------------------|---|-----------------------|
| <b>POLICEMAN'S BENEVOLENT ASSOCIATION,</b>                                                     | ) | CASE NO. ST-16-CV-277 |
|                                                                                                | ) |                       |
| Plaintiff,                                                                                     | ) | ACTION FOR DEFAMATION |
|                                                                                                | ) | AND DAMAGES           |
| vs.                                                                                            | ) |                       |
|                                                                                                | ) |                       |
| <b>DELROY RICHARDS, VIRGIN ISLANDS POLICE DEPARTMENT and GOVERNMENT OF THE VIRGIN ISLANDS,</b> | ) |                       |
|                                                                                                | ) |                       |
| Defendants.                                                                                    | ) |                       |

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**MEMORANDUM OPINION AND ORDER**

Before the Court is Defendants' Motion to Dismiss, which was filed on August 24, 2016. Plaintiff filed a Response on October 3, 2016. Defendants move the Court to dismiss Plaintiff's Complaint and argues Plaintiff failed to state a claim upon which the Court can grant relief.

Defendants appear to proffer three reasons for dismissal of Plaintiff's Complaint. First, Defendants argue Defendant Delroy Richards's alleged defamatory statements were privileged. Second Defendant asserts Richards should be afforded protection from liability under the qualified immunity doctrine. Lastly, Defendants state they were not bound by the grievance process provided in the parties' collective bargaining agreement. The Court will deny Defendants' Motion due to their failure to articulate sufficiently why Plaintiff's Complaint fails to plead a valid claim.

**I. Defendants Have Not Demonstrated that Plaintiff Failed to Plead a Valid Claim.**

**STANDARD FOR MOTION TO DISMISS**

"The adequacy of a complaint is governed by Rule 8 of the Federal Rules of Civil Procedure."<sup>1</sup> A complaint must set forth "a short and plain statement of the claim showing that the pleader is entitled to relief."<sup>2</sup> 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.'"<sup>3</sup> 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.<sup>4</sup> However, a plaintiff is obliged to provide "more than labels and conclusions."<sup>5</sup> Determining whether a complaint states "a plausible claim for relief" is "a context-specific task

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<sup>1</sup> *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.

<sup>2</sup> FED. R. CIV. P. 8(a)(2).

<sup>3</sup> *Ashcroft v. Iqbal*, 559 U.S. 662, 677 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 570 (2002)).

<sup>4</sup> *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)).

<sup>5</sup> *Twombly*, 550 U.S. at 555.

that requires the reviewing court to draw on its judicial experience and common sense.”<sup>6</sup> In making the plausibility determination, the Supreme Court of the Virgin Islands instructs that:

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.<sup>7</sup>

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.<sup>8</sup>

## BACKGROUND

Plaintiff is a labor union representing police officers in the Virgin Islands.<sup>9</sup> Defendant Delroy Richards (“Richards”) is the Commissioner of the U.S. Virgin Islands Police Department.<sup>10</sup> The Police Department and Plaintiff are parties to a collective bargaining agreement.<sup>11</sup> Plaintiff alleges that Richards falsely told several news media organizations that Plaintiff engaged in a “blue flu” labor action.<sup>12</sup> A blue flu, also known as a “sickout,” is a labor strike tactic in which employees simultaneously use sick leave. Plaintiff claims Richards made these statements “to undermine the terms of the collective bargaining agreement, and the ability of the union to effectively negotiate a fair and just contract for its members.”<sup>13</sup> Plaintiff also asserts Richards made these statements “at the height of the 2016 Carnival Season for maximum negative publicity impact . . .”<sup>14</sup>

Plaintiff filed a Complaint on May 20, 2016 and alleged Richards’s statements were defamatory. Defendants filed the present Motion to Dismiss, claiming that Richards’s statements were not defamatory because they were privileged and Richards is shielded from the present action by the qualified immunity doctrine.

## STANDARD FOR DEFAMATION

First, the Court notes that Defendant cites to the Restatement (Second) of Torts and a pre-*Banks* court opinion that treats the Restatement as binding authority when setting forth the

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<sup>6</sup> *Iqbal*, 559 U.S. at 679.

<sup>7</sup> *Brady v. Cintron*, 55 V.I. 802, 822-23 (2011) (citing *Joseph v. Bureau of Corrections*, 54 V.I. 644, 649–50 (2011)).

<sup>8</sup> *Id.*

<sup>9</sup> Compl. ¶ 4.

<sup>10</sup> *Id.* at ¶ 5.

<sup>11</sup> *Id.* a ¶ 6.

<sup>12</sup> *Id.* at ¶ 8.

<sup>13</sup> *Id.* at ¶ 10.

<sup>14</sup> *Id.* at ¶ 9.

elements for the tort of defamation. The Supreme Court of the Virgin Islands dictated that the Superior Court should no longer rely on the Restatement of Laws or precedent that relied on the Restatement as the source of Virgin Islands common law.<sup>15</sup> Instead, when a question of common law is not foreclosed by prior precedent from the V.I. Supreme Court, a court must perform the three-part analysis provided in *Banks v. International Rental & Leasing Corp.*<sup>16</sup>

To prevail on a defamation claim, a plaintiff must prove (1) the existence of “a false and defamatory statement concerning another;” (2) the existence of “an unprivileged publication [of the false and defamatory statement] to a third party;” (3) “fault amounting to at least negligence on the part of the publisher;” and (4) “either the actionability of the statement irrespective of special harm or the existence of special harm caused by the publication.”<sup>17</sup>

### APPLICATION

As a preliminary matter, the Court first addresses Defendants’ argument that “the Union has failed to prove that Commissioner Richards is liable for defamation.”<sup>18</sup> The Court reminds Defendants that Plaintiff is not required to put forth evidence proving its case at this stage of this matter’s proceedings. Instead, the Plaintiff only needs to plead a valid claim.

Defendants’ Motion to Dismiss appears to assert Plaintiff failed to satisfy the second element of defamation because Richards’s statement was privileged. The term “unprivileged” refers to the alleged defamer’s inability to demonstrate that he was in some way “privileged” to make the defamatory communication.<sup>19</sup> The types of privilege defenses available fall into two categories, “absolute privileges,” and “conditional privileges.”<sup>20</sup> Privilege, however, can be abused in such a way as to subject the defamer to liability despite his privilege.<sup>21</sup> Defendants’ offer the following bases for privilege:

(a) the consent of the other affected by the actor’s conduct, or (b) the fact that its exercise is necessary for the protection of some interest of the actor or of the public which is of such importance as to justify the harm caused or threatened by its exercise, or (c) the fact that the actor is performing a function for the proper performance of which freedom of action is essential.<sup>22</sup>

Defendants describe Richards’s role as the Police Department Commissioner and his statement to various media organizations but they fail to articulate why these statements were privileged. Defendants’ explanation in full is the following:

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<sup>15</sup> *Gov’t of the Virgin Islands v. Connor*, 60 V.I. 597, 602-06 (V.I. 2014).

<sup>16</sup> *Id.* (citing *Banks v. Int’l Rental & Leasing Corp.* 55 V.I. 967 (V.I. 2011)).

<sup>17</sup> *Joseph v. Daily News Publishing Co., Inc.*, 57 V.I. 566, 585-88 (V.I. 2012); *see also id.* (defining the tort of defamation pursuant to the requirement set forth by *Banks*, 55 V.I. at 967 and its progeny).

<sup>18</sup> Mot. to Dismiss 5.

<sup>19</sup> *Joseph*, 57 V.I. at 586.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Mot. to Dismiss 4.

When approached by the media, Commissioner Richards made an appropriate statement based upon the facts available to him. The safety and protection of the people and property within this community are a matter of public concern. He also has the right to state the position of his Department and the administration of such matter of public concern. A statement to the media by the top law enforcement official is a discretionary function. His action did not violate any law or right of the Union.<sup>23</sup>

Accepting their proposed bases for privilege *in arguendo*, Defendants' cursory account of facts fails to demonstrate that Richards's alleged statements were privileged. First, Defendants do not assert Plaintiff consented to Richards's conduct. Second, Defendants do not explain why Richards's statements to the media were necessary. While Defendants claim "[t]he safety and protection of the people and property within this community are a matter of public concern,"<sup>24</sup> the Court finds the record contains insufficient facts to determine if Richards's alleged statements were necessary to ensure public safety. Similarly, Defendants have not provided sufficient evidence demonstrating Richards's alleged statements were part of his proper function as Commissioner. Accordingly, the Court determines Defendants have not demonstrated that Richards's statements were privileged and, therefore, outside the second element of defamation.

## **II. Defendant Fail to Convince the Court that It Should Afford Richards Protection from Liability under the Qualified Immunity Doctrine.**

Defendants argue that the qualified immunity doctrine shields Richards from liability because he is a government official. However, Defendants do not provide any binding law granting Richards qualified immunity. In previous Virgin Island cases concerning whether a government official was shielded from liability by qualified immunity, a statute granted such protection.<sup>25</sup> However, Defendants do not provide any statute granting Roberts qualified immunity.<sup>26</sup> Instead, Defendants cite to opinions by federal courts outside of the Virgin Islands without a *Banks* analysis explaining why the Court should adopt a common law principle of qualified immunity for certain government officials.

Furthermore, Defendants assert that "[Richards] acted within his rights as the head of a department within the executive branch. The Department is administered under his supervision and direction." However, Defendants have not provided evidence demonstrating making statements to news media, such as those pertinent to this matter, is part of Richards's duties. This issue is a factual question that would have to be developed at a later stage of this matter's proceedings. Therefore, the Court determines that Defendants have not demonstrated that Richards is shielded from liability due to the qualified immunity doctrine.

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<sup>23</sup> *Id.* at 6.

<sup>24</sup> *Id.*

<sup>25</sup> See e.g., *Chapman v. Cornwall*, 58 V.I. 431 (V.I. 2013) (citing 29 V.I.C. § 496(d)); *Gardiner v. V.I. Hosps. & Health Facilities Corp.*, 2016 V.I. LEXIS 157 (V.I. Super. Ct. Oct. 4, 2016) (citing 19 V.I.C. § 248(a)).

<sup>26</sup> Defendants mistakenly cite to Title 3, § 352 of the Virgin Islands Code, which pertains to the Commissioner of the Department of Labor. Title 3, § 252 concerns the Commissioner of the U.S. Virgin Islands Police Department.

**III. Defendants Non-Use of the Grievance Procedure Set Out in the Parties' Collective Bargaining Agreement Is Irrelevant to This Matter.**

In the second to last paragraph of their Motion to Dismiss, Defendants provide a justification for not utilizing the grievance and arbitration procedure set out in the parties' collective bargaining agreement.<sup>27</sup> While Plaintiff pleaded that Richards made the alleged statements "without resorting to the grievance process outlined in the parties' collective bargaining agreement,"<sup>28</sup> Plaintiff does not plead a breach of contract claim. The only cause of action in the Complaint is defamation. Therefore, this defense is irrelevant to this matter.

Accordingly, it is hereby

**ORDERED** that Defendants' Motion to Dismiss is **DENIED**; and it is further

**ORDERED** that, on or before Friday, February 24, 2017, the Defendants **SHALL** file a responsive pleading to Plaintiff's Complaint; and it is further

**ORDERED** that a copy of this Memorandum Opinion and Order shall be directed to Attorney Nizar A. DeWood of The DeWood Law Firm, counsel for Plaintiff, and Assistant Attorney General Joss N. Springette, counsel for Defendants.

DATED: February 3, 2017

  
**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**  
Acting Chief Deputy Clerk 2/3/17

<sup>27</sup> No party filed a copy of the collective bargaining agreement, so the Court relies on the parties' pleadings and accepts as true that a collective bargaining agreement exists and it has a grievance and arbitration provision.

<sup>28</sup> Compl. ¶ 20.