Not For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

ELIZABETH PICHARDO, Appellant/Plaintiff, **v.** **CECIL R. BENJAMIN, COMMISSIONER OF LABOR, GOVERNMENT OF THE VIRGIN ISLANDS, and COOL IT, INC. d/b/a/ AGAVE TERRACE RESTAURANT,** Appellees/Defendants.	)	**S. Ct. Civ. No. 2007-061** Re: Super. Ct. Civ. No. 2004-085

On Appeal from the Superior Court of the Virgin Islands
Considered: December 17, 2007
Filed: April 16, 2008

BEFORE: **MARIA M. CABRET**, Associate Justice; **IVE ARLINGTON SWAN**, Associate Justice; and **THOMAS K. MOORE**, Justice Pro Tem[1].

APPEARANCES:

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Micol L. Morgan, Esq.
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MEMORANDUM OPINION

PER CURIAM.

[1] Chief Justice Rhys S. Hodge was recused from this matter. By designation, Judge Moore sits in his place pursuant to V.I. CODE ANN. tit. 4 § 24(a).

Appellant Elizabeth Pichardo (hereafter "Pichardo") challenges the Superior Court's refusal to consider her due process claims in its Order affirming the decision of the Department of Labor (hereafter "DOL") that Cool It, Inc. d/b/a/ Agave Terrace Restaurant (hereafter "Agave") did not violate the Wrongful Discharge Act (hereafter "WDA") in firing her. Pichardo asks this Court to find that her due process rights were violated by the DOL's nineteen month delay in holding a hearing and the additional twenty-three month delay in issuing its decision. For the reasons stated below, we find that the Superior Court correctly declined to address Pichardo's due process arguments on a writ of review. Therefore, we will affirm the decision of the Superior Court.

I. BACKGROUND

Agave hired Pichardo on or about August 12, 1998 as a waitress but terminated her eight months later. As grounds for her dismissal, Agave cited numerous instances when Pichardo disobeyed instructions from managers, caused problems with service throughout the restaurant, and made it hard for co-workers to work alongside her.

On April 12, 1999, two days after her termination, Pichardo filed a complaint with the DOL alleging that Agave wrongfully discharged her. The DOL hearing was not scheduled until January 14, 2002 – two years and eight months later.[2] At the hearing, both parties submitted exhibits and had an opportunity to present witnesses, but Pichardo presented only her own testimony. The DOL's decision, which held that Pichardo was not wrongfully terminated, was issued on December 16, 2003 – nearly two years later. A

[2] Part of this delay was attributable to the Government being prohibited by a preliminary injunction from holding any hearings under the WDA until June 30, 2000. *See St. Thomas-St. John Hotel & Tourism Ass'n, Inc. v. Gov't of the Virgin Islands*, 41 V.I. 317 (D.V.I. June 3, 1999)., *rev'd*, 218 F.3d 232, 245-46 (3d Cir. 2000).

month later, the Commissioner of Labor adopted the DOL decision, thereby making it a final order.

On February 20, 2004, Pichardo, acting *pro se*, petitioned the Superior Court for a writ of review, which, though initially denied as untimely, was subsequently granted. The DOL was ordered to deliver a copy of the hearing transcript within twenty days, but the court was notified three months later that the transcript was not transcribable. Thereafter, Pichardo moved to remand to the DOL for a rehearing on grounds of delay and lack of a transcript. The Superior Court instead issued a briefing schedule. On March 30, 2007, the court affirmed the DOL's ruling that Pichardo was not wrongfully terminated. Finding that it could not rule on her due process claim, the Superior Court stated:

> Although this case has been plagued by unexplained delays a writ of review is not the proper method to address such complaints. The writ is to review the ALJ's decision not the administrative processes employed by Labor. These administrative delays, although egregious, have very little, if anything, to do with whether Agave terminated Pichardo for cause.

(J.A. at 7.)

II. DISCUSSION

A. Jurisdiction and Standard of Review

"The Supreme Court shall have jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court, or as otherwise provided by law." V.I. CODE ANN. tit. 4 § 32(a). This appeal of the Superior Court's final order is permissible under section 33(a) of title 4 of the Virgin Islands Code (hereafter "the Code"). Pichardo's Notice of Appeal was timely filed. *See* V.I.S.CT.R. 5(a)(1) ("[I]f the Government of the Virgin Islands or an officer or agency thereof is a party, the notice of

appeal may be filed by any party within sixty days after [the date of entry of the judgment or order appealed from].").

This Court exercises plenary review of the Superior Court's decision that it lacked jurisdiction to hear Pichardo's due process claim. *See Gov't of V.I. v. Hodge*, 359 F.3d 312, 323 (3d Cir. 2004) ("We exercise plenary review in determining whether a court hierarchically below us had subject matter jurisdiction.").

B. The Superior Court's Jurisdiction on a Writ of Review

Pichardo's argument that this Court should fashion a remedy to compensate her for the DOL's delays rests entirely upon her contention that the Superior Court had the power to decide the constitutional issue on a writ of review. Therefore, we must first determine whether the Superior Court had jurisdiction to hear the due process claim on review of the DOL's decision.

Title 24 of the Code is dedicated to the DOL and other labor-related issues, and section 70(a) explicitly provides a method of appeal for persons aggrieved by an adverse DOL decision, namely:

> Any person aggrieved by a final order of the Commissioner . . . denying . . . the relief sought may obtain a review of such order by filing in the [Superior] Court . . . within 30 days of its issuance, a written petition praying that such decision of the Commissioner be modified or set aside.

Further, the first sentence of section 70(b) of title 24 of the Code limits the issues that may be considered by the Superior Court on review:

> No objection that *has not been urged before the Commissioner* shall be considered by the Court unless the failure or neglect to urge such objection is excused because of extraordinary circumstances.

(emphasis added).

On the record before us, we can find no indication that Pichardo raised her objection to the delay in conducting the hearing with the Commissioner of Labor, nor is there any evidence that she took any action to induce the DOL to issue its decision in the many months following the hearing. Additionally, we note that Pichardo failed to allege in this Court or the Superior Court any "extraordinary circumstances" that prevented her from raising her constitutional challenge before the Administrative Law Judge (hereafter "ALJ"). Accordingly, because Pichardo failed to raise the DOL's lengthy delay before the ALJ, we need not and do not determine whether the Superior Court was empowered to hear a due process claim in this context.

We do address another issue advanced by Pichardo, however. She argues that her petition should be governed by title 5, section 1422, rather than title 24, section 70(a). Title 5, section 1422 reads, in full:

> The writ of review shall be allowed in all cases *where there is no appeal or other plain, speedy, and adequate remedy*, and where the officer, board, commission, authority, or tribunal in the exercise of his or its functions appears to have exercised such functions erroneously, or to have exceeded his or its jurisdiction, to the injury of some substantial right of the plaintiff.

(emphasis added). Section 1422 is a general writ of review statute and is only applicable in the absence of another remedy. As title 24, section 70(a) specifically grants Pichardo the right to file a petition to review the DOL Commissioner's decision, there is no basis for invoking the broader, catch-all provision of title 5, section 1422. *See Coady v. Vaughn*, 251 F.3d 480, 484 (3d Cir. 2001) (citing *Edmond v. U.S.*, 520 U.S. 651, 657, 117 S.Ct. 1573, 1578, 137 L.Ed.2d. 917 (1997) ("It is a well-established canon of statutory construction that when two statutes cover the same situation, the more specific statute

takes precedence over the more general one.").

III. CONCLUSION

Title 24, section 70(b) of the Code clearly establishes that only those issues raised before the ALJ are properly reviewable by the Superior Court. Because Pichardo did not raise any claim regarding the DOL's nineteen-month delay in granting her a hearing, the Superior Court lacked jurisdiction to review any potential prejudice she may have suffered due to the delay~~s~~. It follows, then, that this Court has no jurisdiction to consider Pichardo's due process arguments in this appeal. We therefore affirm the Superior Court's decision.

ATTEST:
GLENDA L. LAKE, ESQ.
Acting Clerk of the Court

Dated: April 16, 2008