IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX AT KINGSHILL

CARLYNA ALLARD,	)	
Plaintiff,	)	**CIVIL NO. 69/1992**
vs.	)	**ACTION FOR SEXUAL HARASSMENT**
HESS OIL VIRGIN ISLANDS CORP.,	)	
Defendant.	)	NOT FOR PUBLICATION

LEE J. ROHN, Esquire
OFFICES OF ROHN & CUSICK
1101 King Street, Suite 2
Christiansted, St. Croix
U. S. Virgin Islands 00820
(Attorney for Plaintiff)

BETH MOSS, ESQ.
BRYANT, WHITE & BARNES
47 King Street, 2nd Flr.
P.O. Box 4589
Christiansted, St. Croix, VI 00822
(Attorney For Defendant)

CABRET, Judge

MEMORANDUM OPINION

(December 20, 1996)

In this wrongful discharge action, Hess Oil Virgin Islands Corp. ("HOVIC") moves the Court, pursuant to Rule 12(b) of the Federal Rules of Civil Procedure, to dismiss the plaintiff's complaint or in the alternative, for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the ground that this Court lacks subject matter jurisdiction. For the reasons which follow, defendant's motion will be granted.

FACTUAL BACKGROUND

The plaintiff filed this wrongful discharge action following events which allegedly took place during her employment at HOVIC. In her complaint, plaintiff states that she was subjected to sexual harassment by employees of HOVIC and also by employees of HOVIC's subcontractors. Plaintiff also states that although she repeatedly complained to her foreman, supervisors and other management officers, no measures were taken to stop the harassment. Plaintiff further maintains, that following the formal complaints that she lodged with the management, she was confronted with extreme hostility from her coworkers and her supervisors. As a result of what plaintiff believed to be a hostile work environment, she felt forced to resign from her position. Finally, plaintiff claims that in light of the circumstances of her forced resignation, she was "constructively discharged" in violation of 24 V.I.C. §76.

HOVIC has filed the instant motion to dismiss, in which it argues that the complaint should be dismissed because the Court lacks subject matter jurisdiction, as (1) plaintiff failed to grieve her claims under the terms of the collective bargaining agreement, (2) her wrongful discharge claim is preempted by federal law, and (3) she failed to exhaust administrative remedies before filing a discrimination action in this court.[1]

DISCUSSION

A motion to dismiss under Rule 12(b)(1) of the Federal Rules of Civil Procedure raises

---

[1] Because the Court finds that plaintiff's wrongful discharge claim is preempted and that plaintiff failed to utilize the grievance and arbitration procedures provided in the CBA, it need not address the issue of exhaustion of administrative remedies.

the objection that the court has no authority or competence to hear and decide the case.[2] *Morton v. Morton*, 34 V.I. -- , 1996 V.I. LEXIS 3 (Terr. Ct. 1996) (*citing* Charles A. Wright & Arthur R. Miller, 5A Federal Practice and Procedure § 1350 (1990)). In reviewing a Rule 12(b)(1) motion, "no presumptive truthfulness attaches to plaintiff's allegations and the existence of disputed issues of material fact will not preclude the trial court from evaluating for itself the merits of the jurisdictional claims." *Mortensen v. First Federal Savings & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977). Moreover, the Court may consider affidavits and other relevant evidence outside the pleadings in determining the existence of jurisdiction. *See Berardi v. Swanson Memorial Lodge No. 48 of Fraternal Order of Police*, 920 F.2d 198 (3d. Cir. 1990) and Charles A. Wright & Arthur R. Miller, 5A Federal Practice and Procedure § 1350, at 213 (1990). Furthermore, "[w]hen subject matter jurisdiction is challenged under Rule 12(b)(1), the plaintiff must bear the burden of persuasion." *Kehr Packages Inc. v. Fidelcor, Inc.*, 926 F.2d 1406, 1409 (3d Cir.), *cert. denied*, 501 U.S. 1222 (1991).

A. Preemption Under §301 of the Labor Management Relations Act

HOVIC contends that plaintiff's claim for "constructive discharge" due to sexual

---

[2] HOVIC's motion is for dismissal under Rule 12(b) or alternatively a motion for summary judgment. However, inasmuch as HOVIC's motion raises a Rule 12(b)(1) jurisdictional issue unrelated to the merits of the case, the Court's consideration of matters outside the pleadings does not transform the motion into one for summary judgment. *See Cizek v. United States*, 953 F.2d 1232 (10th Cir. 1992) and *Osborn v. United States*, 918 F.2d 724 (8th Cir. 1990) (only motion under Rule 12(b) that can properly be converted to one for summary judgment is a motion filed under Rule 12(b)(6)).

harassment is preempted by the Labor Management Relations Act, 29 U.S.C. § 301[3] because resolution of the claim is substantially dependent upon an analysis of the plaintiff's rights under the Collective Bargaining Agreement ("CBA"). Section 301 governs disputes regarding collective bargaining agreements, and mandates application of uniform federal law to resolve such disputes. *McCarthy v. Reynolds Metals Co.*, 883 F.Supp. 356, 359 (S.D.Ind. 1995). Although not every dispute involving a provision of a collective bargaining agreement arises under §301, those "claims founded directly on rights created by collective-bargaining-agreements" or "substantially dependent upon analysis" of a CBA establish federal jurisdiction. *McCarthy*, 883 F.Supp. at 360 (*citing Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 211 (1985) and *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394 (1987)).

In support of its motion, HOVIC attaches several decisions of the Virgin Islands Department of Labor ("Department"), wherein the Department ruled that it had no jurisdiction to determine wrongful discharge complaints when the employee is among those covered by an applicable collective bargaining agreement. *See* Defendant's Exhibit C (*Terrence John Desormeaux v. HOVIC*, Case No. WD-229-88-STX; *Patricia Ventura v. Avis Rent-A-Car*, Case Nos. WD-030-87-STT and

---

[3] Section 301(a) provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
> 28 U.S.C.A. § 185(a).

WD-046-87-STT; *Calvin A. Martin v. Lime Tree Branch Hotel*, Case No. WD-202-87-STT; and *Hubert Fleming v. Mechanical Supply Co.*, Case No. WD-225-88-STT).

In response to HOVIC's motion, plaintiff argues that she has rights arising under local laws which are independent of any collective bargaining agreement, and thus, her claim is not preempted by federal law. Specifically, plaintiff asserts that HOVIC's actions violated the rights conferred on her under 24 V.I.C. §76. Plaintiff cites *Caterpillar, Inc. v. Williams*, 482 U.S. 386 (1987), in furtherance of her contention that the mere existence of a collective bargaining agreement does not prevent an employee from bringing state law claims based on independent legal rights. In *Caterpillar*, plaintiffs alleged that their employer breached individual employment agreements that pre-dated their joining the union. The employees filed an action in state court in which they alleged that during the course of their non-union employment their employer repeatedly promised that they would enjoy continuing employment even if one of the defendant's facilities were to close. The defendant removed the action to federal court on the grounds that any individual employment contracts were merged into and superseded by a collective bargaining agreement. The Supreme Court held that the action was not removable on the basis of preemption because plaintiffs' state law contract claims were not dependent upon any collective bargaining agreement but were based on alleged promises made while plaintiffs were in managerial or salaried positions.

Relying on *Caterpillar*, plaintiff argues that her rights arising under the Virgin Islands Wrongful Discharge Act are independent of any collective bargaining agreement, and thus, are not preempted by federal law. HOVIC contends that plaintiff was employed pursuant to a collective bargaining agreement, which is a contract of employment that substantially modified the grounds for discharge thus making 24 V.I.C. § 76 inapplicable. In support of this contention, the defendant directs the court's attention to the Rules and Regulations promulgated pursuant to Title 24, Chapter 3 of the Virgin Islands Code at §77-1(E) which states:

> "Contract" means a written agreement negotiated between an employer and an employee or representative thereof, which contains the specific grounds for discharge, where the employment relationship has an established mechanism or procedure for resolving discharge grievances and this mechanism or procedure is referred to in the agreement or is otherwise known by the parties, such as a collective bargaining agreement. . .

Title 24 V.I.C. §76(a) provides nine specific grounds that an employer may utilize to terminate an employee. Additionally, the §76(a) contains a proviso that specifically exempts from coverage those employment contracts that modify the grounds for discharge. *See* 24 V.I.C. §76(a).[4] The present record simply does not support Allard's reliance on *Caterpillar*. Unlike the plaintiffs in *Caterpillar*, Allard's entire employment relationship with HOVIC was governed by the terms of the CBA. The CBA states that the Union is the exclusive bargaining representative of the employees of the Company and that the Agreement constitutes the sole procedure for settlement of any claim by an employee. Under section 3.1 of Article 3, the term "employee" includes all Operating and Maintenance employees except executive, administrative, clerical and other professional employees. Therefore, as a Process Operator "C", plaintiff was clearly a member of the bargaining unit covered by the CBA.

Section 1.2 of the CBA states that "[t]he provisions of this Agreement constitute the

---

[4] 24 V.I.C. §76(a) provides in pertinent part that "[u]nless modified by contract, an employer may dismiss any employee. . . ."

sole procedure for the processing and settlement of any claim by an employee . . . of a violation by the company of this Agreement." Art. 1, §1.2. Section 4.1 containing the grounds for discharge states that

> the "Management has the right to . . . discharge employees, for cause (including but not limited to, being under the influence or in the possession of alcohol and/or controlled substance(s), gambling, theft, falsification of records, insubordination, incompetency, laziness, absenteeism, tardiness, participation in any unauthorized work stoppage, refusal to perform duties assigned, fighting on Company premises, use of obscene and abusive language, willful destruction of Company property and non-compliance with Company work rules), ... However, it is agreed that . . . any such discharge . . . shall be subject to the Grievance Procedure clause of the Agreement.
> Agreement-- Article 4, §4.1.

The Grievance Procedure, outlined in Article 24 of the CBA, establishes a procedure for resolving complaints and disputes, and it culminates in binding arbitration. *See* Agreement Art.24, §24.2.[5] The CBA also contains an anti-discrimination clause, which states that "[t]here shall be no discrimination against any employee with respect to any of the terms of employment, because of . . . sex . . . ." Article 26, §26.1.

Additionally, pursuant to Section 5.2 of Article 5 of the CBA, as a condition of employment, each new employee must become a member of the union on the 31st day following the

---

[5] Section 24.2 of Article 24 states in pertinent part:

> The Company and the Union do hereby agree to the following procedure and rules for the adjustment of complaints, disputes and grievances. . . . Should no agreement be reached after the parties hereto have used and followed in their respective order the grievance procedure for which provisions are made in this Article, the complaint, grievance or dispute may be submitted to arbitration. . . The decision of the arbitrator . . . shall be final and binding on the parties.

beginning of such employment. It is undisputed that plaintiff was employed at HOVIC as a Process Operator "C" from April 1989 to February 5, 1990, the effective date of her resignation.[6] At the time plaintiff resigned, she was classified as a "probationary" employee, as every new employee must serve a probationary period of 180 days. Although Allard, as a probationary employee, had no right to pursue a grievance concerning her "constructive discharge," there is no language in the CBA which excludes a probationary employee from the protection of the anti-discrimination clause found in section 26.1. Thus, although she failed to do so, Allard did maintain the right to institute a grievance for any alleged sexual harassment which preceded her resignation.[7]

Furthermore, as a probationary employee, Allard was entitled to the wages and premium pay negotiated by the union. Under the CBA, an employee receives full credit for the 180-day probationary period for purposes of determining seniority, vacation, sick leave or severance pay. In fact, there is nothing in Article 3, entitled Scope of Agreement, to suggest the exclusion of probationary employees from the bargaining process. Thus, unlike the plaintiffs *Caterpillar*, it does not appear that Allard worked under any contract other than the collective bargaining agreement and

---

[6] Although it is not clear from the record, it appears that plaintiff would have been required to acquire and maintain membership in the union beginning sometime in May or June of 1989.

[7] Article 3, section 3.3 of the CBA states that during the probationary period, the company may discharge the employee without being subject to the grievance procedure. However, the fact that plaintiff was a probationary employee does not alter her status as a member of the union and/or bargaining unit covered by the CBA. *See Chmiel v. Beverely Wilshire Hotel Co.*, 873 F.2d 1283 (9th Cir. 1989). Moreover, a collective bargaining agreement can limit a probationary employee's substantive rights with respect to discharge. *Capraro v. United Parcel Service Co.*, 993 F.2d 328, 335 (3d Cir. 1993).

plaintiff is bound by the terms and conditions set forth in the CBA, including the grievance procedures for handling all disputes or complaints. As such, plaintiff's contention that her claim for wrongful discharge is based upon independent V.I. law must fail, since her rights arising under 24 V.I.C. §76(a) have been modified by the CBA.

Moreover, the District Court of the Virgin Islands, in *Joseph v. United Dominion Constructors, Inc.* 30 V.I. 220 (D.V.I. 1994), a situation similar to the case at bar, held that claims brought under the Virgin Islands Wrongful Discharge Act are clearly preempted by federal labor law where there is a collective bargaining agreement modifying the employment relationship. *See also Artstide v. United Dominion Constructors, Inc.* 30 V.I. 224 (D.V.I. 1994); *Deterville v. UDCI*, No. 1993 – 188 (D.V.I. filed Nov. 10, 1993); and, *Dawson v. HOVIC*, No. 1990 – 162 (D.V.I. filed Nov. 22, 1993). In *Joseph*, the plaintiff filed an action in the Territorial Court asserting among other things that she was sexually harassed in violation of local and federal anti-discrimination laws and that she was wrongfully discharged in violation of V.I. CODE ANN. tit. 24, § 76. The defendant removed the action to the district court and subsequently filed a motion to dismiss. Defendant argued that the complaint should be dismissed because (1) plaintiff failed to grieve her claims under the terms of the collective bargaining agreement, (2) her wrongful discharge claims are preempted by federal law, and (3) she must first exhaust administrative remedies before filing a discrimination action in court.

The District Court held that Joseph's claim for wrongful discharge under Virgin Islands law was preempted because there was a collective bargaining agreement, modifying the employment relationship. In the instant case, there is no doubt that Allard was an employee who, at the very least was a member of the bargaining unit covered by the CBA which contained the terms and conditions of her employment, including a grievance and arbitration procedure. Thus, contrary to plaintiff's suggestion, this Court finds that plaintiff's claim cannot be resolved without consideration of the CBA, and is therefore, preempted by §301. *See Allis-Chalmers Corp*, 471 U.S. 202 (Supreme Court held that when resolution of a state law claim is substantially dependent upon the analysis of the terms of an agreement made between parties in a labor contract, that claim must be dismissed as preempted by federal labor contract law).

B. Failure to Utilize Grievance Procedures

As a general rule, individual employees are required first to utilize the methods of redress provided by a collective bargaining agreement, as agreed upon by the employer and union, before instituting a court action. *See Republic Steel Corp. v. Maddox*, 379 U.S. 650 (1952). *See also Ames v. Westinghouse Electric Corp.*, 864 F.2d 289, 292 (3d Cir. 1988). The Supreme Court has opined that this general rules serves several purposes. First, it advances the union's interest in prosecuting employee grievances and "complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract." *Maddox*, 379 U.S. at 653. Second, it serves the employer's interest "by limiting the choice of remedies available to aggrieved employees." *Id.* Finally, the rule provides both the union and the employer with a "uniform and exclusive method for orderly settlement of employee grievances." *Id.* As such, absent a showing that the aggrieved employee has attempted to resort to the grievance and arbitration procedures set forth in the collective bargaining agreement, the employee is precluded from instituting a suit to recover damages arising out of disputes covered by the agreement. *See*

United Paperworks Int'l Union v. Misco, Inc., 484 U.S. 29 (1987).

Plaintiff, however, argues that even if the Court were to find that this dispute is subject to a collective bargaining agreement, she should be excused from following its grievance procedures because in paragraphs 5 and 6 of her complaint,[8] she has alleged facts from which it can reasonably be concluded that it would have been futile to pursue her grievances through the union. In support of this contention, plaintiff cites *Rivera v. Government of the Virgin Islands*, 635 F.Supp. 795 (D.V.I. 1986), wherein the District Court held that ". . . a perfunctory handling of a grievance by the union will also excuse exhaustion of grievance procedures." *Rivera*, 635 F.Supp. at 798 (*quoting Vaca v. Sipes*, 386 U.S. 171, 185-86 (1967)).

While it is true that futility or a perfunctory handling of a grievance by a union would excuse a party from exhausting grievance procedures, *Rivera* is inapposite to the instant matter. *Rivera* involved a union member who, in an attempt to follow grievance procedures, complained to the Union President, but the union failed to assist him in pursuing a grievance. The Court in *Rivera*

---

[8] Paragraphs 5 and 6 of plaintiff's complaint state as follows:

> 5. Plaintiff repeatedly complained to her foreman, supervisors and other management officers, all to no avail. She was denied a transfer, and managing officers denied her request that either a meeting be held by management condemning such behavior and reminding its employees that such behavior is forbidden; and she was denied in her request that management issue and circulate a memorandum on this topic.
>
> 6. In February 1990 the workers learned that plaintiff had lodged formal complaints with the management and they confronted plaintiff with extreme hostility. Her immediate supervisors rebuked her for going to higher management and to her to stop complaining or "go ahead and sue us."

held that under those circumstances, plaintiff was excused from following the grievance procedures. In the case *sub judice*, plaintiff has not alleged that she ever complained to a union representative. In fact, plaintiff's own complaint indicates that she complained to her "foreman, supervisors and other management officers." Thus, the exception set forth in *Rivera* is not available to Allard, as she has failed to allege that she sought assistance from a union representative and the union refused to prosecute her grievance.

CONCLUSION

The Supreme Court has prohibited attempts by individual employees which would completely sidestep available grievance and arbitration procedures in favor of a lawsuit because such lawsuits would deprive the employer and the union of the ability to establish a uniform and exclusive method for the orderly settlement of employee grievances. *Maddox*, 379 U.S. at 653. Thus, for the reasons stated above, the Court concludes that Allard's claim against HOVIC for wrongful discharge is preempted under §301, as it is substantially dependent on the interpretation of the collective bargaining agreement. Finally, plaintiff's failure to exhaust her contractual grievance and arbitration remedies will not be excused, as she has not shown that she ever complained to a union representative or that it would have been futile to do so. Accordingly, defendant's motion to dismiss is granted. An appropriate order will enter.

MARIA M. CABRET
Judge

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX AT KINGSHILL

CARLYNA ALLARD, Plaintiff, vs. **HESS OIL VIRGIN ISLANDS CORP.,** Defendant.	)	**CIVIL NO. 69/1992** **ACTION FOR SEXUAL HARASSMENT** NOT FOR PUBLICATION

ORDER

THIS MATTER is before the Court on the defendant's motion dismiss or in the alternative, motion for summary judgment and plaintiffs' opposition thereto. In accordance with the attached memorandum opinion of even date, and pursuant to the requirements set forth in FED. R. CIV. P 12(b)(1), it is hereby

ORDERED that defendant's motion to dismiss is **GRANTED.**

DONE AND SO ORDERED this 20th day of December, 1996.

Maria M. Cabret
MARIA M. CABRET
Judge

A T T E S T:
YVONNE V. WESSELHOFT
Clerk of the Court

By: Marlene Turnbull
SEN. **Deputy Clerk**
12/31/96

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. CROIX AT KINGSHILL

CARLYNA ALLARD,	)	
	)	
Plaintiff,	)	**CIVIL NO. 69/1992**
	)	
vs.	)	**ACTION FOR SEXUAL HARASSMENT**
	)	
HESS OIL VIRGIN ISLANDS CORP.,	)	
	)	NOT FOR PUBLICATION
Defendant.	)	
	)	

JUDGMENT OF DISMISSAL

In accordance with the attached memorandum opinion of even date, and pursuant to the requirements set forth in FED. R. CIV. P 12(b)(1), it is hereby

ORDERED that judgment shall enter in favor of defendant and against the plaintiff; and it is further

ORDERED that plaintiffs' complaint is **DISMISSED WITHOUT PREJUDICE.**

DONE AND SO ORDERED this 20th day of December, 1996.

Maria M. Cabret

MARIA M. CABRET
Judge

A T T E S T:
YVONNE V. WESSELHOFT
Clerk of the Court

By: Darlene Turnbull
Sen. **Deputy Clerk**
12/31/96