

This appeal stems from a wrongful discharge complaint. Respondent Marbeli Santana filed a complaint with the Department of Labor on November 7, 2001, alleging that Mongoose Junction had fired her from her janitorial position there because she did not speak English. On November 29, 2001, the Department ordered the parties to attend a mediation scheduled for December 19, 2001. Santana appeared

personally, and Mongoose Junction appeared through Glen Speers, its representative. But the mediation did not occur because, according to Mongoose Junction, there was no interpreter for Santana. Rather than reschedule the mediation, the Department scheduled a “preliminary hearing” for April 9, 2002. Mongoose Junction appeared, but it appears the hearing did not take place.¹ On May 27, 2002, Mongoose Junction submitted a letter elaborating the reasons and legal justifications for Santana’s termination. In the meanwhile, the Department scheduled a new preliminary hearing for June 3, 2002. Only Santana appeared for the hearing on June 3, 2002. As a result, the hearing officer entered default judgment against Mongoose Junction for \$13,430.00 pursuant to 24-3 V.I. Code R. § 77-61.² According to Mongoose Junction, its clerical employee incorrectly calendared the hearing date on Glen Speers’ calendar. Speers later appeared on the date erroneously entered into his calendar and discovered that the hearing had already been held.³

¹ The record does not indicate why the April 9, 2002 Preliminary Hearing did not occur.

² Rule 77-61 provides: “The Hearing Officer, when hearing such claim of wrongful discharge, may consider any issue raised in the claim or response involved therein and may pass upon the same. The Complainant and the Respondent shall be ready and present at the time and place specified in such notice. *The failure of any such party to appear within thirty (30) minutes of the designated time of the hearing* may, in the Hearing Officer’s discretion, be deemed a waiver of that party’s right to further participation therein and *may, in the Hearing Officer’s discretion, result in entry of [judgment] against such party*” (emphases added).

³ The record is not clear about the relevant dates. The notice of hearing and the transcript indicate that the hearing occurred on June 3, 2002 (although the transcript erred in listing the year as 2007). However, the Department’s Final Order suggests that the hearing was on June 6 when it says that Speers arrived on June 7 (the Order lists the year as 2002 and 2008 in separate instances) and learned that the hearing had been held the day before. The Department’s original Memorandum and Order, as well as Mongoose Junction’s Motion to Set Aside Default Judgment, list the hearing date as June 6, 2002. Despite this confusion, Mongoose Junction has not argued that the Final Order is invalid on the grounds that the hearing was held on a day other than that listed in the notice, so the precise date is not relevant; it is not disputed that Mongoose Junction missed the hearing and that it showed up a day or so afterward.

Later, on July 19, 2002, the hearing officer issued a written Order memorializing the entry of default judgment. On August 13, 2002, Mongoose Junction moved the Department to reconsider its Order and set aside the default judgment. The Department entered its Final Order on January 5, 2009, denying Mongoose's Motion to Reconsider and holding that Mongoose Junction had not "presented [any] new evidence" and that Mongoose Junction's failure to record the correct date and re-read the notice of hearing was merely "negligence" that could not be characterized as an "extraordinary circumstance."

Mongoose Junction timely appealed the Department's Final Order with the Superior Court on February 4, 2009 pursuant to V.I. Code Ann. tit. 24, § 70 and 24-3 V.I. Code R. § 77-73, and the Court issued a writ of review on July 26, 2010. Mongoose Junction submitted its appellate brief on January 24, 2011, Santana submitted hers on February 18, 2011, and Mongoose Junction replied on March 8, 2011.

II. Questions on Appeal and Standard of Review

Mongoose Junction raises the following questions concerning the Department of Labor's Final Order of January 5, 2009:

1. Whether the Labor Commissioner abused his discretion when he denied Mongoose Junction's Motion to Reconsider.
2. Whether Mongoose Junction was denied due process when the Department of Labor entered default judgment merely for Mongoose Junction's failure to appear at a preliminary hearing.

In considering these issues, the Court will review questions of law without deference to the Department of Labor, *see Bryan v. Fawkes*, 61 V.I. 201, 223-228 (V.I. 2014), and the factual “findings of the [Department of Labor], if supported by substantial evidence, shall be conclusive.” V.I. Code Ann. tit. 24, § 70(b). However, the Court will only find an abuse of discretion if the Department’s “decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of fact to law.” *Petrus v. Queen Charlotte Hotel Corp.*, 56 V.I. 548, 554 (V.I. 2012) (quoting *Stevens v. People*, 55 V.I. 550, 552 (V.I. 2011)). As will be seen below, the Court’s answer to the first question is dispositive for the entire appeal. Therefore, the constitutional question will be avoided.

III. Analysis

The Department of Labor should consider a motion for reconsideration “only where based on 1) newly discovered evidence . . . or 2) other extraordinary circumstances justifying relief from operation of the judgment.” 24-3 V.I. Code R. § 77-71. Mongoose Junction encourages the Court not to limit itself to the “literal requirement[s]” of Section 77-71, but rather to employ the terms of Fed. R. Civ. P. 60(b)(1), which governs motions to set aside default judgment in the federal courts and in the Virgin Islands Superior Court. Super. Ct. R. 50. Rule 60 provides more bases for relief than Section 77-71, allowing relief not only for new evidence, but also, inter alia, “mistake, inadvertence, . . . , excusable neglect” or “any other reason that

justifies relief.” The remainder of Mongoose Junction’s brief on this issue assumes the Court will apply an excusable neglect standard and makes arguments and citations accordingly. However, the assumption that the Court will interpret Section 77-71 in light of Rule 60 is misplaced, since Mongoose Junction offers no reasons or legal authorities to support this approach. That Rule 60 affords more bases for relief than Section 77-71 is not a reason to impute those extra bases to Section 77-71; rather it is strong reason to construe Section 77-71 more narrowly than Rule 60 according to its actual text. *Cf. Miller v. People of the Virgin Islands*, 54 V.I. 398, 404 (V.I. 2010) (“*expressio unius est exclusio alterius*”). Therefore, the Court declines Mongoose Junction’s suggestion that it incorporate Rule 60 jurisprudence and will review the Department’s Final Order of January 5, 2009, according to the standards of Section 77-71.

Mongoose Junction admits it did not have any new evidence to offer in support of reconsideration, so the sole remaining question under Section 77-71 is whether there were “extraordinary circumstance justifying relief.” The Commissioner found that there were not. He held that Mongoose Junction had “a responsibility to prepare for the hearing [which] should have involved . . . a review of any documents received by [Mongoose Junction].” It was Speers’s “negligence . . . , as well as the clerical staff member’s error, which ultimately resulted in the . . . default judgment Speers’[s] negligence . . . vitiate[d the] characterization of the circumstances of [Mongoose Junction’s] non-appearance as ‘extraordinary.’”

Although the Commissioner's reasoning is fairly straight-forward, the Court nonetheless finds that the Commissioner abused his discretion in this decision because he limited his analysis to looking for extraordinary circumstances that would justify Mongoose Junction's "non-appearance." This is a similar but fundamentally different inquiry than the one provided for in the Virgin Islands Rules; the Commissioner should have looked instead for "extraordinary circumstances that justify *relief*" (emphasis added) from the default judgment. This is a broader inquiry than the Commissioner conducted and there are a number of potentially relevant facts in the record (as well as in Mongoose Junction's Motion for Reconsideration) that the Final Order did not consider. Notably, the Commissioner did not weigh whether Mongoose Junction's good faith in attending the Department-ordered mediation in December 2001, in attending the scheduled April 2002 preliminary hearing, and in submitting a letter of factual and legal justifications in May 2002, show that Mongoose Junction was not exhibiting the sort of "ordinary" wilfulness that Section 77-61 is designed to combat. Neither did the Commissioner appear to consider that the Instructions attached to the two Notices of Preliminary Hearing (dated March 26, 2002 and April 29, 2002) did not advise Mongoose Junction that failure to appear at the preliminary hearing might result in a judgment being entered against it.⁴ The Commissioner should have considered whether all the circumstances

⁴ The Instructions advise the Employee that failure to appear at the Preliminary Hearing will result in dismissal of his/her complaint. But the Instructions do not include any warning to the Employer that failure to appear might result in judgment being entered against the Employer.

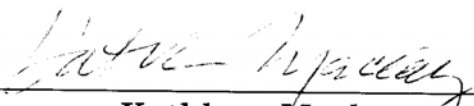
taken together justified giving Mongoose Junction another opportunity to present its evidence and arguments, not just whether Mongoose Junction's non-appearance in June 2002 was unjustified. Therefore, the Court will reverse the Final Order of January 5, 2009, and remand so that the Commissioner may consider the totality of the circumstances.

IV. Conclusion

The Commissioner of Labor abused his discretion because he did not consider Mongoose Junction's prior responsiveness and engagement with the case, nor the failure of the Department's Instructions to warn Mongoose Junction that failure to appear could result in judgment being entered against it, before entering default judgment. Therefore, the Court will reverse the Department of Labor's Final Order of January 5, 2009 and remand for consideration of the factors outlined herein.

An Order consistent herewith will accompany this Memorandum Opinion.

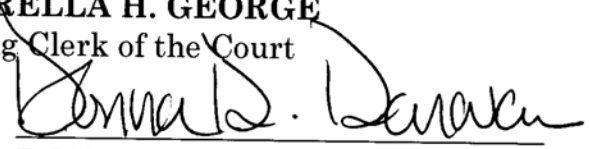
DATED: November 30, 2015


Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

ATTEST:

ESTRELLA H. GEORGE
Acting Clerk of the Court

BY:


DONNA DONOVAN
Court Clerk Supervisor 11/30/2015