

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

|                                     |   |                       |
|-------------------------------------|---|-----------------------|
| <b>JUAN CRUZ,</b>                   | ) |                       |
|                                     | ) |                       |
| Plaintiff,                          | ) | CASE NO. ST-15-CV-491 |
| v.                                  | ) |                       |
|                                     | ) | ACTION FOR DAMAGES    |
| <b>VIRGIN ISLANDS WATER AND</b>     | ) |                       |
| <b>POWER AUTHORITY, HUGO HODGE,</b> | ) |                       |
| <b>JR., AND JULIO RHYMER</b>        | ) |                       |
|                                     | ) |                       |
| Defendants.                         | ) |                       |
|                                     | ) |                       |

**MEMORANDUM OPINION**

**THIS MATTER** is before the Court on a Motion for Partial Judgment on the Pleadings (the “Motion”) filed by Defendants Virgin Islands Water and Power Authority (“WAPA”), Hugo Hodge, Jr. (“Hodge”), and Julio Rhymer (“Rhymer”) pursuant to Fed. R. Civ. P. 12(c).<sup>1</sup> For the reasons set forth in the Memorandum Opinion entered on this day the Motion will be granted.

**BACKGROUND**

WAPA employed Cruz between 1986 and 2015. At all times relevant to this case, Hodge was the Executive Director of WAPA and Rhymer was Chief Financial Officer of WAPA. On December 15, 2014 Cruz was terminated from his position at WAPA. He alleges that he was fired because he reported or was about to report violations of the law committed by WAPA executives.

---

<sup>1</sup> Defendants filed the Motion on December 31, 2015. Plaintiff Juan Cruz filed an opposition on February 3, 2016. Defendants did not file a reply.

Cruz initiated an action “against his suspension and then termination” with the Public Employees Relations Board (“PERB”) within ten days of his termination.<sup>2</sup> PERB dismissed Cruz’s appeal against his suspension because it found that the suspension was not due to discrimination. Cruz then voluntarily dismissed the termination action with PERB on July 6, 2015.

On September 24, 2015, Cruz filed the instant action against Defendants. He alleges: (I) breach of duty of good faith and fair dealing against defendants; (II) tortious interference with Cruz’s employment against defendants Hodge and Rhymer; (III) improper termination of employment in violation of the Whistleblower Protection Act (“WPA”)<sup>3</sup> against defendants; and (IV) improper retaliatory termination of employment in violation of Virgin Islands public policy against defendants.

Defendants Hodge and Rhymer both move to dismiss Count I of Cruz’s Complaint with respect to each of them in their individual capacities. Cruz opposes the Motion suggesting that it should be denied as moot because, he argues, his claim of breach of duty of good faith and fair dealing was not filed against Hodge or Rhymer.<sup>4</sup> All defendants move to dismiss Count III of Cruz’s Complaint. They argue

---

<sup>2</sup> Pl.’s Compl. ¶ 63.

<sup>3</sup> 10 V.I.C. §§ 121-126.

<sup>4</sup> See Pl.’s Consolidated Opp’n to Part. Mot. for J. on the Pleadings, at 1. While Cruz’s Opposition refers to his claim for breach of good faith and fair dealing as Count II, his Complaint clearly indicates that the breach of duty of good faith and fair dealing is listed as Count I. Therefore, the Court will refer to the claim of breach of good faith and fair dealing as Count I to maintain clarity.

that Cruz had ninety days from the time of his termination to bring a claim for relief before this Court pursuant to WPA. Cruz responds by arguing that this Court should equitably toll the ninety day limitations period to bring his claim because he was diligently pursuing an appeal of his termination before the Public Employee Relations Board ("PERB"), thus causing his untimely filing in this Court.

### LEGAL STANDARD

Defendants now move for partial judgment on the pleadings of Cruz's Complaint pursuant to Fed. R. Civ. P. 12(c). In assessing a 12(c) motion,<sup>5</sup> the Court applies the same legal standard as it would apply to a 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted.<sup>6</sup> Thus, the Court will not grant Defendants' Motion for Judgment on the Pleadings unless they establish that there is no material issue of fact left to resolve, and that Defendants are entitled to a judgment in their favor as a matter of law.<sup>7</sup> When considering a motion to dismiss pursuant to Fed. R. Civ. P. 12(c), the Court conducts its analysis under the assumption that all facts (as opposed to mere legal conclusions) pleaded by the non-movant are true.<sup>8</sup> In evaluating the sufficiency of pleadings, the Court identifies the legal elements of the claimant's cause of action; identifies well-pleaded factual

---

<sup>5</sup> Applicable through SUPER. CT. R. 7.

<sup>6</sup> *Rennie v. Hess Oil V.I. Corp.*, 62 V.I. 529, 535 (V.I. 2014) ("[A] post-answer motion to dismiss for failure to state a claim may be considered as a motion for judgment on the pleadings, which would be subject to the same legal standard.").

<sup>7</sup> *Benjamin v. AIG Ins. Co. of P.R.*, 56 V.I. 558, 565 (V.I. 2012).

<sup>8</sup> See, e.g., *Joseph v. Bureau of Corrections*, 54 V.I. 644, 650 (V.I. 2011).

allegations; and compares the well-pleaded allegations against the legal elements and assesses whether those allegations, if true, would plausibly lead to the conclusion that the claimant is entitled to relief.<sup>9</sup> “[W]here 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>10</sup> “To survive a motion for judgment on the pleadings, a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’”<sup>11</sup>

## DISCUSSION

### I. COUNT I—BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING

In his Complaint, Cruz alleges “[t]he actions of *Defendants* constitute breach of *their* duties of good faith and fair dealings...”<sup>12</sup> In order to make a claim for a breach of duty of good faith and fair dealing, a contract must exist between the parties.<sup>13</sup> Cruz did not allege in his Complaint, nor has he argued in his Opposition to this Motion, that a contract exists between Cruz and Hodge or between Cruz and Rhymer. Indeed, Cruz conceded that claim was only intended for WAPA.<sup>14</sup> As a result, the

---

<sup>9</sup> *Id.* at 649-650.

<sup>10</sup> *Brady v. Cintron*, 55 V.I. 802, 823 (V.I. 2011).

<sup>11</sup> *Fleming v. Cruz*, 62 V.I. 702, 710 (V.I. 2015) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 678 (U.S. 2007)).

<sup>12</sup> Pl.’s Compl. ¶ 67. (emphasis added).

<sup>13</sup> *Chapman v. Cornwall*, 58 V.I. 431, 442 (V.I. 2013) (internal citations and quotations omitted) (Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement ... The duty of good faith limits the parties’ ability to act unreasonably in contravention of the other party’s reasonable expectations.”).

<sup>14</sup> Footnote 1 of Pl.’s Consolidated Opp’n to Part. Mot. for J. on the Pleadings.

Court will grant Defendants' Motion for Judgment on the Pleadings with respect to Count I of Cruz's Complaint against defendants Hodge and Rhymer.<sup>15</sup>

**II. COUNT III—VIOLATION OF THE VIRGIN ISLANDS WHISTLEBLOWER PROTECTION ACT ("WPA")<sup>16</sup>**

Cruz alleges that Defendants violated the WPA when they terminated his employment on December 15, 2014.<sup>17</sup> Section 122 of the WPA states:

[a]n employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this territory or the United States to a public body unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing or inquiry held by that public body, or a court action.

10 V.I.C. § 122. With respect to the timeframe for bringing a claim under § 122, "A person who alleges a violation of this chapter [the WPA] may bring a civil action for appropriate injunctive relief, or actual damages, or both, within ninety days after the occurrence of the alleged violation of the provisions of this chapter."<sup>18</sup>

---

<sup>15</sup> Defendant WAPA has not moved for judgment on the pleadings on Count I of Cruz's Complaint. As a result, this Opinion and the accompanying order do not affect Cruz's claim for breach of duty of good faith and fair dealing against WAPA in any way.

<sup>16</sup> 10 V.I.C. §§ 121 to 126.

<sup>17</sup> Pl.'s Compl. ¶ 73.

<sup>18</sup> 10 V.I.C. § 123(a).

Cruz was terminated on December 15, 2014. He filed his WPA claim in this Court on September 24, 2015. Thus, he filed his WPA claim well beyond the ninety day filing window provided in 10 V.I.C. § 123. Defendants argue that the Court should dismiss Cruz's WPA claim because the alleged violation took place on the date that Cruz was terminated and he did not file his WPA claim with this Court within ninety days of his termination. Furthermore, Defendants argue that no statutory requirement exists that required Cruz to file with PERB. Thus, because his PERB filing was permissive—not required—the Court should not toll the statutory ninety day filing period.

In response, Cruz argues that filing his complaint with PERB was a statutory prerequisite to filing in the Superior Court. He further argues that even if filing with PERB was not a statutory prerequisite, the Court should equitably toll the ninety day filing window.

Ultimately, the parties disagree as to whether Cruz was required to appeal to PERB before filing this lawsuit. While Cruz's Opposition clearly alleges that he had a statutory prerequisite to filing suit, he does not point the Court to said statute. Furthermore, while Cruz alleges that he "timely filed with PERB against his suspension and termination," he does not allege that he filed a WPA claim with PERB.

To begin, 10 V.I.C. § 121 to 126 contains no mention of PERB, let alone a directive that an employee first bring his whistleblower claim to PERB. While PERB

has the general authority to hear a regular public employee's appeal from his dismissal, demotion, or suspension,<sup>19</sup> the WPA grants the Superior Court jurisdiction specifically over whistleblower claims.<sup>20</sup> "[I]t is well established that specific statutes establishing comprehensive schemes for attaining judicial review in particular types of cases supplant statutes that broadly confer general jurisdiction."<sup>21</sup> Thus, inasmuch as 3 V.I.C. § 530 confers jurisdiction over an employee's appeal from dismissal, demotion, or suspension to PERB,<sup>22</sup> the WPA supplants any possible PERB grant of jurisdiction over whistleblower claims because it "establishes a comprehensive scheme for attaining judicial review" of such claims.<sup>23</sup> Furthermore, nothing in the statute establishing PERB jurisdiction to hear an employee complaint suggests that PERB has jurisdiction to hear a WPA complaint.<sup>24</sup> This lack of jurisdiction is colored by the fact that PERB cannot award the same remedies available to a prevailing employee in a WPA action before the Superior Court. If an employee succeeds on appeal to PERB, he is reinstated with pay for the period of employment that he missed and can recover attorney's fees.<sup>25</sup> In contrast, a prevailing employee suing

---

<sup>19</sup> 3 V.I.C. § 530.

<sup>20</sup> 10 V.I.C. § 123.

<sup>21</sup> *V.I. Narcotics Strike Force v. Gov't of the Virgin Islands Pub. Emples. Rels. Bd.*, 60 V.I. 204, 216 (V.I. 2013).

<sup>22</sup> *See Chapman*, 58 V.I. at 440 (finding that a public employee had a duty to exhaust his PERB appeals before bringing his breach of contract claim before the Superior Court pursuant to 4 V.I.C. § 76).

<sup>23</sup> *V.I. Narcotics Strike Force*, 60 V.I. at 216.

<sup>24</sup> 3 V.I.C. § 530(e).

<sup>25</sup> *Id.*

under the WPA can obtain actual damages in addition to reinstatement, back wages, and attorney's fees.<sup>26</sup>

In asking the Court to equitably toll the ninety day statutory filing period for a WPA claim, Plaintiff cites *Sanders v. Gov't of the V.I.*,<sup>27</sup> for the proposition that “failure of PERB to adjudicate an appeal within the statutory timeframe was a clear violation of statutory rights such that a litigant is excused for failing to exhaust administrative remedies.”<sup>28</sup> In *Sanders*, Sanders—the plaintiff—worked as the director of emergency medical services in a Virgin Islands hospital. His suit alleged he began experiencing harassment from employees on account of policy decisions he made and enforced in his position as director. Sanders was suspended and subsequently fired, allegedly because of his attempts to improve the quality of services rendered at the hospital. Sanders appealed his termination to PERB, which apparently took over five years to issue a ruling. In the interim, Sanders filed an action in the District Court of the Virgin Islands. His complaint alleged violations of the WPA, breach of contract, equitable claims, and constitutional violations. Importantly, Sanders’ filed his federal complaint at some time beyond the ninety day statutory window specified in the WPA.

---

<sup>26</sup> 10 V.I.C. § 124.

<sup>27</sup> 2009 U.S. Dist. LEXIS 18109 (D.V.I. Mar. 9, 2009).

<sup>28</sup> Pl.’s Consolidated Opp’n to Part. Mot. for J. on the Pleadings, at 5.

Sanders offered no reason for the delay in filing his complaint, but asked the district court to “apply traditional principles of equity to supersede [the] local statute of limitations” for his WPA claim.<sup>29</sup> In promptly disposing of Sanders request and granting the defendant’s 12(c) motion, the district court held, “We are aware of no case that addresses the issue of superseding the Virgin Islands Whistleblowers Protection Act’s statute of limitations. Even if we had the power to do so, there is no compelling reason to override the statute of limitations as Sanders requests.”<sup>30</sup>

The district court went on to analyze Sander’s breach of contract claim and a number of equitable claims. The court ultimately excused Sander’s failure to exhaust his administrative remedies before PERB on account of PERB’s failure to adjudicate Sanders appeal in a timely manner. But, as outlined above, the district court refused to toll the statute of limitations on Sander’s WPA claim.<sup>31</sup>

In *Williams v. V.I. Hous. Auth.*,<sup>32</sup> the district court of the Virgin Islands refused to toll the ninety day statutory filing window for a plaintiff’s WPA claim. Williams—the plaintiff—was terminated by the Virgin Islands Housing Authority (“VIHA”) after VIHA underwent reorganization and his position was eliminated. Immediately after his termination, Williams appealed to the VIHA Board. While the VIHA Board was processing Williams’s appeal, VIHA went under the receivership of the United States

---

<sup>29</sup> *Sanders*, 2009 U.S. Dist. LEXIS 18109 at \*8.

<sup>30</sup> *Id.* at \*8-9.

<sup>31</sup> *Id.*

<sup>32</sup> 2007 U.S. Dist. LEXIS 98197 (D.V.I. Oct. 24, 2007).

Department of Housing and Urban Development and the appeal was indefinitely stayed. Williams subsequently filed suit in the District Court of the Virgin Islands. His complaint included claims for violations of the WPA, equitable claims, and breach of contract. As with the plaintiff in *Sanders*, Williams filed his complaint beyond the WPA's ninety day filing window.

VIHA moved to dismiss Williams's WPA claim on grounds that his ninety day filing window had expired. Williams argued that the district court should toll the ninety day window for filing his WPA claim because he had been diligently appealing his termination to the VIHA Board, which caused the untimely filing of his WPA claim. The Court ultimately agreed with VIHA. It found that Williams's filing before the VIHA Board was permissive rather than a statutorily required prerequisite to filing in court. And, a statute of limitations is not tolled if the plaintiff's delay occurs on account of his filing an administrative appeal that was merely permissive in nature.<sup>33</sup> In addition, the district court noted the plaintiff did not allege that he had filed a WPA claim before the VIHA Board, thus, he could not properly argue that he was attempting to exhaust his administrative remedies with respect to his WPA claim or that he had filed in the wrong forum.

The Court finds *Sanders* on point with respect to this Motion and finds *Williams* instructive. Like *Sanders*, Cruz appealed his termination with PERB. Like

---

<sup>33</sup> *Id* at \*8.

both Sanders and Williams, Cruz failed to file his WPA claim within the statutorily prescribed ninety day period. Finally, like *Sanders*, this Court finds no compelling reason to toll the statutorily prescribed filing period for a WPA claim.<sup>34</sup> In addition, like Williams, Cruz did not allege that he filed his WPA claim in his appeal to the administrative agency. Thus, he cannot claim to have been exhausting his administrative remedies with respect to his WPA claim when he filed his appeal. Cruz has not cited a single case that provides a situation in which a court tolled the WPA's ninety day filing period because the plaintiff was pursuing or had pursued an appeal with an administrative agency. As a result, the Court will grant Defendants' Motion for Partial Judgment on the Pleadings with respect to Count III.

### CONCLUSION

Per the foregoing discussion, the Court will grant Defendants' Motion for Partial Judgment on the Pleadings with respect to Count I as it relates to Defendants Hodge and Rhymer. The Court will also grant Defendants Motion for Partial Judgment on the Pleadings with respect to Count III as it relates to all defendants.

---

<sup>34</sup> See *Greene v. V.I. Water & Power*, 2011 U.S. Dist. LEXIS 80325, \*34 (D.V.I. July 22, 2011) (refusing to toll the ninety day filing period for WAPA employee because WAPA employee's filing an administrative appeal was not a statutory prerequisite to filing his WPA claim in court).

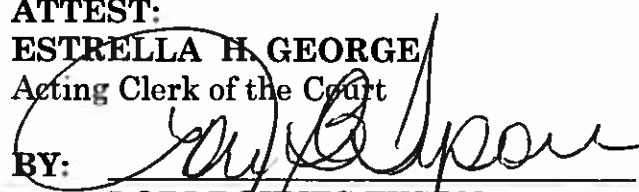
An order consistent with this Opinion will be entered.

DATED: November 10, 2016

  
**Kathleen Mackay**  
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 11/10/16