

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

ANGELO HILL,	)	
	)	
Plaintiff,	)	CIVIL NO. ST-10-CV-585
	)	
vs.	)	ACTION FOR DISCRIMINATION,
	)	BREACH OF CONTRACT, CIVIL
GOVERNOR, JOHN DE JONGH, GOVERNMENT OF	)	CONSPIRACY, DENIAL OF DUE
THE VIRGIN ISLANDS, VIRGIN ISLANDS POLICE	)	PROCESS AND EQUAL PROTECTION,
DEPARTMENT, LAW ENFORCEMENT	)	VIOLATION OF WHISTLEBLOWERS'
SUPERVISORS' UNION LOCAL 118 & PUBLIC	)	PROTECTION ACT
EMPLOYEES RELATIONS BOARD and its	)	
Members HUGO DENNIS, OMAR HENRY,	)	
RODNEY MOORHEAD, AUBREY LEE &	)	
RAYMOND ROY, SR.	)	
	)	
Defendants.	)	
	)	

MEMORANDUM OPINION

HOLLAR, BRENDA J., Judge

THIS MATTER comes before the Court on a motion to dismiss filed by Defendants, Governor John de Jongh, the Government of the Virgin Islands, and the Virgin Islands Police Department (hereinafter collectively "Defendants")¹ on November 17, 2010. Plaintiff filed an opposition to the motion to dismiss on May 23, 2011, and Defendants filed a reply thereto on June 3, 2011. The Court held oral arguments on the motion to dismiss on December 20, 2011. The premises being considered, the Court issues the following findings of fact and conclusion of law.

¹ The complaint also names the Law Enforcement Supervisors Union, Local 118, the Public Employees Relations Board and its members Hugo Dennis, Omar Henry, Rodney Moorhead, Aubrey Lee and Raymond Roy, Sr. as additional defendants. This Memorandum Opinion only addresses the motion to dismiss filed by Governor de Jongh, the Government of the Virgin Islands, and the Virgin Islands Police Department.

I. FINDINGS OF FACT²

1. The complaint alleges that Plaintiff, Angelo Hill, is an employee of the Government of the Virgin Islands – Virgin Islands Police Department and is a member of the Law Enforcement Supervisor's Union, Local 118 ("LESU"). Compl. ¶ 3.

2. Plaintiff alleges that on December 2, 2008, he filed an unfair labor practice charge ("ULPC") with the Virgin Islands Public Employees Relations Board ("PERB") against the Government and the LESU "based on the union's refusal to represent him for past wages and claims" arising under the terms of the Collective Bargaining Agreement ("CBA") between the Government and the LESU. Compl. ¶ 13, 15.

3. On March 3, 2010, the PERB conducted an informal hearing and thereafter scheduled a hearing for June 24, 2010. Compl. ¶ 19, 20.

4. The PERB held a hearing on June 24, 2010 and continued the matter to June 25, 2010. The hearing scheduled for June 25, 2010 was later rescheduled to July 13, 2010. Compl. ¶ 21, 22.

5. On July 6, 2010, the PERB informed Plaintiff that the hearing scheduled for July 13, 2010, would be rescheduled to August 23, 2010. Compl. ¶ 23; *see also* Exhibit E attached to the Complaint.

6. On August 4, 2010, Plaintiff filed an amended witness list with the PERB listing the following individuals as proposed witnesses: Governor John de Jongh, Ray Martinez, Sgt.

² For purposes of a motion to dismiss filed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court will construe the complaint liberally and assume as true all of the factual allegations in complaint. *Santiago v. Warminster Twp.*, 629 F.3d 121, 125 (3d Cir. 2010). Rule 12(b)(6) of the Federal Rules of Civil Procedure applies to proceedings in the Superior Court through Rule 7 of the Superior Court Rules.

Maria Petersen Jones, Commissioner Novelle Francis, Jr., Magistrate Jessica Gallivan, and Joseph Gumbs. Compl. ¶ 24; *see also* Exhibit F attached to the Complaint.

7. On August 18, 2010, the PERB issued a letter to Plaintiff and the LESU that the hearing scheduled for August 23, 2010, was rescheduled to September 29, 2010. Compl. ¶ 25; *see also* Exhibit G attached to the Complaint.

8. On August 25, 2010, prior to the scheduled September 29, 2010 hearing, the PERB issued a Decision and Order dismissing the ULPC filed by Plaintiff. Compl. ¶ 27; *see also* Exhibit H attached to the Complaint.

9. On August 20, 2010, Plaintiff filed the instant complaint against Defendants alleging various causes of actions, including violation of the Virgin Islands Whistleblower Protection Act, breach of contract, violation of 42 U.S.C. § 1983, civil conspiracy, discrimination, declaratory judgment, mental and emotional distress, negligent infliction of emotional distress, intentional infliction of emotional distress, violation of equal protection, and gross negligence.³

II. CONCLUSIONS OF LAW

A. STANDARD OF REVIEW

Defendants filed the motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. When considering a Rule 12(b)(6) motion, “a court must accept all well-pleaded allegations as true and view them in the light most favorable to the plaintiff.” *Golod v. Bank of America Corp.*, 403 Fed. Appx. 699, 702 (3d Cir. 2010) (citing

³ The Court will identify each cause of action alleged against the Defendants by name rather than count number because of the incorrect numbering in the complaint as well as the duplicative nature of some of the counts. For instance, Plaintiff's complaint alleges two Counts VI and Counts VII. Furthermore, Counts IV, V, and VI allege duplicative causes of action for emotional distress.

Evancho v. Fisher, 423 F.3d 347, 350 (3d Cir. 2005)). To survive a motion to dismiss, a complaint must set forth “enough facts to state a claim to relief that is plausible on its face.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim is plausible if it “pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v. Iqbal*, --- U.S. ---, 129 S.Ct. 1937 (2009) (citing *Twombly*, 550 U.S. at 556). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* (citing *Twombly*, 550 U.S. at 556). “A pleading that offers ‘labels and conclusions’ or ‘a formulaic recitation of the elements of a cause of action will not do.’ Nor does a complaint suffice if it tenders ‘naked assertion[s]’ devoid of ‘further factual enhancement.’ ” *Id.* (quoting *Twombly*, 550 U.S. at 555, 557). “Determining whether a complaint states a plausible claim for relief will...be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Iqbal*, 129 S.Ct. at 1950.

To ensure compliance with the *Iqbal* pleading standard, a court must engage in a two-step analysis: (1) the Court must ignore legal conclusions; and (2) consider only those allegations entitled to a presumption of truth to determine whether “they plausibly give rise to an entitlement to relief.” *Golod*, 403 Fed. Appx. at 702 (quoting *Iqbal*, 129 S.Ct. at 1950). The Court will apply the above legal standard to the allegations made in the complaint.

B. DISCUSSION

1. Violation of the Whistleblower Protection Act

Plaintiff's complaint alleges jurisdiction under the Virgin Islands Whistleblower's Protection Act ("WPA"), codified under Title 10, Chapter 7 of the Virgin Islands Code. The complaint, however, does not specify what section of the WPA Defendants have allegedly violated. The Court will, nonetheless, construe the complaint liberally and analyze whether Plaintiff had set forth a plausible claim under the WPA.

Title 10, Section 122 of the WPA prohibits an employer from discharging, threatening or otherwise discriminating against an employee regarding his compensation, terms, conditions, location or privileges of employment because the employee reports or is about to report a violation of law. Generally, in order to prove a claim under the WPA, Plaintiff must allege that: (1) he was engaged in conduct protected under the WPA; (2) that Defendants took adverse action against him; and (3) that there was a causal connection between the protected conduct and the adverse action. *Johnson v. Virgin Islands*, 35 V.I. 27, 31 (Terr. Ct. 1996). Plaintiff's complaint is completely devoid of any allegations that he engaged in any conduct protected under the WPA or that Defendants took any adverse action against him. Simply stated, the complaint does not allege any facts that would permit the Court to draw an inference that Plaintiff has alleged a plausible claim under the WPA. Therefore, to the extent the complaint alleges a cause of action under the WPA, that claim will be dismissed.

2. Breach of Contract

Plaintiff alleges that his employment with the Virgin Islands Police Department is governed by a Collective Bargaining Agreement (“CBA”), the Government of the Virgin Islands Employee Handbook, the Public Employees Relations Act and the Rules and Regulations. Compl. ¶ 37. To state a claim for breach of contract, a plaintiff must allege four elements: “(1) an agreement, (2) a duty created by that agreement, (3) a breach of that duty, and (4) damages.” *Arlington Funding Services, Inc. v. Geigel*, 51 V.I. 118, 135 (V.I. 2009). The complaint is totally silent as to any duty created by the CBA, the Employee Handbook, the Public Employees Relations Act or the Rules and Regulations. Plaintiff further fails to state how Defendants breached a duty created by those documents. Thus, it is clear that Plaintiff has failed to state a “plausible” claim for a breach of contract against Defendants.

3. Violation of 42 U.S.C. § 1983

Counts II asserts a cause of action based on 42 U.S.C. § 1983 (“section 1983”).⁴ To obtain relief under 42 U.S.C. § 1983, “a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged

⁴ Section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983

deprivation was committed by a person acting under color of state law.” *Harvey v. Plains Twp. Police Dep’t*, 421 F.3d 185, 189 (3d Cir. 2005) (quoting *West v. Atkins*, 487 U.S. 42, 48 (1988)). The Supreme Court has held that “[i]t is evident that Congress did not intend to encompass a Territory among those ‘persons who could be exposed to § 1983 liability.’” *Ngiraingas v. Sanchez*, 495 U.S. 182, 191-92 (1990) (reasoning that “if Guam is not a person, neither are its officers acting in their official capacity”). “Neither the Territory of the Virgin Islands nor its officers acting in their official capacities are ‘persons’ under 42 U.S.C. § 1983”. *Brow v. Farrelly*, 994 F.2d 1027, 1037 (3d Cir. 1993).

Here, Plaintiff’s complaint names Governor de Jongh as a defendant in his official capacity as Governor of the United States Virgin Islands. Compl. ¶ 4 (stating that Defendant Governor John de Jongh “is the elected executive of the governing entity of the unincorporated territory of the United States Virgin Islands”). The complaint further lists the Government of the Virgin Islands and the Virgin Islands Police Department as additional defendants. None of these defendants are “persons” subject to damages liability pursuant to section 1983. Accordingly, the Court will dismiss Plaintiff’s section 1983 claims.

4. Civil Conspiracy

Plaintiff alleges that “Defendants herein have all entered into an orchestrated civil conspiracy to deprive Plaintiff of his rights and money. Further, to hide the illegal conduct of the Defendant, Governor John de Jongh , and the Office of Collective Bargaining as to the settlement of union cases and other illegal conduct that were being raised it was necessary to dismiss the case.” Compl. ¶ 29. Plaintiff further alleges “Defendants herein agreed

amongst themselves to dismiss the Unfair Labor Charge filed by Plaintiff and did so in order to avoid the examination of witness that if give [sic] under oath would reveal why some employees are paid and others are not." Compl. ¶ 56.

"Under Virgin Islands law, a civil conspiracy consists of an agreement or combination to perform a wrongful act that results in damage to the plaintiff. A conspiracy may also consist of an agreement to commit a lawful act by unlawful means." *Guar. Fund of Repub. of Finland v. Hyatt Corp.*, 955 F. Supp. 441, 456 (D.V.I. 1997). "Claims of conspiracy that are vague and provide no basis in fact must be dismissed." *Conway v. Garvey*, 2003 WL 22510384, *3 (S.D.N.Y. Nov. 5, 2003).

Here, Plaintiff alleges that the Defendants conspired with the PERB to hide the fact that the Government has settled union cases and to avoid the examination of witnesses who would testify why some employees are paid and others are not. The Court finds that these allegations do not set forth a plausible claim for civil conspiracy. "Allegations of a conspiracy must provide some factual basis to support the existence of the elements of a conspiracy: agreement and concerted action." *Capogrosso v. The Supreme Court of New Jersey*, 588 F.3d 180, 185 (3d Cir. 2009). Plaintiff's complaint asserts vague and conclusory statements that Defendants conspired, but does not allege facts to demonstrate, or to allow an inference of, a conspiracy. Second, there is no liability for civil conspiracy where there is no liability for the act or acts underlying the conspiracy. See *Boyanski v. Capital Area Intermediate Unit*, 215 F.3d 396, 407 (3d Cir. 2000). The Government's decision to settle cases with a union in and of itself does not give rise to liability. The Government is free to settle grievance and arbitration cases with a union just as it is free to settle civil actions

with private litigants. The Court finds that Plaintiff has failed to allege sufficient facts to state a plausible claim for relief for civil conspiracy.

5. Declaratory Judgment

Count IV seeks relief in the form of a declaratory judgment. Plaintiff complaint cites to 5 V.I.C. § 450 as his right to relief for declaratory judgment. This Court, however, is unaware of such a provision. Nonetheless, the Court will assume that Plaintiff is referring to the Virgin Islands Declaratory Judgment Act, codified at 5 V.I.C. § 1261, *et seq.* Title 5, Section 1262 of the Virgin Islands Declaratory Judgment Act provides:

Any person interested under a deed, will, written contract or other writings constituting a contract, or whose rights, status or other legal relations are affected by statute, municipal ordinance, contract or franchise, may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status or other legal relations thereunder.

5 V.I.C. § 1262. “When deciding an action for declaratory judgment, a trial court must declare the parties’ respective rights and obligations.” *Williams v. Blyden*, 45 V.I. 90, 93 (Terr. Ct. 2002). A declaratory judgment is a statutory remedy for the determination of a justiciable controversy where the plaintiff is in doubt as to his legal rights. *Tip Top Constr. v. Dep’t of Prop. & Procurement*, 41 V.I. 72, 78 (Terr. Ct. 1999) (citing *Davis v. Romney*, 490 F.2d 1360, 1369 (3d Cir. 1973)). However, Plaintiff has not set forth a plausible claim that he is entitled to any relief under a deed, will, written contract, or statute.⁵ Accordingly, Plaintiff’s request for declaratory judgment must fail and will be dismissed.

⁵ In light of the fact that Court will dismiss all of the claims against the Defendants, the Court exercises its discretion to deny Plaintiff’s request for declaratory relief. See *Flavo-Rich v. Quinn*, 18 V.I. 530, 532 (D.V.I. 1981) (“The decision to entertain a declaratory action is within the discretion of the Court.”) (Citations omitted).

6. Plaintiff's Claims for Mental and Emotional Distress, Intentional Infliction of Emotional Distress, and Negligent Infliction of Emotional Distress

A claim for intentional infliction of emotional distress requires a plaintiff to allege facts showing that the defendants engaged in "extreme and outrageous conduct" to "intentionally or recklessly causes severe emotional distress to another...." *Eddy v. Virgin Islands Water and Power Authority*, 955 F.Supp. 468, 478 (D.V.I. 1997) (citing Restatement (Second) of Torts § 46)). A defendant's conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Berry v. Jacobs IMC*, 99 Fed. Appx. 405, 410 (3d Cir. 2004) (quoting Restatement (Second) of Torts § 46 cmt. d (1965)). "Whether a defendant's conduct is so extreme or outrageous as to permit recovery is initially a matter to be decided by the court." *Speaks v. Gov't of the Virgin Islands*, 2009 WL 167330, *7, (D.V.I. 2009) (citing Restatement (Second) of Torts § 46 cmt. h)). The Court concludes, as a matter of law, that the alleged conduct of Defendants is not so extreme or outrageous and thus, Plaintiff's claim for intentional infliction of emotion distress will be dismissed.

With regards to Plaintiff's claim for negligent infliction of emotional distress, that claim will be dismissed as well. To state a claim for negligent infliction of emotional distress, Plaintiff must allege that he suffered some physical harm as a result of Defendants' conduct. Restatements (Second) of Torts § 313; *Anderson v. Gov't of the Virgin Islands*, 180 F.R.D. 284, 286 (D.V.I. 1998). Plaintiff does not allege that Defendants committed any physical harm to him. Accordingly, Plaintiff's claim for negligent infliction of emotional distress will be dismissed.

7. Discrimination

Plaintiff alleges that the Defendants and PERB conspired to dismiss his unfair labor practice charge prior to allowing Plaintiff the opportunity to testify because of his political affiliation. Compl. ¶ 33, 34, and 56. Plaintiff alleges that “Defendants have a pattern or practice of favoring one employee over another based on political and other forms of motivation. In furtherance of that pattern and practice, Defendants are guilty of discrimination in their dealings with the Plaintiff.” Compl. ¶ 77-78. The complaint does not identify what statute prohibits discrimination based on political affiliation. In its motion to dismiss, Defendants argue that to the extent Plaintiff’s discrimination claim is based on the Virgin Islands Civil Rights Act, that claim should be dismissed. Plaintiff concedes in his opposition to the motion to dismiss that “the complaint does not cite a specific statute under which the claim for discrimination is brought.” Pl.’s Memo. of Law in Opp. to Gov’t Mot. Dismiss at 10. Despite this deficiency in his complaint, Plaintiff argues in his opposition that Title 10 of the Virgin Islands Civil Rights Act applies to his discrimination claim. The Court agrees with Defendants that Title 10 does not provide a basis for relief and will dismiss Plaintiff’s claim for discrimination.

Sections 3 and 64 of Title 10 prohibit various forms of discrimination. Title 10, Section 3(a)(1) entitles all natural persons to be treated equally with respect to employment without regard to race, creed, color, or national origin. Neither Section 3(a)(1) nor any other sub-section of section 3 prohibits discrimination on account of political affiliation. Thus, Title 10, Section 3 does not provide a basis of relief for a discrimination claim based on political affiliation.

Title 10, Section 64 is also unavailing to Plaintiff. Section 64 states, in relevant part:

(1) It shall be an unlawful discriminatory practice:

(a) For an employer, because of age, race, creed, color, national origin, place of birth, sex and/or political affiliation of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions, or privileges of employment.

10 V.I.C. § 64. However, this statute does not provide for a private right of action. *Haase v. Gov't of the V.I.*, 2009 WL 3855888, at *6 (D.V.I. 2009). Accordingly, Plaintiff's claim for discrimination will be dismissed.

8. Violation of Equal Protection

The Fourteenth Amendment of the U.S. Constitution prohibits a State from “deny[ing] to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend XIV, § 1. The Equal Protection Clause “is essentially a direction that all persons similarly situated should be treated alike.” *Shuman v. Penn Manor Sch. Dist.*, 422 F.3d 141, 151 (3d Cir. 2005). To state a claim for an equal protection violation a plaintiff must allege that the defendant(s) intentionally treated him or her differently from similarly situated individuals. *Vill. of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000); *see also Andrews v. City of Philadelphia*, 895 F.2d 1469, 1478 (3d Cir. 1990) (“To bring a successful claim under 42 U.S.C. § 1983 for a denial of equal protection, plaintiffs must prove the existence of purposeful discrimination.”); *Kranson v. Vall. Crest Nursing Home*, 755 F.2d 46, 52 (3d Cir. 1985) (“To succeed on an equal protection challenge, a plaintiff ‘must show that the allegedly offensive categorization invidiously discriminates against the disfavored group.’”) (citations omitted). “Persons are similarly situated under the Equal Protection

Clause when they are alike 'in all relevant aspects'." *Startzell v. City of Philadelphia*, 533 F.3d 183, 203 (3d Cir. 2008) (citing *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)).

Plaintiff's complaint does not identify other individuals who were similarly situated as Plaintiff who were treated differently. The complaint makes one vague reference to another officer who received compensation as a result of a settlement with the Government. Compl. ¶ 31. The complaint does not state how this officer was similarly situated to Plaintiff nor how the settlement of that officer's case is related to the matter at hand. There is simply no basis for this Court to draw an inference that Plaintiff has properly pled a viable equal protection claim. Therefore, the claim will be dismissed.

9. Gross Negligence

"To survive a motion to dismiss under *Twombly*, a complaint alleging gross negligence. . . must contain facts sufficient to show that the applicable standards for recovery are plausibly met." *Stotesbury v. Pirate Duck Adventure, LLC*, 2011 WL 3843927, *4 (D.V.I. 2011). Gross negligence is defined as "conduct that presents 'an unreasonable risk of physical harm to another...that...is substantially greater than that which is necessary to make the conduct negligent.'" *Thomas v. Rijos*, 780 F.Supp.2d 376, 385-86 (D.V.I. 2011) (emphasis in original) (citing *Booth v. Bowen*, 2008 WL 220067, at *3 (D.V.I. 2008)). The complaint is totally devoid of any allegations that Defendant placed Plaintiff in an unreasonable risk of physical harm. The Court will therefore dismiss Plaintiff's claim for gross negligence.

C. CONCLUSION

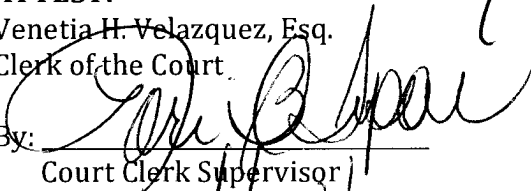
The allegations against the Defendants fail to state a claim in compliance with the standards set forth in *Iqbal* and *Twobly*. Accordingly, the Court will dismiss, with prejudice, all of the claims alleged against the Government of the Virgin Islands, Governor John P. de Jongh, and the Virgin Islands Police Department. An appropriate Order accompanies this Memorandum Opinion.

April 19, 2012
DATED: January __, 2011


BRENDA J. HOLLAR, Administrative Judge
Superior Court of the Virgin Islands

ATTEST:

Venetia H. Velazquez, Esq.
Clerk of the Court


By: _____
Court Clerk Supervisor

Dated: *4/19/12*

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