IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

EMMETT HANSEN, II, Plaintiff, vs. **GOVERNOR JUAN F. LUIS HOSPITAL & MEDICAL CENTER, VIRGIN ISLANDS GOVERNMENT HOSPITAL & HEALTH FACILITIES CORPORATION, and GOVERNMENT OF THE VIRGIN ISLANDS,** Defendants.	)	Case No. SX-15-CV-509 ACTION FOR BREACH OF CONTRACT JURY TRIAL

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendants' Joint Motion to Dismiss Count III of the First Amended Complaint, filed August 3, 2016, and Defendants' Joint Motion to Dismiss Count II of the First Amended Complaint, filed September 14, 2016. Defendants moved to dismiss Count III pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), and moved to dismiss Count II pursuant to Federal Rule 12(b)(6) alone.[1] Also before the Court is Plaintiff's Motion to Allow Filing of Tort Claim Under Count III, filed on September 2, 2016, along with Plaintiff's Opposition

[1] Effective March 31, 2017 the Supreme Court adopted the Virgin Islands Rules of Civil Procedure, which supersede all previous civil procedure rules applicable to the Superior Court, including the Federal and Local Rules of Civil Procedure. Under the V.I. R. Civ. P., the rule that corresponds to Fed. R. Civ. P. 12(b)(1) is V.I. R. Civ. P. 12(b)(1) and the rule that corresponds to Fed. R. Civ. P. 12(b)(6) is V.I. R. Civ. P. 12(b)(6). Per V.I. R. Civ. P. 1-1(c)(2)(B) "These rules, and subsequent amendments, govern: proceedings in any action pending on the effective date of the rules or amendments, unless: the Superior Court makes an express finding that applying them in a particular previously-pending action would be infeasible or would work an injustice." The Court finds that applying the new rules here is feasible and would not "work an injustice" to the parties, and will thus apply the new Virgin Islands Rules of Civil Procedure.

to Defendants' joint motion to dismiss that count. For the reasons set forth below, the Court will dismiss Counts II and III and deny Plaintiff's motion to allow filing of his tort claims.

FACTUAL AND PROCEDURAL BACKGROUND

This matter was initiated by a complaint filed on October 16, 2015, by Plaintiff Emmett Hansen, II, against Defendants the Governor Juan F. Luis Hospital & Medical Center ("JFL" or the "Hospital"), the Virgin Islands Government Hospital and Health Facilities Corporation ("VIGHHFC"), and the Government of the Virgin Islands ("Government" or "GVI"), wherein Plaintiff seeks damages after he was terminated by JFL on March 10, 2015 shortly after signing a contract for employment with JFL in December 2014.

On December 5, 2014, JFL extended an Offer of Employment ("Offer") to Hansen for the position of Vice President of Strategy & Communication at an annual salary of $95,000.00. Hansen signed the agreement that same day, agreeing to employment with JFL "for a minimum for [sic] three (3) year [sic] as a full-time" employee in that role. The Offer indicated that Hansen's employment with JFL would be, "subject to pre-employment screening," and that Hansen's performance would be, "evaluated to establish continuance of employment." It did not state that Hansen would be an exempt employee, or otherwise indicate any particular employment status for Hansen. Hansen's First Amended Complaint ("Amended Complaint") alleges that he "made very clear in his negotiations that he would not accept a position as an exempt employee."[2] The Offer did not discuss in any level of detail the specific responsibilities Hansen would have while working at the Hospital.

Hansen began working at the Hospital on or about December 15, 2014. According to the Amended Complaint, Hansen performed exemplary work while employed by the JFL, despite not having his own office, telephone, or computer until approximately January 10, 2015. He held one press conference on January 26, 2015, which Hansen alleges, "garnered high praise from CEO Griffith and staffers."[3] Hansen also alleges that during his time with JFL he, "was able to identify a source to provide materials for building and repairs at no cost to the Hospital, with a substantial savings to the hospital."[4] Despite Hansen's successful press conference, the Amended Complaint alleges that CEO Griffith cancelled further press conferences suggested by Hansen, and that on February 24, 2015 he refused all of Hansen's suggestions regarding an upcoming legislative hearing.

Hansen was terminated from employment on March 10, 2015. The Amended Complaint alleges that CEO Griffith called Hansen into his office, told him to leave work at the end of the workday, and indicated that he was not to return to work.[5] Hansen asserts that no reason was given and no letter provided to him setting forth the basis for his termination until a hearing was held with the Public Employee Relations Board ("PERB") months after the termination. No performance evaluation

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[2] Am. Compl. para. 6.
[3] *Id.* at para. 2.
[4] *Id.* at para. 13.
[5] *Id.* at para. 14.

was ever completed of Hansen's performance during his time with JFL and prior to his termination, as the Offer indicated would be done.

On June 10, 2015, Hansen appealed his firing by filing a Notice of Appeal ("Appeal")[6] with PERB and served a copy on the Attorney General of the Virgin Islands ("AG"). The Appeal stated that Hansen was appealing his termination as an employee of JFL, and described the circumstances surrounding his hiring, his short employment at the hospital, and his subsequent termination by JFL. It noted that Hansen had not been given a letter of termination, nor a hearing by the hospital to determine if his termination was proper, and asserted that under JFL's own HR Policies & Procedures, Hansen was to receive both. Attached to Hansen's Appeal was a signed Affidavit, which also described the circumstances surrounding his hiring and termination, and objecting that, "No hearing has been held by the Hospital to determine if my termination was proper. None of the conflict resolution procedures were followed."[7]

Apparently, Hansen's appeal with PERB did not resolve satisfactorily[8], and Hansen filed a complaint with the Superior Court on October 16, 2015, and a first amended complaint on July 13, 2016.[9] The Amended Complaint alleges: Count I, that Hansen's termination was in breach of contract; Count II, that the Hospital

[6] *See* "Opposition to Defendants' Joint Motion to Dismiss Count III of the First Amended Complaint, and Motion to Allow Filing of Tort Claim Under Count III" Ex. 3.
[7] *See id.* Ex. 2.
[8] The record is devoid of any mention of the results at PERB, the contents of the decision or when it was entered.
[9] By Order dated July 11, 2016, the Court granted Hansen the right to amend his complaint.

terminated Hansen, "wrongfully, in violation of standards established by 24 VIC §76" (the wrongful discharge statute); Count III, that the Hospital, "either intentionally, with gross recklessness or by negligence failed to meet the Contract's terms, and the Hospital's acts were extreme and outrageous" and "the acts of the Hospital in wrongfully terminating [Hansen] directly and proximately cause him emotional distress, including headache and physical pain and suffering";[10] and Count IV, a claim of breach of covenant of good faith and fair dealing. Defendants now move to dismiss Count II pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted, and to dismiss Count III pursuant to Rule 12(b)(6) as well as Rule 12(b)(1), for lack of subject-matter jurisdiction.

LEGAL STANDARDS

Because a Rule 12(b)(1) challenge is a jurisdictional attack, the Court should consider that motion before reaching the Rule 12(b)(6) motions. *Brunn v. Dowdye*, 59 V.I. 899, 904, 2013 V.I. Supreme LEXIS 72, *8 ("Prior to considering the merits of a matter before it, a court is obligated to examine whether it has subject matter jurisdiction over the dispute.") (citing *V.I. Gov't Hosp. & Health Facilities Corp. v. Gov't of the V.I.*, 50 V.I. 276, 279, 2008 V.I. Supreme LEXIS 37, *3); *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001)) ("When a Rule 12(b)(1) motion is

[10] Defendants describe Count III as a claim for intentional or negligent interference with a contract, although the Court interprets it as a claim for negligent or intentional infliction of emotional distress.

filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits.") (citation omitted). The reason for this is that subject-matter jurisdiction defines a court's authority to hear the type of case, and the, "extent to which a court can rule on the conduct of persons or the status of things." *See Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009) (citing Black's Law Dictionary 870 (8th ed. 2004)).

A Rule 12(b)(1) motion challenging a court's subject-matter jurisdiction may be treated either as facial or factual.[11] The Virgin Islands District Court has characterized this difference by saying that a facial challenge, "attack[s] the complaint on its face," while a factual challenge "attack[s] the existence of subject matter jurisdiction in fact, quite apart from any pleadings." *Weiss v. Maccaferri, Inc.*, 2016 U.S. Dist. LEXIS 50436, *3 (D.V.I.) (citing *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3rd Cir. 1977)); *see also Joseph*, 2017 V.I. LEXIS 175, *5 ("A 'facial attack' argument considers a complaint on its face"). The applicable standard for reviewing a Rule 12(b)(1) motion depends on which of the two challenges the moving party has made. *James-St. Jules v. Thompson*, 2015 V.I. LEXIS 74, *6 (V.I.

[11] The Virgin Islands Supreme Court has not yet explicitly adopted this two-pronged approach to Rule 12(b)(1) motions. However, multiple V.I. courts have utilized it when analyzing 12(b)(1) challenges, both before and after the 2017 adoption of the Virgin Islands Rules of Civil Procedure. *See, e.g.*, *Joseph v. Legislature of the V.I.*, 2017 V.I. LEXIS 175, *4-5 (V.I. Super. Ct.); *Raymond v. Assefa*, 2017 V.I. LEXIS 153, *2 (V.I. Super. Ct.); *Gardiner v. V.I. Hosps. & Facilities Corp.*, 2016 V.I. LEXIS 157, *5-6 (V.I. Super. Ct.); *Klotzbach v. V.I. Water & Power Auth.*, 2016 V.I. LEXIS 28, *4-5 (V.I. Super. Ct.); *James-St. Jules v. Thompson*, 2015 V.I. LEXIS 74, *6-8 (V.I. Super. Ct.); *Brewley v. Gov't of the Virgin Islands*, 59 V.I. 100, 102 (V.I. Super. Ct. 2012). Therefore, this Court will also follow that approach.

Super. Ct.) (citing *Mortensen v. First Fed. Sav. and Loan Ass'n*, 549 F.2d 884, 891 (3rd Cir. 1977).

In reviewing a facial attack to subject-matter jurisdiction, a court must consider only the allegations of the complaint and documents referenced therein and attached thereto, in the light most favorable to the plaintiff, *James-St. Jules*, 2015 V.I. LEXIS 74 at *7 (citing *Constitution Party of Pennsylvania v. Aichele*, 757 F.3d 347, 358 (3rd Cir. 2014)), and must accept the allegations in the complaint as true, *Weiss*, 2016 U.S. Dist. LEXIS 50436, *4. On a factual challenge, "a court must evaluate the merits of the jurisdictional claims based on the evidence offered by either party." *Weiss*, 2016 U.S. Dist. LEXIS 50436, *4 (citing *Mortensen v. First Fed. Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3rd Cir. 1977)). And unlike on a facial challenge, no presumptive truthfulness attaches to the plaintiff's allegations. *In re Horizon Healthcare Servs. Data Breach Litig.*, 846 F.3d 625, 632 (3rd Cir. 2017) (citations and internal quotations omitted). Because on a factual challenge a court may look outside the complaint, a factual challenge normally may occur only after the allegations of the complaint have been controverted. *Weiss*, 2016 U.S. Dist. LEXIS 50436, *4 (citing *Mortensen*, 549 F.2d at 892 n.17).

In considering whether Defendants' 12(b)(1) motion is facial or factual, the Court notes that Defendants have not yet challenged any of the factual allegations within the Amended Complaint itself. This weighs in favor of the Court considering the attack as a facial one. *In re Horizon*, 846 F.3d at 632-3 (3rd Cir. 2017) ("Because [Defendant] did not challenge the validity of any of the Plaintiffs' factual claims as part of its motion, it brought only a facial challenge."). Additionally, the Defendants have not answered the Amended Complaint and the parties had not engaged in discovery, also suggesting the Court should conduct its review based on the Amended Complaint alone. *Askew v. Trs. of the Gen. Assembly of the Church of the Lord Jesus Christ of the Apostolic Faith, Inc.*, 684 F.3d 413, 417 (3rd Cir. 2012) ("As the defendants had not answered and the parties had not engaged in discovery, the first motion to dismiss was facial.").

At the same time, both parties have briefed the Rule 12(b)(1) challenge thoroughly. Defendants were aware of and responded to exhibits and arguments introduced by Plaintiff outside the Amended Complaint (i.e. Hansen's Notice of Appeal and Affidavit). And while Defendants have not yet challenged any factual allegations contained in the Complaint itself, they have disputed the issue of when Plaintiff's Count III claim first arose, a fact asserted by Plaintiff outside the Amended Complaint. Furthermore, because the parties' motions and memoranda spoke to evidence introduced outside the Amended Complaint itself, the Court finds it would be nonsensical to review the Rule 12(b)(1) motion without examining that evidence. Thus, the Court will review the motion as a factual challenge.

Regarding the issue of jurisdiction, the Court notes additionally that it is, "well-established that a court may consider the issue of subject matter jurisdiction *sua sponte*.'" *Drayton v. Drayton*, No. S.CT.CIV.2015-0068, 2016 WL 4543192, at *2 (V.I. 2016) (citing *Virgin Islands Waste Management Auth. v. Bovoni Investments, LLC*, 61 V.I. 355, 363 (V.I. 2014)). Thus, although the Defendants in this case have raised a Rule 12(b)(1) challenge only as regards to Count III, the Court will also consider the issue of jurisdiction as regards to Count II.

DISCUSSION

The Procedural Requirements for Filing a Tort Claim Under the Virgin Islands Tort Claim Act

The Revised Organic Act of the Virgin Islands grants sovereign immunity to the Government of the Virgin Islands, providing that, "no tort action can be brought against the [Government] . . . or against any officer or employee thereof in his official capacity without the consent of the legislature. *Comm'r of Dep't of Planning & Nat. Res. v. Century Alumina Co., LLC*, 2010 WL 56071, at *1 (D.V.I. 2010) (citing 48 USCS § 1541(b)). Through the Virgin Islands Tort Claims Act ("VITCA"), 33 V.I.C. §§ 3401 *et seq.*, the GVI has waived its immunity from liability in certain circumstances. This includes, "with respect to injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of an employee of the [GVI] while acting within the scope of his office or employment . . .." *Id.* § 3408(a). Both Defendants GVI and VIGHHFC are explicitly included in the definition of "Government of the Virgin Islands" as it is defined in Organic Act, *id.* § 3401, and are thus subject to tort liability only as provided by VITCA.

33 V.I.C. § 3409 states that, "[n]o judgment shall be granted in favor of any claimant unless such claimant shall have complied with the provisions," of that section. The provision applicable to this case is § 3409(c):

> [A] **claim** to recover damages for injuries to property or for personal injury caused by the tort of an officer or employee of the [GIV] while acting as such officer or employee, **shall be filed within ninety days after the accrual of such claim unless the claimant shall within such time file a written notice of intention to file a claim therefor, in which event the claim shall be filed within two years after the accrual of such claim.** (emphasis added)

Section 3410 goes on to say that, "[t]he claim or notice of intention shall be filed in the Office of the Governor and a copy shall be served upon the Attorney General and a written receipt therefor shall be issued with the date of filing indicated thereon." Compliance with these filing deadlines is vital to a tort claim against the Government: under VITCA, the GVI has consented to and provided the terms under which it may be sued, and thus these terms are jurisdictional and cannot be waived. *Pickering v. David*, 22 V.I. 105 (V.I. Super. Ct. 1986) (dismissing for lack of subject matter jurisdiction where plaintiff failed to timely comply with administrative requirements of VITCA); *Richardson v. Knud Hansen Memorial Hospital*, 744 F.2d 1007, 1010 (3d Cir. V.I. 1984) ("[T]he [GVI] may not be sued without its consent. We believe the terms of this consent are jurisdictional"); *see FDIC v. Meyer*, 510 U.S. 471, 475 (1994) ("Sovereign immunity is jurisdictional in nature.").

Plaintiff Failed to Satisfy the Procedural Requirements of §§ 3409 and 3410

Defendants contend that Plaintiff failed to properly comply with the filing provisions of VITCA and therefore that the Court lacks subject matter jurisdiction over Count III. According to the Amended Complaint, Plaintiff was terminated on

March 10, 2015. Plaintiff did not file his initial complaint in this matter until October 16, 2015. This was approximately 220 days after Plaintiff's termination—well beyond the 90 days provided for under VITCA. Nor did Hansen file a written notice of intention to file a claim within the 90 days, which would have extended to two years the time within which he could file a claim.[12]

Hansen argues however that his Notice of Appeal, filed with the Public Employee Relations Board on June 10 and served on the AG, acted as proper notice for purposes of VITCA.[13] There are two problems with this argument. First, June 10 fell more than 90 days after Hansen's termination and the accrual of his wrongful discharge claim. In his motion to allow filing, Hansen attempts to get around this by arguing that his Count III claim accrued, "on or about March 17 or 18 2015 [sic]," when he, "began to experience depression, illness, unease, anxiety, and various other maladies." [14] But this argument is inapplicable to Count II.[15] Unlike a claim of

[12] In response to Defendants' Motion to Dismiss, Hansen did file with the Court a "Notice of Tort Claim" on September 2, 2016, along with his motion to allow filing of a tort claim. However, it is not clear if that document was served on the parties appropriately as required by VITCA, rather than just attached as an exhibit to the motion and served on counsel of record, and since it was not even notarized until that date—nearly a year after the initial complaint and summons—that document served little purpose in putting any of the Defendants on notice within 90 days of Hansen's termination.

[13] *See* "Opposition to Defendants' Joint Motion to Dismiss Count III of the First Amended Complaint, and Motion to Allow Filing of Tort Claim Under Count III", Exhibit 3.
[14] Hansen Aff. 3, ¶ 14.

[15] Hansen does not move to allow filing of his wrongful discharge claim and only does so regarding Count III, while claiming that Count II is a contractual cause of action. Thus, he never directly addresses the accrual date for his wrongful discharge claim. However, wrongful discharge is a tort cause of action. *See Chapman v. Cornwall*, 58 V.I. 431, 443 (V.I. 2013); *Sorber v. Glacial Energy VI, LLC*, 2011 V.I. LEXIS 34, *11 (V.I. Super. Ct.); *Harrilal v. Blackwood*, 44 V.I. 144, 145 (V.I. Super. Ct. 2001).

infliction of emotional distress ("IED"), the injury to Hansen for his wrongful termination claim was the loss of his job. Therefore, Hansen's wrongful termination claim accrued when he received notice of his termination. *See Jensen v. Virgin Islands Water & Power Authority*, 52 V.I. 435, 442, 2009 V.I. Supreme LEXIS 48, *12, n.7 ("The parties do not dispute that Jensen's claim accrued on October 19, 2001, the date his employment was terminated."); *Watson v. Eastman Kodak Co.*, 235 F.3d 851, 857 (3rd Cir. 2000) ("Consequently . . . Watson's termination claim accrued on February 4, 1997, the date he received Gagnon's [discharge] letter."); *Daniels v. Fesco Div. of Cities Service Co.*, 733 F.2d 622, 623 (9th Cir. 1984) (wrongful discharge action accrued when the notification was given rather than the date when compensation stopped); *Stephenson v. ADA*, 789 A.2d 1248, 1250-1251, 2002 D.C. App. LEXIS 6, *8-11 (collecting federal and state court cases holding that wrongful discharge/termination claims accrue when the plaintiff receives notice of termination). Since Hansen did not file his appeal until 92 days after his termination, he did not meet the filing deadline for his Count II claim even if the notice of appeal was sufficient, proper notice under VITCA.

The other problem with Hansen's Notice-of-Appeal argument, a problem for both his tort claims, is that he did not file his Appeal with the appropriate party and in the appropriate manner to satisfy VITCA. The Act requires that notice of a tort claim or notice of intention to file, "shall be filed *in the Office of the Governor and a copy shall be served upon the Attorney General*," and also prescribes that the filing be verified. § 3410 (emphasis added). The Certificate of Service for Hansen's Appeal shows that it was served on the Chairman of PERB and the AG of the Virgin Islands. Hansen argues that the Appeal "was served on the [GVI], through the Attorney General, James Carroll, by hand delivery."[16] But the language of VITCA makes quite clear that proper notice of intention to file a claim must be filed in the Office of the Governor, with a copy served on the AG. While the Department of Justice is a department of the executive branch of government, Hansen cites no legal authority for the proposition that service on the AG can be substituted for service on the Governor's Office under § 3410, and the Court finds no authority to support that argument.[17] Also, Hansen made no showing that the AG provided the Office of the Governor with notice of Hansen's claim. This means that, at best, the first time the Governor's Office received documented notice of any of Hansen's tort claims was in the form of his original complaint in October 2015. This was more than six months after either of Hansen's tort claims accrued.

The Court finds that Hansen's Notice of Appeal did not constitute a timely, proper filing or notice of intention to file a claim under §§ 3409 and 3410 of VITCA.

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[16] Opp'n to Defs.' Joint Mot. to Dismiss Count III of the First Am. Compl., and Mot. to Allow Filing of Tort Claim Under Count III 2.

[17] In fact, the Court is persuaded that substitute service on the AG does not satisfy VITCA requirements, as § 3410 requires a claim be filed in the Office the Governor and a copy served on the AG, while § 3409(c), the savings clause, requires that "the Virgin Islands or its appropriate department or agency had, prior to the expiration of the time limited for the filing of the notice of intention, actual knowledge of the facts constituting the claim." The latter is construed as the Virgin Islands Government, *see Daniel v. Virgin Islands*, 27 V.I. 95, 97 (V.I. Super. Ct. 1992), and is broader than the Office of the Governor. Also § 3401 defines 'Government of the Virgin Islands' and provides an obviously broader definition than the Office of the Governor. That the legislature specified in § 3410 that a claim be filed in the Office of the Governor seems to make clear that it intended claims be filed with that office specifically (when giving notice pursuant to § 3410.)

The Procedural Requirements of the § 3409(c) Savings Clause

Hansen moves the Court to permit the late filing of his claim and points out that a court has some discretion to permit a plaintiff's untimely filing of a tort claim. Indeed, § 3409(c) provides:

> A claimant who fails to file a claim or notice of intention . . . within the time limited . . . may, nevertheless, in the discretion of the court, be permitted to file such claim at any time within two years after the accrual thereof . . . [and t]he application for such permission shall be made upon motion based upon affidavits showing a reasonable excuse for the failure to file the notice of intention and that the Virgin Islands or its appropriate department or agency had, prior to the expiration of the time limited for the filing of the notice of intention, actual knowledge of the facts constituting the claim. . . . No such application shall be granted if the court shall find that the Government of the United States Virgin Islands has been substantially prejudiced by the failure of the claimant to file such notice of intention within the time limited therefor.

In order for a court to grant a motion for late filing then, a plaintiff must show: "(1) the Government had actual notice of the facts constituting the claim within the initial filing deadline, (2) the Government was not substantially prejudiced by failure to file a timely notice, and (3) plaintiff had a reasonable excuse for failure to file within the normal time period." *Daniel v. Virgin Islands*, 27 V.I. 95, 97 (V.I. Super. Ct. 1992). All three criteria must be demonstrated for a plaintiff to prevail on a motion. *Pickering*, 22 V.I. at 111; *Choate v. Skinner*, 1983 V.I. LEXIS 59, *7-8 (V.I. Super. Ct.).

Plaintiff Has Failed to Satisfy the Procedural Requirements of the § 3409(c) Savings Clause

Hansen moves to allow late filing of his Count III tort claim pursuant to § 3409(c). He argues that because his Notice of Appeal was filed with PERB and served on the AG on June 10, 2015, "there can be no denial that the Government had actual knowledge of the facts relating to [Count III]." The Court does not agree.

Hansen's Appeal did not provide the Government with knowledge of the facts constituting a claim of intentional or negligent infliction of emotional distress. Unlike a claim for wrongful discharge, a plaintiff cannot have an IED claim without the 'emotional distress.'[18] But nowhere in Hansen's Appeal or attendant affidavit does Hansen describe feeling depression, illness, unease, anxiety, or any other maladies. Because Hansen did not allege these facts in either his Appeal or his affidavit, there is no evidence that the Government had actual knowledge of those facts—the Government might have known that Hansen was terminated, but there's no proof it knew that he experienced emotional distress because of it.

[18] *Diaz v. Ramsden*, 67 V.I. 81, 94 (V.I. Super. Ct. 2016) ("For an individual to recover, to prevail on a claim of negligent infliction of emotional distress under a theory that the plaintiff was the direct victim of a defendant's negligent conduct, a plaintiff must prove: (1) that the defendant owed the plaintiff a duty of care to ensure the plaintiff does not suffer serious or severe emotional injury, which duty either arose by contract or was imposed as an independent legal obligation; (2) that the defendant breached its contractual or legal obligation, i.e. its duty; and (3) that, as a direct and proximate result of defendant's breach, the *plaintiff suffered a serious or severe emotional injury*.") (emphasis added) (citing *Donastorg v. Daily News Publishing Co., Inc.*, 2015 V.I. LEXIS 105, *185-186 (V.I. Super. Ct.); *Diaz*, 67 V.I. at 89 ("To prevail on their IIED claim, Plaintiffs must show that: (1) defendant acted intentionally or recklessly; (2) the conduct was "extreme and outrageous;" (3) defendant's actions were the proximate cause of plaintiffs' emotional distress; and (4) *plaintiffs suffered "severe emotional distress."*) (emphasis added) (quoting *Smith v. Elias*, 49 V.I. 65, 74 (V.I. Super. Ct. 2007)).

Regarding Count II, Hansen offers no excuse, let alone a reasonable one, for why he filed his Appeal more than 90 days after the accrual of his wrongful discharge claim. Even if Hansen "understood that [he] must file first" with PERB to foreclose administrative claims, that does not provide an excuse for why he failed to do so within 90 days of being terminated. It is not determinative that Hansen did not begin to feel his emotional distress until March 17 or 18, 2015: he knew he was terminated on March 10; he was aware of his wrongful discharge on that date and could have filed that claim within 90 days. Even if he did not experience emotional and physical ailments until March 17, those ailments were not a necessary part of his wrongful discharge claim. It is not a reasonable excuse that Hansen was late to act on his wrongful discharge claim because he didn't experience emotional distress for several days.[19]

Hansen has failed to provide facts showing that the Government had actual knowledge of facts constituting his Count III claim within that claim's filing deadline, and has failed to provide a reasonable excuse for why he did not file his Count II claim within 90 days of the accrual of that claim. The Court finds Hansen did not satisfy the requirements of the § 3409(c) savings clause for either claim.

[19] The Court also finds it odd that while Hansen argues that he didn't file his Appeal until June 10 because he didn't experience his emotional distress until March 17 or 18, Hansen's Appeal and affidavit didn't even mention any emotional injuries and spoke only to his wrongful discharge claim. This gives the impression that Hansen is attempting to tack his wrongful discharge claim onto his IED claim and that claim's later accrual date.

Plaintiff's Tort Claims Must Be Dismissed as to GVI and VIGHHFC for Lack of Jurisdiction

As discussed above, the VITCA filing requirements are jurisdictional and thus the deadlines imposed by the statute are important and generally should not be waived.[20] Also, because there is a, "strong policy of this jurisdiction that tort actions against the Government are to be filed promptly and prosecuted diligently[,]" a court should, "closely scrutinize compliance with the mandatory procedural requirements," of the Act. *Faulknor v. Gov't of the Virgin Islands*, 60 V.I. 65, 73 (V.I. Super. Ct. 2014) (citing *Pickering*, 22 V.I. at 110 and *Dublin v. V.I. Telephone Corp.*, 15 V.I. 214, 233-34 (V.I. Super. Ct. 1978)); *see also Daniel*, 27 V.I. at 97 ("While the savings clause of § 3409(c) is interpreted liberally, the requirement that a notice of claim normally be filed within 90 days reflects a strong public policy in favor of the prompt commencement of tort actions against the Government.") (citations and internal quotations omitted); *V.I. Tel. Corp. v. Gov't of the V.I. & O'Brien Plumbing Co.*, 13 V.I. 405, 406 (V.I. Super. Ct. 1997) ("[O]ne desiring to proceed under [VITCA] must strictly adhere to the procedural requirements of the statute before he or she may press a demand under the law.").

[20] The Court acknowledges that the V.I. Supreme Court has not yet determined if the deadlines in the VITCA are jurisdictional or claims processing rules. *See Fleming v. Cruz*, 62 V.I. 702, 718 n. 13 (V.I. 2015). Other Superior Court decisions recognize this void, but point out that the Third Circuit's affirmation in *Richardson v. Knud Hansen Mem'l Hosp.*, 744 F.2d 1007,1010 (3rd Cir. 1984), that the VITCA's pre-filing requirements are jurisdictional, is thus still binding on the Superior Court. *See Lynch v. Juan F. Luis Hosp. & Med. Ctr.*, 2018 V.I. LEXIS 25, *6-7 (V.I. Super. Ct.); In *Yuxiang Peng v. Williams*, 67 V.I. 482, 485-86 (V.I. Super. Ct. 2017).

Adhering to that policy, the Territorial Court in *Sealey v. Camacho* held that despite the discretionary power granted to courts by VITCA § 3409(c), the procedural requirements of that section must be, "strictly complied with to enable the court to permit the filing of a late claim." 20 V.I. 91, 92 (V.I. Super. Ct. 1983) (citations and internal quotations omitted). Otherwise, the court went on, "[a] court cannot exercise the discretionary authority granted to it by the statute." *Id.* In *V.I. Tel. Corp.*, the Territorial Court denied a motion to allow late filing where the plaintiff had failed to prove one of the requirements of § 3409(c). The court emphasized, "when one does not file a claim within ninety days after its accrual, [§ 3409(c)'s] three statutory criteria must be met before this Court can exercise its discretion in permitting a late filing." 13 V.I. at 406-07. Similarly, in denying a Motion for Permission to File a Tort Claim, the Territorial Court in *Choate* wrote, "The requirements of [§ 3409(c)] are stated in the conjunctive rather than disjunctive and thus before the Court can exercise its discretion and grant leave to file a late claim against the Government, all three conditions must be met." 1983 V.I. LEXIS 59, *7-8. Hence, even though courts may exercise discretion in accepting claims filed outside the 90-day window, they may only do so if all three requirements of § 3409(c) are strictly complied with, including the requirement that the Government have actual knowledge of the facts constituting the claim within that initial 90 days.

Hansen has not complied with the requirements of § 3409(c). He has not offered proof showing that the government had actual knowledge of the facts constituting his Count III within the initial filing deadline for that claim, and has not provided a reasonable excuse as to why he did not file his Count II claim within the initial 90 days. Also, this is not a case where equitable tolling while a claimant pursued administrative remedies would place Hansen's filing of Count II within deadlines, as Hansen did not even begin to pursue an appeal with PERB until after 90 days from the accrual of that claim. These procedural defects, along with Hansen's failure to meet the more general filing requirements of §§ 3409 and 3410, tips the balance in favor of the GVI and requires this Court to dismiss Plaintiff's tort claims. It would be inimical to the Virgin Islands' "strong policy," that tort actions be prosecuted diligently to allow a claim to proceed where a party not only filed his claims late, but also failed to satisfy the requirements of § 3409(c).

The Court must dismiss Counts II and III as against GVI and VIGHHFC for lack of subject matter jurisdiction.[21]

Plaintiff's Tort Claims Must Be Dismissed as to JFL

Defendants argue that, "because Count III . . . should be dismissed as to the [Government] and VIGHHFC, it should also be dismissed as to JFL which has no separate legal identity and no separate judgment can be entered as to JFL [sic]." In

[21] The Court is mindful that, when raising the issue of its own jurisdiction *sua sponte*, it must give the party asserting jurisdiction an opportunity to be heard on the issue. *Brunn v. Dowdye*, 51 V.I. 899, 904-5, 2013 V.I. Supreme LEXIS 72, *10; *Mendez v. Gov't of the V.I.*, 56 V.I. 194, 205, 2012 V.I. Supreme LEXIS 7. However, like the plaintiff in *Brunn*, Hansen has had full opportunity to respond to Defendants' Motion to Dismiss Count III and Defendants' jurisdictional challenge, including briefing the issue and submitting an affidavit. By raising *sua sponte* the issue of jurisdiction with relation to Count II—a separate tort claim, but one filed under the exact same circumstances—the Court is not raising any issue separate from the one the parties addressed with relation to Count III. Hansen then has been provided with an opportunity to be heard.

Gov't Emples. Ret. Sys. of the V.I. v. Juan F. Luis Hosp. & Med. Ctr., the Superior Court for the Division of St. Croix addressed whether JFL could sue or be sued in its own capacity, and determined it could not. 2016 V.I. LEXIS 128, *4-9, 13; *see also Titan Med. Group v. Governor Juan F. Luis Hosp. & Med. Ctr.*, 2015 V.I. LEXIS 79, *9 (V.I. Super. Ct.) ("[A] suit against [JFL] is a suit against the Government of the Virgin Islands.") Finding that JFL could not be sued, the court found that it was not a proper defendant in that case. 2016 V.I. LEXIS 128 at *9-10 ("[B]ecause JFL is a public healthcare facility without the authority to sue or be sued and not having a recognized legal existence, it cannot properly be named as defendant in this lawsuit."). The court dismissed JFL as a defendant, and allowed the plaintiff there to amend its complaint to name GVI and VIGHHFC as defendants.

This Court finds the court's reasoning in *Gov't Emples. Ret. Sys.* to be persuasive. JFL must be dismissed as a defendant in this case. Because the Court does not have jurisdiction over the remaining Defendants, Hansen's tort claims must be dismissed in their entirety. His Motion to Allow Filing of Tort Claim Under Count III must be denied.

Defendants' Rule 12(b)(6) Motions Are Moot

Because the Court finds it does not have jurisdiction over Counts II and III and will dismiss those claims, it need not reach Defendants' 12(b)(6) challenges as those challenges are moot. [22,23]

CONCLUSION

Hansen's filing of his tort claims did not comply with the procedural requirements of the Virgin Islands Tort Claims Act, which compliance is necessary for a court to have jurisdiction over tort claims against the government. Even though under the savings clause of 33 V.I.C. § 3409(c) a court has some discretion in allowing claims that did not comply with more general requirements of the Act, that clause itself has procedural requirements that must be strictly followed in order for a court

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[22] *Der Weer v. Hess Oil V.I. Corp.*, 60 V.I. 91, 94 (V.I. Super. Ct. 2014) ("A motion is moot when a determination is sought on a matter which, when rendered, cannot have any practical effect on the existing controversy. In that instance, the motion should be dismissed or denied as moot because a decision will have no practical impact in the case however the court decides the motion.") (citing *Carlock v. Kmart Corp.*, 227 Ga. App. 356, 361 (1997) (citing Black's Law Dictionary (5th ed. 1979))) (internal quotations omitted).

[23] The Court notes, however, that even if it were to proceed to Defendants' rule 12(b)(6) challenges, there is no common law claim for wrongful discharge under Virgin Islands law. *Webster v. CBI Acquisitions, LLC*, 2012 V.I. LEXIS 9, *4 (V.I. Super. Ct.); *see also Rennie v. Hess Oil V.I. Corp.*, 62 V.I. 529, 540, (V.I. 2015) (the Wrongful Discharge Act abolished the common law employment-at-will doctrine). Also, to the extent Hansen argues that his Count II claim was instead a due process claim arising from his "right to continued employment", Opp'n to Joint Mot. to Dismiss Count II of the Am. Compl., the Court rejects that argument as Count II clearly states a "wrongful discharge" claim, and the Court notes that only regular employees of the V.I. Government "have a statutorily created property interest in continued employment, protected by due process." *Fleming v. Cruz*, 62 V.I. 702, 715 (V.I. 2015) (citing 3 V.I.C. § 530 and *Iles v. de Jongh*, 638 F.3d 169, 174 (3rd Cir. 2011).

to do so. Hansen has failed to satisfy the requirements of § 3409(c), and so the Court may not exercise its discretion.

The Court lacks jurisdiction over Hansen's tort claims as against the Government and VIGHHFC. Because the remaining Defendant, JFL, cannot be sued in its own capacity, the claims as against JFL must be dismissed. The Court therefore must dismiss Counts II and III as to all Defendants.

Defendants' Motion to Dismiss Count III shall be granted, and Plaintiff's Motion to Allow Filing of Tort Claim shall be denied. Defendants' Motion to Dismiss Count II is moot and shall be denied.

An Order consistent with this Memorandum Opinion will be entered.

DATED: June 22, 2018

Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court

BY:
LORI BOYNES TYSON
Chief Deputy Clerk 6/22/18