

**IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS
DIVISION OF SAINT CROIX**

JASMINE WALTERS,

Plaintiff,

vs.

**K-MART CORPORATION and CARMELO
RIVERA, COMMISSIONER, VIRGIN ISLANDS
DEPARTMENT OF LABOR, GOVERNMENT
OF THE VIRGIN ISLANDS,**

Defendants.

) **CIVIL NO. 294/1998**

) **PETITION FOR WRIT
OF REVIEW OF
AGENCY DECISION**

) **NOT FOR PUBLICATION**

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MEMORANDUM OPINION

(October 4, 2000)

THIS MATTER is before the Court on petition for a writ of review to overturn a decision by the Labor Department ("Labor" or "Agency") that Petitioner was lawfully discharged under Title 24, Section 76 of the Virgin Islands Code. For the following reasons, the Agency's decision will be affirmed.

FACTS AND PROCEDURAL POSTURE

Petitioner Jasmine Walters ("Walters" or "Petitioner") was terminated after three years of employment with Respondent K-mart ("K-mart"). The reason cited for her termination was excessive absences. Labor determined that Walters' discharge was not wrongful as defined in the Virgin Islands Wrongful Discharge Act and dismissed the case with prejudice.

STANDARD OF REVIEW

An agency determination is upheld if supported by substantial evidence on the record. Virgin Islands Code Ann. tit. 24, § 70 (b) (1997); *Thomas v. Abamar-BB*, 35 V.I. 117, 934 F. Supp. 164 (D.V.I. 1996). Substantial evidence has been defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Pierce v. Underwood*, 487 U.S. 552, 565, 108 S. Ct. 2541, 101 L. Ed. 2d 490 (1988). Further, an agency's findings of fact are reviewed under the clearly erroneous standard and upheld unless the court has "the definite and firm conviction that a mistake has been committed." *Coalition v. State Bd. of Educ.*, 90 F. 3d 752 (3d Cir. 1996)(quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S. Ct. 525, 92 L. Ed. 746 (1948)).

DISCUSSION

Walters claims the Agency's decision was erroneous in several respects: 1) relying on "inaccurate" findings of fact not supported by substantial evidence; 2) excluding testimony by the petitioner as hearsay; and 3) failing to take judicial notice of testimony from an earlier proceeding.

1. Agency's Findings of Fact

Under the Wrongful Discharge Act, an employer may lawfully terminate an employee for any of nine enumerated reasons.¹ Virgin Islands Code Ann. tit. 24, § 76. Labor's decision that

¹ (a) Unless modified by union contract, an employer may dismiss any employee:
(1) who engages in a business which conflicts with his duties to his employer or renders him a rival of his employer;
(2) whose insolent or offensive conduct toward a customer of the employer injures the employer's business;
(3) whose use of intoxicants or controlled substances interferes with the proper discharge of his duties;
(4) who wilfully and intentionally disobeys reasonable and lawful rules, orders, and instructions of the employer; provided, however, the employer shall not bar an employee from patronizing the employer's business after the employee's working hours are completed;
(5) who performs his work assignments in a negligent manner;
(6) whose continuous absences from his place of employment affect the interests of his employer;
(7) who is incompetent or inefficient, thereby impairing his usefulness to his employer;
(8) who is dishonest; or
(9) whose conduct is such that it leads to the refusal, reluctance or inability of other employees to work with him.

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Walters' termination was within the lawful grounds for discharge was based on its findings that she was absent from work on numerous occasions without notifying her employer and had received repeated warnings; and that Walters was aware that this conduct would be grounds for termination under K-mart's policies, as outlined in the employee handbook which she acknowledged receiving.² There is ample evidence in the record to support these findings. Walters received three warnings regarding her absenteeism, dated Feb 5, 1996, March 4, 1996 and April 16, 1999.³ These warnings were signed by Sharon Benjamin, a former K-mart supervisor who did not testify at the wrongful discharge hearing. Magnolia Duff, an immediate supervisor, testified that she was also aware of the absences and had discussed the problem with Walters and Benjamin, who was responsible for preparing the warnings.⁴ Duff further testified that Walters failed to call in when absent, as noted on time records.⁵ Another manager, Nina Fabio, further testified that the time records, personnel warnings and absentee reports were routinely kept as part of K-mart's regular business practice.⁶

Petitioner concedes she was absent on the days in question⁷ but disputes other testimony and evidence that the warnings were prepared at the time of the incidents, rather than in contemplation of the discharge, and that she failed to notify supervisors when absent as company policy required. Walters' arguments would require this Court to weigh conflicting testimony and make credibility determinations. This is not the province of a reviewing court, but is better left to the trier of fact who had an opportunity to view the witnesses. There being no clear error, the agency's factual findings will be left undisturbed.

² Mem. Op. at 3.

³ Resp't Ex. A, B, and C; Tr. at 19-23.

⁴ Tr. at 11-12.

⁵ Tr. at 83-85.

⁶ Tr. at 18-25.

⁷ Tr. at 65.

2. Hearsay Testimony

Additionally, the Administrative Law Judge (ALJ) properly precluded Walters from testifying as to the substance of testimony by two former K-mart employees at an earlier proceeding, which she argues could have established that the absentee warnings were not prepared at the time of the incidents.⁸ Petitioner relies on several evidentiary rules to support her contention that such testimony should have been admitted. However, Petitioner's hearsay testimony cannot be saved by the former testimony exception because she failed to establish the threshold requirement that the declarants were unavailable as defined in the rules. *See* Fed. R. Evid. 804 (b), (a)(5). In this regard, Petitioner does not indicate what, if any, efforts were expended to attempt to secure the witnesses' testimony, but relies on a bald statement that one declarant now lives off-island and the other, while still a resident of St. Croix, probably would not have admitted her previous testimony. This is simply not enough to establish unavailability for the purposes of admitting former testimony. Petitioner's reliance on Federal Rules of Evidence 803(8) (public records and reports) and 801 (d)(2)(admission by party opponent) is also misplaced because they are inapplicable to the facts presented. *See e.g. United States v. Sokolow*, 91 F. 3d 396 (3d Cir. 1996); *Ryder v. Westinghouse Elec. Corp.*, 128 F. 3d 128, 132 (3d Cir. 1997) (discussing application of admission by party opponent rule).

This Court reviews evidentiary rulings for abuse of discretion and affirms unless "arbitrary and irrational." *Ryder*, 128 F. 3d at 132. Finding no abuse of discretion, the Agency's evidentiary ruling is affirmed.

3. Failure To Take Judicial Notice

Finally, Walters argues the ALJ erred in failing to take judicial notice, *sua sponte*, of the prior testimony noted above. A court may judicially notice facts which are not in reasonable dispute and which are readily verifiable. Fed. R. Evid. 201 (c). However, this power is discretionary and

⁸ In her offer of proof, Petitioner noted that the two former employees, Sharon Benjamin and Eileen Schuster, testified at an Unemployment Compensation hearing that the warnings were prepared only in contemplation of her discharge. This is in conflict with other testimony presented at the wrongful discharge hearing.

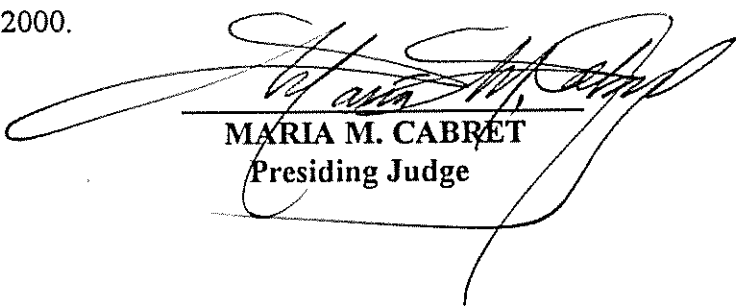
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becomes mandatory only where judicial notice is requested by a party *and the necessary information provided*. Fed. R. Evid. 201 (d) (emphasis added). In the instant case, Walters provided no information (i.e. a certified transcript) to the ALJ to provide a basis for judicial notice, but sought only to testify as to what she recalled the other witnesses saying at the earlier proceedings. Under those circumstances, judicial notice would have been improper because the statements surrounded material issues in dispute; the testimony and credibility of the declarants could be subject to attack; and the accuracy of Walters' recollection could reasonably be questioned. Moreover, the ALJ is not bound to accept testimony from other proceedings. *See* WEINSTEN'S FEDERAL EVIDENCE § 201.12 (3) (2d. ed. 2000).

CONCLUSION

For the foregoing reasons, the Agency's determination that Walters was lawfully discharged is affirmed.

DATED: October 4, 2000.



MARIA M. CABRET
Presiding Judge