

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

AYINDE S. HISS,	)	
	)	
Plaintiff,	)	CIVIL NO. SX-15-CV-104
	)	
v.	)	ACTION FOR DAMAGES
	)	
COMMERCIAL SECURITY, LLC., INC.,	)	
	)	
Defendant.	)	(JURY)

MEMORANDUM OPINION AND ORDER

THIS MATTER is before the Court on Defendant Commercial Security, LLC., Inc.'s ("Commercial") Motion to Dismiss, or in the Alternative Motion for Summary Judgment ("Motion"), filed December 18, 2015 "pursuant to Rules 12 and 56 of the Federal Rules of Civil Procedure;" and Plaintiff's Opposition thereto ("Opposition"), filed January 16, 2016. For the reasons that follow, the Court grants in part and denies in part Defendant Commercial's Motion.

BACKGROUND

This action stems from Plaintiff's verbal contract for employment with Defendant to provide security services at the main building of the Department of Human Services and at the Day Care Facility in Estate Profit. Amended Complaint ¶ 5. Plaintiff alleges that he performed all of his job duties satisfactorily for over a year and was well-liked by the other staff. *Id.* ¶ 6. Plaintiff alleges he was accused of burning paper and destroying the Log book for Commercial and tossing it over a fence into the adjacent Metro Motors Area; as a result of this accusation, the Director of Commercial, Mr. Dean Scarbriel, told Plaintiff not to return to work until he investigated and resolved the issue. *Id.* ¶ 7. However, Plaintiff alleges he was never questioned, investigated, written up, or given further information regarding the investigation. *Id.* ¶ 8. Plaintiff alleges he attempted to inquire about when he could return to work, but that despite his inquiries, he never heard from Commercial, and was constructively terminated, without reason, after four weeks. *Id.* ¶¶ 8-12. Plaintiff alleges that Defendant never spoke with Plaintiff about the accusations, but did tell others that Plaintiff had burned the book and tossed it over the fence. *Id.* ¶ 14.

Plaintiff alleges five counts against Defendant: (1) Wrongful Discharge; (2) Breach of the Duty of Good Faith and Fair Dealing; (3) Intentional Infliction of Emotional Distress; (4) Negligent Infliction of Emotional Distress; and (5) Defamation. Plaintiff requests liquidated

damages based on the value of the contract, pre and post judgment interest, punitive damages, attorneys' fees and costs.

LEGAL STANDARD

The Supreme Court of the Virgin Islands has stated that to survive a motion to dismiss on the pleadings, a complaint must set forth sufficiently well-pleaded factual allegations that, assuming their veracity, plausibly give rise to a reasonable inference that the defendant is liable and the plaintiff is entitled to relief. *Joseph v. Bureau of Corrections*, 54 V.I. 645, 649-650 (V.I. 2011); *see also Pollara v. Chateau St. Croix, LLC*, 58 V.I. 455, 471-472 (V.I. 2013); *Fleming v. Cruz*, 62 V.I. 702, 713-14 (V.I. 2015).

When matters outside the pleadings are presented and not excluded by the court, the motion is treated as one for summary judgment. *Island Tile & Marble, LLC v. Bertrand*, 57 V.I. 596, 612 (V.I. 2012). A moving party will prevail on a motion for summary judgment where the record shows that there is no genuine issue of material fact and that the movant is entitled to judgment as a matter of law. *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008). The court must determine whether there exists a dispute as to a material fact, the determination of which will affect the outcome of the action under the applicable law. *Id.*; *see also Perez v. Ritz-Carlton (Virgin Islands), Inc.*, 59 V.I. 522, 527 (V.I. 2013). Such a dispute is genuine if the evidence is such that a reasonable trier of fact could return a verdict for the nonmoving party. *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 391-92 (V.I. 2014). The court considers the pleadings and full factual record, drawing all justifiable inferences in favor of the nonmoving party, to determine whether the movant has met its burden of showing that there is no unresolved genuine issue of material fact. *Williams*, 50 V.I. at 194-95 (collecting cases).

Here, the Court will not convert this motion to one for summary judgment. The Court will simply consider the pleading on its face without reference to any extrinsic evidence.

DISCUSSION

Defendant Commercial contends that "Plaintiff's Amended Complaint fails to state a claim upon which relief can be granted and is otherwise futile." Motion, at 1. The Court considers each Count *ad seriatim*.

Count I - Wrongful Discharge

The Virgin Islands Wrongful Discharge Act (“VIWDA”) is a “statutory abrogation of the common law rule of at-will employment.” *Pedro v. Ranger American of the Virgin Islands, Inc.*, 2015 V.I. Supreme LEXIS 19, *11 (V.I. 2015).

The plain language of the VIWDA unequivocally expresses the Legislature's intent to abolish the common-law employment-at-will doctrine by creating a presumption that any employment discharge is wrongful, stating that any employee discharged for reasons other than those stated in subsection (a) of this section [24 V.I.C. § 76]¹ shall be considered to have been wrongfully discharged.

Id. (internal quotations omitted).²

A formal termination of employment is not required to maintain an action under the VIWDA. Rather, it is sufficient if the employer's words or actions “would logically lead a prudent person to believe his tenure had been terminated.” *Id.* at *14³ (accord *Rennie v. Hess Oil V.I. Corp.*, 62 V.I. 529, 546 n.11 (V.I. 2015)).

¹ The VIWDA states: (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 willfully 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. 24 V.I.C. § 76(a)

² The Supreme Court explained:

Inasmuch as the VIWDA creates a statutory presumption that an employment discharge is wrongful, requiring a plaintiff to specifically plead and prove that he was wrongfully discharged (as opposed to simply discharged) would require a plaintiff to essentially establish a negative — that he wasn't discharged for one of the permissible grounds under the VIWDA. Rather, the permissible grounds for discharge under the VIWDA are more appropriately considered affirmative defenses that must be raised by a defendant in its answer, as a plaintiff is not required to anticipate in his complaint any affirmative defenses [the defendant] might raise in its answer.

Ranger American, 2015 V.I. Supreme LEXIS 19, *12 (internal quotations omitted).

³ “Although the word ‘discharge’ is not defined for the purposes of the VIWDA, interpreting 24 V.I.C. § 76 to require a formal termination would lead to the absurd result of allowing an employer to avoid liability by doing exactly what *Pedro* alleges *Ranger American* did here — failing to schedule him for additional shifts without explanation. Following this interpretation would allow employers to indirectly terminate an employee in a manner that is inconsistent with the express purposes and mandates of the VIWDA. To construe the VIWDA as allowing such a practice would be contrary to the canons of statutory construction.” *Id.* at *13 (citing *Peters v. People*, 60 V.I. 479, 483 (V.I. 2014)).

The facts of *Ranger American* are akin to the facts of the case at bar. In *Ranger American*, the plaintiff was not required to plead that the defendant “formally terminated him in order to maintain a cause of action for wrongful discharge under the VIWDA” and the plaintiff’s “proposed allegation that defendant failed to schedule him for additional shifts after October 1998 sufficiently alleged a discharge within the meaning of the VIWDA and plausibly state[d] a claim on which relief may be granted.” *Id.* at *14-15.⁴

Likewise, here, Plaintiff has adequately pled a claim for wrongful discharge in that he has alleged that Defendant simply failed to place him on the schedule to work additional shifts; and that after four weeks of waiting to be scheduled for work, he was, in fact, constructively discharged. Defendant’s Motion will be denied as to Count I.

Count II - Breach of Duty of Good Faith and Fair Dealing

The Virgin Islands Supreme Court has held that:

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. A successful claim ... requires proof of acts amounting to fraud or deceit on the part of the employer.

Chapman v. Cornwall, 58 V.I. 431, 442 (V.I. 2013) (internal citations and quotations omitted).⁵

“Fraud means an intention to deceive,” while deceit involves “[t]he act of intentionally giving a false impression.” *Edwards v. Marriott Hotel Mgmt. Co. (V.I.), Inc.*, 2015 V.I. LEXIS 13,

⁴ Defendant argues that Plaintiff cannot maintain a claim for wrongful termination because he was never terminated, as evidenced by the Virgin Islands Department of Labor inquiry into unemployment benefits. *See* Motion, Exhibit A. The Court does not rely on this extrinsic evidence in its decision to deny the motion to dismiss.

⁵ In *Chapman*, without conducting a *Banks* analysis, the Supreme Court adopted RESTATEMENT (SECOND) OF CONTRACTS § 205 as imposing duties of good faith and fair dealing on contracting parties, stating that “Restatements of the Law may apply to the Virgin Islands through 1 V.I.C. § 4 subject to the authority of this Court and the Superior Court to shape the common law of the Territory.” 58 V.I. at 442 n. 15. In the absence of a *Banks* analysis, the Court is not bound by the Supreme Court’s adoption of RESTATEMENT (SECOND) OF CONTRACTS § 205 in *Chapman*. *See Gov’t of the Virgin Islands v. Connor*, 60 V.I. 597, 605 n.1 (V.I. 2014). However, like the Superior Court in *Edwards v. Marriott Hotel Mgmt. Co. (V.I.), Inc.*, 2015 V.I. LEXIS 13, *10 n. 21 (V.I. Super. Ct. 2015), the Court sees no reason to deviate from the substance of the decision in *Chapman* to the effect that a successful breach of employment contract claim requires proof of acts of the employer amounting to fraud or deceit. *See contra, Merchants Commercial Bank v. Oceanside Village, Inc.*, 2015 V.I. LEXIS 146, *40 (V.I. Super. Ct. 2015) (performing a *Banks* analysis and determining that a different standard represents the best rule for the Virgin Islands, namely that a party breaches the implied covenant of good faith and fair dealing by taking actions that deprive another party of the benefits for which it had bargained).

*11-12 (V.I. Super. Ct. 2015). Here, Plaintiff's Amended Complaint contains allegations: that the parties entered into a verbal contract for employment (§ 5); that Defendant's representative "told Plaintiff not to return to work until he cleared the issue that Plaintiff was being accused of" (§ 7); that "Plaintiff never got questioned, investigated, written up, or received any further information regarding any internal investigation" (§ 8); that "Plaintiff was never advised of when to return to work" (§ 9); that Plaintiff attempted to find out when he could return to work, but "was only told that he needed to wait to hear from Commercial Security's owners about the next step" (§ 10); that Plaintiff has never "been told the reason for his termination" (§ 12); and that Defendant did not "afford Plaintiff an opportunity to be heard on the issues regarding his termination" (§ 13).

Accepting the factual allegations of the Amended Complaint as true, Plaintiff has pled sufficient facts to permit a plausible inference of fraud or deceit by Defendant: that is, of "an intention to deceive" or of "intentionally giving a false impression" regarding the Plaintiff's continued employment. At the pleading stage, such allegations are sufficient to survive Defendant's Motion, which will be denied as to Count II.

Count III - Intentional Infliction of Emotional Distress

This Court has previously adopted the provisions of RESTATEMENT (SECOND) OF TORTS § 46 as the best rule for the Virgin Islands with regard to claims alleging intentional infliction of emotional distress ("IIED"). *FirstBank of Puerto Rico v. Prosser*, 2015 V.I. LEXIS 72, *9-12 (V.I. Super. Ct. 2015); *See also Mina v. Hotel on the Cay Time-Sharing Ass'n*, 62 V.I. 220, 235 (V.I. Super. Ct. 2015).

Under Section 46, the tort of intentional infliction of emotional distress is committed when "one who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another.... the actor'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 society."

Id. at *9 (quoting *Edwards v. Marriott Hotel Mgmt. Co. (V.I.), Inc.*, 2015 V.I. LEXIS 13, *24 (V.I. Super. Ct. Jan. 29, 2015); RESTATEMENT (SECOND) OF TORTS § 46, cmt. d); *See also Donastorg v. Daily News Publ. Co.*, 2015 V.I. LEXIS 105, *149 (V.I. Super. Ct. 2015).

Plaintiff merely states that "Defendant's actions have been extreme and outrages [sic] and designed to intentionally inflict emotional distress upon Plaintiff. Defendant's actions did in fact

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inflict severe emotional distress.” Amended Complaint ¶¶ 26-27. Apart from those conclusory allegations, which are not entitled to the assumption of truth,⁶ Plaintiff does not elaborate on the nature or extent of emotional distress he suffered.

Further, the Court finds that an amendment to Count III would be futile because the act of terminating an employee under the factual circumstances alleged cannot rise to the level of an event that would permit a claim for severe emotional distress to stand. The Superior Court has held that “an employer’s exercise of such discretion in dismissing an employee does not rise to the level of conduct 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 society.” *Hodge v. Daily News Publ. Co., Inc.*, 52 V.I. 186, 198-199 (V.I. Super. Ct. 2009).

“The tort of intentional infliction of emotional distress is meant to impose liability for only extreme and outrageous conduct.” *Donastorg v. Daily News Publ. Co.*, 2015 V.I. LEXIS 105, *158. Examples within the Virgin Islands that have been deemed to not state a claim for intentional infliction of emotional distress include (1) termination of an employee; (2) failure to warn firefighters that they are operating in a building containing asbestos; (3) and a financial institution’s alleged breach of its contractual duty of confidentiality and good faith during bankruptcy proceedings and negotiations, concerning a mortgage account with that institution does. *Id.* at *164.

In this case, the Court finds that the allegations of Hiss relative to his termination from employment are insufficient as a matter of law to permit a plausible inference establishing the elements of the tort of intentional infliction of emotional distress. Therefore, Defendant’s Motion will be granted as to Count III, which will be dismissed.

Count IV - Negligent Infliction of Emotional Distress

The Supreme Court of the Virgin Islands has not recognized a claim for negligent infliction of emotional distress (“NIED”). The Superior Court has recognized and defined elements necessary to establish a claim of NIED, as follows:

to prevail on a claim of negligent infliction of emotional distress under a theory that

⁶ See *Joseph v. Bureau of Corrections*, 54 V.I. at 649-50 (citing *Santiago v. Warminster Tp.*, 629 F.3d 121, 130 (3d Cir. 2010)).

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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.

Donastorg v. Daily News Publ. Co., 2015 V.I. LEXIS 105, *185-186.

Here, Plaintiff states that "Defendant's actions all constitute negligent infliction of emotional distress;" and that "As a result of Defendant's conduct, Plaintiff has sustained physical damages as alleged herein." Amended Complaint ¶¶ 30, 31. Plaintiff's sole allegation of suffering emotional distress states: "Defendant's actions did in fact inflict severe emotional distress." *Id.* ¶ 27. These statements are insufficient to state a claim for NIED.

The *Donastorg* court expressed concerns that "emotional disturbance can be too easily feigned or imagined." *Id.* at *175-76. "[A] clear majority of jurisdictions that recognize claims for negligent infliction of emotional distress explicitly require that the alleged emotional distress be serious or severe." *Id.* at *177.

Here, it is not necessary to determine the level of severity of emotional distress alleged in a plaintiff's complaint required for a claim of NIED to survive a motion to dismiss. Suffice it to say that the unenhanced conclusory factual assertions of emotional distress set forth in Plaintiff's Amended Complaint are not entitled to an assumption of truthfulness. As such, the allegations of the Amended Complaint are insufficient to permit a plausible inference of the existence of severe emotional distress required to sustain a claim for NIED. Because the Amended Complaint fails to adequately set forth a factual basis to permit a plausible inference that Plaintiff has suffered severe emotional distress, Plaintiff's Motion will be granted as to Count IV, which will be dismissed.

Count V - Defamation

The Supreme Court of the Virgin Islands has adopted the basic elements for a claim of defamation set forth in the Second Restatement of Torts, post *Banks*. See *Chapman v. Cornwall*, 58 V.I. at 444 (citing *Kendall v. Daily News Pub. Co.*, 55 V.I. 781, 787 (V.I. 2011); see also *Joseph v. Daily News Publishing Co., Inc.*, 57 V.I. 566, 585-588 (V.I. 2012)). The elements are: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3)

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fault amounting to at least negligence; and (4) either the actionability of the statement irrespective of special harm or the existence of special harm caused by the publication. *Joseph*, 57 V.I. at 585-586.

Plaintiff states: "Defendant, with complete disregard for Plaintiff's reputation in this small community, communicated with others through its authorized agents the unfounded and untrue accusation that Plaintiff burned and destroyed property and threw the property over the fence into Metro Motors yard, knowing said accusations were untrue. Defendant's lies have irreparably damaged Plaintiff's reputation and standing, as well as his ability to obtain employment in the community." Amended Complaint ¶¶ 34-35.

Defendant argues correctly that the Amended Complaint includes "no specification as to whether the alleged defamation was libel or slander, who purportedly on behalf of CSS (a corporation) made an allegedly defamatory communication and to whom, when such an alleged communication occurred, the specific substance of the alleged communication, and in what precise manner Plaintiff has been 'irreparably damaged.'" Motion, at 8.

However, "the Complaint is not the proper forum in which to attempt to introduce evidence. ...the purpose of the complaint is not to prove the case, but simply to state a clear, plausible claim for relief which places the adverse party and the Court on reasonable notice." *George v. Wenhaven, Inc.*, 2012 V.I. LEXIS 66, *15 (V.I. Super. Ct. 2012). Arguably, the bare bones allegations of the Amended Complaint fail to meet the applicable "general rules of pleading set forth in Rule 8 of the Federal Rules of Civil Procedure,"⁷ which requires a "short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2).

The Amended Complaint must "present sufficient factual matter which, when accepted as true, would state a claim to relief that is plausible on its face. ... Although under Rule 8 of the Federal Rules of Civil Procedure, [Plaintiff] need not make detailed factual allegations, he was required to present 'more than an unadorned, the-defendant-unlawfully-harmed-me accusation.'" *Fleming v. Cruz*, 62 V.I. at 714 (citing *Iqbal*, 556 U.S. at 678). Plaintiff's Amended Complaint fails to the extent that it "contain[s] labels and conclusions, and baldly assert[s] that the defendants'

⁷ *Brady v. Cintron*, 55 V.I. 802, 822 (V.I. 2012).

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actions resulted in unlawful harm without the ‘factual enhancement[s]’ needed in order to support such claims.” *Id.*

However, “[a] motion to dismiss a complaint should be denied if the factual allegations are ‘enough to raise a right to relief above the speculative level.’” *Bizi, LLC. v. Olive*, 2015 V.I. LEXIS 57, *1 (V.I. Super. Ct. 2015) (citing *Twombly*, 550 U.S. at 555). Here, the allegations of defamation are wholly unspecific regarding the details of “who communicated what to whom when.” Yet, at the pleading stage, because Defendant will have a full opportunity to develop in discovery exact dates, times, and specifics as to the substance of alleged defamatory communications, and the identity of persons on each end of those purported communications alleged to have published defamatory communications, the Court finds that Plaintiff’s cursory allegations are sufficient enough to put Defendant on notice of its potential liability, and will deny Defendant’s Motion as to Count V.

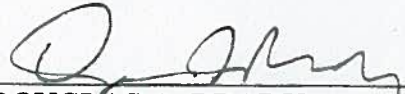
On the basis of the foregoing, it is hereby

ORDERED that Defendant Commercial’s Motion to Dismiss Plaintiff’s Amended Complaint is DENIED as to Counts I, II and V. It is further

ORDERED that Defendant Commercial’s Motion to Dismiss Plaintiff’s Amended Complaint is GRANTED as to Counts III and IV. It is further

ORDERED that Count III and Count IV of Plaintiff’s Amended Complaint against Defendant Commercial, alleging Intentional Infliction of Emotional Distress and Negligent Infliction of Emotional Distress are DISMISSED WITH PREJUDICE.

April 8, 2016

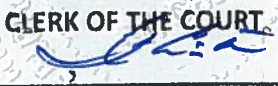

DOUGLAS A. BRADY
Judge of the Superior Court

ATTEST:

ESTRELLA GEORGE
Acting Clerk of the Court

By: 
Court Clerk Supervisor

CERTIFIED A TRUE COPY

DATE: April 11, 2016
ESTRELLA H. GEORGE
ACTING CLERK OF THE COURT
BY: 
COURT CLERK