

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

GERALD E. HODGE, JR.,	)	
	)	CIVIL NO. ST-09-CV-94
Plaintiff,	)	
	)	ACTION FOR EMPLOYMENT
v.	)	DISCRIMINATION
	)	
VIRGIN ISLANDS WATER AND POWER	)	JURY DEMAND
AUTHORITY and BOARD OF	)	
DIRECTORS,	)	
	)	
Defendants.	)	
_____	)	

MEMORANDUM OPINION

THIS MATTER is before the Court on several motions brought on behalf of the Virgin Islands Water and Power Authority and the Board of Directors. On behalf of the Board of Directors, Defendants' counsel has filed a Motion to Dismiss Defendant Board of Directors, Motion to Amend Motion to Dismiss Board of Directors, Amended Motion to Dismiss Board of Directors, and Motion to Deem Conceded the Amended Motion to Dismiss. On behalf of the Virgin Islands Water and Power Authority, Defendants' counsel has filed a Motion to Dismiss and Motion to Deem Conceded the Motion to Dismiss. Defendants Board of Directors ("the Board") and the Virgin Islands Water and Power Authority ("WAPA") are represented by Loreli Farrington, Esq. and Mark Kragel, Esq. Plaintiff Gerald E. Hodge, Jr. ("Hodge") is represented by Archie Jennings, Esq. For the reasons stated below, the Court will grant and deny the pending motions as described more particularly below.

BACKGROUND

Hodge is a citizen of the United States and a practicing Rastafarian who expresses his beliefs by wearing his hair in dreadlocks. (Compl. ¶ 2.) He has been employed for more than

fifteen years by WAPA as a maintenance mechanic in the water distribution section of the power facility in St. Thomas, Virgin Islands. (*Id.* ¶ 3.) Hodge is in a senior position, and by virtue of his experience is in a position to serve as an acting supervisor with the attendant higher wages and benefits. (*Id.* ¶ 9.) However, his supervisor continued to assign less senior personnel to act when he was absent, and also assigned fewer overtime pay assignments than all other employees in his section. (*Id.*)

Hodge made numerous complaints about this unequal treatment and questioned whether his religious beliefs were the underlying reasons for the practice. (*Id.* ¶ 10.) Hodge tried various means to address this matter, but no action was ever implemented by WAPA to assure that he would receive equal treatment. (*Id.* ¶ 11.) Hodge filed a complaint with the Equal Employment Opportunity Commission (“EEOC”), and was given a right to sue letter on November 25, 2008. (Compl. Attach. 2.) On February 25, 2009, Hodge filed the instant lawsuit. In his complaint, Hodge alleges that he has been injured and that he suffered a loss of esteem, loss of income, humiliation and other damages. (*Id.* ¶¶ 13, 19.) He sues under Title VII of the Civil Rights Act of 1964 in Counts I and II, and for violation of his constitutional rights under Count III. (Compl. ¶¶ 15, 18, 22.) Hodge requests actual compensatory damages and punitive damages in his complaint.

On May 18, 2009 and July 30, 2009 WAPA filed a Motion to Dismiss and Motion to Deem Conceded the Motion to Dismiss respectively. The Board filed a Motion to Dismiss Defendant Board of Directors on July 13, 2009. A Motion to Amend Motion to Dismiss Defendant Board of Directors and Amended Motion to Dismiss Defendant Board of Directors were filed on July 15, 2009. Finally on August 17, 2009 the Board filed a Motion to Deem Conceded the Amended Motion to Dismiss.

I. MOTION TO DEEM CONCEDED THE AMENDED MOTION TO DISMISS AND MOTION TO DEEM CONCEDED THE MOTION TO DISMISS

As a preliminary matter, the Court will deny Defendant WAPA's Motion to Deem Conceded the Motion to Dismiss and the Motion to Deem Conceded the Amended Motion to Dismiss the Board of Directors ("Motions to Deem Conceded"). The record reflects the fact that Plaintiff did not respond to the Motion to Dismiss and that Plaintiff's Opposition to the Motion to Dismiss Board of Directors was filed out of time.¹

Regardless, the fact that a party has not filed a response to a motion to dismiss does not excuse the Court from determining whether the moving party is entitled to the relief requested. *Anchorage Assocs. v. V.I. Bd. of Tax Review*, 922 F.2d 168, 175 (3d Cir. 1990) (the court must determine whether facts entitle moving party to judgment even without an opposition to a motion for summary judgment). *GRS Dev. Co. v. Jarrett*, Civ. No. 596/2001, 2003 WL 21134437, at *2 (Terr. Ct. Apr. 10, 2003) (when a party has filed a Motion to Deem Conceded a Motion for Summary Judgment, "[a] court first must determine whether the moving party is entitled to summary judgment as a matter of law."). Pursuant to LRCi 7.1(e)(3),² the Court is not prohibited from deciding a motion without receiving a response; nevertheless, that is a far cry from the Court deeming that the original motion has been conceded due to the lack of a response. Therefore, the Court will deny the Motions to Deem Conceded.

¹ Hodge filed Plaintiff's Opposition to Motion to Dismiss on October 26, 2009. The Opposition, however, does not address any of the issues raised by Defendants in the Motions to Dismiss. The Court is unclear which motion to dismiss to which Hodge is responding.

² The Federal Rules of Civil Procedure and Local Rules of Civil Procedure are applicable to matters before the Superior Court whenever they are not inconsistent with the Rules of the Superior Court. SUPER. CT. R. 7.

II. MOTION TO DISMISS DEFENDANT BOARD OF DIRECTORS, MOTION TO AMEND MOTION TO DISMISS DEFENDANT BOARD OF DIRECTORS AND AMENDED MOTION TO DISMISS BOARD OF DIRECTORS

A. Standard of Review

Rule 12(b)(1) of the Federal Rules of Civil Procedure permits the Court to assess whether it has subject matter jurisdiction over a case. Essentially, rule 12(b)(1) is “the trial court’s . . . power to hear the case . . . and the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case.” *Mortensen v. First Fed. Sav. & Loan Ass’n*, 549 F.2d 884, 891 (3d Cir. 1977). Although a defendant has not filed a 12(b)(1) motion, the Court is permitted to raise the issue of subject matter jurisdiction *sua sponte*. See *Daily v. City of Phila.*, 98 F. Supp. 2d 634, 636 (E.D. Pa. 2000) (“Lack of subject matter jurisdiction may be raised at any time by the court *sua sponte*.”)

Further, Rule 12(b)(6) of the Federal Rules of Civil Procedure permits dismissal of claims when a complaint has “fail[ed] to state a claim upon which relief can be granted.” As it considers such a motion, the Court will separate the factual allegations from the legal conclusions, and accept the factual allegations as true. *Ashcroft v. Iqbal*, -- U.S. --, 129 S. Ct. 1937, 1949 (2009); *Phillips v. County of Allegheny*, 515 F.3d 224, 231 (3d Cir. 2008). The Court will construe the Complaint in the light most favorable to the Plaintiff. *Phillips*, 515 F.3d at 231. Additionally, the Court will determine whether, “under any reasonable reading of the complaint, the plaintiff may be entitled to relief.” *Id.*

Rule 12(b)(6) motions test the sufficiency of the pleadings and are designed to “screen out cases” in which there is no remedy for the wrong alleged or no relief could possibly be granted. *Port Auth. of N.Y. & N.J. v. Arcadian Corp.*, 189 F.3d 305 (3d Cir. 1999). Rule 12(b)(6) motions to dismiss may allege that the complaint states a legal theory that is not cognizable as a matter of law.

B. Discussion

In the Motion to Amend Motion to Dismiss Defendant Board of Directors, the Board requested leave to amend the Motion to Dismiss Defendant Board of Directors to include the defense of improper service. This is a pro forma motion that should be granted.³

In the Motion to Dismiss Defendant Board of Directors and the Amended Motion to Dismiss Defendant Board of Directors, Defendant contends that Hodge has failed to state a claim upon which relief can be granted against Defendant Board of Directors as a matter of law, and that the Complaint should therefore be dismissed. The Court agrees that the Motion to Dismiss should be granted but, as noted below, the Court does not agree that the Motion to Dismiss the Board of Directors should be granted for the reasons advanced by the Defendant.

The Defendants' contention is that the Board of Directors has delegated the routine operations of WAPA to the Executive Director, and for that reason, the day to day operations of WAPA are controlled not by the Board of Directors but by the Executive Director. For this reason, the Defendant argues, the functions of the Directors as Board Members are remote from the day to day operation and employment decisions of WAPA.

The Court agrees that the Board of Directors of WAPA is not a proper party to this lawsuit, but not for the reasons suggested by WAPA. Indeed, if it were solely a question about whether or not the Board of Directors had ultimate authority of operating WAPA, it is clear that it does, since the statute allows that the powers of WAPA shall be exercised by a Governing Board consisting of the members of WAPA acting as a board. V.I. Code Ann. tit. 30, § 104(a) (1998). The Virgin Islands Code also provides for the appointment of an Executive Director by the Board of Directors, and allowing by its bylaws for the delegation to the Executive Director or

to other officers, agents or employees such of the powers of WAPA that the Board of Directors deems to be proper. *Id.* § 104(c).

The Board of Directors has supplied to the Court evidence that it has delegated to the Executive Director the powers as general manager and chief executive officer of WAPA who is in general charge of its activities, officers, personnel and property. *See Bylaws of the Virgin Islands Water and Power Authority, Article XXIV.* The Executive Director in turn shall: 1. execute the development of WAPA in accordance with the policies set up by the Governing Board; 2. present policy problems, programs, rules and regulations, and other appropriate matters to the Governing Board; direct and coordinate the activities of the officers, consultants, and other personnel of WAPA; and 3. promote the most effective public relations for the Authority, etc. In addition, the bylaws enumerate powers of the Executive Director in connection with the routine operation of WAPA, but caution that the enumeration of the specific powers is simply by way of example, and is not meant to limit the specific powers of the Executive Director as the chief executive officer of WAPA.

The fact that the Board of Directors may have delegated its powers of running the daily operations to the Executive Director does not lead this Court to conclude that the Board of Directors has divested itself of the control of WAPA. Firstly, the delegation of its powers is limited by such limitations as may be imposed by the Governing Board. *Id.* Because there is no restriction on what limitations may be imposed, it is clear that ultimate control of WAPA is in the hands of the Board of Directors. Also, the statute specifically provides that the powers of WAPA shall be exercised by the Governing Board, and that the Board of Directors may delegate its powers and duties to an Executive Director as it “may deem proper.” 30 V.I.C. § 104(c). Since the final authority to determine what the proper delegation is rests with the Board of Directors, it is the ultimate authority in running WAPA. If the authority to run the public

corporation were the only consideration before the Court, the Court would have to deny WAPA's motion. There are, however, other factors in this case involving the waiver of sovereign immunity by WAPA which leads the Court to believe that the Board of Directors must be dismissed as a party defendant.

WAPA was created in 1964 by the Virgin Islands Legislature as "a public corporation and independent governmental instrumentality" with its own governing board for the purpose of developing and providing water and electric power services for the people of the Virgin Islands. V.I. Code Ann. tit. 30 §§ 103-105; *V.I. Pub. Serv. Comm'n v. V.I. Water & Power Auth.*, 49 V.I. 478, 488 (V.I. 2008). From the time of its inception, WAPA was armed with the power "to sue and be sued in its own corporate name." 30 V.I.C. § 105(4); *Cyprian v. Butcher*, No. SX-08-CV-515, 2010 WL 2025760 at *2 (Super. Ct. May 17, 2010). By including the language allowing WAPA "to sue and be sued," the Legislature waived WAPA's sovereign immunity. *Id.*; see also *Rosa v. V.I. Hous. Auth.*, 43 V.I. 131, 136 (Terr. Ct. 2001) (by conferring the Virgin Islands Housing Authority ("VIHA") with the power to sue and be sued, the government waived sovereign immunity with respect to VIHA as a separate entity from the government). Once one acknowledges that the Government has waived WAPA's sovereign immunity with regards to litigation, one must strictly follow the statute which allows such suits against this independent Governmental entity by suing in accordance with the terms of the statute. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94 (1990); *Vester v. Potter*, No. 1:00 cv 10063, 2003 WL 21314051, at *1 (M.D.N.C. June 4, 2003). The Legislature did not waive sovereign immunity with respect to the Board or otherwise designate that the Board may sue and be sued. 30 V.I.C. § 105(4). Therefore, the Board is an improper party and this Court lacks subject matter jurisdiction to hear a suit against it.

In the Amended Motion to Dismiss Defendant Board of Directors, WAPA contends that service was improper on the Board of Directors, and that the complaint should therefore be dismissed against the Board of Directors pursuant to Fed. R. Civ. P. 12(b)(4). In light of the Court's dismissal of the Board of Directors as an improper party and the Court's lack of subject matter jurisdiction for reasons stated above, it is not necessary for the Court to decide this issue.

III. MOTION TO DISMISS VIRGIN ISLANDS WATER AND POWER AUTHORITY

In the Motion to Dismiss, WAPA contends that Hodge has improperly served process on WAPA, has failed to notify WAPA of the commencement of an action against it, has failed to request waiver of service and that the Complaint should therefore be dismissed without prejudice. The Court agrees with WAPA and will dismiss the Complaint without prejudice. The Court will allow Hodge thirty (30) days from the date of this Memorandum Opinion and Order to properly serve WAPA with a copy of the summons and Complaint.

WAPA's assertion is that Hodge has failed to serve process on WAPA in accordance with the requirements under Fed. R. Civ. P. 4(h) which, provides for personal service of process rather than by certified mail, the method that Hodge chose. In absence of sufficient service of process, WAPA further asserts that Hodge has failed to notify WAPA that an action had been commenced. Lastly, WAPA contends that Hodge has failed to request waiver of service in compliance with Fed. R. Civ. P. (4)(d)(1)(A)(ii) which provides that the notice and request must in writing and addressed to an officer, managing or general agent or any other agent authorized by appointment or by law to receive service of process. The Court agrees with WAPA that Hodge has failed to effectuate proper service of process and has failed to request waiver of service.

Rule 4(j) of the Federal Rules of Civil Procedure provides for service upon a municipal entity. Specifically, Rule 4(j) stipulates that "[a] state, a municipal corporation, or any other

state-created governmental organization that is subject to suit must be served by: (A) delivering a copy of the summons and of the complaint to its chief executive officer” Fed. R. Civ. Pro. 4(j). Since Hodge did not properly serve WAPA by delivering a copy of the summons and complaint to WAPA’s Chief Executive Officer, service on WAPA was improper. Assuming, but not deciding, that Rule 4(h) of the Federal Rules of Civil Procedure applies to WAPA, since by WAPA’s assertion it is a corporation, Hodge did not follow the provisions for waiver of service, under Rule 4(d).⁴ Therefore, the Complaint must be dismissed without prejudice. The Court will allow Hodge to properly serve WAPA within thirty (30) days from entry of the date of this Memorandum Opinion and Order.

CONCLUSION

Defendants’ Motion to Deem Conceded and Motion to Deem Conceded the Motion to Dismiss are denied, since pursuant to LRCi 7.1(e)(3) the Court is not prohibited from deciding on a motion without receipt of Hodge’s response. Defendants’ Motion to Dismiss is granted without prejudice, since Hodge has failed to properly serve process on WAPA, however, the Court will allow Hodge thirty (30) days to properly serve WAPA from the date of entry of this Memorandum Opinion and Order. Defendants’ Motion to Dismiss Defendant Board of Directors pursuant to Fed. R. Civ. P. 12(b)(6) is granted, since the Board of Directors is not a proper party pursuant to the waiver of sovereign immunity of WAPA contained in 30 V.I.C. § 105(4) which provides that WAPA may sue and be sued in its corporate name. Defendants’ Motion to Amend is granted since it is a pro forma motion. Finally, in light of the dismissal of the Complaint

⁴ Specifically, Federal Rule of Civil Procedure Rule 4 provides: “(1) Requesting a Waiver. An individual, corporation, or association that is subject to service under Rule 4(e), (f), or (h) has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may notify such a defendant that an action has been commenced and request that the defendant waive service of a summons. The notice and request must: (A) be in writing and be addressed: (i) to the individual defendant; . . .”

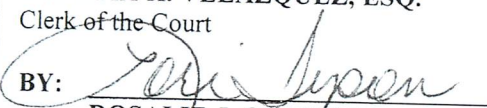
against the Board of Directors, the Defendants' Amended Motion to Dismiss Defendant Board of Directors is granted. A separate order of even date will follow.

DATED: September 20, 2010

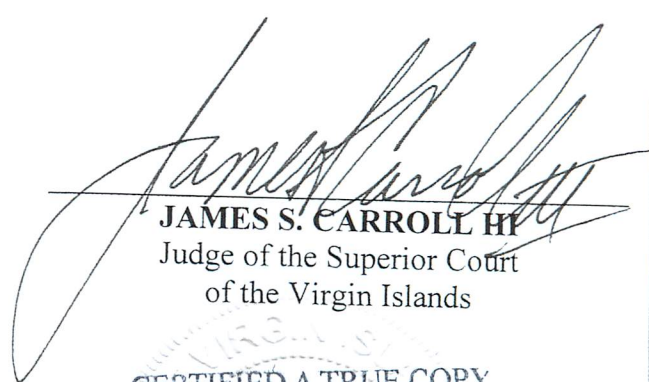
ATTEST:

VENETIA H. VELAZQUEZ, ESQ.
Clerk of the Court

BY:


ROSALIE J. GRIFFITH
Court Clerk Supervisor

9/21/2010


JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

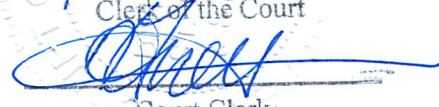
CERTIFIED A TRUE COPY

Date:

9/23/10

Venetia H. Velazquez, Esq.
Clerk of the Court

By:


Court Clerk

