

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

PAUL THOMAS,

Petitioner,

vs.

**WALSH METAL WORKS, INC.,
CARMELO RIVERA, Commissioner of
Labor, GOVERNMENT OF THE
VIRGIN ISLANDS,**

Respondents.

CIVIL NO. 370/1998

**WRIT OF REVIEW OF
AGENCY DECISION**

NOT FOR PUBLICATION

William W. Franks, Esq.
Legal Services of the Virgin Islands
3017 Orange Grove
Christiansted, St. Croix
U.S. Virgin Islands 00820
(Attorney for Petitioner)

Joel H. Holt, Esq.
Holt & Russell
2132 Company Street, Suite 2
Christiansted, St. Croix
U.S. Virgin Islands 00820
(Attorney for Respondent Walsh)

CABRET, J.

MEMORANDUM OPINION

(July 12, 1999)

Paul Thomas was formerly employed as a welder by Walsh Metal Works, Inc. ("Walsh"). After Walsh terminated Thomas, he filed a complaint with the Virgin Islands Department of Labor alleging he was wrongfully discharged. Following a hearing, an administrative law judge ("A.L.J.") rejected Thomas' claims and dismissed his complaint. This Court granted Thomas' Petition for a Writ of Review, and for reasons which follow, the decision of the Department of Labor will be affirmed.

I. STANDARD OF REVIEW

"In reviewing a decision of an administrative agency, the Court is limited to review of the agency's findings to ascertain whether they are based on substantial evidence. The findings of fact of the Commissioner of Labor shall be conclusive if supported by substantial evidence on the record considered as a whole. V.I. Code Ann. tit. 24, § 78 (1997)." The Village, Virgin Islands Partners in Recovery v. Government of the Virgin Islands, Civ. No. 317-1995, 1998 V.I. LEXIS 20, at *2 (Terr. Ct. 1998) (internal citation omitted). "Substantial evidence is 'more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' Universal Camera Corp. v. NLRB, 340 U.S. 474, 477, 95 L. Ed. 456, 71 S. Ct. 456 (1951)." CPS Chemical Co. v. NLRB, 160 F.3d 150, 154 (3rd Cir. 1998).

II. FACTS

The evidence of record shows that in June of 1996, Walsh, a small metal fabricating company, hired Thomas as a welder. According to Walsh's vice-president, Michael Walsh, the company hired Thomas for a 90-day "probationary period" to determine whether "we could all get along[,] . . . if he could meet our standards of performing . . . [and] if he was happy with us."¹

Walsh terminated Thomas at the end of the 90-day probationary period, citing numerous deficiencies in his performance. Michael Walsh testified that Thomas disregarded plant procedures, was inefficient and incompetent, had difficulty dealing with co-workers, was uncooperative, arrived late for work numerous times and on two occasions falsified his time cards. With regard to many of these problems, Michael Walsh elaborated that the company

¹ Dept. of Labor Hr'g Tr. at 44.

"needed to have procedures that ducktailed and coordinated with other procedures."² Thomas often ignored these procedures and the instructions of his supervisors. As a result, Michael Walsh explained, Thomas spent too long completing assignments and the company lost money. In one instance, Thomas failed to perform a job as instructed and it was later returned by the customer who did not pay for the work.

Concerning Thomas' tardiness, Michael Walsh stated that employees were required to start work at 7:00 a.m. Thomas, however, "was in the habit of coming in late."³ On one occasion, Thomas arrived at 7:45 a.m., but stated on his time card that he arrived at 7:00 a.m. On another occasion, Thomas arrived at 7:30 a.m., but stated that he came in at 7:00 a.m.

Walsh's plant manager, Alex Kononoff, also testified concerning problems with Thomas' performance. Like Michael Walsh, Kononoff stated that Thomas often failed to follow instructions and that, as a result, the company lost money. Kononoff elaborated: "the work is quoted so much per given piece, and if there is too much spent for that particular work we lose money. And this would happen time and again. So that -- that was our greatest concern."⁴ Kononoff further testified that because it is a small business, "everybody helps everybody else,"⁵ but on at least two occasions, Thomas refused to work with other employees.

Thomas testified on his own behalf and disputed Walsh's claims concerning his job

² Id. at 13.

³ Id. at 19.

⁴ Id. at 45.

⁵ Id. at 49.

performance. According to Thomas, "every job that was given to me have (sic) been taken care of, finished and sent out and never came back in."⁶ Thomas acknowledged, however, that an unsatisfied customer returned a product which he had welded. Thomas denied Walsh's allegations that he failed to follow instructions and falsified his time cards.

Based on this evidence, the A.L.J. concluded that Walsh "met its burden of proof that the discharge was lawful and [Thomas] was not wrongfully discharged within the meaning of [24 V.I.C. § 76" Thomas v. Walsh Metal Works, Inc., No. WD-300-96-STX, slip op. at 5 (Dep't of Labor 1996) (final decision of A.L.J.).

III. DISCUSSION

Thomas asserts that the A.L.J. erred in dismissing his complaint because there was insufficient evidence establishing Walsh was authorized to terminate his employment and because both the A.L.J. and Walsh applied a different standard to his performance as a probationary employee than they would for a permanent employee. According to Thomas, the evidence shows that Walsh discharged him as a probationary employee for conduct which would not have warranted discharge of a permanent employee. The Court disagrees.

Virgin Islands law expressly authorizes an employer to dismiss an employee for certain types of deficient performance. Specifically title 24, section 76 of the Virgin Islands Code permits an employer to dismiss an employee:

(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;

⁶ Id. at 66.

....
(7) who is incompetent or inefficient, thereby impairing his usefulness to his employer;
(8) who is dishonest[.]

V.I. Code Ann. tit. 24, § 76 (4), (7), (8) (1997).

There is substantial evidence establishing that Thomas' performance deficiencies satisfied a least one of these justifications for discharge. Both Michael Walsh and Kononoff stated that Thomas repeatedly failed to follow instructions and that he was inefficient. According to both witnesses, these deficiencies caused Walsh to lose money on certain projects, which unquestionably impaired his usefulness to the company. In addition, although Thomas denied that he falsified his time cards, Michael Walsh stated that he did commit this dishonest act. This is substantial evidence which supports the A.L.J.'s decision.

Furthermore, although the evidence shows that Walsh hired Thomas on a probationary status, there is no evidence showing the company treated him differently than permanent employees. Indeed, Thomas has cited no evidence which shows that a permanent employee would have been treated differently than he was for the same performance deficiencies. And, although Michael Walsh testified that he considered Thomas' probationary status when he decided to terminate him, he clarified that "there are certain standards under any circumstances, whether that be under probation or not, that an employee would have to meet that Paul did not meet and that I felt it was necessary being in the position that I was, responsible for the business to terminate his employment."⁷ Likewise, Kononoff stated that "any person on the floor [who] doesn't meet the specifi -- doesn't help out, who is a troublemaker, who comes in late, we will

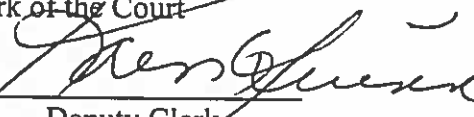
⁷ Id. at 25. (Emphasis supplied).

get rid of him regardless (sic) he's on probation or not."⁸

IV. CONCLUSION

For these reasons, the Court concludes that the A.L.J.'s decision should be affirmed. There is substantial evidence supporting the A.L.J.'s conclusion that Walsh did not wrongfully discharge Thomas. The record contains substantial evidence establishing that Thomas' inefficiencies impaired his usefulness to Walsh and that he was dishonest with his time cards. Furthermore, despite his allegations, Thomas has cited no evidence showing he was treated differently than other employees who were not on probationary status. Accordingly, the A.L.J.'s decision will be affirmed.

ATTEST:
YVONNE V. WESSELHOFT
Clerk of the Court

By: 
Deputy Clerk

Dated: _____


MARIA M. CABRET
Territorial Court Judge

⁸ Id. at 55.