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

PENNY FEUERZEIG,	)	
	)	CIVIL NO. 531/1998
Plaintiff,	)	
	)	
v.	)	ACTION FOR DAMAGES
	)	
INNOVATIVE COMMUNICATIONS	)	JURY TRIAL DEMANDED
CORPORATION and JEFFREY J.	)	
PROSSER,	)	NOT FOR PUBLICATION
Defendants.	)	
	)	

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MEMORANDUM OPINION
(October 5, 2000)

THIS MATTER is before the Court on Defendants' Innovative Communications Corp. ("ICC") and Jeffrey J. Prosser ("Prosser"), motion to dismiss for failure to state a claim and failure to plead fraud with particularity. For the reasons set forth herein, the motion to dismiss will be denied as to the contract, fraud and wrongful discharge claims and granted as to the claims for negligent and intentional infliction of emotional distress.

FACTS

ICC, which is owned by Prosser, purchased the outstanding stock of the V.I. Daily News Publishing Co. The V.I. Daily News Publishing Co. publishes the V.I. Daily News. The plaintiff worked with the V.I. Daily News as its executive editor at the time of the acquisition by ICC. Shortly after the acquisition, Plaintiff was demoted from executive editor to editorial page editor and subsequently resigned, claiming Defendants interfered with her job performance. She brings this action for breach of an implied-in-fact contract, fraud, wrongful discharge, and intentional and negligent infliction of emotional distress. Defendants now seek judgment on the pleadings, claiming the plaintiff has not sufficiently pleaded the essential elements of each claim.

DISCUSSION

In reviewing a motion to dismiss pursuant to Federal Rule of Civil Procedure 12 (b)(6), the Court must determine whether the complaint states facts sufficient to show the existence of a cognizable claim and to adequately notify Defendant of the cause of action alleged. *See Conley v. Gibson*, 355 U.S. 41, 78 S. Ct. 99, 103, 2 L. Ed 2d 80 (1957). While sufficient facts must be pleaded, Rule 12 (b) (6) of the Federal Rules of Civil Procedure must be read with the liberal pleading requirements of Rule 8(a). *See Hans Lollik Corp. v. Gov't of the Virgin Islands*, 17 V.I. 220, 230 (Terr. Ct. 1981). Thus, the claimant need not "set out in detail the facts upon which he bases his claim. To the contrary, the Rules require only a short, plain statement of the claim that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."

Id. (*internal quotation marks omitted*). All allegations of the plaintiff are taken as true, and the plaintiff is given the benefit of all inferences that may be drawn from them. *See Pennsylvania v. Pepsico, Inc.*, 836 F.2d 173, 175-179 (3d Cir.1988). On review, "the issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claim." *Espinosa v. Gov't of the Virgin Islands*, 20 V.I. 78, 83 (Terr. Ct. 1983). A motion to dismiss should, therefore, be denied unless it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Quinones v. United States*, 496 F. 2d 1269, 1271, 1273 (3d Cir. 1974). Dismissal on the pleadings is also appropriate if the allegations fail to meet the elements of a claim. *See In Re Tutu Wells Contamination Litig.*, 846 F. Supp. 1243 (D.V.I. 1993).

1. The Employment and Contractual Relationship

Plaintiff alleges Defendants did not honor oral promises to retain existing management, maintain editorial autonomy, and provide pension benefits, thereby breaching an implied-in-fact employment agreement. Additionally, Plaintiff brings a wrongful discharge claim, alleging the defendants' conduct amounted to constructive discharge. Defendants counter that Plaintiff's employment relationship was with the V.I. Daily News Publishing Co., which owns the Daily News, and not with the defendants, thereby precluding relief on both the contract and wrongful discharge claims. Thus, the issue presented is whether ICC, as a parent company of the V.I. Daily News Publishing Co., and Prosser, as the principal shareholder of ICC, may be regarded as Plaintiff's "employers " for liability purposes in this action.

Generally, the determination of who is an "employer"[1] is based on who has the right to control how the employee performs the job or to direct such performance. *See Tutu Wells*, 846 F. Supp. 1243. Thus, employer status is based on the relationship established through the parties' interactions, regardless of whether that party may or may not be technically described as an "employer." *See Graves v. Lowery*, 117 F. 3d 723, 728 (3d Cir. 1997). In *Graves,* the Court noted that an employment relationship may be found based on the "level of control an organization asserts over an individual's access to employment and the organization's power to deny such access." *Id.*

The Wrongful Discharge Act provides further guidance, defining an employer as "any person acting in the interest of an employer, directly or indirectly." V.I. Code Ann. tit. 24, § 62 (1997). The general provisions of the Virgin Islands Code further defines "person" to include: corporations, companies, associations, joint stock companies, firms, partnerships, and societies, as well as individuals. V.I. Code Ann. tit. 1, § 41 (1995). These definitions appear in line with the common law emphasis on the substance of the relationship to confer employer status, rather than technical labels.

In determining the parties to an employment relationship where a parent company and subsidiary are involved, there is a strong presumption that a subsidiary, even one that is wholly-owned, is a separate and distinct entity from its parent company. *See Marzano v. Computer Science*

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[1] Defendants improperly rely on the definitions of "employer' embodied in ERISA, 29 U.S.C. § 1001. However, Plaintiff's claims in contract and wrongful discharge all derive from the common law and the Virgin Islands Wrongful Discharge statute. Therefore, this Court will apply the common law definitions of employer and will further look to the local statute for guidance.

Corp., Inc., 91 F. 3d 497, 513 (3d Cir. 1996). This presumption is overcome only by a showing that the parent "so dominated the subsidiary that it had no separate existence." *Id.; See Al Tech Specialty Steel v. Allegheny Int'l Corp.*, 104 F. 3d 601, 608 (3d Cir. 1997). "To warrant disregard of corporate separateness, the plaintiff must show more than that the parent owns the majority or all of the stock of the subsidiary and more than that the officers, directors, and managers are identical." *Tutu Wells*, 846 F. Supp. at 1261. Rather, a more searching inquiry of both entities is required to determine whether there is significant control or domination over the subsidiary company. *See* 1 WILLIAM FLETCHER, FLETCHER CYCLOPEDIA OF CORPORATIONS § 41.10 at 587 (1999).

This jurisdiction has applied the "integrated enterprise" test in determining whether both a parent company and its subsidiaries may be deemed a single employer. This test incorporates elements of the above-mentioned right to control test and the alter ego test[2] and requires an assessment of several factors:

> 1. The extent to which the operations of the subsidiary are integrated, merged, or interrelated with the parent corporation;
>
> 2. The extent to which the parent corporation exercised centralized control of the subsidiary's labor relations;
>
> 3. and whether the subsidiary and parent corporations were commonly owned and managed.

See Brown v. Vitelcom, Inc., 47 F. Supp. 2d 595, 599-600 (D.V.I. 1999). In applying the above

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2 Under the alter ego test, the court may pierce the corporate veil and impose liability on a parent company for its subsidiary's conduct if it determines that a corporation is a "mere instrumentality or business conduit of another corporation or person." *See Brown*, 47 F. Supp. 2d at 599; 1 WILLIAM FLETCHER, FLETCHER CYCLOPEDIA OF CORPORATIONS § 41.10 (A finding of alter ego allows courts to disregard the corporate entity in order to prevent injustice and "merely furnishes a means for a complainant to reach a second corporation or individual upon a cause of action that otherwise would have existed only against the first corporation.")

criteria in *Brown*, the District Court held that the following facts established factual issues with regard to the interrelatedness of the two companies: the parent and subsidiary companies' use of consolidated financial statements, the parent's control over labor relations of its subsidiary, shared employees, identity of management, and evidence that the parent company's directors may have given directives or instructions to the subsidiary's employees. *Id.* (denying summary judgment for defendant).

Here, Plaintiff has asserted that Defendant Prosser headed a staff meeting, during which he promised to retain the staff of the Daily News. Plaintiff further alleges that Defendant ICC, through its officers, directed Plaintiff's work and was intimately involved with editorial and management decisions of the Daily News, including vetoing or editing editorials and exercising oversight over the editorial board. Moreover, Plaintiff alleges that Defendant Prosser made editorial decisions, at times calling personally to do so. Plaintiff additionally alleges that Prosser on at least one occasion personally wrote an editorial and ordered it published as an editorial board opinion. These allegations, taken as true, could form a basis for finding that both defendants exercised significant control or direction over Plaintiff's work and that the operations of ICC and its subsidiary, the V.I. Daily News Publishing Co., were so enmeshed that they may be deemed employers.

2. Fraud

Defendants argue that plaintiff's fraud claim fails for failure to allege each element with particularity, as required by Rule 9 (b) of the Federal Rules of Civil Procedure.

A fraud action requires a showing of a knowing false representation of a material fact, made without the intent to act as stated and with the defendant's intention that the statement should be acted upon, and plaintiff's reliance on such statement. *See Voilas v. GMC*, 170 F. 3d 367 (3d Cir. 1999); Restatement (Second) of Torts § 530 (1977). Each element must be specifically pleaded. *See* Fed. R. Civ. P. 9(b); *In Re Tutu Water Wells Contamination Litig*., 78 F. Supp. 2d 456 (D.V.I. 1999).

Plaintiff alleges Defendants made promises of employment with no present intent of honoring such promises. Moreover, Plaintiff asserts that the defendants' promises to retain existing management and maintain editorial freedoms formed the basis for her decision to stay with the company and forego other employment opportunities after the ICC-Daily News acquisition. Thus, Plaintiff has sufficiently pleaded the elements of fraud. However, determinations of Defendants' state of mind and the reasonableness of Plaintiff's reliance on the representations are questions uniquely reserved for the jury and thus may not be resolved at this stage. *See Colon v. Gremar Dev. Co.*, 28 V.I. 83 (Terr. Ct. 1993); *In Re Tutu Water Wells Contamination Litig*., 78 F. Supp. 2d 456 (D.V.I. 1999) (citing *Glatfelter Co. v. Voith, Inc.*, 784 F. 2d 770, 774 (7th Cir. 1986); *Provenz v. Miller*, 102 F. 3d 1478, 1479 (9th Cir. 1996)); Restatement (Second) of Torts § 538 cmts. d, e (1977).

3. Intentional Infliction of Emotional Distress

Next, Defendants seek to have the infliction of emotional distress claim dismissed, arguing that Plaintiff has not pleaded facts sufficient to establish the elements of the claim. To satisfy a prima facie case of intentional infliction of emotional distress, a plaintiff must establish "extreme and outrageous conduct" by the defendant which "intentionally or recklessly causes severe emotional distress to another." Restatement (Second) of Torts § 46 (1965). The conduct complained of 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 cmt. d. Absent such a showing, the plaintiff's claim may not go to a jury. *See Alvarez v. Pueblo Int'l, Inc.*, 24 V.I. 141, 147 (Terr. Ct. 1989) (citing *Moolenaar v. Atlas Motor Inns, Inc.*, 616 F.2d 87, 89 (3d Cir. 1980)); Restatement (Second) of Torts § 46 cmt. j. Indeed, the Third Circuit has noted that "it is extremely rare to find conduct in the employment context that will rise to the level of outrageousness necessary to provide a basis for recovery" for intentional infliction of emotional distress. *Cox v. Keystone Carbon Co.*, 861 F. 2d 390, 395 (3d Cir. 1988). "In the context of a dismissal, it has been noted that while loss of employment is unfortunate and unquestionably causes hardship, often severe, it is a common event and cannot provide a basis for recovery for intentional infliction of emotional distress." *Id.* (internal quotation marks omitted).

In this instance, the plaintiff complains she was transferred from executive editor to editorial page editor and subsequently subjected to constant interference in her job, specifically vetoing her editorial decisions, replacing editorials planned for the Daily News, and requiring prior review of editorials before publication. These facts, even if accepted as true, do not rise to the level of conduct required to state a claim for intentional infliction of emotional distress.

4. Negligent Infliction of Emotional Distress

Defendants additionally argue they are entitled to judgment on the pleadings because the plaintiff has failed to plead sufficient facts to establish all essential elements of this claim.

To withstand a motion to dismiss a negligent infliction of emotional distress claim, the plaintiff is required to plead facts that tend to show that the defendants acted negligently, creating an unreasonable risk which resulted in bodily harm. *See* Restatement (Second) of Torts § 436A; *Seafarer's Int'l Union of N. America v. Thomas*, 40 V.I. 218, 42 F. Supp. 2d 547 (D.V.I. App. Div. 1999) (citations omitted).

Mere emotional disturbance such as "temporary freight, nervous shock, nausea, grief, rage and humiliation," absent a showing of bodily harm, does not establish a cognizable claim for negligent infliction of emotional distress, particularly where the suffering is short-lived. Restatement (Second) of Torts § 436A cmts. a, c (1965); *accord Matczak v. Frankford Candy & Chocolate Co.*, 136 F. 3d 933 (3d Cir. 1997). However, longstanding physical manifestations of emotional disturbance may meet the bodily harm requirements of Section 436A. Restatement (Second) of Torts § 436A cmt. c. Similarly, relying on its interpretation of section 436A and the general provisions of the Restatement in an analogous case, the Third Circuit has defined bodily harm to include physical injuries which resulted solely from emotional disturbance. *See Walters v. Mintec/Int'l*, 758 F. 2d 73 (3d Cir. 1985) (relying on Restatement (Second) of Torts §§ 7, 436 to define physical harm in a strict liability case).

Here, Plaintiff says she suffered "physical injuries", including skin rashes, sleep loss, grinding of teeth, nervousness and irritability as a result of Defendants' conduct. Even if these assertions meet the threshold requirement of physical injury under the Third Circuit's standard, the plaintiff's claim fails to show that the alleged conduct presented an unreasonable risk of bodily harm, an essential element of the claim.

Conduct is "unreasonable" if it creates a risk of physical danger which outweighs its utility or social value. Restatement (Second) of Torts § 291, 293. The risks envisioned by the Restatement generally involve a threat of actual physical danger. *See* Restatement (Second) of Torts § 436 A cmt. a; *see also Lempert v. Singer*, 26 V.I. 326, 344-45 (D.V.I. 1991) (negligent emotional distress claim in context of fraud and misrepresentation); *Thomas*, 40 V.I. at 233 n. 12 (requiring a showing that defendant's conduct places another in danger of his safety, resulting in physical harm); *Hawley v. Dresser Indus., Inc.*, 737 F. Supp. 445, 470-71 (S.D. Ohio 1990) (holding that a negligent emotional distress claim is inappropriate in the employment context).

In the case *sub judice,* Feuerzeig alleges no facts that would allow a reasonable jury to find that the alleged conduct placed her at an unreasonable risk of physical harm as contemplated in the law. Her complaint therefore fails to state a claim of negligent infliction of emotional distress and will be dismissed.

CONCLUSION

Plaintiff's assertions, taken as true and read along with the general pleading requirements of Rule 8(a), sufficiently state a claim in breach of contracts, wrongful discharge, and fraud. However, the claims for negligent and intentional infliction of emotional distress fail to plead facts that would entitle Plaintiff to relief and will be dismissed.

MARIA M. CABRET
Presiding Judge