

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

JACQUELINE J. PAYNE,	)	
Plaintiff,	)	CASE NO.: ST-14-CV-528
	)	
v.	)	ACTION FOR WRONGFUL
	)	DISCHARGE, REINSTATEMENT
THE LEGISLATURE OF THE VIRGIN	)	AND DAMAGES
ISLANDS and SHAWN MICHAEL MALONE	)	
in his Official Capacity as President of the 30th	)	JURY TRIAL DEMANDED
Legislature,	)	
	)	
Defendants.	)	

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendants, the Legislature of the Virgin Islands and Shawn Michael Malone (collectively, “Defendants”), Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim, filed on May 18, 2015.¹ Plaintiff, Jacqueline J. Payne (“Payne”), filed an Opposition to Defendants’ Motion to Dismiss on June 17, 2015.²

In her Amended Complaint, Payne alleges that Defendants wrongfully discharged her from her employment with the Legislature of the Virgin Islands in violation of V.I. CODE ANN. tit. 2, § 47(a). Defendants move this Court to dismiss Payne’s Amended Complaint for lack of subject matter jurisdiction, arguing that 2 V.I.C. § 47(a) and the Legislature’s Employee Manual do not create private causes of action. Defendants also argue that this Court lacks subject matter jurisdiction because Payne’s claim is a nonjusticiable issue.³ Further, Defendants argue that the Amended Complaint should be dismissed for failure to state a claim upon which relief can be granted because “Plaintiff does not otherwise state a wrongful discharge claim because she is not protected by the Virgin Islands Wrongful Discharge Act.” Payne argues that under the test established by the United States Supreme Court in *Cort v. Ash*,⁴ section 47(a) creates an implied private cause of action. Payne also argues that she has a due process right to be heard under section 3 of the Revised Organic Act of 1954, and that her claim under 2 V.I.C. § 47(a) is a justiciable issue because the alleged violation is based on an external rule of law.

The Court having reviewed and considered the parties’ positions, finds that pursuant to the common law approach adopted by the Supreme Court of the Virgin Islands in *Rennie v. Hess Oil V.I. Corp.*,⁵ 2 V.I.C. § 47(a) creates an implied private cause of action for all members of the special class that the statute was intended to benefit. The Court also finds that Payne’s claim that the Legislature has violated 2 V.I.C. § 47(a) is a justiciable issue because the claim is based on an external law that does not require the Court to interfere with the internal workings of a coordinate branch of government. However, the Court finds that Payne’s claim that Defendants have violated its internal Employee Manual is a

¹ Plaintiff is represented by Pedro K. Williams, Esquire, of the Law Offices of Pedro K. Williams. Defendants are represented by Kye Walker, Esquire, of The Walker Legal Group.

² Payne filed a Motion for Expansion on Time and to File Motion Outside of Time, on June 17, 2015. Under separate Order the Court granted Plaintiff’s Motion for Extension of Time.

³ (Def.’s Mot. to Dismiss for Lack of Subject Matter J. & for Failure to State a Claim, 1, May 18, 2015).

⁴ 422 U.S. 66, 78 (1975).

⁵ S. Ct. Civ. No. 2104-0028, ___ V.I. ___, 2015 V.I. Supreme LEXIS 3 (V.I. Feb. 6, 2015).

nonjusticiable issue that this Court will not consider. Lastly, this Court finds that Defendants' assertion that this matter should be dismissed because of Payne's failure to state a claim under the Virgin Islands Wrongful Discharge Act is a nonissue because the Amended Complaint does not suggest that Payne seeks to bring the instant action pursuant to the V.I. Wrongful Discharge Act. Therefore, based on the foregoing reasons, the Court will deny Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim.

FACTUAL AND PROCEDURAL HISTORY

Plaintiff, Jacqueline J. Payne ("Payne"), was employed by Defendant, the Legislature of the Virgin Islands (the "Legislature"), as a member of the Legislature's central staff since February 22, 2000. On June 20, 2014, Payne was involved in a verbal altercation with a coworker during work hours. Following the altercation, on June 26, 2014, the Legislature's Senate Vice President, Samuel Sanes, allegedly held a disciplinary hearing, which resulted in Payne's thirty (30) day suspension. On July 28, 2014, upon returning to work, Payne alleges that the Executive Director of the Legislature, Iver A. Stridiron, informed her that she was being reassigned from her position in the Human Resources Division to a receptionist position. Payne further alleges that, based on her reaction to this reassignment, the Legislature placed her on a three (3) day suspension. Upon returning to work on August 1, 2014, Payne further contends that the President of the 30th Legislature, Defendant, Shawn Malone ("Malone"), terminated her employment.

On November 13, 2014, Payne filed a Complaint against Defendants for wrongful discharge under V.I. Code Ann. tit. 2, § 47(a).⁶ On May 18, 2015, Defendants filed the instant Motion to Dismiss for Lack of Subject Matter Jurisdiction and for Failure to State a Claim. Defendants contend that this matter should be dismissed because 2 V.I.C. § 47(a) does not create a private cause of action, Payne has raised a nonjusticiable issue, and the Amended Complaint fails to state a claim under the V.I. Wrongful Discharge Act. Payne filed an Opposition to Defendants' Motion to Dismiss on June 17, 2015.

ANALYSIS

I. The Court will deny Defendants' Motion to Dismiss for Lack of Subject Matter Jurisdiction because 2 V.I.C. § 47(a) creates an implied private cause of action.

- a. Title 2, § 47(a) of the Virgin Islands Code creates a private cause of action for central staff employees of the Legislature of the Virgin Islands who have been employed on the central staff of the Legislature for more than four (4) consecutive years.

Defendants move this Court to dismiss Payne's Amended Complaint for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1)⁷ on the grounds that 2 V.I.C. § 47(a) does not create a private cause of action.⁸

Section 47(a) of Title 2 of the Virgin Islands Code, in pertinent part, provides that—

⁶ Payne filed an Amended Complaint on February 11, 2015.

⁷ The Federal Rules of Civil Procedure are applicable to this proceeding by virtue of Superior Court Rule 7.

⁸ (Def.'s Mot. to Dismiss for Lack of Subject Matter J. & for Failure to State a Claim, 1, May 18, 2015).

[c]entral staff employees of the Legislature of the Virgin Islands who have been employed on the central staff of the Legislature for more than four (4) consecutive years shall receive automatic appointments in each Legislature and may not be dismissed unless it is for cause and they have had an opportunity to be heard in accordance with the Rules of the Legislature.

Although the statute is silent on the issue of whether a private cause of action is created, the Court must also consider whether there is an implied private cause of action notwithstanding the statute's silence.

To support their argument that 2 V.I.C. § 47(a) does not create an implied private cause of action, Defendants cite to the District Court of the Virgin Islands' decision in *Miller v. V.I. Hous. Auth.*⁹ In *Miller*,¹⁰ the District Court adopted a modified version of a four-part test adopted by the United States Supreme Court in *Cort v. Ash*¹¹ to determine whether a Virgin Islands statute created an implied private cause of action. The original *Cort* test provides that,—

a cause of action could be inferred from a *federal* statute only if: (1) the plaintiff is one of the class for whose benefit the statute was enacted; (2) some indication of legislative intent, explicit or implicit, suggests a legislative intent to create a private remedy; (3) implying a remedy for the plaintiff would be consistent with the underlying purposes of the legislative scheme and (4) “the cause of action is not one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law.”¹²

The District Court only adopted the first three factors of the *Cort* test, having determined that the fourth factor was inapplicable when construing a territorial statute.¹³

In reliance on *Miller*'s modified test, Defendants argue that although Payne is a member of the class intended to benefit from the enactment of 2 V.I.C. § 47(a), the statute fails to satisfy the second factor given that there is no indication that the Legislature intended to create a private cause of action. According to Defendants, the sole remedy that the Legislature intended to provide to members of the class is limited “to an opportunity to be heard ‘in accordance with the Rules of the Legislature’ and nothing else.”¹⁴ Defendants also argue that “had the Legislature intended to create a private cause of action for its own employees, it would have included language similar to the enabling legislation of [other Virgin Islands' statutes].”¹⁵ In the absence of such language, Defendants conclude that “the Legislature did not intend to create a private cause of action for central staff employees when it enacted 2 V.I.C. § 47(a).”¹⁶

⁹ 46 V.I. 623 (D.V.I. 2005).

¹⁰ *Id.* at 629.

¹¹ 422 U.S. 66, 78 (1975).

¹² *Miller*, 46 V.I. at 629 (emphasis added).

¹³ *Id.*

¹⁴ (Def.'s Mot. to Dismiss for Lack of Subject Matter J. & for Failure to State a Claim, 7, May, 18, 2015).

¹⁵ (Def.'s Mot. to Dismiss for Lack of Subject Matter J. & for Failure to State a Claim, 7-8, May, 18, 2015).

¹⁶ (Def.'s Mot. to Dismiss for Lack of Subject Matter J. & for Failure to State a Claim, 8, May, 18, 2015).

In opposition to Defendants' position, Payne also cites to *Cort*, but draws the conclusion that section 47(a) creates an implied private cause of action.¹⁷ Payne asserts that not only is she a member of the class that the statute was intended to benefit, but that her remedies are not solely limited to the relief provided by the Rules of the Legislature. Payne also argues—for the first time—that pursuant to section 3 of the Revised Organic Act of 1954, she has a due process right to be heard, and that that right has been “restated and implemented by the Legislature’s enactment of [2 V.I.C. § 47(a)].”¹⁸

Upon considering the parties’ positions, the Court notes that neither party has cited to a rule of law that is binding on this Court. First, the Virgin Islands Supreme Court has previously held that decisions from the District Court of the Virgin Islands are not binding on the Superior Court—with the exception of decisions issued by the Appellate Division.¹⁹ Second, the V.I. Supreme Court has explicitly rejected *Miller*, and the application of *Cort* when interpreting a Virgin Islands statute.

In *Rennie v. Hess Oil V.I. Corp.*,²⁰ the V.I. Supreme Court explained that “the four-prong *Cort* test is perhaps the textbook example of a rule of statutory construction adopted by the United States Supreme Court to interpret acts of Congress that *should not be used to interpret a Virgin Islands statute.*”²¹ Rather than employing a “wholesale, uncritical importation of federal rules and precedents into Virgin Islands jurisprudence,”²² the V.I. Supreme Court ruled that the traditional common law approach is the appropriate rule of law that courts in this jurisdiction should apply to determine whether a Virgin Islands statute creates a private cause of action when the statute is silent, or where there is an ambiguity concerning standing.²³ The common law approach provides that “the denial of a remedy [is] the exception rather than the rule,” and [] “[i]f a statute was enacted for the benefit of a special class, a remedy was recognized for members of that class.”²⁴ Further, based on local precedence, the V.I. Supreme Court explained that “statutes which are silent as to who has standing to bring suit should be broadly interpreted to confer standing.”²⁵ “[S]ilence or ambiguity could not be a reason to deny standing to enforce a statute by an individual who the statute was clearly enacted to protect.”²⁶

Thus, upon applying *Rennie*, this Court finds that 2 V.I.C. § 47(a) creates a private cause of action. Section 47 was specifically enacted for the benefit of “[c]entral staff employees of the Legislature of the Virgin Islands who have been employed on the central staff of the Legislature for more than four (4) consecutive years.”²⁷ The benefit is that no member of this special class may be dismissed from their

¹⁷ (Pl.’s Opp’n to Def.’s Mot. to Dismiss, 3-5, June 17, 2015). Payne represents that the original *Cort* test is a three-prong test although there are actually four prongs that were established by the Supreme Court of the United States.

¹⁸ (Pl.’s Opp’n to Def.’s Mot. to Dismiss, 6, June 17, 2015).

¹⁹ *Halliday v. Footlocker Specialty, Inc.*, 53 V.I. 505, 511 n.7 (V.I. 2010) (“Decisions rendered by the Third Circuit and the Appellate Division of the District Court’ [are] binding upon the Superior Court.”).

²⁰ S. Ct. Civ. No. 2104-0028, ___ V.I. ___, 2015 V.I. Supreme LEXIS 3 (V.I. Feb. 6, 2015).

²¹ *Id.* at *31 (emphasis added).

²² *Id.* at *30-31 (citing *Bryan v. Fawkes (Bryan I)*, 61 V.I. 201, 225 (V.I. 2014); *Sweeney v. Ombres*, 60 V.I. 438, 442 (V.I. 2014); *Browne v. People*, 50 V.I. 241, 254-55 (V.I. 2008); *Gov’t of the V.I. v. Durant*, 49 V.I. 366, 374 (V.I. 2008); *Maynard v. Rivera*, 675 F.3d 225, 230 (3d Cir. 2012)).

²³ *Id.* at *32-33.

²⁴ *Id.* at *28 (citing *Miller* 46 V.I. at 627).

²⁵ *Id.* at *32-33 (citing *Hansen v. O’Reilly*, S. Ct. Civ. No. 2014-0085, ___ V.I. ___, 2015 V.I. Supreme LEXIS 1, at *53 n.35 (V.I. Jan. 8, 2015); *Mapp v. Fawkes*, 61 V.I. 521, 534 n.11, (V.I. 2014); *Bryan I*, 61 V.I. at 230-31 n.12; *V.I. Narcotics Strike Force v. Pub. Emps. Relations Bd.*, 60 V.I. 204, 212 (V.I. 2013)).

²⁶ *Id.* at *29 (citations omitted).

²⁷ 2 V.I.C. § 47(a).

employment with the Legislature unless it is “for cause and they have had the opportunity to be heard in accordance with the Rules of the Legislature.”²⁸ Although the statute grants the Legislature discretion to determine the procedure that governs the manner in which the opportunity to be heard is provided, the statute expressly states that the Legislature must provide the class members with that opportunity. If a member of the class is dismissed without cause and the opportunity to be heard, the affected member has standing to commence an action under 2 V.I.C. § 47(a). Therefore, because 2 V.I.C. § 47(a) was enacted for the benefit of a special class, it creates an implied private cause of action, and this Court will deny Defendants’ Motion to Dismiss for Lack of Subject Matter Jurisdiction.

- b. Payne’s claim that the Legislature of the Virgin Islands has violated 2 V.I.C. § 47(a) is a justiciable issue because the alleged violation is based on an external rule of law.

Defendants also argue that “Plaintiff’s claim that her termination was unlawful because the Legislature failed to comply with its internal rules is a non-justiciable political issue for which this Court lacks jurisdiction.”²⁹

First, the Court notes that “a claim that a particular action is barred by the separation of powers doctrine does not go to subject matter jurisdiction, but to whether the claim is justiciable, i.e., whether a court should refrain from deciding the matter even though it has the jurisdiction to do so.”³⁰ “A matter is non-justiciable when ‘a concern over the separation of powers between coordinate branches of government is so inextricably intertwined to the case at hand that a judicial forum would be an inappropriate place for resolution of that issue.’”³¹

In *Brown v. Hansen*,³² the United States Court of Appeals for the Third Circuit³³ considered whether an action challenging the validity of four bills and resolutions allegedly passed in violation of the Legislature’s internal voting procedures presented a nonjusticiable political question.³⁴ Upon refusing to decide the matter, the Third Circuit held that “if [the Legislature’s] conduct did not violate any constitutional or statutory provision, the question whether the legislature violated its own internal rules is nonjusticiable.”³⁵ The court further explained that “[a]bsent a clear command from some external source of law, we cannot interfere with the internal workings of the Virgin Islands Legislature ‘without expressing lack of the respect due coordinate branches of government.’”³⁶

In this case, Payne has raised both justiciable and nonjusticiable issues. The Amended Complaint alleges that the Legislature has violated 2 V.I.C. § 47(a). Section 47(a) is an external statutory law that the Legislature must uphold in respect to the benefits conferred upon members of the special class.

²⁸ 2 V.I.C. § 47(a).

²⁹ (Def.’s Mot. to Dismiss for Lack of Subject Matter J. & for Failure to State a Claim, 10, May 18, 2015).

³⁰ *Bryan I*, 61 V.I. at 212 (citing *Powell v. McCormack*, 395 U.S. 486, 511-12 (1969)).

³¹ *Barshinger v. Legislature of the V.I.*, Case No. ST-11-CV-24, 2012 V.I. LEXIS 46, at *3 (V.I. Super. Ct. Sept. 28, 2012) (unpublished) (citations omitted).

³² 973 F.2d 1118 (3d Cir. 1992).

³³ See *Better Bldg. Maint. of the V.I., Inc. v. Lee*, 60 V.I. 740, 755 (V.I. 2014) (“[T]he Superior Court is only required to follow cases the Third Circuit decided while serving in its capacity ‘as the *de facto* court of last resort in the Virgin Islands.’”); *Halliday*, 53 V.I. at 511 n.7 (“Decisions rendered by the Third Circuit and the Appellate Division of the District Court’ [are] binding upon the Superior Court.”).

³⁴ *Brown*, 973 F.2d at 1119-21.

³⁵ *Id.* at 1122.

³⁶ *Id.*

Because this is an external rule of law that regulates the conduct of the Legislature, the Court has the authority to determine whether the Legislature is in compliance therewith. Thus, a claim alleging that the Legislature has violated 2 V.I.C. § 47(a) is a justiciable issue.³⁷

The Amended Complaint also alleges that Defendants have violated sections 8.3 and 8.4 of the Legislature of the Virgin Islands' Employee Manual. Sections 8.3 and 8.4 provide guidelines governing the Legislature's internal disciplinary procedures, and sanctions, respectively. As an internal rule, the creation and implementation of these guidelines are exclusively under the authority of the Legislature. Because the Employee Manual is so inextricably intertwined with the internal workings of the Legislature of the Virgin Islands, this Court will not consider any issue concerning whether the Legislature is in compliance with its own rules because such issues are nonjusticiable.

II. The Court will deny Defendants' Motion to Dismiss for Failure to State a Claim because Payne's action is not based on the Virgin Islands Wrongful Discharge Act.

Defendants also move this Court to Dismiss Payne's Amended Complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim, arguing that "Plaintiff cannot state a claim under the Virgin Islands Wrongful Discharge Act because she was a public employee and therefore does not fit the definition of an employee protected by the Act."³⁸ Pursuant to Fed. R. Civ. P. 12(b)(6), a defendant may move the court to dismiss a complaint when there is a failure to state a claim upon which relief can be granted. In the Virgin Islands, to determine whether a complaint will survive a motion to dismiss, this Court must conduct the following three-step analysis –

First, the court must take note of the elements a plaintiff must plead to state a claim so that the court is aware of each item the plaintiff must sufficiently plead. Second, the court should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. These conclusions can take the form of either legal conclusions couched as factual allegations or naked [factual] assertions devoid of further factual

³⁷ In her Opposition to Defendants' Motion to Dismiss, Payne also argues that section 3 of the Revised Organic Act of 1954 is an external rule of law that entitles her to a right to be heard. According to Payne, [t]he right to due process is restated and implemented by the Legislature's enactment of [2 V.I.C. § 47(a)] based on the Revised Organic Act. Payne did not raise this argument in her Amended Complaint, and does not bring the instant action pursuant to the Revised Organic Act of 1954. Nevertheless, this Court notes that the Revised Organic Act is also an external rule of law that allows Payne to assert a claim for the alleged violation of her right to be heard. Section 3 of the Revised Organic Act provides, in pertinent part, that, "[n]o law shall be enacted in the Virgin Islands which shall deprive any person of life, liberty, or property without due process of law or deny to any person therein equal protection of the laws." Revised Organic Act of 1954, § 23A, 48 U.S.C. § 1614, reprinted in V.I. CODE ANN., Historical Documents, Organic Acts, and U.S. Constitution at 159-60 (1995 & Sup. 2013) (preceding V.I. CODE ANN. tit. 1). "Whether an employee has a procedural due process protected property right in continued employment is a question of territorial law, and such a property right must flow either from a statutory policy or contractual agreement." *Fleming v. Cruz*, S. Ct. Civ. No. 2011-0092, ___ V.I. ___, 2015 V.I. Supreme LEXIS 16, at *15-16 (V.I. June 16, 2015) (citations omitted). "To succeed on a claim alleging a violation of procedural due process rights to continued employment, a plaintiff must prove that [s]he had a property right in continued employment." *Id.* (citations omitted). Here, Payne asserts that her property right in continued employment with the Legislature arises under 2 V.I.C. § 47(a). As previously stated, section 47(a) provides that members of the special class have a right not to be dismissed from their employment with the Legislature without cause and the opportunity to be heard according to the Rules of the Legislature. This statute sufficiently creates a property interest in continued employment, which is protected by due process. Thus, the Revised Organic Act is an external rule of law that provides an alternative means to which Payne may seek redress because of the Legislature's alleged failure to afford her the opportunity to be heard.

³⁸ (Def.'s Mot. to Dismiss for Lack of Subject Matter J. & for Failure to State a Claim, 10, May 18, 2015).

enhancement. Finally, where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief. If there are sufficient remaining facts that the court can draw a reasonable inference that the defendant is liable based on the elements noted in the first step, then the claim is plausible.³⁹

Here, the Court finds that it is unnecessary to conduct the three-part analysis because there is no indication from the Amended Complaint that Payne seeks to bring her action pursuant to the V.I. Wrongful Discharge Act.⁴⁰ Within her entire three-page pleading, Payne states on five (5) separate occasions that her action is pursuant to 2 V.I.C. § 47(a). Therefore, because Payne is not required to support a claim that she has not raise in her pleading, Defendants' Motion to Dismiss for Failure to State a Claim will be denied.

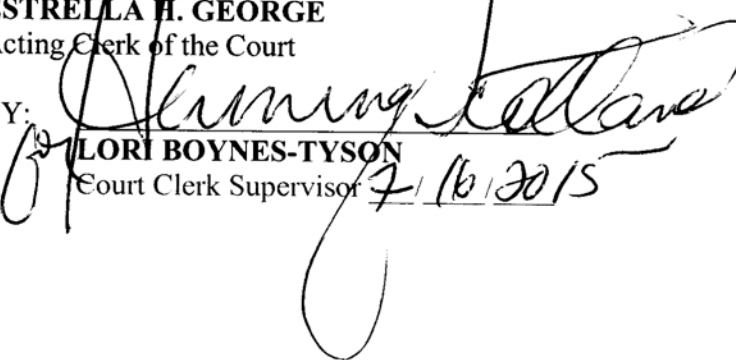
CONCLUSION

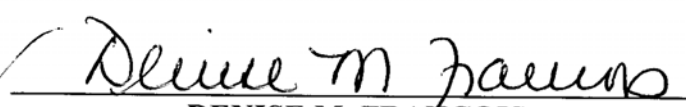
Under the common law approach adopted by the V.I. Supreme Court in *Rennie v. Hess Oil V.I. Corp.*, this Court finds that 2 V.I.C. § 47(a) creates an implied private cause of action. Further this Court finds that the issue of whether the Legislature is in compliance with 2 V.I.C. § 47(a) presents a justiciable issue because section 47 is an external rule of law. However, the issue of whether the Legislature has complied with its internal Employee Manual is a nonjusticiable issue that this Court will not consider. This Court also finds that Defendants' Motion to Dismiss for Failure to State a Claim is unmerited because Payne does not bring the instant action pursuant to the Virgin Islands Wrongful Discharge Act.

An Order in accordance with this Memorandum Opinion will follow.

DATED: July 16, 2015

ATTEST:
ESTRELLA H. GEORGE
Acting Clerk of the Court

BY: 
LORI BOYNES-TYSON
Court Clerk Supervisor 7/16/2015


DENISE M. FRANCOIS
Judge at the Superior Court
of the Virgin Islands

³⁹ *Fleming*, 2015 V.I. Supreme LEXIS 16, at *16-17 (citations omitted).

⁴⁰ The Virgin Islands Wrongful Discharge Act is codified at 24 V.I.C. §§ 61-79.