

FOR PUBLICATION

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

DAWN L. COLSON,	)	
	)	CASE NO. ST-18-CV-374
Plaintiff,	)	
vs.	)	ACTION FOR DAMAGES
	)	
WTS INTERNATIONAL, INC.	)	
	)	
Defendant.	)	JURY TRIAL DEMANDED
	)	

2019 VI Super 157

APPEARANCES:

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MEMORANDUM OPINION

¶1 **THIS MATTER** is before the Court on Defendant WTS International, Inc.'s ("WTS International" or "WTS") Motion to Dismiss, filed September 17, 2018. The Motion is fully briefed. WTS argues Plaintiff cannot bring this new action for wrongful discharge in the Superior Court because she did not appeal the Order of the Department of Labor that dismissed her identical wrongful discharge claim. However, for the reasons set forth herein the Motion will be denied.

FACTS

¶2 WTS International “held the spa account for patrons staying at the Marriott Frenchman’s Reef & Morning Star in St. Thomas, U.S. Virgin Islands.” (Compl. ¶ 4, Aug. 1, 2018). Plaintiff Dawn Colson worked for WTS International until she was terminated sometime in May 2017. *Id.* ¶ 5-6. Shortly thereafter, Colson filed a wrongful discharge claim with the Virgin Islands Department of Labor (“VIDOL”) pursuant to the Wrongful Discharge Act (“WDA”), V.I. CODE ANN. tit. 24, §§ 76-79. The claim was docketed as Dawn K. Colson, Case No. WD-046-2017-STT, at 1 (V.I. Dep’t. of Labor July 6, 2017) (prelim. h’rg).¹ VIDOL held a preliminary hearing on June 27, 2017. *Id.* at 1. On July 6, 2017, VIDOL ruled that it lacked jurisdiction to decide the WDA claim because Colson was considered a supervisor and was thereby preempted by the National Labor Relations Act (“NLRA”) from filing a claim under the WDA. *See id.* at 1-3. In its Administrative Memorandum Opinion and Order (“VIDOL’s Order”), VIDOL stated the following:

On Tuesday, June 27, 2017, this matter came on for Preliminary Hearing. [WTS International] appeared through its Spa Director . . . and was represented by [a] law firm[] . . . [Colson] appeared in person and represented herself. Both [Colson] and [WTS International]’s Spa Director were sworn, and testified under oath. [Colson] testified, among other things, that she had not had the authority to supervise other employees. However, [WTS International]’s Spa Director[] . . . refuted

¹ The VIDOL Order was provided to the Court by Defendant. *See* (Notice Filing Corrective Ex. Mot. Dismiss, Oct. 10, 2018).

[Colson]'s testimony, testifying, among other things, that [Colson] had been a supervisor, that she had been the "second in charge", had held the position of lead massage therapist, and had been the person who set the work schedules for the other massage therapists. [WTS International] also introduced a job description for the position of lead therapist, which establishes that anyone holding that position was also responsible for training new massage therapists, testing staff for quality of service, and ensuring there was appropriate supervisory coverage within that department, among other things.

Id. at 1-2.

¶3 VIDOL concluded that because Colson is considered a supervisor under the NLRA, her WDA claim "cannot be adjudicated by the Department of Labor, since the Agency lacks jurisdiction to adjudicate this matter." *Id.* at 2. VIDOL's Order included a note that detailed the deadlines for an order to become final, for filing motions for reconsideration, and for filing a petition for review with the Superior Court of the Virgin Islands. *See id.* at 3 (citing 24 V.I. R. & REGS. §§ 77-70(B), 77-71, 77-73). Additionally, VIDOL's Order contained a note that stated, "[p]ursuant to the Rules and Regulations which govern Wrongful Discharge proceedings, if the Commissioner determined the complaint is without merit, or was filed untimely, or that the Department lack[ed] jurisdiction, the complaint shall be dismissed, in writing, with notice the [sic] parties and an opportunity for appeal." *Id.* at 3 (citing 24 V.I. R. & REGS. § 77-21(A)). Colson did not appeal VIDOL's Order; but instead, filed a new Complaint with the Superior Court on August 1, 2018, more than one year after

VIDOL issued its Order. *See* (Compl.). WTS International contends that Colson's Complaint should be dismissed under Virgin Islands Rules of Civil Procedure 12(b)(6) because the claim is barred by res judicata and collateral estoppel, and because Colson's claim is preempted by the NLRA. (Def. WTS Int'l, Inc.'s Mot. Dismiss and Incorporated Mem. Law 3-7, Nov. 13, 2018).

ANALYSIS

A. Rule 12(b)(6) Standard

¶4 The Virgin Islands is a notice pleading jurisdiction. V.I. R. Civ. P. 8(a)(2); *Mills-Williams v. Mapp*, 67 V.I. 574, 585 (V.I., 2017). To overcome a motion to dismiss under a notice pleading regime the plaintiff must provide "a short and plain statement showing that the pleader is entitled to relief." *In re Adoption of the VI Rules of Civil Procedure*, No. 2017-001, 2017 VI Supreme LEXIS 22 at *49 (Apr. 3, 2017); *see also Brathwaite v. H.D.V.I. Holding Co.*, No. ST-16-CV-764 2017 WL 2295123 at *2 (V.I. Super. May 24, 2017) (noting that V.I. R. Civ. P. 8(a)(2) eliminates the plausibility standard). To evaluate a motion to dismiss for failure to state a claim under V.I. R. Civ. P. 12(b)(6), a court "merely tests whether the claim has been adequately stated in the pleading;" it does not address the merits of the claim. *Oxley v. Sugar Bay Club & Resort Corp.*, No. ST-18-CV-96, 2018 WL 4002726, at *2 (V.I. Super., May 14, 2018). A complaint has been sufficiently stated when it "adequately alleges facts that put an accused on notice of claims brought

against it.” *Brathwaite*, 2017 WL 2295123, at *2. Such facts “must be viewed in the light most favorable to the plaintiff,” *Greaux v. Frett*, No. ST-18-CV-078, 2019 WL 2331114, at *3 (V.I. Super. May 29, 2019) (quoting *Adams v. North West Co. (International), Inc.*, 63 V.I. 427, 438 (V.I. Super. Oct. 6, 2015)) and should be “sufficient to advise the responding party of the transaction or occurrence on which the claim is based and identify the claim, reciting its elements so as to enable the defendant to respond intelligently and to enable the Court to determine. . . whether the claim is adequately pled.” *Oxley*, 2018 WL 4002726, at *5.

¶5 For complaints arising under the WDA, the Virgin Islands Supreme Court held that a plaintiff need only “plead that [the defendant] was his employer and that [the defendant] wrongfully discharged him;” a plaintiff is “not required to anticipate in [her] complaint any affirmative defenses [the defendant] might raise in its answer, such as the permissible grounds for discharge.”² *Joseph v. Sugar Bay Club & Resort, Corp.*, S. Ct. Civ. No. 2014-0048, 2015 V.I. Supreme LEXIS 4, at *2 (V.I. 2015) (alterations in original) (internal quotation marks omitted) (quoting *Rennie v. Hess Oil V.I. Corp.*, 62 V.I. 529, 544 (V.I. 2015)). In *Joseph*, the V.I. Supreme Court found a WDA complaint sufficient where the only facts alleged were: (1) the plaintiff was employed by the defendant, and (2) the defendant terminated the plaintiff” on or

² “The Third Circuit reasoned that section 76 . . . codified ‘a presumption . . . that an employee has been wrongfully discharged if discharged for any reason other than those listed in Section 76(a) [of the WDA].” *Maynard v. Rivera*, 675 F.3d 225, 230 (3d Cir. 2012) (quoting *Gonzalez v. AMR*, 549 F.3d 219, 222 (3d Cir. 2008).

about a specified date. *Id.* at *1 (first alteration in original) (internal quotation marks omitted).

¶6 Colson's Complaint states that she "was employed with [WTS International], a covered employer under the [WDA], until her employment with [WTS International] was wrongfully terminated without just cause on or about May 2017." (Compl. ¶ 6). Colson's Complaint additionally states that WTS International "wrongfully terminated [Colson]'s employment, claiming [Colson]'s license to perform spa procedures [had] expired" and that WTS provided no opportunity for [Colson] to renew her license." *Id.* ¶ 9. In light of *Joseph*, the Court finds that Colson's Complaint satisfies the notice pleading standard, and therefore withstands WTS's 12(b)(6) Motion. *See* V.I. R. Civ. P 8(a)(2); *Joseph*, 2015 V.I. Supreme LEXIS 4, at *2. The Court now turns its attention to WTS International's claims of res judicata, collateral estoppel, exhaustion of administrative remedies, and preemption.

B. Suit Not Barred By Res Judicata.

¶7 "[T]o bar . . . relitigation of a claim under the doctrine of res judicata, an asserting party must demonstrate: (1) the prior judgment was valid, final, and on the merits; (2) the parties in the subsequent action are identical to or in privity with the parties in the prior action; and (3) the claims in the subsequent action arise out of the same transaction or occurrence as those in the prior action." *Stewart v. V.I. Bd. of Land Use Appeals*, 66 V.I. 522, 533 (V.I. 2017) (citing *Cacciamani & Rover Corp. v.*

Banco Popular de P.R., 61 V.I. 247, 255 (V.I. 2014)). The rule is “premised on fairness to the defendant and sound judicial administration.” *Stewart*, 66 V.I. at 533 (first citing *Alcantara ex rel. Alcantara v. Wal-Mart Stores, Inc.*, 321 P.3d 912, 915 (Nev. 2014); then citing *Cassidy v. Bd. of Educ. of Prince George’s Cnty.*, 557 A.2d 227, 230 (Md. 1989)). It “protects litigants ‘from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.’” *Stewart*, 66 V.I. at 533 (citations omitted) (quoting *Montana v. United States*, 440 U.S. 147, 153-54 (1979)). Neither Colson nor WTS disputes that, 1) the Parties in this case are identical to or in privity with the parties in the prior action before the Department of Labor, nor that 2) the claims in this subsequent action arise out of the same transaction or occurrence as those before the Department of Labor. Therefore, the only remaining factors to consider is whether the VIDOL Order was valid, final, and on the merits. *Id.*

¶8 “A decision is on the merits if it ‘permanently forecloses a party from further advancing a claim or defense.’” *Stewart*, 66 V.I. at 533 (quoting *Mitchell v. Chapman*, 343 F.3d 811, 821 (6th Cir. 2003); then quoting *Cassidy*, 557 A.2d at 231). Importantly, “[a] decision may be on the merits for purposes of res judicata even if it does not actually resolve the underlying substantive issues,” *Stewart*, 66 V.I. at 534 (collecting cases), however, “a dismissal for lack of jurisdiction does not bar a second action as a matter of claim preclusion.” *Stewart*, 66 V.I. at 534 (quoting 21 Charles

Alan Wright & Arthur R. Miller, *Federal Practice and Procedures* § 4436 (3d ed. 1998)).

¶9 WTS International argues that Colson “failed to follow the appropriate procedures to appeal [VIDOL]’s final determination that no wrongful termination occurred,” and that “therefore the final order precludes [Colson] from relitigating [the] identical claim again.” (Def. WTS Int’l, Inc.’s Mot. Dismiss and Incorporated Mem. Law 3). WTS also argues that the “matter was fully adjudicated on the merits of [Colson’s] claim as set forth by [VIDOL’s Order].” *Id.* at 4.

¶10 Conversely, Colson argues that res judicata does not apply because the VIDOL never adjudicated Colson’s claim and the case was not decided on the merits. (Pl.’s Resp. Opp’n Def.’s Mot. Dismiss and Incorporated Mem. Law 1-5, Oct. 30, 2018). Under *Stewart*, the Court agrees with Colson and finds that VIDOL’s Order for lack of jurisdiction was not a decision on the merits. The VIDOL Order clearly states the matter “cannot be adjudicated by the Department of Labor, since the Agency lacks jurisdiction to adjudicate this matter”³ and no findings were made on whether Colson’s termination was proper. Furthermore, the VIDOL Order was issued after a preliminary hearing, not a hearing on the merits as defined in the Rules and Regulations.⁴ Therefore, the Court finds that Colson’s claim, having not been previously decided on the merits, is not barred by res judicata.

³ The Court offers no opinion on whether the Department of Labor had jurisdiction over the claim.

⁴ Virgin Islands Rules and Regulations title 24, § 77-1 defines a “[p]reliminary hearing” as “the initial hearing.” 24 V.I. R. & REGS. § 77-1. A “[h]earing” is defined as “a hearing on the merits following a preliminary hearing.” *Id.* The VIDOL Order was based on a preliminary hearing, not a decision on

¶11 Since the VIDOL decision was not rendered on the merits, the Court need not address whether VIDOL's Order is final for the purposes of res judicata.

C. Suit Not Barred By Collateral Estoppel.

¶12 “[T]o bar relitigation of an issue under the doctrine of collateral estoppel, an asserting party must demonstrate: (1) the issue to be barred is identical to an issue actually and necessarily decided in the prior action; (2) the prior action was adjudicated in a decision that was final, valid, and on the merits; (3) the party against whom the doctrine is asserted was a party or in privity with a party to the prior action; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior action.” *Stewart*, 66 V.I. at 549-50 (first citing *Benjamin v. Coral World V.I., Inc.*, Case No. ST-13-CV-065 (Consolidated with Case No. ST-13-CV-294), 2014 V.I. LEXIS 35, at *6 (V.I. Super. Ct. June 12, 2014); then citing *Modiri v. 1342 Rest. Grp., Inc.*, 904 A.2d 391, 394 (D.C. 2006); and then citing *Talarico v. Dunlap*, 685 N.E.2d 325, 328 (Ill. 1997). The doctrine of collateral estoppel “protect[s] against the expense and vexation attending multiple lawsuits, conserve[s] judicial resources, and foster[s] reliance on judicial action by minimizing the possibility of inconsistent decisions.” *Id.* at 549 (alterations in original) (citation

the merits, because there is a clear distinction between a hearing, which is on the merits, and a preliminary hearing; the language denoting this difference is plain and unambiguous; and the statutory-like scheme that contains these two terms “is coherent and consistent.” See *Thomas v. People*, 69 V.I. 913, 923 (V.I. 2018), and *People v. Baxter*, 49 V.I. 384, 388 (V.I. 2008),

omitted) (internal quotation marks omitted) (quoting *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008)).

¶13 The Court finds, however, that WTS International's collateral estoppel argument fails for the same reason as its res judicata argument. Colson's claim was not adjudicated on the merits and therefore is not barred by collateral estoppel. For this reason, the Court need not address whether Colson, against whom the doctrine of collateral estoppel was asserted, had a full and fair opportunity to litigate the issue in the prior action. *See Stewart*, 66 V.I. at 550 (citations omitted); 24 V.I. R. & REGS.

D. Neither VIDOL's Ruling nor Interpretation is Binding on the Court.

¶14 Colson also argues that this Court need not defer to VIDOL's Order because VIDOL was not vested with sole adjudication and interpretation power over WDA. *See* (Pl.'s Resp. Opp'n Def.'s Mot. Dismiss and Incorporated Mem. Law 5). This Court agrees. First, the Court finds that the WDA does not grant exclusive jurisdiction to the Department of Labor to consider claims brought under the WDA. *See Nickeo v. Virgin Islands Telephone Corp.*, 42 F.3d. 804, 807-08 (3d. Cir. 1994) (finding that the WDA does not require complainants to pursue nor exhaust administrative procedures prior to seeking judicial relief); *Harley v. Caneel Bay*, 93 F. Supp. 2d. 833, 842 (D.V.I. 2002) (finding that "the Legislature has given both the courts and the DOL adjudicatory authority under the WDA"); *Hess Oil V.I. Corp. v. Richardson*, 894 F. Supp. 211, 214-15 (D. V.I. App. Div. 1995) (discussing its jurisdiction to review the

WDA). Rather, Virgin Islands courts have consistently found that the Superior Court and the Department of Labor share concurrent jurisdiction to hear complaints filed pursuant to the WDA. *See Harley*, 193 F. Supp. 2d. at 842; *Pedro v. Ranger American of the V.I., Inc.*, 70 V.I. 251, 271-81, (V.I. Super. Ct. 2019 (considering plaintiff's WDA claim on plaintiff's motion for summary judgment); *Edwards v. Marriott Hotel Management Co. (Virgin Islands) Inc.*, No. ST-14-CV-222, 2015 WL 476216, at *6-7 (V.I. Super. Ct. Jan. 29, 2015); *Webster v. CBI Acquisitions, L.L.C.*, No. ST-11-CV-558, 2012 WL 832044, at *2-3 (V.I. Super. Ct. Mar. 5, 2012) (considering a plaintiff's complaint under the WDA). Moreover, a reading of V.I. CODE ANN. tit., 24 §§ 70, 79 reveals that the Virgin Islands Legislature intended the courts and VIDOL to share adjudicatory and remedial authority. *See Pichardo v. V.I. Commissioner of Labor*, 53 V.I. 936, 954, (3d Cir. 2010); *Hess Oil V.I. Corp., v. Richardson*, 894 F. Supp. 211, 213 (D.V.I. 1985); *Peters v. Channel 8 (WSVI)*, 30 V.I. 20, 22 (V.I. Super. Ct. 1994). Under 24 V.I.C. § 70, "Any person aggrieved by a final order of the Commissioner *granting or denying* in whole or in part *the relief sought* may obtain a review of such order by filing in the Superior Court or the District Court, within 30 days of its issuance, a written petition praying that such decision of the Commissioner be modified or set aside." (emphasis added) 24 V.I.C. § 70(a).⁵ The decision rendered by VIDOL was

⁵ VIDOL's Rules and Regulations provides that: "Within thirty (30) days from the date the Commissioner's order becomes final, any party aggrieved thereby may petition the Courts for review of the same." 77-73. However, the WDA Rules and Regulations do not trump the statute. *See Bryan v. Fawkes*, 61 V.I. 201, 212 (V.I. 2014) (the executive cannot exercise powers given to the legislative branch). Therefore, the Court must apply Section 70, and not the rules and regulations.

neither final nor on the merits, and thus does not trigger the application of Section 70.⁶ However, even if the decision was final, it did not grant nor deny the relief sought, and thus did not activate the option for Colson to seek administrative review. Therefore, the Court finds that Colson had no duty to seek judicial review of the VIDOL Order within 30 days of its issuance.

¶15 The Court also agrees that it need not defer to VIDOL's statutory interpretation. "The interpretation of a statutory scheme by the administrative agency charged with its enforcement is entitled to great deference." *Abramson v. Georgetown Consulting Group, Inc.*, 765 F. Supp. 255, 259 (D.V.I. 1991) (first citing *Equal Employment Opportunity Comm'n v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n. 17 (1981); then citing *N.L.R.B. v. Boeing Co.*, 412 U.S. 67, 74–75 (1973); and then citing *Westinghouse Elec. Corp. v. United States Nuclear Regulatory Comm'n*, 555 F.2d 82, 91 n. 44 (3d Cir.1977)); see also *Williams v. Kmart*, No. 1999-102, 2001 WL 304024 (D.V.I. Mar. 5, 2001) (applying *Abramson*). Specifically, binding

⁶ This case is distinguishable from *Stewart*, which addressed appeals from the Coastal Zone Management Board, codified at Title 12 V.I.C. §913(d), which states: Pursuant to Title 5, chapter 97 and Appendix V, Rules 10 and 11 of this Code, a petition for writ or review may be filed in the District Court of the United States Virgin Islands in the case of *any person aggrieved by the granting or denying of an application for a coastal zone permit...within forty-five days after such decision or order has become final provided that such administrative remedies as are provided by this chapter have been exhausted.* (emphasis added). That statute specifically requires a petition for writ of review by a person aggrieved by the granting or denying of an application to file within 45 days. Whereas, the VIDOL statute provides for review of an order *granting or denying ... the relief sought.* *Contra*, 1) appeals from the V.I. Taxi Association, where the law provides, "Any person aggrieved by any *decision* rendered by the [Taxicab] Commission may, within 10 days following the date of notice of the decision, file an appeal with the V.I. Superior Court of the Virgin Islands. 3 V.I.C. § 274(g) (emphasis added), and 2) appeals from the Public Relations Board, where the law states, "Any party aggrieved by any *final order* of the PERB issued under section 530 or 531 of this chapter, may appeal to the Superior Court of the Virgin Islands...The rules of procedure of the Superior Court regarding a writ of Review shall govern the appeal proceeding." 3 V.I.C. § 530a (emphasis added),

authority from the Third Circuit states that “courts are ‘obligated to regard as controlling a reasonable, consistently applied administrative interpretation.’” *Westinghouse Elec. Corp.*, 555 F.2d at 91 n. 44 (quoting *Northern Indiana Public Service Co. v. Porter County Chapter of Izaak Walton League of America, Inc.*, 423 U.S. 12, 15 (1975)); *Abramson*, 765 F. Supp at 259. However, in *Harley v. Caneel Bay*, the District Court found that a “[c]ourt is not obligated to defer to an agency interpretation of a statute when that agency is not *exclusively* charged with its enforcement.” *Harley v. Caneel Bay, Inc.*, 193 F. Supp. 2d. 833, 842 (D.V.I. 2002) (emphasis added) (citing *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990)). While this Court is not bound by District Court decisions, in light of the plain language of the WDA—and the canons of construction that compel this Court to refer to it—this Court finds *Harley* to be persuasive. A plain-language reading of the WDA demonstrates that the Legislature gave “both the courts and the [VIDOL] adjudicatory authority,” and did not exclusively empower VIDOL with its enforcement. *Harley*, 193 F. Supp. 2d. at 842. As such, the Court is not obligated to defer to VIDOL’s interpretation of the WDA. *See Harley*, 193 F. Supp. 2d. at 842. Rather, the Court finds that “[VIDOL’s] interpretation under its administrative processes deserves at best only limited deference from this Court as a possibly persuasive interpretation,” rather than automatic deference. *Harley*, 193 F. Supp. 2d. at 842; *cf Madison v. Resources for Human Dev. Inc.*, 233 F.3d 175, (3d. Cir. 2000) (quoting *Skidmore v. Swift*, 323 U.S. 134, 140 (1944) (finding that the weight of an

administrative ruling, opinion, or interpretation is “not controlling upon Courts” and “will depend on the thoroughness evident in its considerations, the validity of its reasoning, its consistency with early and later pronouncements, and all those factors which give it power to persuade, if lacking power to control”).⁷

¶16 Here, the parties dispute whether Colson was a supervisor for purposes of the WDA. VIDOL ruled that it lacked jurisdiction to decide the WDA claim because Colson was considered a supervisor under the National Labor Relations Act (“NLRA”), which prevents her from filing a wrongful discharge claim under the WDA. To reach its conclusion, VIDOL applied authority from the Third Circuit. The Third Circuit has “held that the WDA, as applied to supervisors, is preempted by the National Labor Relations Act (“NLRA”). *St. Thomas-St. John Hotel & Tourism Ass’n v. Gov’t of U.S. Virgin Islands ex rel. Virgin Islands Dep’t of Labor*, 357 F.3d 297, 303 (3d Cir. 2004). This court must treat decisions by the Third Circuit as binding authority. *Gov’t of V.I. v. Connor*, 60 V.I. 597, 606 n.1 (V.I. 2014) (citing *In re People of the V.I.*, 51 V.I. 374, 389 n.9 (V.I. 2009)). However, deference to an agency’s

⁷ The Court also recognizes that, where “the language of a statute. . . is susceptible of two constructions, a long continued and unvarying construction applied by administrative officials is a persuasive influence in determining the judicial construction, and should not be disregarded except for the strongest and most urgent reasons.” *Abramson*, 765 F. Supp. at 259 (quoting *Shapiro v. City of Baltimore*, 186 A. 2d 605, 614 (1962)). A party may demonstrate that such reasons exist with support from public policy or established local or federal authority, but absent such support, the Court must defer to the administrative interpretation. See *United States v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985); *Williams v. Kmart Corp.*, No. 1999-0102, 2001 WL 304024, at *4 (D.V.I. Mar. 5, 2001) (deferring to the DOL’s interpretation “absent any local or federal law to the contrary”); *Abramson*, 765 F. Supp. at 259.

statutory interpretation is distinct from any deference given to an agency's findings of fact, which unquestionably influence determinations of governing law. Typically, courts review an administrative agency's factual determinations "to ascertain whether [they] are supported by 'substantial evidence in the record. . .'" *Gov't of the V.I. v. Crooke*, 54 V.I. 237, 256 (V.I. 2010).⁸ However, this standard is often applied by this Court to petitions for review of administrative agencies. *See generally, Brooks v. Gov't of V.I.*, 58 V.I. 417 (V.I. 2013); *Crooke*, 54 V.I. 237, 256 (V.I. 2010). Since VIDOL and Virgin Islands courts possess concurrent jurisdiction over WDA claims, the Court is also the fact-finder in the first instance and need not apply an appellate standard of review where there is no appeal. To require otherwise would be to limit the adjudicatory capacity that was granted to Virgin Islands courts by the Legislature under the WDA and conflict with the plain-language of the statute. *Harley*, 193 F. Supp. 2d. at 842 ("[T]he Legislature's delegation of concurrent enforcement authority to [VIDOL] 'does not empower the Commissioner of Labor to regulate the scope of the judicial power vested by the statute.'" (quoting *Adams Fruit*, 494 U.S. at 650)). As such, the Court will not defer to VIDOL's factual findings.

Conclusion

¶17 The WDA's rules and regulations do not provide for a decision on the merits after a preliminary hearing, as parties are only expected to present their initial

⁸ "Substantial evidence is 'such evidence that a reasonable mind would accept as adequate to support an agency's conclusion.'" *Gov't of the V.I. v. Crooke*, 54 V.I. 237, 256 (V.I. 2010) (quoting *Williams-Jackson v. PERB*, No. 2008-0084, 2009 WL 4981794, at *2 (V.I. Dec. 11, 2009).

statements at the preliminary hearing. Furthermore, the VIDOL Order clearly states the matter "cannot be adjudicated by the Department of Labor, since the Agency lacks jurisdiction to adjudicate this matter." Therefore, the matter was not decided on the merits at the Department of Labor. As a result, Colson's claim is not barred by res judicata or collateral estoppel. In addition, because Colson's claim was not adjudicated she was not required to file an appeal within 30 days. Finally, the Complaint survives the 12(b)(6) standard.

¶18 Whether Colson is considered a supervisor is a clear point of contention between the parties that must be fully litigated, and then decided by the Court. Although WTS International and Colson both discuss whether supervisory status preempts Colson's WDA claim, it would be premature for the Court to make any findings on that issue at this early stage of the proceeding since the matter was not decided on the merits at the VIDOL.

¶19 Therefore, the Motion to Dismiss will be denied. An Order consistent with this Memorandum Opinion will be entered contemporaneously herewith.

DATED: December 3, 2019

ATTEST:

ESTRELLA H. GEORGE

Clerk of the Court

BY:

LORI BOYNES TYSON

Chief Deputy Clerk 12/3/19


Kathleen Mackay

Judge of the Superior Court
of the Virgin Islands