IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
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ANNICE CANTON, Plaintiff, v. VIRGIN ISLANDS HUMANITIES COUNCIL, Defendant.	)	CASE NO. ST-12-CV-279 ACTION FOR BREACH OF CONTRACT, BREACH OF DUTY OF GOOD FAITH AND FAIR DEALING, UNLAWFUL DISCHARGE, DEFAMATION, DAMAGES, INJUNCTIVE AND DECLARATORY RELIEF JURY TRIAL DEMANDED

MEMORANDUM OPINION AND ORDER

Before this Court is Plaintiff's Motion for Default Judgment, which was filed on July 1, 2015. This Court held an evidentiary hearing on Plaintiff's Motion on May 9, 2017. Defendant did not file a response to the Motion or appear at the evidentiary hearing. Despite numerous directives from this Court,[1] the record does not reflect that Defendant retained counsel in this matter. After reviewing the Complaint, this Court will deny the Motion because Plaintiff fails to plead a valid claim.

BACKGROUND

On or about June 29, 2010, Plaintiff Annice Canton was hired by Defendant Virgin Islands Humanities Council, a non-profit organization, as its Executive Director. The decision to hire Plaintiff was made by Defendant's Board of Directors ("the Board"). Upon receipt of Defendant's job offer, Plaintiff left her previous position as a librarian.[2] Plaintiff was provided an offer letter but the offer letter did not explain her job duties as Executive Director.[3] Despite her repeated requests, the Board did not provide Plaintiff with a letter specifying her job duties. However, the Complaint alludes that Plaintiff's job duties involved hiring personnel. The Complaint states the Board pressured Plaintiff to fill two positions.[4] Plaintiff also alleges individuals were pre-selected by the Board to fill those positions.[5]

After reviewing Defendant's by-laws and operations manual, Plaintiff determined that the Board's directive to hire the two pre-selected applicants was improper. Plaintiff alleges the Board was acting *ultra vires*, or in other words, beyond the scope of its authority under the by-laws and

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[1] Entry of Default n.5 (Jan. 29, 2015).
[2] Compl. ¶ 7.
[3] *Id.* at ¶ 8.
[4] *Id.* at ¶¶ 11, 14, 16, 18.
[5] *Id.* at ¶¶ 14, 16.

operations manual.[6] Plaintiff refused to comply with the Board's directive.[7] In response, the Executive Committee of the Board informed Plaintiff that she would not receive a formal hire letter and it would reevaluate whether she was a "good fit" for continued employment with Defendant.[8] Plaintiff alleges Board terminated her in retaliation for her refusal to comply with the its *ultra vires* directive.[9]

Defendant failed to sustain its defense of this civil action. Defendant retained legal counsel[10] and filed an Answer and Affirmative Answers.[11] The parties proceeded with discovery. However, on August 30, 2013, Defendant's attorney withdrew as counsel with the Superior Court's permission[12] and Defendant has not since retained new counsel. Defendant was warned several times that failure to retain substitute counsel would result in an entry of default.[13] Therefore, on January 29, 2015, this Court issued an Entry of Default against Defendant.

This Court's recitation of facts relevant to the validity of Plaintiff's claims is limited to allegations provided in the Complaint. This Court's recitation of facts relevant to Plaintiff's damages is limited to the evidence presented at the evidentiary hearing. At the evidentiary hearing, Plaintiff provided testimony and other evidence in support of her claim for five years of back pay.

STANDARD FOR DEFAULT JUDGMENT

A. This Court Must Determine if Plaintiff Pleads Valid Claims.

Virgin Islands Rule of Civil Procedure 55 provides that a party must apply to a court for a default judgment after an entry of default if a claim is not for a sum certain or cannot be made certain by computation. "[I]t is well established that . . . a party's default is deemed to constitute a concession of all well pleaded allegations of liability . . .."[14] In other words, after the entry of default, a trial court accepts the well-pleaded factual allegations of the complaint as true.[15] However, "a trial court need not accept as true the legal conclusions a plaintiff places in its complaint, or any factual allegations which are not well-pleaded."[16] "Thus, when reviewing the allegations of a complaint to determine whether to award a judgment by default, this Court essentially looks at the pleading through a prism similar to that used when ruling on a motion to dismiss for failure to state a claim."[17]

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[6] *Id.* at ¶ 14.
[7] *Id.* at ¶30.
[8] *Id.* at ¶18.
[9] *Id.* at ¶¶ 32-34, 44.
[10] Notice of Appearance (filed by Ogletree, Deakins, Nash, Smoak & Stewart, LLC on June 25, 2012).
[11] Filed on June 25, 2012.
[12] Order (Aug. 30, 2013).
[13] Record of Proceedings, Case No. ST-12-CV-279 (status conference held on August 6, 2014); Record of Proceedings, Case No. ST-12-CV-279 (status conference held on October 28, 2013).
[14] *Appleton v. Harrigan*, 61 V.I. 262, 263 (V.I. 2014) (quoting *Cement & Concrete Workers Dist. Council Welfare Fund v. Metro Found. Contractors Inc.*, 699 F.3d 230, 234 (2d Cir. 2012)).
[15] *Id.* (quoting *Bank of Nova Scotia v. Dore*, 57 V.I. 105, 110 (V.I. Super. Ct. 2012)).
[16] *Bank of N.S. v. Dore*, 57 V.I. 105, 110 (V.I. Super. Ct. 2012).
[17] *Id.* at 110-111.

Courts must undertake the following three-step analysis to determine whether a complaint states a plausible claim for relief:

> 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 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.[18]

<u>1. This Court Will Consider Counts I, II, III, IV, and VI under Federal Rule of Civil Procedure 8.</u>

On April 3, 2017, the Supreme Court of the Virgin Islands adopted the Virgin Islands Rules of Civil Procedure. Fed. R. of Civ. P. 8(a)(2) and V.I. R. Civ. P. 8(a)(2) both provide that "a pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." However, V.I. R. Civ. P. 8(a)(2) specifies the Virgin Islands "is a notice pleading jurisdiction." V.I. Supreme Court has held that the adoption of V.I. R. Civ. P. 8(a)(2) abolished the plausibility standard articulated in *Bell Atlantic Corp. v. Twombly*[19] and restores the notice pleading regime that had been in effect previously.[20] However, V.I. R. Civ. P. 1-1(c)(2)(B) provides that the Superior Court can continue to operate under the previous rules if "the Superior Court makes an express finding that applying them in a particular previously-pending action would be infeasible or would work an injustice." For this matter, this Court determines applying V.I. R. Civ. P. 8(a)(2) and its notice pleading standard, instead of Fed. R. of Civ. P. 8(a)(2) and its plausibility standard, would be unjust.

Plaintiff filed her Motion almost two years before the adoption of V.I. R. Civ. P. 8(a)(2). While courts have justified applying the new procedural rules when a Virgin Islands Rule contains the same language and standard of review as an old rule,[21] this Court notes that V.I. R. Civ. P. 8(a)(2) and Fed. R. of Civ. P. 8(a)(2) require different standards of review. Defendant did not file a response but any arguments opposing the Motion would be predicated on Fed. R. of Civ. P. 8(a)(2)'s plausibility standard. Finally, this Court determines it would not dismiss at least some of Plaintiff's claims if it considers the Complaint under V.I. R. Civ. P. 8(a)(2). Defendant should not be prejudiced because Plaintiff's Motion is addressed long after it was filed and Defendant's

[18] *Brady v. Cintron*, 55 V.I. 802, 823 (V.I. 2011).
[19] 550 U.S. 544 (2007).
[20] *Mills-Williams v. Mapp*, 2017 V.I. Supreme LEXIS 35, at *12 (V.I. July 14, 2017).
[21] *See, e.g., Gerald v. R.J. Reynolds Tobacco Co.*, 2017 V.I. LEXIS 102, *3 n.15 (V.I. Super. Ct. July 10, 2017); *Hawkins v. Greiner*, 2017 V.I. LEXIS 65, *3 n. 3 (V.I. Super. Ct. Apr. 27, 2017).

deadline for filing a response lapsed before the adoption of new procedural rules.[22] Therefore, this Court will review Plaintiff's Motion in accordance with Fed. R. of Civ. P. 8(a)(2).

2. This Court Will Consider Count V under Virgin Islands Rule of Civil Procedure 9.

Count V states Defendant "enticed" Plaintiff resign from her previous job as a librarian with malice and bad faith.[23] In other words, Count V alleges Defendant convinced to take the Executive Director position by making dishonest or deceptive representations. Defendant claims that but for Defendant's enticement Plaintiff would have continued her employment as a librarian.[24]

Count V does not expressly state a cause of action. Since "[p]leadings must be construed so as to do justice,"[25] this Court construes Count V broadly. Therefore, considering the facts alleged in Count V, this Court construes Count V as alleging the tort of fraudulent misrepresentation. The facts alleged conform to that cause of action more than any other tort of which this Court is aware.

V.I. R. Civ. P. 9(b) requires fraud and misrepresentation allegations to be stated with particularity.[26] Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.[27]

B. Plaintiff Must Present Evidence Demonstrating Her Damages.

In addition, after alleging a well-pleaded claim, a plaintiff bears the burden of demonstrating her damages.[28] "[T]he amount of damages . . . generally must be established in an evidentiary proceeding where the defendant is afforded the opportunity to contest the amount claimed."[29]

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[22] LRCi 7.1(e), applicable pursuant to the now-amended SUPER. Ct. R. 7, allowed a party to file a response to a motion within fourteen (14) days.
[23] Compl. ¶¶ 40, 42.
[24] *Id.* at ¶ 41.
[25] FED. R. CIV. P. 8(e).
[26] The Court applies V.I. R. Civ. P. 9(b) because the rule's language is identical to that of Fed. R. Civ. P. 9(b) and the Note to V.I. R. Civ. P. 9(b) alludes that the new rule continues the standard of review applied by its predecessor.
[27] V.I. R. CIV. P. 9(b).
[28] *King v. Appleton*, 61 V.I. 339, 346 (V.I. 2014) ("it is well established that . . . a party's default is .... not considered an admission of damages") (*quoting Cement & Concrete Workers Dist. Council Welfare Fund v. Metro Found. Contractors Inc.*, 699 F.3d 230, 234 (2d Cir. 2012)).
[29] *Id.*

APPLICATION

A. Plaintiff Fails to Plead a Valid Claim under the Wrongful Discharge Act.

Count I alleges Defendant unlawfully terminated Plaintiff in violation of the Wrongful Discharge Act ("WDA"). The WDA prohibits covered employers from discharging employees except for certain enumerated reasons.[30] The WDA covers employers that are not a public employer and have employed five (5) or more employees for each working day in each of the twenty (20) or more calendar weeks in the two (2) year period preceding a discharge.[31] The V.I Supreme Court held that an employee needs to plead only that she was a defendant's employee and she was wrongfully discharged in order to plead a valid claim under the WDA.[32] Rejecting the use of Title VII's pleading standard for the WDA, the V.I. Supreme Court also rejected the notion that an employee must affirmatively plead an employer employed the requisite number of employees at the time of her discharge.[33] Similarly, this Court determines it should not require Plaintiff to plead affirmatively she was a covered employee.

However, the Complaint indicates that Plaintiff was a supervisor and Virgin Islands courts have held that supervisors are not covered under WDA because the National Labor Relations Act ("NLRA") preempts application of the WDA to supervisors.[34] "Because the term 'supervisor' is not defined by the WDA, courts look to the definition of that term in the NLRA."[35] Under the NLRA, a "supervisor" is defined as:

> any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.[36]

While this Court does not require Plaintiff to plead affirmatively she was not a supervisor, this Court cannot ignore pleaded facts suggesting she was a supervisor. It was her job to fill the two positions at the epicenter of her dispute with the Board, which indicates she had authority to hire.[37] Because Plaintiff had authority to hire, she was a supervisor and, consequently, not covered by the WDA. As such, this Court determines Plaintiff has not provided a well-pleaded claim for a wrongful discharge claim under the WDA.

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[30] 24 V.I.C. § 76.
[31] *Id.* at § 62.
[32] *Rennie v. Hess Oil V.I. Corp.*, 62 V.I. 529, 544 (V.I. 2015).
[33] *Id.* at 544 n.10.
[34] *Charles v. CBI Acquisitions*, LLC, 2016 V.I. LEXIS 62, *at 19 n.43 (V.I. Super. Ct. May 9, 2016) (collecting cases).
[35] *Id.* at *21.
[36] 29 U.S.C. § 152(11).
[37] Compl. ¶¶ 11, 16.

This Court notes it disagrees with precedent providing that the NLRA preempts application of the WDA to supervisors. The WDA exempts employers whose employees' terms and conditions of employment are modified by a "union contract."[38] The U.S. Court of Appeals for the Third Circuit in *St. Thomas - St. John Hotel & Tourism Association v. Virgin Islands* held that the WDA unlawfully encourages employers to enter into a "union contract" with supervisory employees to avoid the just cause termination requirement and, therefore, is preempted by the NLRA, which excludes supervisors.[39] Virgin Islands courts have followed the Third Circuit's ruling and held that the WDA excludes supervisors from the WDA's protections.[40]

This Court considers the Third Circuit's analysis in *St. Thomas - St. John Hotel & Tourism Association v. Virgin Islands* to be flawed. The Third Circuit misunderstands the definition of "union contract." The Third Circuit stated, "the only way for an employer to alter or expand the WDA's nine enumerated grounds for terminating a supervisor/employee would be to enter [into] a 'union contract' with the supervisor."[41] However, such contract would not be a "union contract." A union contract, formally known as a collective bargaining agreement, is a "contract between an employer and a labor union regulating employment conditions, wages, benefits, and grievances."[42] A collective bargaining agreement ("CBA") is not the same as an individual employment contract. A CBA is a labor contract negotiated by a labor union on behalf of the employees it represents. In order for employment contract to be considered a "union contract," an employer could not "bargain with the supervisor as an employee"[43] but, instead, would have to bargain with a labor union representing the supervisor. In other words, while the parties to an individual employment contract are an employer and employee, the parties to a "union contract" are an employer and a labor union.

In addition, the Third Circuit misreads the U.S. Supreme Court's NLRA preemption case law. The Third Circuit relied on *Beasley v. Food Fair of North Carolina, Inc.*[44] In *Beasley,* managers at a grocery chain were discharged after they joined a labor union. The managers attempted to file a claim under a North Carolina law prohibiting employers from discriminating against employees due to union membership without an exception for supervisors. The U.S. Supreme Court held that the NLRA preempts the North Carolina law in regards to supervisors because the NLRA clearly provides that employers may take adverse employment actions against supervisors for participating in union activities.[45]

The Third Circuit is correct when it states that *Beasley* "teaches that state [or territorial] laws that pressure employers to accord supervisors the status of employees for collective bargaining purposes conflict with Section 14(a) of the NLRA."[46] However, the Third Circuit reads *Beasley* too broadly and excludes all supervisors from the WDA's protections. While in *Beasley*

[38] 24 V.I.C. § 76(a).
[39] *St. Thomas - St. John Hotel & Tourism Ass'n v. Virgin Islands*, 357 F.3d 297, 302 (3d. Cir. 2004).
[40] *See, e.g., Mina v. Hotel on the Cay Time-Sharing Ass'n*, 62 V.I. 220, 232 (V.I. Super. Ct. 2015); *Sorber v. Glacial Energy VI, LLC*, 2013 V.I. LEXIS 69, at *5 (V.I. Super. Ct. Nov. 22, 2013).
[41] 357 F.3d at 303.
[42] *Collective Bargaining Agreement*, BLACK'S LAW DICTIONARY (9th ed. 2009).
[43] 357 F.3d at 303.
[44] 416 U.S. 653 (1974).
[45] *Id.* at 662.
[46] 357 F.3d at 303.

the plaintiffs were members of a labor union, in the present case, there is no indication Plaintiff is represented by a labor union. Therefore, Defendant could not have felt pressure to enter collective bargaining negotiations regarding Plaintiff's terms and conditions of employment, in particular the standard under which she can be discharged, if there was no labor union with whom the Board could bargain.

As expressed by the U.S. Supreme Court in *Beasley*, a major concern Congress had when choosing to exempt supervisors from the protections of the NLRA was "to redress a perceived imbalance in labor-management relationships that was found to arise from putting supervisors in the position of serving two masters with opposed interests."[47] However, the Complaint does not indicate Plaintiff was represented by a labor union or that she tried to join a labor union. Therefore, there was no other "master" she could serve besides Defendant and there is no reason to rule that the NLRA preempts her WDA claim.

The V.I. Supreme Court has not adopted the Third Circuit's ruling or reasoning in *St. Thomas - St. John Hotel & Tourism Association v. Virgin Islands*. But, it clarified in *Defoe v. Phillip* that, while it is not bound by the Third Circuit's interpretation of Virgin Islands statutes, the Superior Court is compelled to treat such decisions as binding precedent.[48] Therefore, this Court is bound to follow the Third Circuit's holding that the WDA does not apply to supervisors, such as Plaintiff.

B. Defendant Fails to Plead a Valid Breach of Contract Claim.

Counts II and IV allege Defendant is liable for breach of contract resulting from its firing Plaintiff without just cause. To establish a breach of contract claim, Plaintiff must demonstrate: (1) an agreement; (2) a duty created by that agreement; (3) a breach of that duty; and (4) damages.[49] While the V.I. Supreme Court has acknowledged that employment-at-will is "a well-established common-law doctrine accepted in nearly all American jurisdictions,"[50] it has not actually adopted employment-at-will as Virgin Islands common law through a *Banks* analysis. This Court is not bound by V.I. Supreme Court decisions establishing principles of common law that do not examine the *Banks* factors.[51] Therefore, since the WDA does not apply to this matter, this Court must engage a *Banks* analysis to determine if should adopt the common law doctrine of employment-at-will.

Banks v. International Rental and Leasing Corp. and its progeny provides that, before adopting a common law principle that has not been adopted by the V.I. Supreme Court, the Superior Court must consider the following three non-dispositive factors: (1) whether any Virgin Islands courts have previously adopted a particular rule; (2) the position taken by a majority of courts from other jurisdictions; and (3) most importantly, which approach represents the soundest rule for the Virgin Islands.

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[47] *Beasley*, 416 U.S. at 61-62.
[48] 56 V.I. 109, 119 (V.I. 2012).
[49] *Phillip v. Marsh-Monsanto*, No. 2015-0040, 2017 V.I. Supreme LEXIS 30, at *9 (V.I. May 30, 2017).
[50] *Pedro v. Ranger Am. of the V.I., Inc.*, 63 V.I. 511, 518 (V.I. 2015).
[51] *Merchs. Commercial Bank v. Oceanside Vill., Inc.*, 64 V.I. 3, 12 (V.I. Super. Ct. 2015).

At-will employment means an employer or employee can terminate their employment relationship at any time and for any reason not prohibited by statute or for no reason at all.[52] Therefore, neither party has the right to the continuation of the employment relationship. However, like other terms of an employment agreement, parties can agree to modify an employment relationship's at-will status, such as by promising only to terminate the relationship for just cause.

The Superior Court has acknowledged that employment relationships outside the WDA are at-will.[53] In addition, as the V.I. Supreme Court has mentioned, a review of other jurisdictions shows that the employment-at-will doctrine has been adopted in nearly all American jurisdictions.

This Court determines that the common law doctrine of at-will employment is the soundest rule for the Virgin Islands. To rule otherwise would judicially abrogate the WDA, which abolished the common law employment-at-will doctrine for covered employees.[54] Therefore, this Court adopts the common law principle that an employment relationship is at-will unless it is modified by a statute, such the WDA, or an express contract provision.

Because she was not covered under the WDA or any other statute requiring just cause termination, Plaintiff's employment relationship with Defendant was governed by the employment-at-will doctrine, unless such status was modified by an express contract. The Complaint does not reveal the existence of a contract provision, whether written or oral, creating a duty to terminate Plaintiff only for just cause or with due process protections. In addition, the fact that she did not receive a formal hire letter "setting forth the terms and conditions of her employment" alludes that no express contract provision requiring just cause termination or due process existed.[55]

This Court notes that a portion of Defendant's employee handbook is attached to Plaintiff's Motion and it was introduced during the evidentiary hearing. The handbook contains language addressing employees' right to due process before suffering an adverse employment action such as termination.[56] However, Plaintiff does not mention the employee handbook in her Complaint. When determining if a complaint is well-pleaded, a court should limit its review to the four-corners of the complaint.[57] While some courts have stated a complaint's attachments may be considered

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[52] *See Edwards v. Marriott Hotel Mgmt. Co. (V.I.), Inc.*, 2015 V.I. LEXIS 13, at *6 (V.I. Super. Ct. Jan. 29, 2015).

[53] *See, e.g., Edwards*, 2015 V.I. LEXIS 13 (stating there is implied covenant of good faith); *Marcano v. Cowpet Beach Resort*, 31 V.I. 99, 105 (V.I. 1995).
[54] *Id.* at 546.
[55] Compl. ¶¶ 26, 32.
[56] Employees' handbook for Virgin Islands Humanities Council (Plaintiff did not provide a title page), VIHC-000056, § 10, Employee Conduct, pp. 20-21 (revised May 16, 2009), attached to Motion for Default Judgment.
[57] *Cacciamani & Rover Corp. v. Banco Popular*, 2013 V.I. LEXIS 49, at *2 n.2 (V.I. Super. Ct. July 10, 2013), reversed on other grounds by 61 V.I. 247 (V.I. 2014) ("this Court's holding is based on the factual allegations stated with in the four corners of the Complaint"); *Callender v. Nichtern*, 32 V.I. 96, 106 (V.I. Super. 1995) ("Upon careful examination of the four corners of the plaintiff's complaint together with the applicable law, the Court finds that the plaintiff has established a cause of action upon which relief can be granted"); *David v. AMR Servs. Corp.*, 191 F.R.D. 89, 90 n.1 (D.V.I. 2000) ("Because [defendant] has moved to dismiss for failure to state a claim, the Court will limit its analysis to a review of the four corners of the complaint").

part of the pleading,[58] Plaintiff did not attach the employee handbook or other documents to her Complaint.

Therefore, because Plaintiff was not covered by the WDA and she did not plead that an express contract provision altered the employment-at-will relationship, Plaintiff has not satisfactorily pleaded a valid breach of contract claim.

C. Plaintiff Fails to Plead Valid Claim for Breach of the Implied Duty of Good Faith and Fair Dealing.

<u>1. Previous Decisions Applying the Implied Duty of Good Faith and Fair Dealing to Employment Contracts Are Not Binding.</u>

In Counts III and VI, Plaintiff alleges that her termination violated the duty of good faith and fair dealing. The duty of good faith and fair dealing requires parties to a contract not to act in contravention of the other party's reasonable expectations arising out of the contract. A review of Virgin Islands case law reveals no binding precedent allowing or disallowing Plaintiff to plead a claim for breach of the duty of good faith and fair dealing resulting from termination of an at-will employment relationship.

Some Virgin Islands courts have relied on *Petersen v. First Federal Savings and Loan Association*[59] to recognize such claims.[60] However, in *Petersen*, the District Court for the Virgin Islands mechanistically applied RESTATEMENT (SECOND) OF CONTRACTS § 205.[61] The V.I. Supreme Court held that Virgin Islands courts should not apply the Restatements as binding authority or rely on case law that treats the Restatements as binding authority.[62]

Other decisions rely on the V.I. Supreme Court's decision *Chapman v. Cornwall,* which recognized the existence of an implied duty of good faith and fair dealing in contracts in a wrongful discharge case.[63] However, this Court determines it should not rely on *Chapman* as binding precedent for two reasons. First, *Chapman* relied upon RESTATEMENT (SECOND) OF CONTRACTS § 205, which expresses the universal view that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." In *Merchants Commercial Bank v. Oceanside Village Inc.*, this Court determined *Chapman's* holding concerning the implied duty of good faith and fair dealing is not dispositive because the V.I. Supreme Court did not conduct a *Banks* analysis.[64]

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[58] *See, e.g., Mossman v. Moran*, 2004 U.S. Dist. LEXIS 14267, at *7-8 (D.V.I. June 1, 2004).
[59] 617 F. Supp. 1039, 1042 (D.V.I. 1985).
[60] *See, e.g., Marcano v. Cowpet Beach Resort,* 31 V.I. 99, 105 (V.I. Super. 1995); *Hodge v. Daily News Publ'g Co., Inc.*, 52 V.I. 186, 200 (V.I. Super. Ct. 2009); *Sorber*, 2013 V.I. LEXIS 12, at *16.
[61] 617 F. Supp. at 1042 (citing *Robinson v. Hess Oil V.I. Corp.*, 19 V.I. 106, 112 (D.V.I. May 3, 1982)).
[62] *Gov't of the V.I. v. Connor*, 60 V.I. 597, 605 n.1 (V.I. 2014).
[63] *See, e.g., Edwards,* 2015 V.I. LEXIS 13, at *10-11.
[64] 64 V.I. 3, 12, 34 (V.I. Super. Ct. 2015) ("if the Supreme Court recites a common law proposition without first subjecting same to a Banks analysis, the Superior Court may not rely on that case as conclusive authority for a proposition of law").

Second, this Court does not find that the universally accepted principle that every contract includes an implied duty of good faith and fair dealing seamlessly applies to at-will employment agreements. At-will employment agreements are distinct from most other types of contracts. Parties to an at-will employment contract have an inherent right to terminate the contract at any time and for any reason or no reason unless expressly provided otherwise. On the other hand, for most other contracts, a party can only terminate a contract if the contract expressly provides such a right and only for expressly permitted reasons. While the implied duty of good faith and fair dealing has been adopted virtually by every jurisdiction, only a small minority of states have held at-will employment contracts include the implied duty. Although this Court generally recognized an implied duty of good faith and fair dealings in contracts,[65] it finds that further analysis is necessary to determine if the common law doctrine should be applied to at-will employment contracts. Therefore, this Court must conduct a *Banks* analysis.

2. This Court Recognizes that an Implied Duty of Good Faith and Fair Dealing is Found in At-Will Employment Contracts.

As discussed above, Virgin Islands courts, including the V.I. Supreme Court, have recognized an implied duty of good faith and fair dealing in employment agreements. However, these courts relied upon the Restatements as binding authority or prior decisions that relied on the Restatements.

A review of other jurisdictions reveals that a minority of states recognize an implied duty of good faith and fair dealing in at-will employment relationships.[66] A majority of jurisdictions have rejected application of the implied duty to at-will employment contracts.[67]

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[65] *Id. at* 34-35 (providing *Banks* analysis).

[66] *Reust v. Alaska Petrol. Contractors Inc.*, 127 P.3d 807 (Alaska 2005); *Wagenseller v. Scottsdale Mem'l Hosp.*, 710 P.2d 1025 (Ariz. 1985), superseded by statute on other grounds; *Guz v. Bechtel Nat'l Inc.*, 8 P.3d 1089 (Cal. 2000); *Merrill v. Crothall-Am. Inc.*, 606 A.2d 96 (Del. 1992); *Idaho Power Co. v. Cogeneration Inc.*, 9 P.3d 1204 (Idaho 2000); *Gram v. Liberty Mut. Ins. Co.*, 660, 429 N.E.2d 21 (Mass. 1981); *Brehany v. Nordstrom, Inc.*, 812 P.2d 49, 55 (Utah 1991); *Garcia v. Uniwyo Fed. Credit Union*, 920 P.2d 642 (Wyo. 1996) (applied to employment terminations calculated to avoid some employer responsibility to the employee).

[67] *Grant v. Butler*, 590 So. 2d 254, 256 (Ala. 1991); *Gladden v. Ark. Children's Hosp.*, 728 S.W.2d 501 (Ark. 1987); *Magnan v. Anaconda Indus.*, 479 A.2d 781 (Conn. 1984); *Decker v. Browning-Ferris Indus.*, 931 P.2d 436 (Colo. 1997); *Paul v. Howard Univ.*, 754 A.2d 297, 310 (D.C. 2000) (citing *Hais v. Smith*, 547 A.2d 986 (D.C. 1988)); *Ins. Concepts & Design Inc. v. Healthplan Servs. Inc.*, 785 So. 2d 1232 (Fla. Dist. Ct. App. 2001); *Schuck v. Blue Cross & Blue Shield of Ga.*, 534 S.E.2d 533 (Ga. Ct. App. 2000); *Parnar v. Americana Hotels*, 371, 652 P.2d 625 (Haw. 1982); *Miller v. Ford Motor Co.*, 152 F. Supp. 2d 1046, *aff'd*, 105 Fed. App'x 84 (7th Cir. 2004, unpublished); *Harrison v. Sears, Roebuck & Co.*, 546 N.E.2d 248 (Ill. App. Ct. 1989); *Hamblen v. Danners Inc.*, 478 N.E.2d 926 (Ind. Ct. App. 1985); *Anderson v. Douglas & Lomason Co.*, 540 N.W.2d 277 (Iowa 1995); *Dickens v. Snodgrass, Dunlap & Co.*, 872 P.2d 252 (Kan. 1994); *Morriss v. Coleman Co.*, 738 P.2d 841 (Kan. 1987); *McCart v. Brown-Forman Corp.*, 713 F. Supp. 981 (W.D. Ky. 1988); *Favrot v. Favrot*, 68 So. 3d 1099 (La. Ct. App. 2011); *Poirier v. Sears, Roebuck & Co.*, No. CV-80-231, 1983 Me. Super. LEXIS 229 (Me. 1983); *Suburban Hosp. Inc. v. Dwiggins*, 596 A.2d 1069 (Md. 1991); *Hammond v. United of Oakland*, 483 N.W.2d 652 (Mich. Ct. App. 1992); *Hunt v. IBM Mid Am. Employees Fed. Credit Union*, 384 N.W.2d 853 (Minn. 1986); *Miranda v. Wesley Health Sys.*, 949 So. 2d 63 (Miss. Ct. App. 2006); *Kempe v. Prince Gardner Inc.*, 569 F. Supp. 779 (E.D. Mo. 1983); *Bishop v. Shelter Mut. Ins. Co.*, 129 S.W.3d 500 (Mo. Ct. App. 2004); *Martin v. Sears, Roebuck & Co.*, 899 P.2d 551, 555 (Nev. 1995); *Centronics Corp. v. Genicom Corp.*, 562 A.2d 187 (N.H. 1989); *Wade v. Kessler Inst.*, 798 A.2d 1251 (N.J. 2002);

Several reasons have been provided for not recognizing the implied duty in at-will employment contracts. Some courts have held that remedies to protect employees against bad faith termination can be found in statutes.[68] Other courts have warned application of the duty to at-will employment contracts "would write into every hiring of indefinite duration a provision requiring good cause for termination"[69] and that "[i]mposing a good faith duty to terminate would unduly restrict an employer's discretion in managing the work force."[70]

However, this Court finds the majority's concern that recognizing the implied duty in an at-will employment context would effectively require just cause termination to be unwarranted. The approach taken by the majority is based on a flawed understanding of both the employment-at-will doctrine and the implied duty of good faith and fair dealing. In their efforts to avoid undermining an employer's right to terminate at-will employees for any reason or no reason, the majority ignores that an at-will employment contract, while unique, is still a bargained for exchange.

In *Wagenseller v. Scottsdale Memorial Hospital,* the Arizona Supreme Court provides an in-depth analysis of at-will employment and how the terms of at-will employment contracts would be altered, if at all, by application of the implied duty of good faith and fair dealing.[71] The Arizona Supreme Court stated "the relevant inquiry always will focus on the contract itself, to determine what the parties did agree to."[72] The appellate court pointed out that "[t]he covenant requires that neither party do anything that will injure the right of the other to receive the benefits of their agreement."[73] The Arizona Supreme Court then provided the following explanation of why application of the implied duty to at-will employment contracts does not impose new obligations upon employers:

Melnick v. State Farm Mut. Auto. Ins. Co., 749 P.2d 1105 (N.M. 1988); *Riccardi v. Cunningham*, 737 N.Y.S.2d 871 (N.Y. App. Div. 2002); *Teleflex Info. Sys. Inc. v. Arnold*, 513 S.E.2d 85 (N.C. Ct. App. 1999); *Hillesland v. Fed. Land Bank Ass'n of Grand Forks*, 407 N.W.2d 206 (N.D. 1987); *Clark v. Collins Bus Corp.*, 736 N.E.2d 970 (Ohio Ct. App. 2000); *Ammarco v. Anthem Ins. Cos.*, 723 N.E.2d 128 (Ohio Ct. App. 1998); *Burk v. K-Mart Corp.*, 770 P.2d 24 (Okla. 1989); *Downs v. Waremart*, 903 P.2d 888, (Or. Ct. App. 1995), *rev'd on other grounds by* 926 P.2d 314 (Or. 1996); *Donahue v. Fed. Express Corp.*, 753 A.2d 238 (Pa. Super. Ct. 2000); *Salisbury v. Stone*, 518 A.2d 1355 (R.I. 1986); *Keiger v. Citgo*, 482 S.E.2d 792 (S.C. Ct. App. 1997); *Butterfield v. Citibank of S.D.*, 437 N.W.2d 857 (S.D. 1989); *Whittaker v. Care-More Inc.*, 621 S.W.2d 395 (Tenn. Ct. App. 1981); *Shelby v. Delta Air Lines Inc.*, 842 F. Supp. 999 (M.D. Tenn. 1993); *Midland v. O'Bryant*, 18 S.W.3d 209 (Tex. 2000); *LoPresti v. Rutland Reg'l Health Servs. Inc.*, 865 A.2d 1102 (Vt. 2004); *Wright v. St. Charles Water Auth.*, 59 Va. Cir. 244, 246 (Va. Cir. Ct. 2002); *Thompson v. St. Regis Paper Co.*, 685 P.2d 1081 (Wash. 1984); *Miller v. Mass. Mut. Life Ins. Co.*, 455 S.E.2d 799 (W. Va. 1995); *Mackenzie v. Miller Brewing Co.*, 623 N.W.2d 739 (Wis. 2001).

[68] *See, e.g., Grant v. Butler*, 590 So. 2d 254, 255 (Ala. 1991) (finding that the Occupational Safety and Health Act provides adequate remedies for employees fired for reporting safety violations).

[69] *Magnan v. Anaconda Indus., Inc.*, 479 A.2d 781, 786 (Conn. 1984).

[70] *Brockmeyer v. Dun & Bradstreet*, 569, 335 N.W.2d 834 (Wis. 1983).

[71] 710 P.2d 1025 (Ariz. 1985).

[72] *Id.* at 1040.

[73] *Id.* at 1025.

> [T]he implied-in-law covenant of good faith and fair dealing protects the right of the parties to an agreement to receive the benefits of the agreement that they have entered into. The denial of a party's right to those benefits, whatever they are, will breach the duty of good faith implicit in the contract.
>
> . . .
>
> In the case of an employment-at-will contract, it may be said that the parties have agreed, for example, that the employee will do the work required by the employer and that the employer will provide the necessary working conditions and pay the employee for work done. What cannot be said is that one of the agreed benefits to the at-will employee is a guarantee of continued employment or tenure. The very nature of the at-will agreement precludes any claim for a prospective benefit.
>
> . . .
>
> The covenant does not protect the employee from a 'no cause' termination because tenure was never a benefit inherent in the at-will agreement. The covenant does protect an employee from a discharge based on an employer's desire to avoid the payment of benefits already earned by the employee.
>
> . . .
>
> To the extent, however, that the benefits represent a claim for prospective employment, her claim must fail.[74]

Therefore, while an at-will employment agreement does not provide a worker with a guarantee of continued employment, it does provide the employee with a right to payment for labor already provided.[75] Minority jurisdictions have restricted recognition of claims for breach of the implied duty to situations in which an employer terminated an employee to avoid paying a benefit already earned, as opposed to a prospective benefit. For example, in *Fortune v. National Cash Register Company*, a salesman claimed he was terminated so that his employer could avoid paying commission on sales he made before his termination.[76] Another example, in *K Mart Corp. v. Ponsock*, an employee with a long tenure and approximately six months away from 100 percent vesting of his retirement benefits claimed he was terminated so his employer could avoid providing retirement benefits.[77] Finally, *Metcalf v. Intermountain Gas Company*, an employee claimed she was terminated for taking too much earned sick leave.[78] In each of the above-cases, the implied duty was applied in recognition of an employee's retrospective right to an earned benefit, as opposed to any possible prospective damages, such as back pay. Courts in minority jurisdictions

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[74] *Id.* at 1040.

[75] Most employers do not pay employees prospectively. Instead, most employers pay employees at the end of a pay period and after employees have provided their labor.

[76] 364 N.E.2d 1251, 1253-1255 (Mass. 1977).

[77] 732 P.2d 1364, 1372 (Nev. 1987).

[78] 778 P.2d 744 (Idaho 1989).

also have been clear that the implied duty does not impose an obligation upon employers to terminate employees only for just cause.[79]

Finding the minority's view convincing and considering that Virgin Islands court have extensively applied the implied duty to employment agreements, this Court holds that an implied duty of good faith and fair dealing exists in at-will employment contracts. However, this Court clarifies that the implied duty only protects an employee's reasonable expectations stemming from the employment contract, i.e. payment earned from labor provided. An at-will employee does not have a reasonable expectation of continued employment or just cause termination. In addition, since the implied duty is a common law principle, it does not apply to employment relationships covered by WDA because the V.I. Supreme Court has stated that the WDA is a statutory abrogation of the common law doctrine of at-will employment.[80]

<u>3. Plaintiff Does Not Plead that Her Termination Was Motivated By Defendant's Desire to Avoid Payment of Some Earned Benefit.</u>

Plaintiff does not assert that her termination undermined a reasonable expectation promised to her in exchange for serving as Defendant's Executive Director. Plaintiff claims that Defendant's retaliatory motive for terminating her violated an implied duty of good faith and fair dealing.[81] Specifically, Plaintiff asserts she was discharged for refusing to comply with the Board's *ultra vires* directives. However, as explained above, the implied duty of good faith and fair dealing in at-will employment contracts did not require Defendant to terminate Plaintiff only for good cause. As an at-will employee, Plaintiff had no reasonable expectation of continued employee. Finding no allegation in the Complaint claiming Defendant terminated Plaintiff to avoid providing a reasonably expected benefit, this Court determines Plaintiff fails to plead a valid claim for breach of the implied duty of good faith and fair dealing.

D. Plaintiff Fails to Plead with Particularity a Claim of Fraudulent Misrepresentation.

Fraudulent misrepresentation occurs when "one makes a misrepresentation of fact, opinion, intention, or law that he or she either knew or had reason to know was false, and that was made for the purpose of inducing another to act or refrain from acting on it, is subject to liability to the other for pecuniary loss caused by the other's justifiable reliance on the misrepresentation."[82]

The Complaint does not provide any falsehood or misrepresentation told by Defendant in order to convince Plaintiff to take the Executive Director position. Therefore, this Court determines Count V does not satisfactorily plead a claim for fraudulent misrepresentation.

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[79] *See, e.g., Metcalf v. Intermountain Gas Co.*, 627, 778 P.2d 744, 749 (Idaho 1989) ("we reject the 'amorphous concept of bad faith' as the standard for determining whether the covenant has been breached"); *Magnan v. Anaconda Indus., Inc.*, 571, 479 A.2d 781, 789 (Conn. 1984) ("a breach of such an implied covenant cannot be predicated simply upon the absence of good cause for a discharge").
[80] *Rennie*, 62 V.I. at 542.
[81] Compl. ¶¶ 33, 34, 44, 45.
[82] *Merchs. Commercial Bank.*, 64 V.I. at 21-22 (providing *Banks* analysis).

CONCLUSION

Although, in accordance with its authority under Fed. R. Civ. P. 55(b), it held an evidentiary hearing to determine Plaintiff's damages, this Court limits its analysis to the Complaint. Concluding that Plaintiff has not pleaded a claim for which this Court can grant relief, this Court is unable to proceed to determining a proper award of damages. Therefore, this Court will deny Plaintiff's Motion for Default Judgment. In addition, finding that Plaintiff has alleged no viable claim, this Court will dismiss Plaintiff's Complaint.

Accordingly, it is hereby

ORDERED that Plaintiff's Motion for Default Judgment is **DENIED**; and it is further

ORDERED that Plaintiff's Complaint is **DISMISSED**; and it is further

ORDERED that a copy of this Memorandum Opinion and Order shall be directed to the Law Offices of Pedro K. Williams and Jacqueline Dennis, Chairperson of Defendant Virgin Islands Humanities Council, at 1829 Kongens Gade, St. Thomas, VI 00802-6746.

DATED: July 26, 2017

Denise M. Francois
DENISE M. FRANCOIS
Judge of the Superior Court
of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Clerk of the Court

BY: Lori B Tyson
LORI BOYNES-TYSON
Court Clerk Supervisor 7/26/17