

DIVISION OF ST. THOMAS AND ST. JOHN

Defendants.

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³ ST-13-CV-168, Verified Compl. ¶2. ST-14-CV-420, Verified Compl. ¶2.

Summary Judgment requests declaratory relief, and adds claims for intentional infliction of emotional distress, negligent infliction of emotional distress, mental and emotional distress, and gross negligence.⁴

The VIPD hired Frazer in March 1998,⁵ and Frazer became a member of the Police Benevolent Association STT/STJ District – Local Chapter 816, in August 1998.⁶ On October 28, 2011, the VIPD served Frazer with disciplinary violations⁷ with respect to an incident that occurred on September 17, 2011,⁸ in which Frazer was dispatched to a residence to investigate an activated alarm and allegedly failed to take proper police action, resulting in the burglary of the residence later that night.⁹ After a disciplinary hearing on the charges, the hearing officer issued a written decision on December 14, 2011, finding Frazer guilty of the four charges and recommending the termination of Frazer's employment.¹⁰ Specifically, the hearing officer found

⁴ Plaintiff's Second Motion for Summary Judgment ¶¶94-114 (Plaintiff adds claims for intentional infliction of emotional distress, negligent infliction of emotional distress, mental and emotional distress, and gross negligence, which the Court will construe as amendments to the Verified Complaint under V.I. R. Civ. Pro. 15).

⁵ ST-14-CV-420 Verified Compl. ¶13.

⁶ ST-13-CV-168, Verified Compl. ¶11.

⁷ ST-13-CV-168, Verified Compl. ¶12. *See also* ST-14-CV-420 Verified Compl., Exhibit 2: Hearing Officer's Decision, Pages 1-8. The eight-page decision explains the four charges brought against Frazer, the arguments of the PBA and the VIPD, evidence in support thereof, and the recommendations of the Hearing Officer.

The four charges against Frazer were as follows:

Charge I: Personal Conduct: Section 4.1: Law Enforcement Code of Ethics.

Finding: Guilty (2 days suspension without pay)

Charge II: Article I – Conduct Unbecoming a Police Officer: Section 6 – Knowingly and willfully making a false report or entry in any departmental records.

Finding: Guilty (Dismissal from the VIPD) [emphasis added]

Charge III: Article III – Neglect of Duty: Section 6: Failure to conduct proper, thorough and complete investigation.

Finding: Guilty (5 days suspension without pay)

Charge IV: Article I – Conduct Prejudicial to the Good Order of the Department: Section Performing any act or omission not specifically, which may be prejudicial to the good order and efficiency of the Department.

Finding: Guilty (3 days suspension without pay)

⁸ *Id.*

⁹ ST-14-CV-420 Verified Complaint, Exhibit 2: Hearing Officer's Decision, Page 2.

¹⁰ ST-14-CV-420 Verified Complaint, Exhibit 2: Hearing Officer's Decision, Page 7.

that Frazer violated the VIPD Police Manual¹¹ when Frazer reported, “All appeared to be in order!”, and failed to disclose that Frazer had made contact with two individuals in the area, one of whom informed Frazer that the other individual did not live at the residence.¹²

On December 22, 2011, the PBA filed a Level I Grievance on behalf of Frazer requesting that the VIPD dismiss the hearing officer’s recommendation to terminate Frazer¹³ on the grounds that the VIPD failed to issue the hearing decision within thirty days of the hearing in violation of Article V, Section 10C of the CBA.¹⁴ The following day, the PBA filed a Level II Grievance that was substantively identical to the Level I Grievance,¹⁵ and on January 3, 2012, the PBA filed a Level III Grievance, again requesting dismissal, asserting that the VIPD “violated the agreement [CBA] by failing to respond in (3) working days,” and referencing a provision of the CBA relating to class actions.¹⁶ On January 17, 2012, an order enforcing the hearing officer’s December 14, 2011, decision was served upon Frazer indicating the VIPD’s intent to request the Governor’s approval for the recommendation of Frazer’s termination.¹⁷ The PBA filed a demand to arbitrate Frazer’s termination on January 24, 2012,¹⁸ and the arbitration hearing was held over three days on August 28-30, 2012, before Arbitrator Pereles, who was selected by the parties.¹⁹

¹¹ ST-14-CV-420 Verified Compl., Exhibit 2: Hearing Officer’s Decision, Pages 1-8. The Hearing Officer’s finding that Frazer made a false report constituted a violation of the VIPD Police Manual, Article I – Conduct Unbecoming a Police Officer: Section 6 – Knowingly and willfully making a false report or entry in any departmental records, for which Hearing Officer’s recommended penalty was dismissal.

¹² ST-14-CV-420 Verified Complaint, Exhibit 2: Hearing Officer’s Decision, Page 2-3.

¹³ Defendants’ Memo. of Law in Opposition to Plaintiff’s Motion to Vacate Award and Reinstate, Exhibit 5: Grievance Reports.

¹⁴ *Id.*

¹⁵ *Id.* See also Defendants’ Memo. of Law in Opposition to Plaintiff’s Motion to Vacate Award and Reinstate, page 7.

¹⁶ Defendants’ Memo. of Law in Opposition to Plaintiff’s Motion to Vacate Award and Reinstate, Exhibit 5: Grievance Reports. The PBA’s reference to class actions constituted incorrect procedure, since Frazer’s case was not part of a class action.

¹⁷ Defendants’ Memo. of Law in Opposition to Plaintiff’s Motion to Vacate Award and Reinstate, page 8.

¹⁸ ST-14-CV-420 Verified Compl. ¶22-23, citing Exhibit 33: Demand for Arbitration.

¹⁹ Defendants’ Mem. of Law in Opposition to Plaintiff’s Motion to Vacate, Page 7.

Prior to the commencement of the arbitration, the parties stipulated that the matter should proceed solely on the merits of the grievance (i.e., whether there was just cause to terminate Frazer's employment),²⁰ and consequently, any potential procedural irregularities were not arbitrated. On February 18, 2013, the Arbitrator issued his opinion and award upholding the recommendation for termination.²¹ On February 26, 2013, the Governor approved the VIPD's recommendation, and Frazer's dismissal became effective on February 28, 2013.²²

On March 11, 2013, Defendant Lisa Plaskett-Samuel,²³ as the PBA representative, submitted to the Office of the Police Commissioner a Level III Grievance Letter on behalf of Frazer that alleged six violations of the CBA, sought full employment reinstatement of Frazer, and requested that the VIPD "cease and desist from discriminatory & retaliatory practice(s) of harassment against the Grievant."²⁴ On March 20, 2013, the Level III Grievance was dismissed since the Office of the Police Commissioner was without the authority to overrule either the decision of the Arbitrator or the Governor's authorization for the termination of a VIPD employee.²⁵

On July 15, 2013, Frazer filed an unfair labor practice complaint with the Public Employees Relations Board against the VIPD and the PBA, alleging unfair labor practices in

²⁰ Defendants' Memo. of Law in Opposition to Plaintiff's Motion to Vacate Award and Reinstate, Exhibit 8, Arbitrator's Award and Opinion, page 2 provides: "...the Parties agreed (1) that there were no substantive or procedural arbitrability issues for the arbitrator to consider and (2) the matter should proceed solely on the merits of the Grievance. The parties stipulated to the issues involved."

²¹ Defendants' Memo. of Law in Opposition to Plaintiff's Motion to Vacate Award and Reinstate, Exhibit 8, Arbitrator's Award and Opinion.

²² ST-14-CV-420 Verified Compl. ¶25-26, citing Exhibit 10: Termination Notification from the VIPD.

²³ ST-14-CV-420 Verified Compl. ¶30.

²⁴ ST-14-CV-420 Verified Compl., Exhibit 14: Level III Grievance Notice.

²⁵ Verified Compl., Exhibit 15: Level III Grievance Decision of March 19, 2013, pgs. 1-2.

violation of the Public Employee Labor Relations Act.²⁶ Following an investigation and hearing, the PERB issued a final order on August 15, 2014, in favor of defendants, finding that no unfair labor practices occurred in violation of PELRA.²⁷ These suits followed.

On September 22, 2015, Frazer filed a Motion to Vacate the Arbitrator's Decision, which this Court denied on May 25, 2017. The PBA filed a Motion for Summary Judgment on all causes of action on April 20, 2016, arguing that Frazer failed to produce any evidence of conspiracy to violate her civil rights and that there were no genuine issues of material fact regarding whether the PBA fairly represented Frazer.²⁸ On January 28, 2016, the PERB filed a Motion for Summary Judgment, contending that, because Frazer did not follow the statutory procedure for challenging the PERB's decision, the PERB is entitled to summary judgment.²⁹ On January 28, 2016, Defendant DeWood filed a Motion for Summary Judgment arguing that Frazer failed to produce any evidence showing a conspiracy between DeWood and the other co-defendants to violate Frazer's civil rights, and asserting that DeWood was never involved in any of Frazer's administrative proceedings.³⁰

STANDARDS

The Superior Court has jurisdiction over civil claims under 4 V.I.C. §76(a),³¹ the "violation of contracts between a public employer and an exclusive representative, or between

²⁶ PERB Decision and Order Re: Denise M. Frazer v. PBA, Local 816, et. al. (PERB-ULPC-13-23T). (Frazer's Complaint against the Virgin Islands Police Department alleged violations of 24 V.I.C. §378(a) (1),(2),(4),(6),(7),&(8)²⁶ and against the PBA, alleged violations of 24 V.I.C. §378(b)(1),(3),(4),(5)).

²⁷ *Id.*

²⁸ Defendant Policeman's Benevolent Association's Motion for Summary Judgment, page 5.

²⁹ Defendant Public Employee's Relations Board's Motion for Summary Judgment and Memorandum of Law in Support Thereof, page 1.

³⁰ Defendant DeWood's Memorandum of Law in Support of Motion for Summary Judgment, page 2.

³¹ 4 V.I.C. §76(a) provides, in pertinent part: "Subject to the original jurisdiction conferred on the District Court by section 22 of the Revised Organic Act of 1954, as amended, effective October 1, 1991, the Superior Court shall have original jurisdiction in all civil actions regardless of the amount in controversy."

labor organizations” under 383(a),³² and, suits that public employees bring against their unions under the Public Employee Relations Act.³³

The Court's role in deciding a motion for summary judgment is not to determine truth, but rather to determine whether a factual dispute exists that warrants trial on the merits.³⁴ Where such a factual dispute exists, the Court must deny summary judgment.³⁵ Summary judgment “is only appropriate where the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.”³⁶ The party moving for summary judgment must show—by “citing to particular parts of materials in the record, including depositions, documents ... admissions, interrogatory answers, or other materials”³⁷—that there is no “genuine issue of material fact, at which point the burden shifts to the non-moving party to present ‘affirmative evidence’ from which a jury might reasonably return a verdict in his favor.”³⁸ In reviewing a

³² 24 V.I.C. §383(a) provides, in pertinent part: “Suits for violation of contracts between a public employer and an exclusive representative, or between labor organizations, may be brought in any court of this Territory having jurisdiction of the parties ... without respect to the amount in controversy or without regard to the citizenship of the parties.”

³³ 24 V.I.C. § 383(b) provides: “Any exclusive representative of public employees of this Territory shall be bound by the acts of its agents. Any such exclusive representative may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of this Territory, including the Federal District Court. Any money judgment against an exclusive representative in a court of this Territory, including the Federal District Court, shall be enforceable only against the labor organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.”

³⁴ See *Williams v. United Corp.*, 50 V.I. 191, 195 (V.I. 2008).

³⁵ See *Sealey-Christian v. Sunny Isle Shopping Center*, 52 V.I. 410, 423 (V.I. 2009).

³⁶ *Der Weer v. Hess Oil V.I. Corp.*, 2014 V.I. LEXIS 51, 6 (V.I. Super. Ct. Mar. 4, 2014) (citing *Defoe v. Phillip*, 56 V.I. 109, 117 (2012) (internal quotation marks and citation omitted), *aff'd on other grounds*, 702 F.3d 735 (3d Cir. 2012)). The Virgin Islands Supreme Court promulgated the Virgin Islands Rules of Civil Procedure effective March 31, 2017. By their terms, the Virgin Islands Rules of Civil Procedure are applicable to cases pending in the Superior Court at the time of their promulgation. Because most provisions of the V.I. Rules are substantially identical to the Federal Rules, the Court determines that prior decisions interpreting the Federal Rules are at least persuasive authority in those instances when the two sets of rules are substantively identical.

³⁷ V. I. R. Civ. P. 56(c)(1)(B)(i).

³⁸ *Der Weer v. Hess Oil V.I. Corp.*, 2014 V.I. LEXIS 51, 2014 WL 3974548 (V.I. Super. Ct. Mar. 4, 2014) (citing *Chapman v. Cornwall*, 58 V.I. 431, 436 (2013)).

summary judgment motion, the Superior Court must view all of the evidence in the light most favorable to the nonmoving party and also draw all reasonable inferences in that party's favor.³⁹ "Facts that could alter the outcome are 'material facts' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of proof on the disputed issue is correct."⁴⁰ "A defendant meets this standard when there is an absence of evidence that rationally supports the plaintiff's case. A plaintiff, on the other hand, must point to admissible evidence that would be sufficient to show all elements of a prima facie case under applicable substantive law."⁴¹ "To survive summary judgment, the nonmoving party's evidence must amount to more than a scintilla, but may amount to less in the evaluation of the court than a preponderance."⁴²

ANALYSIS

I. The Facts Entitle the Public Employees Relations Board, the Police Benevolent Association and the Virgin Islands Police Department to Summary Judgment Enforcing the Final Order of the Public Employees Relations Board.

The PERB argues that the PERB, the PBA, and the VIPD are entitled to summary judgment. Because Frazer did not follow the statutory procedure for challenging the PERB's decision, the PERB acted within its authority when it found that the Police Benevolent Association did not violate the law, and the PERB issued its decision on the basis of established law and precedent.⁴³ Under the Public Employee Labor Relations Act, any party aggrieved by

³⁹ *Id.* (citing *Defoe*, 56 V.I. at 117).

⁴⁰ *Id.* at 6-7 (citing *Clark v. Modern Group, Ltd.*, 9 F.3d 321, 326 (3d Cir. 1993).

⁴¹ *Id.* at 7 (citing *Clark v. Modern Group, Ltd.*, 9 F.3d 321, 326 (3d Cir. 1993).

⁴² *Id.* citing *Defoe*, 56 V.I. at 117 (internal quotation marks, parentheses, and citation omitted).

⁴³ Defendant Public Employee's Relations Board's Motion for Summary Judgment and Memorandum of Law in Support Thereof, page 1.

any final order of the PERB under Section 379⁴⁴ may appeal to the Superior Court for review of the order within twenty days of the date of the final order, naming the PERB as a party respondent.⁴⁵ The date of the final order is the date itself and not the date the order was served on the parties.⁴⁶ Further, holidays and weekends are included in the calculation.⁴⁷ An application for review is subject to timeliness requirements despite the *pro se* status of a plaintiff's pleadings.⁴⁸

Here, the Court must liberally construe Frazer's *pro se* Verified Complaint as a challenge to the PERB decision.⁴⁹ Because Frazer filed the Verified Complaint on Friday, September 5,

⁴⁴ 24 V.I.C. § 379(a) provides in pertinent part: "Any party aggrieved by the action of another, which action is believed to be a violation of this chapter, may complain of such violation in writing to the PERB and shall state in the complaint any relief sought."

⁴⁵ 24 V.I.C. § 380(a) provides: "Any party aggrieved by any final order of the PERB made pursuant to section 379 of this chapter, may appeal to the Superior Court of the Virgin Islands for review of such order and shall name the PERB as a party respondent. An application for review must be filed within 20 days after the date of the final order. The rules of procedure of the Superior Court not inconsistent with this chapter shall govern the appeal proceeding. An application not filed in a timely manner shall entitle the prevailing party to summary judgment enforcing the final order of the PERB."

⁴⁶ *Public Emples. Rel. Bd. v. United Indus. Workers-Seafarers Int'l Union*, 56 V.I. 429, 2012 V.I. Supreme LEXIS 19 (VI. 2012).

⁴⁷ 24 V.I.C. § 380(a) provides in pertinent part that the "rules of procedure of the Superior Court not inconsistent with this chapter shall govern the appeal proceeding." V.I. R. Civ. Pro. R. 6 provides, regarding whether to count holidays and weekends in a period of days:

"Computing and Extending Time

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any court order, or in any statute that does not specify a method of computing time.

(1) *Period Stated in Days or a Longer Unit*. When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) when the period is 15 days or more, count every day, including intermediate Saturdays, Sundays, and legal holidays; when the period is 14 days or less, do not count intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday." [emphasis added]

⁴⁸ *Simpson v. Golden*, 56 V.I. 272, 280 (V.I. 2012) (*pro se* status allows for a less stringent standard but does not allow a party to ignore or defy the "rules of procedural and substantive law").

⁴⁹ See *Appleton v. Harrigan*, 61 V.I. 262, 267 (V.I. 2014) ("[I]t is our policy to give *pro se* litigants greater leeway in dealing with matters of procedure and pleading") (citing *Joseph v. Bureau of Corr.*, 54 V.I. 644, 650 (V.I. 2011)); *Constr. Technicians v. Zurich Am. Ins. Co.*, 61 V.I. 153, 157 n.3 (V.I. 2014) (*pro se* status allows for a less stringent standard but does not allow a party to ignore or defy the "rules of procedural and substantive law") (citing *Simpson v. Golden*, 56 V.I. 272, 280 (V.I. 2012)); See also *V.I. Narcotics Strike Force v. Gov't of the Virgin Islands Pub. Emples. Rels. Bd.*, 60 V.I. 204, 216-19 (VI. Dec. 2, 2013) ("While section 76 of title 4 of the Virgin Islands

2014, twenty-one days after the PERB issued the final order on Friday, August 15, 2014,⁵⁰

Frazer's application to set aside the PERB decision is untimely. Although Frazer did not explicitly ask the Court to review the PERB decision, Frazer's failure to follow the statute establishing a specific procedure for invoking the Superior Court's jurisdiction deprives the Superior Court of jurisdiction to review Frazer's arguments under 4 V.I.C. §76(a), which broadly confers the Superior Court with original jurisdiction in all civil actions.⁵¹ Further, because "[a]n application not filed in a timely manner shall entitle the prevailing party to summary judgment enforcing the final order of the PERB,"⁵² the PERB, PBA and VIPD are entitled to summary judgment enforcing the final order of the PERB.

Even if Frazer had filed the Verified Complaint within twenty days of the PERB order, the PERB decision would nonetheless be enforced on the merits. Among the duties of the PERB is "to conduct hearings and/or proceedings, when warranted, on complaints of prohibited

Code broadly confers the Superior Court with original jurisdiction in all civil actions, it is well established that specific statutes establishing comprehensive schemes for attaining judicial review in particular types of cases supplant statutes that broadly confer general jurisdiction. *See, e.g., Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14-15, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981) (holding regulatory statute that provides a comprehensive scheme for judicial review precludes actions under general jurisdictional provisions); *In re Guardianship of Smith*, 54 V.I. 517, 526 (V.I. 2010) [**23] ("[W]hen a statute establishes a specific procedure for invoking the Superior Court's jurisdiction, the failure to follow that procedure deprives the Superior Court of its jurisdiction.")...we can find absolutely no basis for construing Watson's January 12, 2010 motion as anything other than a request for the Superior Court to review the PERB's September 11, 2009 Order").

⁵⁰ PERB Order p. ? Case No. ST-14-CV-420

⁵¹ *V.I. Narcotics Strike Force v. Gov't of the Virgin Islands Pub. Emples. Rels. Bd.*, 60 V.I. 204, 216-17 (VI. Dec. 2, 2013) ("While section 76 of title 4 of the Virgin Islands Code broadly confers the Superior Court with original jurisdiction in all civil actions, it is well established that specific statutes establishing comprehensive schemes for attaining judicial review in particular types of cases supplant statutes that broadly confer general jurisdiction. *See, e.g., Middlesex Cnty. Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 14-15, 101 S. Ct. 2615, 69 L. Ed. 2d 435 (1981) (holding regulatory statute that provides a comprehensive scheme for judicial review precludes actions under general jurisdictional [217] provisions); *In re Guardianship of Smith*, 54 V.I. 517, 526 (V.I. 2010) [**23] ("[W]hen a statute establishes a specific procedure for invoking the Superior Court's jurisdiction, the failure to follow that procedure deprives the Superior Court of its jurisdiction.")...*V.I. Pub. Servs. Comm'n v. V.I. Water & Power Auth.*, 49 V.I. 478, 485 (V.I. 2008) ("when two statutes cover the same situation, the more specific statute takes precedence over the more general one, unless it appears the Legislature intended for the more general to control" (internal quotation marks and citations omitted)).

⁵² 24 V.I.C. §380(a).

practices by employers or by employee organizations” and to take necessary and proper actions.⁵³ The PERB shall “make findings of fact and law based on its investigations and hearing, if any, and issue a written opinion of its final determinations.”⁵⁴ In a review of a PERB decision, the Superior Court shall deem all questions of fact determined by the PERB to be conclusive if supported by substantial evidence in the record,⁵⁵ and upon completion of its review, the Superior Court “may enforce the order, modify the order and enforce it, set the order aside, or return the matter to the PERB with instructions for further proceedings not inconsistent with this chapter.”⁵⁶

On July 15, 2013, Frazer filed charges of unfair labor practice against the PBA⁵⁷ and VIPD.⁵⁸ The PERB determined solely whether the PBA breached its duty of fair representation by refusing Frazer’s request to pursue the vacation of the Arbitrator’s February 18, 2013, decision and Frazer’s request to pursue a new arbitration with respect to Frazer’s March 9, 2013, grievance.⁵⁹ The PERB noted Frazer did not argue that the PBA breached its duty of fair representation during the time period between the disciplinary hearing and the arbitration hearing, and the PERB did not receive relevant correspondence from Frazer regarding the status of the Arbitrator’s decision.⁶⁰

⁵³ 24 V.I.C. §365(i).

⁵⁴ 24 V.I.C. §379(a)(3).

⁵⁵ 24 V.I.C. §380(b) provides: “In a review by appeal pursuant to this section, all questions of fact determined by the PERB pursuant to section 379, shall be conclusive if supported by substantial evidence on the record considered as a whole.” *See also Government of the Virgin Islands v. Crooke*, 54 V.I. 237, 256 (VI. Aug. 24, 2010) (Substantial evidence is such “evidence that a reasonable mind would accept as adequate to support an agency’s conclusion” (citation omitted)).

⁵⁶ 24 V.I.C. §380(c).

⁵⁷ PERB Decision and Order Re: Denise M. Frazer v. PBA, Local 816, et. al. (PERB-ULPC-13-23T). Frazer filed a charge of unfair labor practice against the PBA, alleging violations of 24 V.I.C. 378(b)(1),(3),(4),(5).

⁵⁸ PERB Decision and Order Re: Denise M. Frazer v. PBA, Local 816, et. al. (PERB-ULPC-13-23T). Frazer filed a charge of unfair labor practice against the VIPD, alleging violations of 24 V.I.C. 378(a)(1),(2),(4),(6),(7),(8).

⁵⁹ *Id.*, page 11.

⁶⁰ *Id.*, page 12.

The PERB found that the PBA did not breach its duty of fair representation to Frazer.⁶¹

First, the PERB recognized that the PBA filed grievances on Frazer's behalf, initiated arbitration, and presented arguments on Frazer's behalf over the three-day arbitration hearing.⁶² Second, the PERB found that the PBA's decision not to pursue arbitration of Frazer's March 9, 2013, Level III Grievance was not discriminatory, arbitrary, or in bad faith.⁶³ The PERB determined that the PBA's decision not to pursue arbitration of the grievance was proper under the CBA.⁶⁴

Additionally, the PERB found that the PBA had discretion regarding whether to pursue arbitration under case law,⁶⁵ and the PBA exercised that discretion when it reviewed the information before it and determined it would not be successful if it pursued arbitration since it had already pursued the grievance and arbitration process over the same or substantially similar issues to an unsuccessful end.⁶⁶ Third, the PERB found that PBA did not breach its duty of fair representation to Frazer when it chose not to move to vacate the February 18, 2013, arbitration decision, since the decision was binding on the parties under the CBA⁶⁷ and nothing in the CBA required the PBA to move to vacate the arbitration.⁶⁸ Regarding Frazer's charge against the

⁶¹ *Id.*, page 8.

⁶² *Id.*, page 3.

⁶³ *Id.*, page 15.

⁶⁴ *Id.*, page 13. *See also* ST-13-CV 168, Verified Compl., Exhibit 1: Collective Bargaining Agreement, Article V Section 2A provides: "If the Employer's final answer at Step 3 is not satisfactory to the PBA, within fifteen (15) working days after receipt of the Employer's final answer, the Union shall present the Police Commissioner with a written notice of its demand for arbitration. The demand for arbitration shall include a copy of the grievance specifying the nature of the grievance, the violation and relief sought." (only PBA has right to demand arbitration).

⁶⁵ *Id.*, page 14 (quoting *Burns v. Salem Tube, Inc.*, 381 Fed. Appx. 178 (3d Cir. Pa. May 24, 2010) ("an employee is subject to the union's discretionary power to settle or even to abandon a grievance, as long as it does not act arbitrarily").

⁶⁶ *Id.*

⁶⁷ *Id.*, page 13.

⁶⁸ *Id.*, page 13.

VIPD, the PERB found that, because the PBA did not breach its duty of fair representation to Frazer, Frazer's charge against the VIPD must be dismissed.⁶⁹

Because the PERB received Frazer's complaint, conducted a hearing, explained its findings of fact and conclusions of law within the scope of its authority under PELRA,⁷⁰ the PERB's determination that there were no violation of PELRA, and its consequent dismissal of charges against the PBA and VIPD, were neither ultra vires nor erroneous. Thus, even if the PBA and VIPD were not entitled to summary judgment due to Frazer's failure to timely file an application for writ of review, the PBA and VIPD would be entitled to enforcement of the PERB decision.

Finally, Frazer contends that the PERB ignored arguments supporting her claim that the PBA and VIPD were liable for unfair labor practices. During a review of a PERB decision, the Superior Court would ordinarily determine whether the PERB supported all questions of fact with substantial evidence in the record considered as a whole. But here, because Frazer's Verified Complaint is untimely as an application for writ of review, the Court is not authorized

⁶⁹ *Id.*, page 16 ("Charging Party, who is represented by the union, is not a party to the CBA because the CBA is between the union and the Government. Charging Party does not have standing to pursue a charge against the Government without the union...Thus, where the union has determined not to pursue a grievance and has not violated its duty of fair representation, the charge against the employer must be dismissed").

⁷⁰ 24 V.I.C. §379(a)(1-3) provides in pertinent part:

(a) Any party aggrieved by the action of another, which action is believed to be a violation of this chapter, may complain of such violation in writing to the PERB and shall state in the complaint any relief sought. No fee shall be charged for the filing of any complaint. No complaint shall be considered which is filed more than 180 days after the alleged violation is known to the complaining party. Upon receipt of a complaint, the PERB shall:

- (1) promptly notify the party which is the subject of the complaint of the allegations against such party and order such party to respond in writing to the allegations within a reasonable time certain;
- (2) investigate the complaint, and if warranted, conduct a hearing to receive testimony from each side on the alleged violations;
- (3) make findings of fact and law based on its investigations and hearing, if any, and issue a written opinion of its final determinations;
- (4) issue written orders to enforce its findings and opinions and take such action as may be warranted to remedy the complaint and/or penalize a party found in violation of this chapter.

to review whether the PERB ignored Frazer's arguments and supported questions of fact with substantial evidence in the record.⁷¹ Nonetheless, the Court observes that some of the factual arguments underpinning Frazer's Verified Complaint against the PERB are identical to those that the Court determined lack merit in a separate Memorandum Opinion regarding Frazer's Motion to Vacate the Arbitrator's Decision.⁷²

II. The Facts Entitle All Defendants to Summary Judgment on the Due Process Claim.

Frazer argues that she was denied due process.⁷³ A right to procedural due process with respect to continued employment may be afforded by a territorial law statute or a contractual agreement.⁷⁴ For example, in the Virgin Islands under 3 V.I.C. §530(a), a "regular" public

⁷¹ 24 V.I.C. §380 provides in pertinent part:

(a) Any party aggrieved by any final order of the PERB made pursuant to section 379 of this chapter, may appeal to the Superior Court of the Virgin Islands for review of such order and shall name the PERB as a party respondent. **An application for review must be filed within 20 days after the date of the final order. The rules of procedure of the Superior Court not inconsistent with this chapter shall govern the appeal proceeding. An application not filed in a timely manner shall entitle the prevailing party to summary judgment enforcing the final order of the PERB.**

(b) In a review by appeal pursuant to this section, all questions of fact determined by the PERB pursuant to section 379, shall be conclusive if supported by substantial evidence on the record considered as a whole. **No objection not urged before the PERB shall be considered in a review by the Superior Court unless the failure to urge the objection is excused by the court because of extraordinary circumstances.** [emphasis added]

⁷² In Plaintiff's Second Motion for Summary Judgment, Frazer appears to argue that the PERB decision was erroneous (See Second Motion for Summary Judgment ¶14) and contends that she was not properly terminated under the CBA. But, this Court found that Frazer was properly terminated under the CBA in the Memorandum Opinion issued on May 25, 2017, regarding Frazer's Motion to Vacate the Arbitrator's Decision.

⁷³ Plaintiff's Second Motion for Summary Judgment, ¶79-86.

⁷⁴ *Fleming v. Cruz*, 62 V.I. 702, 713 (VI. June 16, 2015) ("There is no constitutional guarantee of an established right to continued employment. *McKinney v. Pate*, 20 F.3d 1550, 1560 (11th Cir.1994) (en banc) ("Supreme Court precedent demonstrates that an employee with a property right in employment is protected only by the procedural component of the Due Process Clause, not its substantive component. Because employment rights are state-created rights and are not 'fundamental' rights created by the Constitution, they do not enjoy substantive due process protection."). See also *Roth*, 408 U.S. at 577 ("Property interests, of course, are not created by the Constitution."). Further, there is no substantive due process interest in continued employment. See *Wrench Transportation Systems, Inc. v. Bradley*, 340 Fed. Appx. 812, 815 (3d. Cir. 2009). 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. *Iles*, 638 F.3d at 173; *Roth*, 408 U.S. at 578...To succeed on a claim alleging a violation of procedural due process rights to continued

employee may be terminated only for cause and only after he has been furnished with a written statement of the charges against him.⁷⁵

Assuming for argument that Frazer was a regular public employee, the VIPD complied with the statute by terminating Frazer for cause and by serving Frazer with written charges.⁷⁶ Further, Frazer missed the deadline established by the statute to appeal her employment termination to the PERB under 3 V.I.C. §530(a)(1),⁷⁷ which gives a regular employee ten days after the issuance of a written statement of charges to appeal a termination to the PERB. Thus, because, “a procedural due process violation cannot have occurred when the governmental actor provides apparently adequate procedural remedies and the plaintiff has not availed himself of those remedies,”⁷⁸ Frazer was not deprived of her right to procedural due process.

employment, [**16] a plaintiff must prove that he had a property right in continued employment. *Wilson v. MVM, Inc.*, 475 F.3d 166, 177 (3d Cir. 2007)).

⁷⁵ 3 V.I.C. §530 (a)(1) provides in pertinent part: “Notwithstanding any other provision of law, in any case after January 1, 1977, before a head officer of an executive department, agency or instrumentality of the Government dismisses, demotes or suspends a regular employee of a department, agency or instrumentality of the Government, the head officer shall furnish the employee with a written statement of the charges against the employee.” *See also Wheatley v. Mapp*, 2016 U.S. Dist. LEXIS 35806, 14-15 (D.V.I. Mar. 21, 2016) (“[I]n interpreting Virgin Islands law, ... [the Third Circuit has] held that under the employee termination procedures of § 530, employees who are “regular employees” may be terminated only for cause, thus granting them “a property interest in continued employment.” *Id.*; *see also Martinez-Sanes*, 318 F.3d at 489 (stating, [*15] in interpreting Virgin Islands law, that “[o]nly ‘regular’ employees had Civil Service Protection” and vacating injunction based on procedural due process claim, because plaintiff had not completed his probationary period as required by the definition of “regular” employee.) (emphasis added); *Richardson*, 856 F.2d at 511 n. 8 (“As noted earlier in our discussion, section 530, the provision that makes *regular* employees terminable only for cause, also sets forth procedures for the termination of such employees.”) (emphasis added). Accordingly, not all “career service” employees have due process protection, but rather, only those who also meet the definition of “regular” employees. *Iles v. de Jongh*, 638 F.3d 169, 173-74, 55 V.I. 1251 (3d Cir. 2011)).

⁷⁶ ST-14-CV-420 Verified Compl., Exhibit 2: Hearing Officer’s Decision, Pages 1-8. The eight-page decision explains the written four charges brought against Frazer.

⁷⁷ 3 V.I.C. §530(a)(1) provides: “Notwithstanding any other provision of law, in any case after January 1, 1977, before a head officer of an executive department, agency or instrumentality of the Government dismisses, demotes or suspends a regular employee of a department, agency or instrumentality of the Government, the head officer shall furnish the employee with a written statement of the charges against the employee. The employee shall have ten days following the date of receipt of the statement of charges to appeal the proposed action to the Public Employees Relations Board. The appeal must be in writing, and the Board must provide a copy to the head officer and the Attorney General.”

⁷⁸ *St. Thomas & St. John Police Benevolent Ass’n v. V.I. Police Dep’t*, 2016 V.I. LEXIS 132, 4 (V.I. Super. Ct. Aug. 31, 2016) (citation omitted).

Assuming for argument that Frazer's right to procedural due process was protected by the CBA even though Frazer was not party to the contract, the Court is deprived of jurisdiction to construe Frazer's arguments as a hybrid claim for breach of fair representation/breach of contract⁷⁹ since Frazer failed to properly appeal the PERB order, entitling the PERB, PBA and VIPD to summary judgment. Moreover, this Court found that Frazer was properly terminated under the CBA in the Memorandum Opinion issued May 25, 2017, regarding the Motion to Vacate the Arbitrator's Decision.⁸⁰

III. The Facts Entitle All Defendants to Summary Judgment on the Conspiracy Claim.

Frazer argues that all Defendants conspired to deny her due process,⁸¹ and in response, the PBA contends that Frazer fails to present evidence to support his claim.⁸² The Court adopts

⁷⁹ If Frazer's application for a writ of review had been timely, the Court might have construed Frazer's claims against the PBA as a hybrid breach of contract/duty of fair representation claim. *See Joseph v. Bureau of Corrections*, 54 V.I. 644, 653-54 (VI. Mar. 7, 2011) ("The hybrid breach of contract/duty of fair representation claim was originally a creation of the United States Supreme Court to avoid [*654] what it considered an inherent inequity in the administrative exhaustion requirements of the National Labor Relations Act ("NLRA"). *See DelCostello*, 462 U.S. at 164, 103 S.Ct. at 2290 (recognizing that the exhaustion rule under the NLRA caused "an unacceptable injustice when the union representing the employee in the grievance/arbitration procedure ... breach[ed] its duty of fair representation."). In *Gomez v. Government of the Virgin Islands*, the United States Court of Appeals for the Third Circuit applied the same concept to the Virgin Islands Public Employee Labor Relations Act ("PELRA"), codified at 24 V.I.C. §§ 361-83, and held that a similar hybrid suit could be maintained under the PELRA. *Gomez*, 882 F.2d at 737-38; *see also Stafford v. Hess Oil V.I. Corp.*, No. 928/1993, 1998 V.I. LEXIS 10, *16, [WL], at *6 (V.I. Super. Ct. May 12, 1998) (unpublished) (recognizing hybrid suit in the Virgin Islands and dismissing [**16] it under a motion to dismiss for failure to state a claim of breach of the duty of fair representation)).

⁸⁰ *See Denise Frazer v. Police Benevolent Association, Local 816, et. al.* Memorandum Opinion, May 25, 2017.

⁸¹ Plaintiff's Second Motion for Summary Judgment ¶87-93. (Frazer asserts that all Defendants are liable for civil conspiracy: "The agreement between the Defendants and other known and unknown with the Defendants, POLICE BENEVOLENT ASSOCIATION LOCAL 816, PBA PRESIDENT LISA PLASKETT SAMUEL, VIRGIN ISLANDS POLICE DEPARTMENT, GOVERNMENT OF THE VIRGIN ISLANDS, OFFICE OF COLLECTIVE BARGAINING, ARBITRATOR EDWARD A. PERELES, ATTORNEY NIZAR DEWOOD AND THE PUBLIC EMPLOYEE RELATIONS BOARD, was an agreement (wherein written or unwritten) to accomplish an unlawful purpose or an agreement to accomplish a lawful purpose by unlawful means, in which there was a meeting of the minds in the object or course of the actions constitutes civil conspiracy").

⁸² Defendant Policeman's Benevolent Association's Motion for Summary Judgment, page 5.

the standard articulated in *Isaac v. Crichlow* defining civil conspiracy as “an agreement or combination to perform a wrongful act, or lawful act by unlawful means, that results in damage to the plaintiff.”⁸³ The existence of a conspiracy can be inferred “from evidence of related facts and circumstances from which it appears as a reasonable and logical inference, that the activities of the participants... could not have been carried on except as the result of a preconceived scheme or common understanding.”⁸⁴ “There is no liability for civil conspiracy where there is no liability for the act or acts underlying the conspiracy.”⁸⁵

Here, Frazer has not submitted any evidence to show that any of the Defendants agreed to terminate her employment by unlawful means. Although Frazer appears to argue that the occurrence of the arbitration prior to the Governor’s approval of the recommendation of Frazer’s termination indicates a conspiracy among the Defendants,⁸⁶ the occurrence of the arbitration prior to the Governor’s approval constituted proper procedure under the CBA.⁸⁷ Additionally, Frazer’s suggestion that the agreement between the PBA and VIPD not to arbitrate any potential

⁸³ The Virgin Islands Supreme Court has not conducted a *Banks* analysis to adopt the common law elements of civil conspiracy. But, the Superior Court adopted the following standard—“an agreement or combination to perform a wrongful act, or lawful act by unlawful means, that results in damage to the plaintiff”—as the soundest rule for the Virgin Islands in *Isaac v. Crichlow*, 2015 V.I. LEXIS 15, 32 (V.I. Super. Ct. Feb. 10, 2015). After reviewing this *Banks* analysis and agreeing with the methodology and conclusions, the Court adopts the standard articulated in *Isaac v. Crichlow*.

⁸⁴ *Isaac v. Crichlow*, 2015 V.I. LEXIS 15, 33 (V.I. Super. Ct. Feb. 10, 2015) (quoting *United States v. Ellis*, 595 F.2d 154, 160 (3d Cir. 1979)).

⁸⁵ *Id.* at 33-34 (citing *Mieczkowski v. York City School Dist.*, 414 Fed. Appx. 441, 450 (3d Cir. 2011) (citing *Boyanowski v. Capital Area Intermediate Unit*, 215 F.3d 396, 407 (3d Cir. 2000)).

⁸⁶ Plaintiff’s Second Motion for Summary Judgment ¶90 (“The conspiratorial purpose of obtaining an arbitration decision was Politically motivated to force Governor John de Jongh, Jr. to Terminate the Plaintiff due to the fact that the Virgin Islands Police Department could not obtain the authorization of the Governor, until an untimely arbitration decision was used to terminate the Employment of the Plaintiff”).

⁸⁷ ST-13-CV 168, Verified Compl., Exhibit 1: Collective Bargaining Agreement, Article V Section 11 provides: “In the case of discharge of an employee, he shall be removed from the payroll effective the date of discharge provided that if a grievance challenging the discharge is filed and is upheld by the Arbitrator, an arbitration award restoring the grievant to employment shall be immediately complied with by the Employer whether or not further proceedings in the nature of an appeal are instituted by the Employer, pending the outcome of such proceedings. A discharge shall be subject to the approval of the Governor in accordance with law.”

procedural irregularities asserted by Frazer⁸⁸ demonstrates a conspiracy is unpersuasive because that agreement was not unlawful or wrongful.⁸⁹ Further, contrary to Frazer's contention,⁹⁰ nothing in the CBA entitled Frazer to the assistance of an attorney provided by the PBA. Accordingly, because there is an absence of evidence that rationally supports a claim for conspiracy among any of the defendants, summary judgment must be granted.

IV. The Facts Entitle the Police Benevolent Association, the Virgin Islands Police Department, Plaskett-Samuel, and DeWood to Summary Judgment on the Equal Protection and Discrimination Claims.

Frazer contends that Defendants are liable for denial of equal protection and discrimination.⁹¹ To survive a motion for summary judgment on an equal protection claim, a plaintiff must submit evidence indicating there exists a genuine issue of material fact with respect to whether a state actor⁹² is liable for selective treatment "compared with others similarly situated ... based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a

⁸⁸ Plaintiff's Response to Defendant, Joss Springette's/Office of Collective Bargaining Opposition to Plaintiff's Motion to Vacate, Reinstate and Summary Judgment, pgs. 17-20.

⁸⁹ See *Denise Frazer v. Police Benevolent Association, Local 816, et. al.* Memorandum Opinion, May 25, 2017. See also *Burns v. Salem Tube, Inc.*, 381 Fed. Appx. 178, 181-82 (3d Cir. Pa. May 24, 2010) ("A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190, 87 S. Ct. 903, 17 L. Ed. 2d 842 (1967). "[A] union's actions are arbitrary only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness' as to be irrational." *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67, 111 S. Ct. 1127, 113 L. Ed. 2d 51 (1991)(quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338, 73 S. Ct. 681, 97 L. Ed. 1048 (1953)) (internal citation omitted). An employee is 'subject to the union's discretionary power to settle or even to abandon a grievance, as long as it does not act arbitrarily.' *Bazarte v. United Transp. Union*, 429 F.2d 868, 872 (3d Cir. 1970).").

⁹⁰ Plaintiff's Second Motion for Summary Judgment ¶109.

⁹¹ *Id.*, ¶100-01 and ¶107-09.

⁹² *Fleming v. Cruz*, 62 V.I. 702 at 716 ("The Equal Protection Clause guarantees United States citizens a 'right to be free from invidious discrimination in statutory classifications and other governmental activity.' *Harris v. McRae*, 448 U.S. 297, 322, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980). 'When a state actor turns a blind eye to the Clause's command, aggrieved parties ... can seek relief pursuant to 42 U.S.C. § 1983.' *Nabozny v. Podlesny*, 92 F.3d 446, 454 (7th Cir. 1996).

person.”⁹³ Similarly, to survive summary judgment on a discrimination claim, a plaintiff must present evidence that her employer violated 42 USCS § 2000e-2, which provides in pertinent part:

- (a) Employer practices. It shall be an unlawful employment practice for an employer--
 - (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
 - (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Here, Frazer argues that the PBA, Plaskett-Samuel, in her official capacity, and DeWood denied Frazer equal protection by refusing to represent Frazer.⁹⁴ But, a claim for equal protection may only be brought against a governmental actor,⁹⁵ and because the PBA, Plaskett-Samuel, and DeWood do not represent the government, Frazer’s claim fails. Moreover, Frazer’s contention against those Defendants represents a claim for breach of duty of fair representation, which the Court is deprived of jurisdiction to consider. Accordingly, the PBA, Plaskett-Samuel and DeWood are entitled to summary judgment on the equal protection claim.

Further, with respect to the VIPD, Frazer asserts that she was subjected to drug tests and a psychological evaluation and was “aware that she was being singled out,”⁹⁶ but this does not

⁹³ *Id.* at 716 (quoting *Barrington Cove Ltd. P'ship v. R.I. Hous. & Mortg. Fin. Corp.*, 246 F.3d 1, 7 (1st Cir. 2001) (emphasis omitted)).

⁹⁴ Plaintiff’s Second Motion for Summary Judgment ¶89 and ¶109. *See also* Plaintiff’s Response to PERB’s Opposition to Plaintiff’s Motion to Vacate and Reinstate, pgs. 8-10.

⁹⁵ *Fleming v. Cruz*, 62 V.I. 702 at 716 (“The Equal Protection Clause guarantees United States citizens a ‘right to be free from invidious discrimination in statutory classifications and other governmental activity.’ *Harris v. McRae*, 448 U.S. 297, 322, 100 S. Ct. 2671, 65 L. Ed. 2d 784 (1980). ‘When a state actor turns a blind eye to the Clause’s command, aggrieved parties ... can seek relief pursuant to 42 U.S.C. § 1983.’ *Nabozny v. Podlesny*, 92 F.3d 446, 454 (7th Cir. 1996).”).

⁹⁶ Plaintiff’s Response to Defendant, Joss Springette’s/Office of Collective Bargaining Opposition to Plaintiff’s Motion to Vacate, Reinstate and Summary Judgment, page 41.

satisfy the requirements for a claim for either equal protection or discrimination because there is no indication that Frazer was singled out on the basis of race, gender, or any other improper reason. Additionally, Frazer's comparison of her case with that of another police officer, who was also disciplined for the filing of a false report but later reinstated to his position after serving a suspension,⁹⁷ is unpersuasive as evidence of discrimination or denial of equal protection. There exists no evidence in the record to suggest that Frazer was treated differently from other persons similarly situated to her, based on race, gender, or any other unconstitutional reason, or that the VIPD acted with the purpose of punishing her for exercising her constitutional rights. Accordingly, since there is an absence of evidence that rationally supports claims for denial of equal protection and discrimination, the VIPD is entitled to summary judgment.

V. The Facts Entitle All Defendants to Summary Judgment on the Claims for Intentional Infliction of Emotional Distress, Negligent Infliction of Emotional Distress, Mental and Emotional Distress, Gross Negligence, and Violation of the Whistleblower's Protection Act.

Frazer argues that the PBA, Plaskett-Samuel, and DeWood are liable for intentional infliction of emotional distress on the grounds that they interfered with her civil rights and conspired against her.⁹⁸ Similarly, Frazer asserts a claim against the PBA, Plaskett-Samuel, the VIPD, Office of Collective Bargaining, PERB, and DeWood for mental and emotional distress,⁹⁹ which the Court will liberally construe as a claim for intentional infliction of emotional distress. Such a claim requires a showing that a defendant "(1) intentionally or recklessly; (2) engaged in extreme and outrageous conduct that exceeds all possible bounds of decency such that it is

⁹⁷ *Id.*

⁹⁸ Plaintiff's Second Motion for Summary Judgment ¶104.

⁹⁹ *Id.* at ¶97.

regarded as atrocious and utterly intolerable in a civilized society; (3) that caused the plaintiff to suffer severe emotional distress.”¹⁰⁰ Here, Frazer has not submitted evidence to show that the any of the Defendants intentionally or recklessly engaged in extreme and outrageous conduct.¹⁰¹ Moreover, the Court has recognized that Frazer’s assertions in support of her claim for intentional infliction of emotional distress of—interference with civil rights (construed as a discrimination claim) and conspiracy—lack merit. Accordingly, the PBA, Plaskett-Samuel, VIPD, Office of Collective Bargaining, PERB, and DeWood, are all entitled to summary judgment.

Frazer also argues that the PBA, Plaskett-Samuel, and DeWood are liable for negligent infliction of emotional distress on the basis that they violated the CBA and PELRA, failed to perform their duties, and conspired against Frazer.¹⁰² Such a claim requires a demonstration “(1) that the defendant owed the plaintiff a duty of care to ensure the plaintiff does not suffer serious or severe emotional injury which duty either arose by contract or was imposed as an independent legal obligation; (2) that the defendant breached ... its duty; and (3) that, as a direct and proximate result of defendant's breach, the plaintiff suffered a serious or severe emotional injury.”¹⁰³ Here, Frazer has not introduced evidence to show that any of the Defendants owed

¹⁰⁰ The Virgin Islands Supreme Court has not conducted a *Banks* analysis to adopt the common law elements of intentional infliction of emotional distress. But, in *Donastorg v. Daily News Publishing Co., Inc.*, the Superior Court adopted as the soundest rule for the Virgin Islands the following standard: “(1) intentionally or recklessly; (2) engaged in extreme and outrageous conduct that exceeds all possible bounds of decency such that it is regarded as atrocious and utterly intolerable in a civilized society; (3) that caused the plaintiff to suffer severe emotional distress.” After reviewing this *Banks* analysis and agreeing with the methodology and conclusions, the Court adopts the standard articulated in *Donastorg v. Daily News Publishing Co., Inc.*, 2015 V.I. LEXIS 105, 149-50 (V.I. Super. Ct. Aug. 19, 2015).

¹⁰¹ Restatement (Second) of Torts § 46 cmt. d (“The defendants’ conduct must be “so outrageous in character, and so extreme in degree, as to go beyond all possible all bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society”).

¹⁰² Plaintiff’s Second Motion for Summary Judgment ¶98.

¹⁰³ The Virgin Islands Supreme Court has not conducted a *Banks* analysis to adopt the common law elements of negligent infliction of emotional distress. But, in *Donastorg v. Daily News Publishing Co., Inc.*, the Superior Court

Frazer a duty of care arising from a contract or any other legal obligation. Further, Frazer has not submitted factual support to indicate a breach of a duty which caused serious or severe emotional injury. Although Frazer asserts that she suffered emotional distress,¹⁰⁴ Frazer has not submitted evidence of a physical harm caused by emotional distress, which is a necessary element to recover on a claim for negligent infliction of emotional distress.¹⁰⁵ Without evidence of all elements of a prima facie claim for the negligent infliction of emotional distress, the PBA, Plaskett-Samuel and DeWood, are entitled to summary judgment.

Further, Frazer contends that all of the Defendants are liable for gross negligence on the basis that each Defendant acted in furtherance of the conspiracy.¹⁰⁶ In order to survive a motion for summary judgment on a claim for gross negligence, a plaintiff must submit evidence to show a genuine issue of material fact regarding “wanton or reckless behavior demonstrating a conscious indifference to the health and safety of persons or property.”¹⁰⁷ Here, Frazer has not presented evidence to support a claim for such behavior, and accordingly, all Defendants are entitled to summary judgment.

adopted as the soundest rule for the Virgin Islands the following standard: “(1) that the defendant owed the plaintiff a duty of care to ensure the plaintiff does not suffer serious or severe emotional injury which duty either arose by contract or was imposed as an independent legal obligation; (2) that the defendant breached ... its duty; and (3) that, as a direct and proximate result of defendant's breach, the plaintiff suffered a serious or severe emotional injury.” After reviewing this *Banks* analysis and agreeing with the methodology and conclusions, the Court adopts the standard articulated in *Donastorg v. Daily News Publishing Co., Inc.*, 2015 V.I. LEXIS 105 at 185-86.

¹⁰⁴ Plaintiff's Second Motion for Summary Judgment ¶98.

¹⁰⁵ Restatements (Second) of Torts §313 (A physical manifestation of emotional distress is a necessary element to recover on a claim for negligent infliction of emotional distress).

¹⁰⁶ Plaintiff's Second Motion for Summary Judgment ¶111.

¹⁰⁷ The Virgin Islands Supreme Court has not conducted a *Banks* analysis to adopt the common law elements of gross negligence. But, in *Yusuf v. Ocean Props.*, the Superior Court adopted as the soundest rule for the Virgin Islands the following standard: “as wanton or reckless behavior demonstrating a conscious indifference to the health and safety of persons or property.” After reviewing this *Banks* analysis and agreeing with the methodology and conclusions, the Court adopts the standard articulated in *Yusuf v. Ocean Props.*, 2016 V.I. LEXIS 19, 11 (V.I. Super. Ct. Mar. 7, 2016).

Finally, Frazer claims protection under the Whistleblower's Protection Act but has not stated a claim or submitted evidence to indicate that she was terminated for engaging in protected activity. The Act provides in pertinent part:

An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this territory or the United States to a public body unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing or inquiry held by that public body, or a court action.¹⁰⁸

Further, a person alleging a violation of §122 “may bring a civil action for appropriate injunctive relief, or actual damages, or both, within ninety days after the occurrence of the alleged violation.”¹⁰⁹ Here, Frazer has not presented any evidence to show that she was discharged for reporting unlawful behavior, had been requested to participate in an investigation, or the anything else to suggest that the Act was triggered, within ninety days of the filing of her Verified Complaint. Accordingly, there is an absence of evidence to rationally support a claim for a violation of the Act.

VI. The Request for Declaratory Judgment is Denied.

Finally, Frazer requests declaratory relief from the Court.¹¹⁰ Under the Virgin Islands Declaratory Judgment Act, 5 V.I.C. §§ 1261-1272, the Superior Court has the “power to declare [the] rights, status, and other legal relations whether or not further relief is or could be

¹⁰⁸ 10 V.I.C. §122.

¹⁰⁹ 10 V.I.C. §123(a).

¹¹⁰ Plaintiff's Second Motion for Summary Judgment ¶¶94-96.

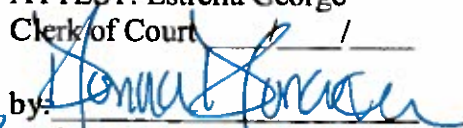
claimed.”¹¹¹ The “decision to entertain a declaratory action is within the discretion of the Court,” and the matter must involve an actual and justiciable controversy.¹¹² The “declaration may be either affirmative or negative in form and effect,” with “the force and effect of a final judgment or decree.”¹¹³ Here, because Frazer does not specify the rights she wishes the Court to declare, the Court must deny the request for declaratory relief.

CONCLUSION

For the foregoing reasons, all the Defendants are entitled to summary judgment on each of Plaintiff’s claims. Accordingly, Defendants’ Motions for Summary Judgment are granted. An Order consistent with this Memorandum shall follow.

Dated: June 7, 2017

ATTEST: Estrella George
Clerk of Court

by: 
Lori Boynes-Tyson
Court Clerk Supervisor 6 / 7 / 2017


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS

A CERTIFIED TRUE COPY

DATE 06-07-2017
ESTRELLA H. GEORGE
CLERK OF THE COURT

BY 
COURT CLERK II

¹¹¹ V.I.C. §1261.

¹¹² *Flavo-Rich v. Quinn*, 18 V.I. 530 (D.V.I. 1981) (citation omitted).

¹¹³ *Nat'l Ass'n For Stock Car Auto Racing, Inc. v. Scharle*, 184 Fed. Appx. 270, 274 (3d Cir. 2006) (citing *St. Thomas-St. John Hotel & Tourism Assoc., Inc. v. Gov't of United States Virgin Islands*, 218 F.3d 232, 240 (3d Cir. 2000)) (“A declaratory judgment may issue only where the constitutional standing requirements of a justiciable controversy are satisfied”).