

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

SHORN T. JOSEPH,	)	
	)	
Plaintiff,	)	CASE NO. ST-11-CV-419
	)	
v.	)	
	)	ACTION FOR DAMAGES
LEGISLATURE OF THE VIRGIN ISLANDS and	)	
the HONORABLE MYRON D. JACKSON, in his	)	JURY TRIAL DEMANDED
official capacity as President of the 32 nd Legislature	)	
of the Virgin Islands,	)	
	)	
Defendants. ¹	)	
_____	)	

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CARTY, RENÉE GUMBS, Judge

MEMORANDUM OPINION

(Filed: April 12, 2017)

Before the Court is the Defendants' Legislature of the Virgin Islands and Senate President Shawn Michael Malone (collectively "Defendants'") "Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State Claims as a Matter of Law" ("Motion to Dismiss") filed on October 8, 2014. Plaintiff Shorn T. Joseph responded in "Plaintiff Shorn T. Joseph's Opposition to Motion to Dismiss for Lack of Subject Matter Jurisdiction and Failure to State

¹ At the commencement of this action, Plaintiff Shorn Joseph originally named the Legislature of the Virgin Islands and Ronald E. Russell, as President of the 29th Legislature, subsequently Shawn-Michael Malone, as President of the 30th Legislature, and Neville A. James, as President of the 31st Legislature. Neither Ronald Russell, Shawn-Michael Malone, nor Neville A. James is still in office. In accordance with Supreme Court Rule 34 (c), this Court has automatically inserted the name of the Honorable Myron D. Jackson as the current successor of the presidency of the Virgin Islands Legislature.

Claims as a Matter of Law” (“Plaintiff’s Opposition”) filed on October 24, 2014. Additionally, the U.S. Department of Justice filed a “Statement of Interest on Behalf of the United States of America in Support of Plaintiff’s Opposition to Defendants’ Motion to Dismiss” (“DOJ Statement in Support of Plaintiff’s Opposition to Defendants’ Motion to Dismiss”) on December 24, 2014. For the reasons set forth below, Defendants’ motion will be denied in part and granted in part.

I. FACTUAL AND PROCEDURAL BACKGROUND.

As the issues raised in Defendants’ motion to dismiss are not fact intensive, the Court will not recite all the allegations set forth in the existing record. At the commencement of this action, Plaintiff Shorn Joseph was a First Lieutenant and Judge Advocate in the United States Army Reserve (“Army Reserve”) and a member of the National Guard of the Virgin Islands. Plaintiff Joseph was employed by Defendants as Assistant Legal Counsel in the Legislature’s Office of Legal Counsel. Joseph held that position from July 2007 until February 9, 2011. On September 29, 2010, Plaintiff provided his supervisors, then Senate President, Louis Hill, and Attorney Yvonne Tharpes, with written notice that he was being ordered to active military service for training. On October 5, 2010, Plaintiff received such an order for training from October 23, 2010, until February 3, 2011. The training was divided into two parts over approximately three months. Next, on January 19, 2011, the Army Reserve ordered Plaintiff to continue training. The training would run from February 4, 2011, through March 22, 2011. Plaintiff notified his employer of this additional training on January 31, 2011. He received no response. Plaintiff again attempted to contact then Senate President Russell on February 7, 2011, via telephone. Plaintiff terminated the call after waiting on hold for over twenty minutes. An employee of Senate President Russell called Plaintiff later that day and notified him that he was being terminated. The employee informed

Plaintiff by reading, to him, his termination letter. The letter, signed by the Senate President, gave Plaintiff two days notice that his employment with the Legislature was being terminated, effective 5:00 p.m. on Wednesday, February 9, 2011.

Plaintiff filed a Verified Complaint in the Virgin Islands Superior Court on July 25, 2011, and subsequently filed a First Amended Complaint on September 14, 2011. In his Amended Complaint, Plaintiff seeks relief in the form of reinstatement, back pay, and liquidated damages. He filed suit under the Uniformed Services Employment and Reemployment Rights Act of 1994 (“USERRA”), Title 23, Section 1531(a) of the Virgin Islands Code for employment discrimination, and additionally for a breach of his employment contract. Defendants filed their Answer on August 13, 2013. Next, on September 18, 2014, this Court held a hearing on all pending motions. The Record of Proceeding for this hearing notes that the Honorable Judge Christian directed Defendants to file a “12B1 Motion by [October 2, 2014]” with “Responses by [October 16, 2014].”² Defendants were granted an extension, and as noted, filed their Motion to Dismiss on October 8, 2014.

II. LEGAL DISCUSSION.

The Court addresses the portion of Defendants’ motion to dismiss devoted to subject-matter jurisdiction.³ Virgin Islands Rule of Civil Procedure 12(b)(1) provides that a party may

² R. Proceedings at 2 (Sept. 18, 2014).

³ Defendants’ motion requests dismissal for both lack of subject-matter jurisdiction and for “failure to state claims as a matter of law.” However, only Defendants’ subject-matter jurisdiction claims are properly before this Court. First, Defendants cite no legal standard for when dismissal should be granted for “failure to state claims as a matter of law.” As the Court is not required to make arguments for parties this alone is enough for this Court to deny this claim. *See Joseph v. Joseph*, 2015 V.I. LEXIS 43, *5 (V.I. Super. Ct. Apr. 23, 2015) (citing *Bernhardt v. Bernhardt*, 51 V.I. 341, 345-46 (V.I. 2009)). Furthermore, the “standard” alleged by Defendants vacillates between Virgin Islands Rule of Civil Procedure (“V.I. R. Civ. P.”) 12(b)(6) “failure to state a claim upon which relief may be granted” and V.I. R. Civ. P. 56 Summary Judgment based on “no genuine dispute of material fact and the movant is entitled to judgment as a matter of law” while committing to neither. Thus, even if inclined to do so, this Court would

move for a dismissal on the basis that the trial court lacks subject-matter jurisdiction.⁴ “Subject-matter jurisdiction defines the court’s authority to hear a given type of case....”⁵ If the trial court lacks subject-matter jurisdiction, the action must be dismissed.⁶ Any such dismissal should be without prejudice because a determination that subject-matter jurisdiction is lacking does not constitute a decision on the merits of the case.⁷

While not yet explicitly adopted by the Supreme Court,⁸ several judges of this Court have recognized that all motions to dismiss based on Rule 12(b)(1) are not the same.⁹ Rather, “[t]he applicable standard of review under Rule 12(b)(1) differs depending on whether the moving party has made a facial attack or a factual attack on the court’s power to hear the case.”¹⁰ Similar to a Rule 12(b)(6) motion, a “facial attack” argument considers a complaint on its face, with all facts taken as true, as insufficient to invoke subject-matter jurisdiction based on a jurisdictional defect.¹¹ Alternatively, a “factual attack” disputes the existence of jurisdictional facts as sufficient to confer

be unable to ascertain the basis for Defendants’ argument. Still, as already noted, Defendants are limited to arguments regarding subject-matter jurisdiction, likely because they had already filed an answer in this case. *See* R. Proceedings at 2 (Sept. 18, 2014); *see also Willie v. Amerada Hess Corp.*, 2017 V.I. LEXIS 37, *14 (V.I. Super. Ct. Feb. 28, 2017) (citations omitted). Accordingly, the Court shall only review those arguments properly before it on the basis of subject-matter jurisdiction.

⁴ V.I. R. CIV. P. 12(b)(1) is styled identically to its corresponding Federal Rule, thus allowing determinations made by this Court on the Federal Rule to be of significant importance.

⁵ *Carlsbad Tech., Inc. v. HIF Bio, Inc.*, 556 U.S. 635, 639 (2009) (citing *United States v. Morton*, 467 U.S. 822, 828 (1984)).

⁶ SUPER. CT. R. 7, 12; V.I. R. CIV. P. 12(h)(3).

⁷ *Dennie v. Government*, 55 V.I. 1237, 1246-47 (D.V.I. App. Div. 2011).

⁸ *See Martinez v. Colombian Emeralds, Inc.*, 51 V.I. 174 (V.I. 2009) (noting the difference of Rule 12(b)(1) and Rule 12(b)(6) dismissal standards relying on the Third Circuit’s *Mortensen* decision) (citing *Mortensen v. First Federal Savings and Loan Assn.*, 549 F.2d 884, 891 (3d Cir. 1977) (explaining the differences of factual and facial challenges under Rule 12(b)(1) as the latter are reviewed under the same standard as a 12(b)(6) motion); *see also Chavayez v. Buhler*, V.I. Supreme LEXIS 26, *46-48 (V.I. 2009) (Swan, J., concurring) (citing *Mortensen*, 549 F.2d at 891).

⁹ *See Brewley v. Gov’t of the Virgin Islands*, 59 V.I. 100 (V.I. Super. Ct. Feb. 9, 2012); *James-St. Jules v. Thompson*, 2015 V.I. LEXIS 74, (V.I. Super. Ct. June 25, 2015); *Klotzbach v. V.I. Water & Power Auth.*, 2016 V.I. LEXIS 28 (V.I. Super. Ct. Mar. 29, 2016); *Gardiner v. V.I. Hosps. & Facilities Corp.*, 2016 V.I. LEXIS 157 (V.I. Super. Ct. Oct. 4, 2016).

¹⁰ *James-St. Jules*, 2015 V.I. LEXIS at *6 (citations omitted).

¹¹ *See James-St. Jules*, 2015 V.I. LEXIS at *6-7; *Brewley*, 59 V.I. at 102.

subject-matter jurisdiction.¹² Thus, in determining which standard applies, the Court looks at the specific challenge raised by the movant.¹³

In this matter *sub judice*, the motion to dismiss was filed after answers were submitted, and discovery had already begun. Still, none of the facts from discovery are the basis for this motion. Instead, Defendants' challenge is premised on the argument of sovereign immunity. This Court finds this challenge to be a facial attack of the Complaint.¹⁴ Accordingly, this Court is limited to viewing the allegations in the light most favorable to plaintiff and "only consider[ing] the allegations of the complaint and documents referenced therein and attached thereto."¹⁵

A. Whether the Eleventh Amendment Applies to the Virgin Islands.

The Eleventh Amendment provides that "[t]he Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."¹⁶ Although having several opportunities to decide the Eleventh Amendment's applicability to the Virgin Islands, the United States Third Circuit Court of Appeals has deliberately chosen not to.¹⁷ However, the court did cite in *dicta*, to case law where a statute that explicitly stated the

¹² See *James-St. Jules*, 2015 V.I. LEXIS at *7; *Brewley*, 59 V.I. at 102.

¹³ *Brewley*, 59 V.I. at 102.

¹⁴ See *Gardiner*, 2016 V.I. LEXIS at *6 (construing the motion to dismiss as a facial attack, even though answers had been filed prior to the motion and parties had begun to conduct discovery, since none of the aforementioned filings spoke to the nature of the motion to dismiss).

¹⁵ *James-St. Jules*, 2015 V.I. LEXIS at *7.

¹⁶ U.S. Const. amend. XI.

¹⁷ See *United Steel Paper & Forestry Rubber Mrg. Allied Indus. & Serv. Workers Int'l Union AFL-CIO-CLC v. Gov't of the V.I.* ("United Steel Paper"), 842 F.3d 201, 207 n.2 (3d Cir. 2016); *United States v. Gov't of the Virgin Islands*, 363 F.3d 276, 286-87 (3d Cir. 2004).

constitutional provisions applicable to a territory, was informative in determining whether the Eleventh Amendment applied to that territory.¹⁸

Congress has identified the provisions of the U.S. Constitution applicable to the Virgin Islands, via The Revised Organic Act of 1954.¹⁹ Specifically, § 1561 explicitly states:

The following provisions of and amendments to the Constitution of the United States are hereby extended to the Virgin Islands to the extent that they have not been previously extended to that territory and shall have the same force and effect there as in the United States or in any state of the United States: ...the first to ninth amendments inclusive; the thirteenth amendment; the second sentence of section 1 of the fourteenth amendment; and the fifteenth and nineteenth amendments[.]

48 U.S.C. § 1561.

Clearly absent from this list is the Eleventh Amendment, suggesting that Congress did not intend it be applicable to the Virgin Islands. This sentiment is echoed by the *Tonder* case from the Virgin Islands District Court.²⁰ In *Tonder*, the District Court rationalized the exclusion of the Eleventh Amendment on the grounds that it concerns principles of federalism inapplicable to the Virgin Islands.²¹ Thus, “the only avenue(s) that would permit its applicability to the unincorporated Territory of the U.S. Virgin Islands is if it were characterized as a “fundamental right” or ... deemed applicable through some other recognized theory, case law or doctrine.”²² We too find the Eleventh Amendment inapplicable to the Virgin Islands.

¹⁸ *United Steel Paper*, 842 F.3d at 207 n.2 (citing *Fleming v. Dep’t of Pub. Safety*, 837 F.2d 401, 407 (9th Cir. 1988)).

¹⁹ Revised Organic Act of 1954; 48 U.S.C. § § 1541-1645.

²⁰ *See Tonder v. M/V the “burkholder” et al.*, 630 F. Supp. 691 (D.V.I. 1986).

²¹ *Id.* at 693.

²² *E.g., People of the V.I. v. Clarke*, 53 V.I. 183, 194 (V.I. Super. Ct. May 12, 2010) (holding that the Supremacy Clause of the U.S. Constitution was inapplicable to the Virgin Islands).

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B. Whether the Revised Organic Act Shields the Virgin Islands From Lawsuits Under the Uniformed Services Employment and Reemployment Rights Acts of 1994.

In a case from the United States Ninth Circuit Court of Appeals, Judge Tashima provided an in-depth review of USERRA's legislative history. The court stated, "USERRA forbids employment discrimination on the basis of membership in the armed forces (citations omitted)..." To enforce its provisions, USERRA authorizes private suits for damages or injunctive relief against... a state employer (citations omitted)."²³ Continuing, the Court spoke of the change in the statute that occurred with the 1998 amendments:

Before the 1998 amendments to USERRA, the Act provided that "...district courts of the United States shall have jurisdiction" over all USERRA actions, including those brought by a person against a State employer. *See* Pub. L. No. 103-353, § 2, 108 Stat. 3149, 3165 (1994), *amended by* Pub. L. No. 105-368, § 211(a), 112 Stat. 3315, 3329 (1998)...

...In 1998, Congress enacted the Veterans Programs Enhancement Act of 1998, making substantial changes to the jurisdiction ... provisions of USERRA. The amended jurisdictional provision now provides that "[i]n the case of an action against a State (as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State." 38 U.S.C. § 4323(b)(2)...

Townsend, 543 F.3d at 482.

Recognizing the significance of this amendment, Judge Tashima interpreted the legislative's action as "confirm[ation] that Congress intended that actions brought by individuals against a state be commenced in state court."²⁴ Equally compelling is the context of these amendments in light of Congress' concern over the then-recent *Seminole Tribe*²⁵ case:

²³ *Townsend v. Univ. of Alaska*, 543 F.3d 478, 482 (9th Cir. 2008).

²⁴ *Id.* at 483.

²⁵ *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44 (1995).

... In *Seminole Tribe*, the Court held that Congress may abrogate a state's sovereign immunity only when acting pursuant to its powers under § 5 of the Fourteenth Amendment... *Id.* at 59, 72-73. Following *Seminole Tribe*, the validity of USERRA's abrogation of state sovereign immunity was in doubt. *See* 144 Cong. Rec. H1396-02, H1398 (daily ed. Mar. 24, 1998) (Statement of Rep. Evans) ("[S]everal courts have held the reasoning of the *Seminole Tribe* case precludes [jurisdiction] to enforce federal rights of State employees under...USERRA").

Townsend, 543 F.3d at 482-83.

Therefore it follows that the 1998 amendments should be read as broadening the accessibility of relief for private claimants asserting a claim against their State employer. This view is further clarified, as the *Townsend* Court then delves into the House Reports on the USERRA amendments that speak to jurisdictional changes:

H.R. 3213, the jurisdictional provisions... which survive in the current version of 38 U.S.C. § 4323, [were] introduced on the House floor on March 24, 1998. *See* 144 Cong. Rec. H1396-02 (1998); *see also* H.R. 3213, 105th Cong. (1998). The stated purpose of the bill was, in part, "to clarify enforcement of veterans' employment and reemployment rights with respect to a State as an employer." 144 Cong. Rec. at H1396; *see also* H.R. 3213. The summary of the bill in the Report of the House Committee on Veterans' Affairs provide[d] further insight into Congress' intent[.]

...The House Report thus makes plain that the purpose of the bill was to solve the *Seminole Tribe* problem by: ... (2) directing actions brought by individual service members, who were not represented by the United States, to state court. *See* H.R. Rep. No. 105-448, at 2-5 (discussing the problems created by *Seminole Tribe* for USERRA's enforcement scheme and the proposed solution); *see also* 144 Cong. Rec. at H1398 (statement of Rep. Quinn) ("... Individuals not represented by the Attorney General would be able to bring enforcement actions in State court.")"

Townsend, 543 F.3d at 483.

On the other hand, if this Court were to read the 1998 amendments to USERRA, as Defendants request, that Congress changed the law so that States could only be sued if they chose to, the result would be illogical. This Court agrees with the principle of law articulated by the Attorney General, in their Statement of Interest that, “if this were Congress’s intent there would have been no reason to limit suits against States to state court, because a State that waives its sovereign immunity can be sued in federal court as well.”²⁶

Alternatively to the Eleventh Amendment, Defendants argue that the Revised Organic Act “clearly grants sovereign immunity to the Government of the Virgin Islands for tort claims and any claim not based in contract.”²⁷ The Revised Organic Act provides in relevant part that,

“[T]he government of the Virgin Islands shall have the powers set forth in this Act and shall have the right to sue by such name and in cases arising out of contract, to be sued: *Provided*, That no tort action shall be brought against the government of the Virgin Islands or against any officer or employee thereof in his official capacity without the consent of the legislature constituted by this Act.

48 U.S.C. § 1541(b) (emphasis in original).

In their motion, Defendants contend that because neither the Virgin Islands Legislature nor Congress has waived its sovereign immunity, the USERRA claim is fruitless.²⁸ Defendants proceed to cite a litany of cases that speak to sovereign immunity. However, as the vast majority of these cases feature state responses and not territorial law, they do little to move the needle. Of the applicable case law cited, Defendants rely on a Superior Court case, *Rosa v. V.I. Housing Authority* to suggest that the Virgin Islands’ sovereign immunity protects it from wrongful

²⁶ DOJ Stmt. Supp. Pl. Opp’n Defs’ Mot. Dismiss 12.

²⁷ Defs.’ Mot Dismiss 9.

²⁸ *Id.* at 1.

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termination and other claims sounded in tort.²⁹ In *Rosa*, plaintiff sued Virgin Islands Housing Authority for personal injuries suffered as a result of falling off a ramp.³⁰ The Court found that a statutory cap created by the Legislature was applicable to creating an immunity for local tort claims.³¹ However, this case does not find sovereign immunity in the context of a federal statute as in this present matter, and therefore too has limited applicability.

More on point is a decision cited by both parties, *Mathes v. Century Alumina Co., LLLP*, where the District Court of the Virgin Islands ruled on whether the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”), a federal statute, was barred by the Virgin Islands’ sovereign immunity.³² There, the court found that sovereign immunity was limited to that which stemmed from the Revised Organic Act.³³ Additionally, the court acknowledged, that the Virgin Islands is “not sovereign, in the true sense of that term.”³⁴ Rather, turning to the “Territorial Clause” of the U.S. Constitution, “Congress shall have power to dispose of and make all needful Rules and Regulations respecting the Territory... belonging to the United States.”³⁵ Finding the holding of *Seminole Tribe of Fla. v. Florida*, inapplicable to territories, the Court noted that Congress retained the ability to abrogate the sovereign immunity of the Virgin Islands.³⁶ Finally, further recognizing the sovereign immunity granted by Congress, the *Mathes* Court held,

²⁹ 43 V.I. 131 (Terr. Ct. Apr. 17, 2001).

³⁰ *Id.* at 132-33.

³¹ *Id.* at 137-38.

³² 2009 U.S. Dist. LEXIS 52135 (D.V.I. June 19, 2009).

³³ *Id.* at *11-12, 17.

³⁴ *Id.* at *12.

³⁵ *Id.* at *15-17 (quoting U.S. Const. art. IV, § 3, cl. 2).

³⁶ *Id.* (“Whatever the law may be as to other possessions of the United States, we conclude that the holdings of *Seminole Tribe* and its progeny concerning State sovereign immunity have no bearing on the relationship between Congress and the Government of the Virgin Islands...[T]he nature of State immunity stems from “constitutional design”...[and] [t]he Virgin Islands... simply cannot lay claim to a similar constitutional privilege” (citations omitted)).

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“[w]e find it implausible that Congress may grant such immunity by statute and yet lack the authority later to waive or remove it once it is granted.” The court accordingly found that as constructed, Congress, via CERCLA, did demonstrate an abrogation of the territory’s sovereign immunity.³⁷

Thus, the question before this Court is whether Congress abrogated the Virgin Islands’ sovereign immunity when it passed or amended USERRA. The interpretation of USERRA is an issue of first-impression for the Virgin Islands, as well as for any of the United States’ territories. In light of that distinction, this Court looks first to the plain meaning of the statute as most illuminating. As this is a federal statute, this Court is mindful to not limit itself to the statutory canons listed in Title 1 of the Virgin Islands Code.³⁸

Section 4303 of USERRA is titled “Definitions”. Under sub-section 14, Congress has provided its definition of a “State” as meaning “each of the several States of the United States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, and other territories of the United States.”³⁹ Thus, the Virgin Islands is defined as a State for the purposes of USERRA. Continuing, § 4302(a) notes that “nothing in this chapter shall supersede, nullify or diminish any Federal or State law... that establishes a right or benefit that is more beneficial... to a right... in this chapter.”⁴⁰ While this shows deference to other laws that provide greater protections, it is important to view subsection (a) alongside (b) of the same section. There, it is noted that this statute “supersedes any State law... that reduces, limits, or eliminates in any manner

³⁷ *Id.* at *18-19.

³⁸ *See Billu v. People*, 57 V.I. 455, 471 (V.I. 2012).

³⁹ 38 U.S.C. § 4303(14).

⁴⁰ *Id.* at §4302(a).

any right or benefit provided by this chapter.”⁴¹ While the Revised Organic Act is obviously not covered under this section, as a federal statute, it is revealing that a limitation was placed on other laws that reduces the benefits of this chapter, while statutes providing greater benefit remain unchecked.

Section 4323 is titled, “Enforcement of rights with respect to a State or private employer”. There, the process by which an employee of either the “State” or a “private employer” may obtain relief is explained. Specifically, the statute enumerates the requirements for “[a] person [to] commence an action for relief with respect to a complaint against a State (as an employer).”⁴² The distinction of § 4323 from “§ 4322- Enforcement of employment or reemployment rights”, does demonstrates lawmakers understanding of a difference in claims, but also demonstrates a recognition that such claims against a “State(as an employer)” have merit in their own right. Still, this is not enough to prove a clear abrogation of the sovereign immunity power of the Virgin Islands.

Thus, continuing under §4323, sub-section (b) is titled “Jurisdiction”. Under sub-section (b)(2) it reads, “[i]n the case of an action against a State(as an employer) by a person, the action may be brought in a State court of competent jurisdiction in accordance with the laws of the State.”⁴³ This further distinguishes a State Employer sued by a private person from cases brought on behalf of the United States, or cases brought against private employers, both which find jurisdiction in the district courts of the United States.⁴⁴ If any ambiguity remained, it was intended

⁴¹ *Id.* at §4302(b).

⁴² *Id.* at §4323(3).

⁴³ *Id.* at §4323(b).

⁴⁴ *Id.*

to be resolved later in this section. Under “(d) Remedies”, the court’s ability to award relief under USERRA is explicitly stated:

- (A) The court may **require the employer to comply** with the provisions of this chapter.
- (B) The court may **require the employer to compensate** the person for any loss of wages or benefits suffered by reason of such employer’s failure to comply with the provisions of this chapter.
- (C) The court may **require the employer to pay the person** an amount equal to the amount referred to... as liquidated damages, if the court determines the failure to comply was willful.

38 U.S.C. § 4323(d) (*emphasis added*).

Therefore, it is clear that Congress not only viewed the Virgin Islands as a state under this statute, but also that it intended for USERRA claims such as the one brought by Plaintiff, a private individual, to be brought before a state court of competent jurisdiction. Not only is the court explicitly stated, but monetary remedies are additionally spelled out, as being enforceable by jurists. As financial awards against a state are explicitly indicated, it would thus be illogical to read this statute as not abrogating, at least part of a “state’s” sovereign immunity. To do so would essentially strike-through multiple provisions of USERRA, thus reducing the actual protections to members of the military.

In addition, USERRA articulates three purposes of this statute under § 4301. Section 4301(a) reads, “...(2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service.”⁴⁵ If this Court were to read sovereign immunity as superseding the provisions of

⁴⁵ *Id.* at §4301(a).

USERRA, then it follows that, unless waived by the State, private individuals would be limited to bring forth suit via the Attorney General.⁴⁶ As opposed to pursuing immediate relief by choosing to pursue a claim without applying to the Secretary of Labor (in which the statute provides the Secretary two months to respond), or additionally requesting that the Secretary of Labor refer the complaint to the Attorney General (who also has two months to respond), as many as four months would pass in what is purposed to be “prompt reemployment.”⁴⁷ This Court further notes that such a reading would turn another of USERRA’s protections, the lack of a statute of limitations, “the inability of the Secretary, the Attorney General, or the Special Counsel to comply with a deadline... (D) shall not constitute a defense, including a statute of limitations,” into an anchor of government inaction, as opposed to its vessel of prompt relief.⁴⁸ This Court thus rules, as the District Court did in *Mathes*, that Congress did abrogate the sovereign immunity of the Virgin Islands via USERRA and its amendments. Defendants’ motion to dismiss for lack of subject-matter jurisdiction will be **DENIED** with regards to Count I.

C. Whether Title 23 VIC § 1531 allows for a private right of action.

Defendants next argue that Title 23 V.I.C. § 1531 must be dismissed as it does not allow for a private right of action.⁴⁹ “A private right of action is the right of an individual to bring suit to remedy... an injury resulting from... violation of a legal requirement.”⁵⁰ When private rights of action are not expressly stated in a statute, there may still be an implied private right of action

⁴⁶ *Id.* at § 4323(a).

⁴⁷ *Id.*

⁴⁸ *Id.* at §4327(a).

⁴⁹ Defs.’ Mot. Dismiss 10- 11.

⁵⁰ *Olive v. de Jongh*, 57 V.I. 24, 43 (V.I. Super. Ct. Aug. 3, 2012) (quoting *Wisniewski v. Rodale, Inc.*, 510 F.3d 294, 296 (3d Cir. 2007).

that allots that right.⁵¹ The test for whether an implied right of action is created in a statute involves the two-part test, noted in the U.S. Supreme Court decision *Alexander v. Sandoval*.⁵² There the Court found an implied private right of action in Title VI that provided for compensatory and injunctive relief.⁵³ This Court adopted that test in the 2012 decision, *Olive v. de Jongh*, where this Court found that a Virgin Islands conflict of interest statute, providing both civil and criminal penalties, did not provide for a private right of action.⁵⁴

In *Olive*, this Court noted that the legal inquiry is 1) “whether the legislature intended to create a personal right”; and 2) “whether the legislature intended to create a private remedy.”⁵⁵ The first part of this test accounts for the statute’s text and construction to make a determination, while the second part examines the statute’s text and construction, as well as the legislative history of the statute.⁵⁶ Thus it follows, if the Legislature intended to create a personal right and a private remedy, then an implied private right of action exists for the statute in question.⁵⁷

This Court continued, when reviewing whether a “personal right” was intended, the court must review the text and structure of the statute for “language that focuses on the “individual protected” rather than the “person regulated.””⁵⁸ Statutes that focus on the “person regulated” confer no implication of a private right of action.⁵⁹ With regards to whether a “private remedy”

⁵¹ *Olive*, 57 V.I. at 44; see also *Cort v. Ash*, 422 U.S. 66 (1975) (noting that a statute’s criminal penalty provision did not necessarily preclude a private right of action, while finding the statute in question to be a “bare criminal statute” that did not provide for a private right of action).

⁵² *Alexander v. Sandoval* (*Sandoval*), 532 U.S. 275 (2001).

⁵³ *Id.* at 279.

⁵⁴ *Olive*, 57 V.I. at 44; see also *Haynes v. Ottley*, 2014 V.I. LEXIS 96 (V.I. Super. Ct. Oct. 30, 2014) (applying the *Sandoval* test to determine whether a private right of action existed in a matter where plaintiffs sought injunctive relief), *rev’d on other grounds*, 61 V.I. 547 (V.I. 2014).

⁵⁵ *Olive*, 57 V.I. at 44.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Olive*, 57 V.I. at 44 (quoting *Wisniewski*, 510 F. 3d at 294).

⁵⁹ *Olive*, 57 V.I. at 44 (citing *Sandoval*, 532 U.S. at 288-290).

was intended, “an express provision of one method of enforcing a substantive rule *suggests* [emphasis added] that the legislature intended to preclude other methods of enforcement.”⁶⁰ Furthermore, ““the existence of a comprehensive remedial scheme in the statute” *implies* [emphasis added] that no private right of action exists outside of the method[s] articulated.”⁶¹

Here, Plaintiff is implying a private right of action to § 1531, a statute that focuses mostly on the person being regulated.⁶² There is no reference to the “individual protected” besides that as a victim to the discrimination, which is a far cry from successfully demonstrating an intent to create a “personal right.” Even assuming *arguendo* that the Legislature did intend to create a personal right, this Court does not find any intent to create a “private remedy”. Section 1531, does not include a “comprehensive remedial scheme”, and the Legislature did not, under this section, detail any private remedies as the statute speaks only to criminal punishments or internal disciplinary measures.⁶³ Since § 1531 does not imply a “personal right” nor a “private remedy”, this Court finds that no implied private cause of action exists. As this statute does not provide for a private cause of action, this claim cannot be raised, and this Court lacks subject-matter jurisdiction to hear this claim. Thus, Defendants’ motion to dismiss for lack of subject-matter jurisdiction will be **GRANTED** on Count II.

III. CONCLUSION.

For the foregoing reasons, the Court will grant in part and deny in part Defendants’ motion to dismiss. The motion is denied with regards to the subject-matter jurisdiction of Plaintiff’s

⁶⁰ *Id.* at 45 (citing *Sandoval*, 532 U.S at 290).

⁶¹ *Id.* at 45 (quoting *Wisniewski*, 510 F. 3d at 303).

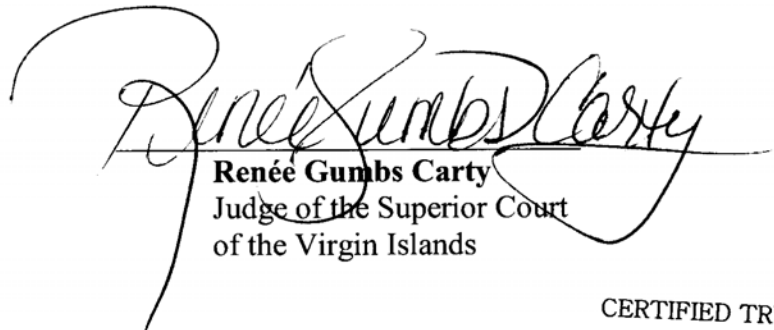
⁶² V.I. CODE ANN. TIT. 23, §1531 (“(a)...any person who willfully deprives a member of officer of his employment... (b) Any officer or employee of the Government of the Virgin Islands... who violates section 1524”).

⁶³ *Id.*

Memorandum Opinion
Shorn Joseph v. Legislature of the Virgin Islands,
Myron D. Jackson in his official capacity as President
ST-11-CV-419

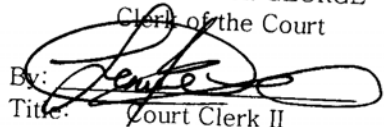
USERRA claim finding Congress to have abrogated the sovereign immunity of the Virgin Islands. The motion is granted with regards to Plaintiff's statutory claim under Title 23 § 1531 as the statute does not provide for a private right of action. Lastly, the motion is denied with regards to Plaintiff's implied breach of contract claim as Defendant made no arguments demonstrating how this Court lacked the subject-matter jurisdiction to hear this claim. An Order of even date shall follow.

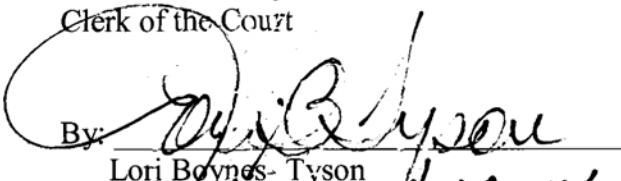
Dated: April 12, 2017


Renée Gumbs Carty
Judge of the Superior Court
of the Virgin Islands

CERTIFIED TRUE COPY

ATTEST:
Estrella H. George
Clerk of the Court

Date: _____
ESTRELLA H. GEORGE
Clerk of the Court
By: 
Title: Court Clerk II

By: 
Lori Boynes-Tyson
Chief Deputy Clerk 4/12/17