

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX

CLARENCE GILES,	)	
	Plaintiff,	CIVIL NO. SX-16-CV-359
v.	)	
THE BUCCANEER, INC.,	)	WRONGFUL TERMINATION
	Defendant.	(JURY)
	)	

**MEMORANDUM OPINION AND ORDER
DENYING MOTIONS FOR SUMMARY JUDGMENT
AND GRANTING JURY DEMAND**

THIS MATTER is before the Court on Defendant's Motion and Memorandum for Summary Judgment (Motion), filed April 18, 2017; Plaintiff's Opposition thereto, filed May 23, 2017; and Defendant's Reply, filed June 5, 2017. Defendant filed a Second Motion for Summary Judgment on December 15, 2017 (Second Motion), and Plaintiff filed his Opposition thereto on January 16, 2017. Also pending is Plaintiff's Jury Demand, filed June 19, 2017; Defendant's Motion to Strike Plaintiff's Jury Demand, filed June 21, 2017; Plaintiff's Opposition thereto, filed June 30, 2017; and Defendant's Reply, filed July 21, 2017. Because Plaintiff has demonstrated that a genuine dispute of material fact exists as to whether Defendant sufficiently communicated its warnings and reprimands to Giles such that his failure to abide by them constituted willful and intentional disobedience within the meaning of the WDA, Defendant's Motion for Summary Judgment will be denied. Additionally, because the factual and legal issues adjudicated in the administrative proceeding before the Department of Labor are not identical to those presented in the instant matter, Plaintiff's claim is not barred by the doctrine of collateral estoppel and Defendant's Second Motion will be denied. Lastly, because Plaintiff has represented that his failure to timely demand trial by jury was solely the result of his counsel's inadvertence, the Court

finds the interests of justice to be best served by denying Defendant's Motion to Strike and granting Plaintiff a trial by jury pursuant to Virgin Islands Rule of Civil Procedure 39(b).

Background

Clarence Giles had been employed by the Buccaneer Hotel for nearly fifty years, most recently as the "primary backhoe operator," until his employment was terminated for insubordination on November 3, 2014. This dispute, as summarized by Plaintiff, "centers around Giles' use of the Buccaneer's backhoe, on his own time, to clear brush for a friend." Opposition, at 2. The incident in question occurred on June 14, 2014, when "Giles took the backhoe off the hotel premises to do work at another location at a friend's private home in Estate Boetzberg." Motion, at 4. Defendant contends that at the time of the incident, Giles was aware that he was not authorized to take the backhoe off hotel property, as he had first been warned in the fall of 2013 by Elizabeth Armstrong, the manager of the Buccaneer Hotel, and had been reprimanded following a previous similar incident in early 2014. Following that incident, Defendant contends that Giles had been explicitly "warned ... to not take the backhoe off of the hotel's property without express permission." Motion ¶ 15. Defendant made no written record of such warnings or reprimands. Reply, at 4.

While Giles does not affirmatively deny that he received a warning following the incident in early 2014, he testified at his deposition that he could not recall either the 2013 or the 2014 conversations taking place. Motion at ¶17. At a Department of Labor (DOL) hearing in February 2015, Giles testified that prior to the incidents in 2013 and 2014, he had taken and used the backhoe off hotel property several times under similar circumstances with Armstrong's knowledge and explicit permission. Opposition, Exhibit 4, at 20-21 (BU-CG-000383-84). However, Giles admitted that each such permitted off-property use of the backhoe occurred prior to 2012. *Id.*

Motion for Summary Judgment

“Summary Judgment is a drastic remedy [and] should be granted only when the pleadings, the discovery and disclosure materials on file, and any affidavits show there is no genuine issue as to any material fact,” and judgment is appropriate as a matter of law. *Machado v. Yacht Haven U.S.V.I., LLC*, 61 V.I. 373, 379 (V.I. 2014) (quoting *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008)). In ruling on a motion for summary judgment, the Court must determine whether there exists a dispute as to a material fact, the determination of which will affect the outcome of the action under the applicable law. *Id.*; see also *Perez v. Ritz-Carlton (Virgin Islands), Inc.*, 59 V.I. 522, 527 (V.I. 2013) (citations and quotations omitted). Such a dispute is genuine if the evidence is such that a reasonable trier of fact could return a verdict for the nonmoving party. *Machado*, 61 V.I. at 391-92. In evaluating the evidence of record, the Court must draw all justifiable inferences in favor of the nonmoving party, and accept the non-moving party’s allegations as true if properly supported by the record. *Id.* at 379. The moving party bears the burden of demonstrating the absence of any genuine issue of material fact. *Martin v. Martin*, 54 V.I. 379, 389 (V.I. 2010). Only if the moving party discharges this initial obligation does the burden shift to the non-moving party to introduce some evidence showing the existence of a genuine issue of material fact. See *Perez*, 59 V.I. at 527-28.

Pursuant to the Wrongful Discharge Act (WDA), 24 V.I.C. § 76(a)(4), “Unless modified by union contract, an employer may dismiss any employee... who willfully and intentionally disobeys reasonable and lawful rules, orders, and instructions of the employer...” By its Motion, Defendant argues that it is undisputed “that Giles was instructed on several occasions not to take the backhoe off the hotel’s premises, by both the hotel’s manager and his direct supervisor,” and that “notwithstanding this direct instruction, he still did so.” Motion, at 8. Therefore, Defendant

contends, under the plain language of the WDA, Buccaneer was entitled to terminate Giles' employment.

Although Defendant is correct that there is no dispute that Giles took the backhoe off hotel property after being instructed not to do so, there remains a genuine dispute as to whether Giles, in light of his advanced age and history of using the backhoe off-property with permission, subjectively understood the warnings and directives given to him by hotel management; that is, whether hotel management sufficiently communicated to Giles that he was prohibited from using the backhoe off property such that his decision to do so rises to the level of willful and intentional disobedience under §76(a)(4). Defendant's argument rests heavily on Giles' failure to actively deny receiving the relevant warnings and reprimands, presenting Giles' failure to recall receiving those warnings as the equivalent of an admission that he willfully disobeyed his employer's express instruction. Such equivalence is false.

Viewed in the light most favorable to Plaintiff, Giles' failure to recall the warnings and instructions given to him concerning off-property use of the backhoe, taken together with the lack of any formal, written reprimand as well as Giles' previous history of utilizing the equipment off hotel property with permission, permit the reasonable inference that hotel management did not sufficiently communicate to Giles the relevant warnings and instructions such that the incident leading to his termination did not constitute willful and intentional disobedience within the meaning of the WDA. While Defendant is correct that the WDA does not require an employer's directives or warnings to be made in writing, written documentation of serious warnings and reprimands is standard business practice in the modern age and lends clarity, precision, and gravitas to any disciplinary interaction between employer and employee.

One reasonable inference that may be drawn from the absence of such records is that the incident in question was not sufficiently serious to merit documentation. In turn, if the incident was not of sufficient severity to justify documentation by hotel management, one may infer, that management did not convey in a sufficiently clear and serious manner that Giles was prohibited from using the backhoe off hotel property. While such an inference may be strained if considered in isolation, when considered together with the fact that off-property use of the backhoe was historically permitted and that Giles himself has no recollection of receiving any warnings or reprimands, the inference that management failed to sufficiently convey its warnings and reprimands may be deemed reasonable. Thus, there exists a genuine dispute of material fact in this matter as to whether Defendant sufficiently communicated its warnings and reprimands to Giles such that his failure to abide by them constituted willful and intentional disobedience within the meaning of the WDA. At this stage of the proceedings, the existence of that factual dispute mandates that Defendant's Motion for Summary Judgment be denied.

Second Motion for Summary Judgment

Defendant's Second Motion argues that factual findings made by the Department of Labor Administrative Law Judge (ALJ) in the context of Plaintiff's appeal of the denial of his request for unemployment benefits have preclusive effect under "the doctrine of res judicata or, alternatively, the doctrine of collateral estoppel," and that Plaintiff's WDA claim must therefore fail as a matter of law. Second Motion, at 1. Specifically, Defendant contends that the ALJ's finding "that Giles disobeyed one of the Buccaneer's rules — taking company property off the hotel's premises without permission — after being warned not to do so again," precludes Plaintiff from asserting his WDA claim and necessitates judgment in favor of Defendant.

The Supreme Court of the Virgin Islands has established that “to bar the *relitigation of a claim* under the doctrine of *res judicata*, an asserting party must demonstrate: (1) the prior judgment was valid, final, and on the merits; (2) the parties in the subsequent action are identical to or in privity with the parties in the prior action; and (3) the claims in the subsequent action arise out of the same transaction or occurrence as those in the prior action.” *Stewart v. Virgin Islands Board of Land Use Appeals*, 66 V.I. 522, 533 (V.I. 2017) (citing *Cacciamani & Rover Corp. v. Banco Popular De Puerto Rico*, 61 V.I. 247 (V.I. 2014)) (emphasis added). Here, Defendant seeks to bar Plaintiff from pursuing his WDA claim on the basis of factual findings made in the context of an administrative proceeding concerning the denial of unemployment benefits. Thus, the doctrine of *res judicata* is clearly inapplicable, as Plaintiff does not seek to relitigate any claim previously raised. Rather, the preclusion of litigation of specific issues previously adjudicated in the context of related but distinct claims is governed by the doctrine of collateral estoppel.

“[T]o bar relitigation of an issue under the doctrine of collateral estoppel, an asserting party must demonstrate: (1) the issue to be barred is identical to an issue actually and necessarily decided in the prior action; (2) the prior action was adjudicated in a decision that was final, valid, and on the merits; (3) the party against whom the doctrine is asserted was a party or in privity with a party to the prior action; and (4) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the prior action.” *Stewart*, 66 V.I. at 549-50 (citations omitted). For the purposes of this Opinion, the Court assumes without determining that the second, third, and fourth elements of the collateral estoppel defense as listed above are satisfied. However, with the respect to the first element, the Court must determine whether the issue Defendant seeks to bar is, in fact, *identical* to the issue actually and necessarily decided in the DOL proceeding.

Specifically, the ALJ made the following relevant findings of fact: 1) “the Claimant without permission from any member of management during the weekend of August 2, 2014, drove a company owned heavy equipment backhoe off the Employer’s property and performed work on the owner of Sam Wiltshire’s private property, located at 41 Estate Boetzberg;” 2) “the Claimant had been specifically warned to never take company equipment [backhoe] off the property unless authorized by management;” 3) “the Claimant did not seek nor was he given permission to drive or use the company backhoe off the Employer’s property during the weekend of August 2, 2014;” and 4) “the applicable language [of The Buccaneer Employees’ Handbook] has been deemed by management to have been violated by Claimant. Insofar as the Claimant did not have permission to drive the backhoe that belonged to the Employer off company property, and the Claimant had been previously warned not to do so.” Second Motion, Exhibit 2, at 2. On that basis, the ALJ concluded that “when [Giles] drove the backhoe off the Employer’s property he did engage in misconduct.” *Id.*

In its Second Motion, Defendant repeatedly emphasizes that it is not merely the legal issue adjudicated below — that Giles engaged in misconduct within the meaning of 24 V.I.C. §304(b)(3) — upon which Defendant bases its collateral estoppel argument, but rather the factual findings that “Giles disobeyed one of the Buccaneer’s rules — taking company property off the hotel’s premises without permission — after being warned not to do so again.” Second Motion, at 1. Although not explicitly articulated in the Second Motion, Defendant implicitly argues here, as it did in its first Motion for Summary Judgment, that if there exists no dispute that Plaintiff took the backhoe off hotel property after being instructed not to do so, his WDA claim must fail as a matter of law. However, as discussed above, while there exists no dispute as to the fact that Plaintiff took the backhoe off hotel property, or the fact that he had been instructed not to do so, there nonetheless

exists a genuine dispute as to whether Defendant sufficiently communicated its warnings and reprimands to Giles in such a manner that they were understood, such that his failure to abide by them constituted willful and intentional disobedience within the meaning of the WDA. Thus, even if the Court were to conclude that Plaintiff is collaterally estopped from challenging the factual findings of the ALJ, Defendant still would not be entitled to judgment as a matter of law.

To the extent that Defendant also argues that Plaintiff is barred from pursuing his WDA claim on the basis of the ALJ's legal conclusion that Plaintiff engaged in misconduct in violation of 24 V.I.C. §304(b)(3), the Court finds that issue decided in the DOL proceeding is not sufficiently identical with the issue presented in this matter to permit application of the doctrine of collateral estoppel. Rather, the Court finds most persuasive the analysis presented in *Harrilal v. Blackwood*, 2001 V.I. LEXIS 42 (V.I. Super. Ct. 2001) (Hodge, J.):

With respect to identity of issues, the analysis involved in a wrongful discharge action encompasses a separate set of policies and rights than a determination of unemployment benefits. *Cf. Rue v. K-Mart Corp.*, 456 Pa. Super. 641, 691 A.2d 498, 501 (Pa. Super. 1997) (holding that the public policy considerations undergirding Pennsylvania unemployment compensation law were insufficiently similar to an action for civil defamation). The stated purpose of the Labor Relations statutes, which include section 76, "is to encourage the friendly adjustment of employer-employee disputes through the practice and procedure of collective bargaining, and to protect the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing[.]" V.I. CODE ANN. tit. 24, § 61. By contrast, the purpose of the UIA is to establish a general unemployment fund in order to assist "sustain the morale and conserve the skills and standards of living of those who became unemployed, by enabling them to meet their essential expenses for reasonable period until they are able to obtain suitable work." V.I. CODE ANN tit. 24, § 301. Thus, the considerations at stake in a wrongful discharge action speak to larger issues of employee-employer relations than do the largely economic considerations of a grant or denial of unemployment benefits...

Furthermore, the mission of the VIESA is to determine an applicant's eligibility for unemployment benefits, not to determine the culpability of the employer. *See Manning v. Alaska R.R. Corp.*, 853 P.2d 1120, 1125 (Alaska 1993) (noting that the Alaska Commissioner of Labor did not have jurisdiction to consider the elements

of a wrongful discharge claim). The inquiry of the ALJ was limited solely to whether Harrilal engaged in “misconduct,” as countenanced in section 304(b)(3), not whether she was wrongfully discharged in violation of section 76(a). *See Berrier v. Bizer*, 57 S.W.3d 271, 280 (Ky. 2001) (concluding that the issue before Kentucky’s unemployment commission was not whether the plaintiff was wrongfully discharged, but whether she was terminated for good cause). Although there may be considerable overlap between the definition of “misconduct” and the nine enumerated elements of proper discharge under section 76(a), the language and the resulting scope of each provision are by no means identical...

Because the factual predicates for both questions involve different requirements, i.e., a finding of misconduct for section 304(b)(3) versus the existence of one of nine scenarios for section 76(a), an administrative determination that Harrilal was ineligible for unemployment benefits does not inform a finder of fact in a subsequent proceeding whether or not she was improperly terminated.

Id. at *12-15.

“Thus, because the issue of wrongful discharge in this proceeding is different from the issue of eligibility for unemployment benefits, the invocation of collateral estoppel is not appropriate.” *Id.* at 16. Accordingly, because the issue Defendant seeks to preclude Plaintiff from litigating in this matter is not identical to the issue adjudicated in the DOL proceeding, Defendant’s Second Motion for Summary Judgment will be denied.

Motion to Strike Jury Demand

Pursuant to Virgin Islands Rule of Civil Procedure 38 a party may demand a jury trial by “serving parties with a written demand — which may be included in a pleading — no later than 14 days after the last pleading directed to the issue is served.” Additionally, “a party waives a jury trial unless its demand is properly served and filed.” By its Motion to Strike, Defendant argues that because Giles’ jury demand was filed nearly a year out of time, Plaintiff has waived his right to trial by jury. Plaintiff’s counsel has represented to the Court that the failure to include a jury demand in the Complaint resulted solely from counsel’s inadvertence. Defendant has not alleged any prejudice by having the matter heard before a jury. The Court acknowledges that the right to

trial by jury remains one of the most fundamental and defining features of our system of justice, set forth in the Seventh Amendment to the U.S. Constitution, extended with the same force and effect in the Virgin Islands by virtue of the Revised Organic Act. *See Antilles School, Inc. v. Lembach*, 64 V.I. 400, 433 (V.I. 2016). In the context of negligence cases where, as here, weighing and determining facts is essential to disposition, the Supreme Court “has consistently favored – wherever possible – the adjudication of negligence cases by a jury, a preference codified by the Legislature in 5 V.I.C. § 1451(a), instead of by a single judge at summary judgment.” *Machado*, 61 V.I. at 399. Here, the Court will exercise its discretion under V.I. R. Civ. P. 39(b) to order trial by jury in this matter.

Therefore, on the basis of the foregoing, it is hereby

ORDERED that Defendant’s Motion for Summary Judgment is DENIED. It is further

ORDERED that Defendant’s Second Motion for Summary Judgment is DENIED. It is further

ORDERED that Defendant’s Motion to Strike Plaintiff’s Jury Demand is DENIED. It is further

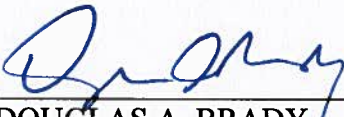
ORDERED that Plaintiff’s Jury Demand is accepted and the Clerk is directed to transfer this matter to the Jury Division. It is further

ORDERED that the parties shall submit the matter to mediation pursuant to V.I. R. Civ. P. 90, and shall report to the Court the results of such mediation no later than March 16, 2018. It is further

ORDERED that in the event that the matter is not resolved in mediation, it shall be scheduled for jury selection and trial to commence May 29, 2018; with final pretrial conference

pursuant to V.I. R. Civ. P. 16(e) scheduled for 3:00 p.m. May 21, 2018. Plaintiff shall be responsible for convening a conference and for filing no later than May 14, 2018 the parties' proposed final pretrial order pursuant to V.I. R. Civ. P. 16-1.

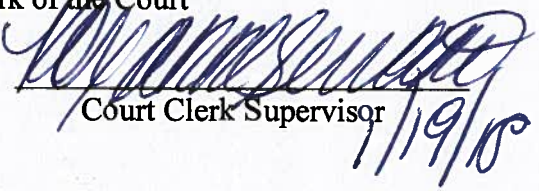
January 18, 2018



DOUGLAS A. BRADY
Judge of the Superior Court

ATTEST:

ESTRELLA GEORGE
Clerk of the Court

By: 

Court Clerk Supervisor
1/19/18