

NONPRECEDENTIAL

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

THERESA FRORUP-ALIE,)
)
Plaintiff)
)
v.)
)
V.I. HOUSING FINANCE)
AUTHORITY (VIHA) and DWH)
BUSINESS SERVICES, INC. (DWH),)
)
Defendants)
_____)

CIVIL NO. 2000-0086

ATTORNEYS:

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MEMORANDUM OPINION

Finch, Chief Judge

This matter comes before the Court on Defendant Virgin Islands Housing Finance Authority (VIHFA)'s Motion to Dismiss the Amended Complaint. For the reasons expressed

herein, Defendant's motion will be granted in part, and denied in part.

I. Background

Plaintiff Theresa Frorup-Alie brings this employment discrimination action alleging that Defendants discriminated against her on the basis of her race (Black) and national origin (native Virgin Islander). Plaintiff's Amended Complaint alleges: violation of 24 V.I.C. § 451 et seq., 10 V.I.C. § 64, and Title VII of the Civil Rights Act as amended (Count I); retaliation (Count II); breach of employment contract and violation of 24 V.I.C. § 76 (Count III); slander (Count IV); intentional infliction of emotional distress (Count V); negligent infliction of emotional distress (Count VI); and entitlement to punitive damages (Count VII).

Defendant now moves for dismissal on all Counts (I - VII), pursuant to Fed. R. Civ. P. 12(b)(6) on the basis that each count fails to state a cause of action against Defendant VIHFA. Moreover, Defendant VIHFA asserts the following in support of its motion:

(1) Regarding Counts I and II, Plaintiff does not have a valid claim under 24 V.I.C. § 451 for the following reasons: Plaintiff lacks standing because the statute does not provide a private cause of action, Plaintiff's claim is not ripe because a final order has not been issued by the Virgin Islands Department of Labor, and Plaintiff is time-barred by the statute of limitations.

(2) Regarding Counts I and II, Plaintiff does not have a valid claim under 10 V.I.C. § 64 on the basis that Plaintiff lacks standing since the statute does not provide a private cause of action.

(3) Regarding Counts I, II, and III, Plaintiff does not have a valid claim under 24 V.I.C. § 76 because Defendant VIHFA is exempt from the statute as a "public employer."

(4) Regarding Counts I, II, and III, Plaintiff is time-barred from bringing a retaliation claim under 10 V.I.C. § 123 by the statute of limitations.

(5) Regarding Counts I, II, and III, Plaintiff does not have a valid claim under Title VII because Plaintiff has not demonstrated that she has exhausted administrative remedies and Plaintiff is time-barred by the statute of limitations.

(6) Regarding Count IV, Plaintiff does not allege an unprivileged publication to a third party and Plaintiff does not specifically identify the content of the defamatory statements nor the person(s) by whom and to whom such statements were made. Furthermore, the Court lacks subject matter jurisdiction because Plaintiff has failed to comply with the Tort Claims Act.

(7) Regarding Count V, Plaintiff cannot bring a claim against Defendant VIHFA based on the actions of DWH supervisors/employees Dennis Hernandez and Jose George. Even if VIHFA could be vicariously liable for the actions of these DWH supervisors/employees, Plaintiff has not alleged any facts that would constitute extreme and outrageous conduct. Furthermore, the Court lacks subject matter jurisdiction because Plaintiff has failed to comply with the Tort Claims Act.

(8) Regarding Count VI, Plaintiff cannot bring a claim against Defendant VIHFA based on the actions of DWH supervisors/employees Dennis Hernandez and Jose George. Furthermore, the Court lacks subject matter jurisdiction because Plaintiff has failed to comply with the Tort Claims Act.

(9) Regarding Count VII, Plaintiff has stipulated to dismiss this count against Defendant VIHFA.

Plaintiff opposes Defendant VIHFA's motion.

II. Analysis

A. Standard Governing a Rule 12(b)(6) Motion to Dismiss

In determining a Rule 12(b)(6) motion to dismiss, “the material allegations of the complaint are taken as admitted,” and the Court must liberally construe the complaint in Plaintiff’s favor. Jenkins v. McKeithen, 395 U.S. 411, 421 (1969) (citing Fed. R. Civ. P. 8(f) and Conley v. Gibson, 355 U.S. 41 (1957)). All reasonable inferences are drawn in favor of Plaintiff. Sturm v. Clark, 835 F.2d 1009, 1011 (3d Cir. 1987). Further, the Court must follow “the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.” Conley, 355 U.S. at 45 - 46; Piecknick v. Commonwealth of Pennsylvania, 36 F.3d 1250, 1255 (3d Cir. 1994). The Rule 12(b)(6) motion is viewed with disfavor and rarely granted. 5A Charles Alan Wright & Arthur Miller, Federal Practice and Procedure § 1357 at 321 (West 1990).¹

B. Count I

Plaintiff’s Claim under 24 V.I.C. § 451 et seq.

Defendant VIHFA has correctly asserted that Plaintiff has failed to state a cause of action under 24 V.I.C. § 451 *et seq.* because the statute does not provide a private cause of action. Plaintiff’s Amended Complaint alleges that Defendants’ actions constituted, “illegal discrimination in violation of 24 V.I.C. § 451 *et seq.* 10 V.I.C. § 64 and Title VII of the Civil

¹ The Court need not rely on any documentation outside the pleadings in deciding this motion to dismiss and, therefore, declines to convert this motion into a motion pursuant to Fed. R. Civ. P. 56.

Rights Act as amended.” (Pl. Am. Compl. at ¶42.) Defendant VIHFA contends that there is no private right of action under Title 24. Indeed, this Court has held that there is no private right of action under 24 V.I.C. § 451 *et seq.*, also known as “Chapter 17” governing discrimination in employment. See Charles, Rennie, Elmour et al. v. HOVIC, Civ. Nos. 1994/0081, 1994/0082, 1994/0104 (D.V.I. Feb. 19, 2003); Hazell v. Executive Airlines, Inc., 886 F. Supp. 526, 527 (D.V.I. 1995); Williams v. Kmart Corp., 2001 WL 304024, at *5 (D.V.I. Mar. 13, 2001). Therefore, Plaintiff lacks standing to assert a claim under 24 V.I.C. § 451 *et seq.*

Plaintiff’s Claim under 10 V.I.C. § 64

However, the Court disagrees with Defendant VIHFA’s contention that Plaintiff does not have a private cause of action for discrimination under Chapter 5 of Title 10 of the Virgin Islands Civil Rights Act, 10 V.I.C. § 64 (“Chapter 5”).² A review of Virgin Islands case law indicates that this issue has been addressed many times indirectly. In Codrington v. Virgin Islands Port Authority, 911 F. Supp. 907, 917 (D.V.I. 1996), the Court ruled that the plaintiff failed to state a claim under § 64 because Title 10 was never cited in her complaint. The complaint merely acknowledged that she filed a complaint with the Civil Rights Commission. As dictum, the Court noted:

[E]ven if Codrington were to attempt to amend her complaint at this late date to assure that she stated a separate cause of action under Title 10, it is not clear that the local act even creates such a right. . . . Nowhere in the statute is it established that an aggrieved individual may directly bring an action for violation of section 64. Not having knowledge of whether and to what extent the Civil Rights Commission is active, the Court declines to address whether its analysis and conclusion would change if the Civil Rights Commission is either non-existent or non-functional.

²Although Plaintiff brings her claim under § 64, Chapter 5 encompasses 10 V.I.C. §§ 61 - 75.

Likewise, in Anderson v. Government, Civ. No. 96-118 (D.V.I. Nov. 21, 1997), Judge Moore dismissed the plaintiff's argument that he was entitled to damages under 10 V.I.C. §§ 1 - 11, Chapter 1 of the Virgin Islands Civil Rights Act. The Court reasoned: "Whether or not the local act creates a private cause of action, it does not entitle plaintiff to recover damages" against the government, as opposed to a private defendant. Id. at 13 - 14. The opinion then added that the plaintiff could not seek relief from the Court under 10 V.I.C. §§ 61 - 75 (Chapter 5), because no private right of action exists under Chapter 5.

Conversely, at least one other decision, Allard v. Hess Oil Virgin Islands Corp., 43 F. Supp.2d 551 (D.V.I. 1999), seems to suggest without deciding that a private claim under § 64 exists. Id. at 556 (holding appellant did not preserve her claim under the Virgin Islands Civil Rights Act [§64] for purposes of appeal).

Yet the issue of whether 10 V.I.C. § 64 provides a private cause of action was squarely decided by the Court in Whitmore v. HEPC Sugar Bay, Inc., 2002 WL 31574132 (D.V.I. 2002), in which the St. Thomas-St. John Division of this Court found that no private right of action exists under Chapter 5. Whitmore was based primarily on the conclusion that in Figueroa v. Buccaneer Hotel Inc., 188 F.3d 172, 176 - 81 (3d Cir. 1999), "the Court of Appeals held that no private cause of action exists under chapter 5 of title 10 of the Virgin Islands Code." Whitmore, 2002 WL 31574132, at *3. This Court's reading of Figueroa leads to a different result.

Figueroa held that a private right of action exists under *Chapter 1* of the Civil Rights Act, 10 V.I.C. §§ 1-11 ("Chapter 1"). Figueroa, 188 F.3d at 181. It did not, however, resolve the issue of whether a private right of action exists under Chapter 5 of the Act. Figueroa provides a

clear discussion of the relationship between Chapters 1 and 5 of the Act:

The Virgin Islands legislature enacted the Civil Rights Act in 1950 with the intent to “prevent and prohibit discrimination in any form.” The Act contains six chapters, only two of which--chapter 1 and chapter 5--are relevant to this case. Chapter 1 of the Act, 10 V.I.C. §§ 1-11, substantially amended and effective in 1961, contains a statement declaring the public policy of prohibiting and punishing discrimination based on race, creed, color, or national origin. § 1. It recognizes the right to equal treatment with respect to employment and working conditions, and specifies those discriminatory acts prohibited under the chapter. § 3. In section 7, the legislature provided civil and criminal penalties for violations of the chapter, including a specific provision for punitive damages. § 7. As an aid to its interpretation, it also includes a provision requiring courts to “construe [it] liberally in furtherance of its intent as stated in section 1.” § 10.

In 1974, the Virgin Islands legislature enacted chapter 5 of Title 10, §§ 61-75, and created the Virgin Islands Civil Rights Commission, granting it “general jurisdiction and power” to combat discrimination. § 61. The Commission was empowered to investigate allegations of discrimination, collect information about the denial of equal protection of the law in the Virgin Islands, appraise the laws and policies of the Virgin Islands as to such discrimination, hold hearings and disseminate information regarding discrimination, and impose sanctions or provide other remedies in individual cases of discrimination. § 63. Chapter 5 also contains a list of prohibited discriminatory practices, targeting discrimination based on race, color, religion, and national origin as in chapter 1, and also discrimination based on sex [age, place of birth] and political affiliation. § 64. Chapter 5 provides a mechanism for those aggrieved by discrimination covered under the chapter to file a claim with the Commission, which will then investigate the claim and issue a cease and desist order, and such other orders that in the judgment of the Commission are consistent with enforcement of the chapter. §§ 71-72. Finally, “the Commission may bring a civil action in the Territorial Court of the Virgin Islands by filing with it a complaint” setting forth the facts of the discrimination and requesting such relief as it deems necessary to enforce the Act. § 73.

Figueroa, 188 F.3d at 177 (footnotes omitted).

Defendant VIHFA argues that 10 V.I.C. § 64 vests only the Civil Rights Commission with the right to enforce violations of the section. Although Figueroa addressed Chapter 1 of the

Act, its reasoning suggests that a private cause of action is also available to Plaintiff under Chapter 5. First, the statutory construction principles applied in Figueroa to Chapter 1 apply equally to the question of whether a private right of action exists under Chapter 5:

[T]he mere creation of an agency such as the Commission does not necessarily reflect legislative intent to exclude private enforcement of the Act . . . an express indication of exclusivity of remedies is required.

Figueroa, 188 F.3d at 180. Accordingly, if the Virgin Islands legislature had intended to create an exclusive remedy in the Commission by enacting Chapter 5, it should have expressly said so. Yet “here, there is no implication that chapter 5 was to constitute an exclusive remedy, let alone an express statement to that effect.” Figueroa, 188 F.3d at 180. Therefore, this Court cannot find that the additional remedies provided through the Civil Rights Commission in Chapter 5 are exclusive remedies, even for violations specific to Chapter 5. See Wright v. City of Roanoke Redevel. & Housing Auth., 479 U.S. 418, 424 - 25 (1987) (concluding that a private cause of action existed where statute and its legislative history were devoid of any indication that exclusive enforcement authority was vested in HUD), cited in Figueroa, 188 F.3d at 180.

Furthermore, the reasoning in Samuel v. Virgin Islands Telephone Corp., No. 75-6, 1975 WL 289 (D.V.I. 1995), as cited in Figueroa, is applicable to this case. In Samuel, Judge Christian noted that the legislature did not use language in Chapter 5 implying that the Commission was to have the exclusive original right to hear and make determinations concerning civil rights matters. On that basis, he further stated:

It is therefore certainly arguable that parties whose rights have been violated under § 64 of chapter 5 need not bring their claims in the first instance to the Commission, but may bring them directly to District Court.

Samuel, 1975 WL 289 at *7 n.4. The Third Circuit stated in Figueroa, and this Court agrees, that Judge Christian's observation reinforces the statutory construction principles applicable to this case. Figueroa, 188 F.3d at 180. Therefore, Plaintiff may bring her 10 V.I.C. § 64 claim before this Court.

Plaintiff's Claim under Title VII of the Civil Rights Act as amended

The Court also finds that Plaintiff has stated a cause of action under Title VII. Section 42 U.S.C. § 2000e-5(f)(1) of the Civil Rights Act requires that claims brought under Title VII be filed within ninety days of the claimant's receipt of a right-to-sue letter from the EEOC. However, such issuance of a right-to-sue letter is not a jurisdictional requirement, but is rather a statutory requirement designed to give the administrative process an opportunity to proceed before a lawsuit is filed. Tori v. Shark Information Services, 1995 WL 764578, at *2 (E.D. Pa. 1995) (*citing* Gooding v. Warner-Lambert Co., 744 F.2d 354 (3rd Cir. 1984)); *see also* Figueroa v. Buccaneer Hotel Inc., 188 F.3d 172, 176 (3d Cir. 1999). The administrative requirement thus works as a statute of limitations rather than as a jurisdictional bar to suit. *See* Figueroa, 188 F.3d at 176.

In accordance with the above decisions, this Court finds no validity in Defendant VIHFA's assertion that Plaintiff's failure to allege receipt of a right-to-sue letter in her Amended Complaint necessitates dismissal of the Complaint. Because the administrative requirement is nonjurisdictional, Plaintiff's failure to allege receipt of a right-to-sue letter does not deprive this Court of jurisdiction to hear the matter. In her Opposition to Defendant's Motion to Dismiss, Plaintiff alleges that she followed the appropriate administrative procedures

in the filing of her claim (as set forth in 42 U.S.C. § 2000-e-5(f)(1))³ by filing her Complaint and Amended Complaint within ninety days of receipt of each Dismissal and Notice of Rights letter from the EEOC Commission. Accordingly, the Court will decline to grant Defendant VIHFA's motion and will permit Plaintiff to amend her Amended Complaint to incorporate the receipt of these Dismissal and Notice of Rights letters.

Plaintiff has not stated a cause of action upon which relief can be granted under 24 V.I.C. § 451 *et seq.*, but has stated cognizable claims under 10 V.I.C. § 64 and Title VII. Accordingly, Defendant VIHFA's motion shall be denied with respect to Count I.

C. Count II - Plaintiff's Retaliation Claim

Plaintiff has validly stated a claim for retaliation under Title VII. Although Plaintiff's Amended Complaint did not specify which statute(s) her retaliation claim was being brought pursuant to, Plaintiff's Opposition to Defendant's Motion to Dismiss clarifies that her retaliation claim is grounded in Title VII. As discussed in Count I, the Court does not agree with Defendant that Plaintiff is barred from bringing claims under Title VII on the grounds that Plaintiff has not demonstrated that she has exhausted administrative remedies and that Plaintiff is time-barred by

³ 42 U.S.C. § 2000e-5(f)(1) provides in relevant part:

If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d) of this section, whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice.

The essential elements of a retaliation claim under Title VII, are that the employee engaged in a Title VII protected activity, the employer acted adversely against the employee with regard to employment, and there was a causal relationship between the employee's and employer's actions. See, e.g., Nelson v. Upsala College, 51 F.3d 383 (3d Cir. 1995). In the instant case, Plaintiff stated in her Amended Complaint:

Defendants further retaliated against Plaintiff for exercising her employment rights and the harassment and intimidation against Plaintiff escalated in that plaintiff received no assistance, accommodation and/or cooperation to perform her duties, was subjected to derogatory, racial remarks by her Hispanic supervisors and was ultimately terminated by Defendants.

(Pl. Am. Compl. at ¶45.)

It is true that Plaintiff has not specified that she exercised her employment rights by participating in an activity protected under Title VII nor that such participation *caused* Defendant VIHFA's retaliatory actions of harassment and termination. However, reading Plaintiff's Amended Complaint in the light most favorable to Plaintiff, the Court finds that it may be possible for Plaintiff to succeed on a claim for retaliation under Title VII and will therefore allow Plaintiff to bring this claim.

Accordingly, Defendant VIHFA's motion shall be denied with respect to Count II.

D. Count III - Plaintiff's Claims of Breach of Employment Contract and Violation of 24 V.I.C. § 76

The Court finds that Plaintiff has not stated a cognizable claim under the Virgin Islands Wrongful Discharge Act, 24 V.I.C. § 76. Public employers are exempt from 24 V.I.C. § 76 because they are not included in the definition of "employer" for purposes of Chapter 3 as stated

in 24 V.I.C. § 62. A “public employer” is defined in 24 V.I.C. § 362(i) as “the executive branch of the Government of the United States Virgin Islands and any agency or instrumentality thereof including, but not limited to...the Virgin Islands Housing Authority....” Defendant VIHFA is a public employer. Therefore, Plaintiff is barred from bringing a claim under 24 V.I.C. § 76 against Defendant VIHFA.

On the other hand, the Court does not agree with Defendant VIHFA’s argument that Plaintiff has failed to allege a prima facie case for breach of contract. First, Rule 8(a) of the Federal rules of Civil Procedure requires only that a complaint contain a general statement of facts from which the defendant will be able to frame a responsive pleading. See Fed. R. Civ. P. 8(a). It is against this liberal backdrop that the Court must apply the Rule 12(b)(6) standard. See Rannels v. S.E. Nichols, Inc., 591 F.2d 242, 243 (3d Cir. 1979). In the instant case, Plaintiff alleges that her employment with VIHFA began on August 12, 1991, that said employment was subcontracted to DWH on April 1, 1994, and that Defendant DWH was her immediate supervisor under the terms of the Contract of Employment. (Pl. Am. Compl. at ¶6.) Plaintiff sets forth various allegations of discriminatory conduct by Defendants DWH and VIHFA. Taking those material allegations as admitted, this Court cannot find that Plaintiff can prove no set of facts entitling her to relief for breach of contract. Plaintiff has sufficiently stated a claim for relief under Rule 8(a) with regard to breach of employment contract.

Although Plaintiff has failed to state a cause of action upon which relief may be granted through her 24 V.I.C. § 76 claim, Plaintiff has properly stated a breach of employment contract claim. Accordingly, Defendant VIHFA’s motion shall be denied with respect to Count III.

E. Count IV - Plaintiff’s Claim of Slander

The Court finds merit in Defendant VIHFA's argument that Plaintiff has not met the standard of pleading required for a defamation claim. To state a claim upon which relief can be granted regarding a defamation claim, a plaintiff must give the defendant proper notice by pleading the content of the defamatory statement, who made it, to whom the statement was published, and when. See Manns v. Leather Shop Inc., 960 F. Supp. 925 (D.V.I. 1997). In the instant case, Plaintiff has pleaded the content of the defamatory statement by alleging that DWH (not VIHFA) accused Plaintiff of stealing money. (Pl. Am. Compl. at ¶32). However, Plaintiff has not even specified which employee at DWH made the statement. (Pl. Am. Compl. at ¶32). Similarly, Plaintiff has only made a vague reference as to whom the statement was published, saying that the accusation was "circulated among other including the tenants...." (Pl. Am. Compl. at ¶34). Plaintiff has also failed to provide information as to *when* such defamatory statement was made.

For these reasons, Plaintiff has not plead with the particularity required for a defamation claim and has not state a claim upon which relief may be granted. Accordingly, Defendant VIHFA's motion shall be granted with respect to Count IV.

F. Count V - Plaintiff's Claim of Intentional Infliction of Emotional Distress

Defendant VIHFA next argues that Plaintiff has stated no facts in support of her claim for intentional infliction of emotional distress. The Court agrees. For a plaintiff to prevail on a claim for intentional infliction of emotional distress, the defendant must have, by extreme and outrageous conduct, intentionally or recklessly caused severe emotional distress to another. "The defendant's conduct must be 'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in

a civilized society.’ ” See also Manns v. Leather Shop Inc., 960 F. Supp. 925, 930 - 31 (D.V.I.

1997) (*quoting* Cox v. Keystone Carbon Co., 861 F.2d 390 (3d Cir. 1988) and holding that

“[a]llegations that the defendant made statements concerning the plaintiff’s poor job performance and alleged misconduct simply do not rise to the level of extreme and outrageous behavior by the

defendant.”); Moolenaar v. Atlas Motor Inns, Inc., 616 F.2d 87 (3d Cir. 1980)). Moreover, “it is

extremely rare to find conduct in the employment context that will rise to the level of

outrageousness necessary to provide a basis for recovery for the tort of intentional infliction of

emotional distress.” Cox, 861 F.2d at 395 (citations omitted). Even conduct in which an

employer engaged in a premeditated plan to force an employee to resign by making employment

conditions difficult has been held not to rise to the level of extreme and outrageous conduct

justifying recovery for intentional infliction of emotional distress. Id. (*citing* Madreperla v.

Williard Co., 606 F. Supp. 874, 880 (E.D. Pa. 1985)).

In the instant case, Plaintiff alleges that Defendants knowingly caused Plaintiff emotional distress by giving her an unacceptable workload, telling her that she would have to work overtime if she could not finish her assignments during the workday, encouraging her to resign, accusing her of stealing money, and firing her without just cause. (Pl. Am. Compl. at ¶14 - 18, 33 - 34, 39.) Plaintiff claims that DWH (not VIHFA) employees consistently spoke Spanish in front of Plaintiff, knowing that Plaintiff does not understand Spanish. (Pl. Am. Compl. at ¶11, 18.) Plaintiff further alleges that Defendant DWH President Hernandez (not VIHFA) constantly yelled and shouted at Plaintiff. (Pl. Am. Compl. at ¶13, 18, 27.) However, assuming those allegations to be true, as the Court must, Defendant VIHFA’s conduct would not be considered extreme or outrageous.

Accordingly, the Court finds no stated cause of action for intentional infliction of emotional distress against VIHFA and will grant Defendant VIHFA's motion to dismiss Count V.

G. Count VI - Plaintiff's Claim of Negligent Infliction of Emotional Distress

The Court is not persuaded by Defendant VIHFA's argument that Plaintiff has not stated a cause of action with regard to her negligent infliction of emotional distress claim. In the Virgin Islands, there are two required elements of a claim for negligent infliction of emotional distress: (1) physical harm and (2) foreseeability. See, e.g., Anderson v. Government of Virgin Islands, 180 F.R.D. 284, 286 (D.V.I. 1998). In the instant case, Plaintiff has cited many manifestations of physical harm as a result of Defendants' conduct. She alleges that *Defendants* (not just DWH) inflicted emotional distress that caused her insomnia, weight loss, neck and shoulder pain, shaky hands, and headaches, which often caused Plaintiff to need to go home from work early. (Pl. Am. Compl. at ¶18 - 19.) Plaintiff further alleges that said emotional distress forced her to experience labor and delivery complications, causing her to need a caesarean section. (Pl. Am. Compl. at ¶20.) Two weeks after returning from her maternity leave, Plaintiff claims that she experienced a work-induced depression and was placed on anti-depressant medication and ordered to stay home by her physician. (Pl. Am. Compl. at ¶26.)

Similarly, Plaintiff has plead foreseeability of the distress inflicted. The relevant inquiry for the foreseeability element of a negligent infliction of emotional distress claim is whether the person who caused the distress "*should have realized* that his conduct involved an unreasonable risk of causing the distress, otherwise than by knowledge of the harm or peril of a third person, and...from facts known to him *should have realized* that the distress, if it were caused, might

result in illness or bodily harm.” Anderson, 180 F.R.D. at 287 (citing RESTATEMENT (SECOND) OF TORTS § 313). Plaintiff specifically states that *Defendants* (not just DWH) knew suggesting to Plaintiff that she find another job would cause Plaintiff emotional distress. (Pl. Am. Compl. at ¶17). According to Plaintiff, Defendant DWH knew accusing Plaintiff of illegal and immoral conduct would cause Plaintiff emotional distress. (Pl. Am. Compl. at ¶33). Plaintiff also contends that *Defendants* (again, not just DWH) knew firing Plaintiff unjustifiably would cause Plaintiff emotional distress. (Pl. Am. Compl. at ¶39.)

Plaintiff has alleged physical harm and foreseeability. Viewing Plaintiff’s Amended Complaint most favorably to Plaintiff, this Court finds that Plaintiff may be able to prove that she is entitled to relief for negligent infliction of emotional distress. Accordingly, Defendant VIHFA’s motion shall be denied with respect to Count VI.

H. Count VII - Plaintiff’s Claim of Entitlement to Punitive Damages

Finally, Defendant VIHFA argues that Plaintiff has stipulated to dismiss Count VII against Defendant VIHFA. Regardless, this Court has found that “punitive damages are not available against an agency of the Virgin Islands government.” Chase v. Virgin Islands Port Authority, 3 F.Supp.2d 641, n.1 (D.V.I. 1998) (citing Codrington v. Virgin Islands Port Authority, 33 V.I. 245 (January 17, 1996)). Accordingly, Defendant VIHFA’s Motion is granted with regard to Count VII.

III. Conclusion

The Court recognizes that Defendant VIHFA may have a viable defense under the Torts

Claims Act regarding all of Plaintiff's tort-based claims. However, the relevant inquiry at this juncture is whether Plaintiff may be able to ultimately succeed on such claims against Defendant VIHFA. The Court finds that it may be possible for Plaintiff to do so. For the foregoing reasons, Defendant VIHFA's Motion to Dismiss the Amended Complaint will be granted with regard to Counts IV, V, and VII; and denied with regard to Counts I, II, III, and VI. An appropriate Order is attached.

ENTER:

Dated: October __, 2003

RAYMOND L. FINCH
CHIEF U.S. DISTRICT JUDGE

Attest:

Wilfredo F. Morales
Clerk of the Court

By: _____
Deputy Clerk

cc: Honorable Jeffrey L. Resnick, U.S. Magistrate Judge
Andrew L. Capdeville, Esq.
Natalie Nelson Tang How, Esq.