

NONPRECEDENTIAL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 Defendants' Virgin Islands Housing Finance

Authority (VIHFA) and DWH Business Services, Inc. (DWH) Motion for Summary Judgment.

For the reasons expressed herein, Defendants' motion will be denied as to all Counts, with the exception that summary judgment will be granted to Defendant DWH on Plaintiff's claim for negligent infliction of emotional distress.

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 alleged: 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).

Defendants now move for summary judgment on all Counts (I - VII) of Plaintiff's Amended Complaint, pursuant to Fed. R. Civ. P. 56(b) on the basis that there are no genuine issues of material fact for trial and that they are entitled to judgment as a matter of law. In an order entered on October 3, 2003, this Court dismissed Counts IV and V against DWH. In an order entered on October 7, 2003, this Court dismissed Counts IV, V, and VII against VIHFA. Therefore, the issue of summary judgment is moot with regard to these counts (respectively) and will not be discussed.

Plaintiff opposes Defendants' motion.

II. Analysis

A. Standard Governing a Rule 56 Motion for Summary Judgement

Under Fed. R. Civ. P. 56, a court may grant summary judgment only if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, show that “there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed. R. Civ. P. 56(c). A dispute involving a material fact is “genuine” where “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In determining whether such genuine issues exist, the Court must resolve all reasonable doubts in favor of the nonmoving party. Christopher v. Davis Beach Co., 15 F.3d 38, 40 (3d Cir. 1994). The burden of proof for summary judgment lies with the moving party. Adickes v. S.C. Kress & Co., 938 U.S. 144 (1970). A trial court should not act other than with caution in granting summary judgment, and may deny summary judgment where there is reason to believe that the better course would be to proceed to a full trial. Anderson, 477 U.S. at 254.

Defendants have moved for summary judgment on all of Plaintiff’s claims. Therefore, each count of Plaintiff’s Seconded Amended Complaint will be analyzed in turn.

B. Count I

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

Because the statute does not provide a private cause of action, this Court has previously determined that Plaintiff lacks standing to assert a claim under 24 V.I.C. § 451 *et seq.* (Order on DWH’s Motion to Dismiss entered on October 3, 2003; Order on VIHFA’s Motion to Dismiss entered on October 7, 2003.) Plaintiff has revised her complaint accordingly. (Plaintiff’s

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

As the Court explained in the Orders it issued for this case on October 3, 2003 and October 7, 2003, the Court reiterates that a private cause of action for discrimination exists under Chapter 5 of Title 10 of the Virgin Islands Civil Rights Act, 10 V.I.C. § 64 ("Chapter 5").

Chapter 5 of Title 10 of the Virgin Islands Civil Rights Act provides, in relevant part:

- (1) It shall be an unlawful discriminatory practice:
 - (a) For an employer, because of age, race, creed, color, national origin, place of birth, sex and/or political affiliation of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

10 V.I.C. § 64(1)(a).

Defendant DWH seeks summary judgment on Plaintiff's *10 V.I.C. § 64* claim on the ground that Defendant DWH was not Plaintiff's employer. (Defendants' Motion at 4.) However, the Court finds that there is a genuine issue of material fact as to whether Defendant DWH acted as Plaintiff's employer. Defendants point out that Plaintiff admitted in her deposition that only VIHFA, not DWH, was her employer. (Defendants' Motion at 5.) Defendants also cite a myriad of exhibits from Plaintiff's February 6, 2002 deposition that indicate VIHFA was Plaintiff's actual employer. (Defendants' Motion at 6 - 8.) However, Plaintiff asserted in her continued deposition that Defendant DWH acted as her co-employer insofar as DWH directly supervised her work, Plaintiff was accountable to DWH, and DWH had the authority to fire Plaintiff for cause. (Plaintiff's Continued Deposition at 72 - 76.) VIHFA's Executive Director also confirmed that Plaintiff was subject to DWH's supervision, and that

DWH had the authority to discipline and terminate Plaintiff's employment (Deposition of Claude Richards at 16 - 17.) Based on these conflicting pieces of evidence, it is the Court's opinion that a reasonable jury could conclude that an employer-employee relationship existed between DWH and Plaintiff.

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

As discussed above, the Court finds that a reasonable jury could conclude that DWH acted as Plaintiff's employer. One ground upon which Defendant DWH seeks summary judgment on Plaintiff's Title VII discrimination claim is that Defendant DWH asserts that it was not Plaintiff's employer. (Defendants' Motion at 4.)

Defendants also seek summary judgment on Plaintiff's Title VII discrimination claim for the reason that Plaintiff has not set forth a prima facie case of discrimination. (Defendants' Motion at 19.) Defendants specifically argue that Plaintiff was not treated less favorably than others similarly situated who did not belong to the protective class of which Plaintiff is a member. (Defendants' Motion at 22 - 25.)

The Civil Rights Act of 1964 makes it "an unlawful employment practice for an employer . . . 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." 42 U.S.C. § 2000e-2(a)(1). One form of discrimination prohibited by Title VII of the Civil Rights Act is that of a "hostile work environment." Harris v. Forklift System, Inc., 510 U.S. 17, 21 (1993). Workplace conduct is actionable and a hostile work environment exists where Plaintiff can show that the environment was "both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in

fact did perceive to be so.” Id. at 22. Whether an action is sufficiently hostile to be actionable requires consideration of all the circumstances, and any one factor alone is not determinative. Id. at 22 - 23. Relevant factors that may be considered include “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.” Id. at 23.

In the instant case, Plaintiff presents facts that create a genuine issue as to whether both she subjectively, and a reasonable person objectively, would have found her work environment offensive and hostile. In her continued deposition, Plaintiff explained that her supervisors at DWH (Mr. Hernandez and Mr. Ruiz) spoke to her in a disrespectful and demeaning manner. They often spoke Spanish in front of her at work and that this included raising their voices and making derogatory comments in Spanish about Plaintiff in her presence. (Plaintiff’s Continued Deposition, 35 - 37, 118.) When Plaintiff would ask a co-worker to translate her supervisors’ remarks from Spanish to English, Plaintiff would be told that she didn’t even want to know. (Plaintiff’s Continued Deposition, 119.) Claude Richards, the executive director of VIHFA verified that Plaintiff had complained to him that she had been harassed in the workplace, including that Plaintiff had been talked about in Spanish in Plaintiff’s presence. Mr. Richards does not recall taking any action to rectify the situation, except possibly informing Plaintiff’s supervisors of the complaint. (Deposition of VIHFA Executive Director, Claude Richards, 22 - 23.)

Plaintiff also described in her continued deposition that Mr. Hernandez would yell at Plaintiff and that he wrote Plaintiff a letter asking her to refrain from giving input on how work

performance could be improved. This was discouraging to Plaintiff, who found Mr. Hernandez's conduct to have a negative impact on the firm's efficiency and productivity (Plaintiff's Continued Deposition, 118.) It is true that Plaintiff has not produced overwhelming proof of a hostile work environment. However, based on the evidence, it is possible that a reasonable jury could find that Plaintiff was subjected to a working environment that was hostile and offensive.

Although the Court recognizes that Plaintiff is not entitled to pursue a claim under 24 V.I.C. § 451 *et seq.*, there are genuine issues of material fact as to Plaintiff's cognizable claims under 10 V.I.C. § 64 and Title VII. Accordingly, Defendants' motion shall be denied with respect to Count I.

C. Count II - Plaintiff's Retaliation Claim

As discussed above in Count I, the Court finds that a reasonable jury could conclude that DWH acted as Plaintiff's employer. One ground upon which Defendant DWH seeks summary judgment on Plaintiff's Title VII retaliation claim is that Defendant DWH asserts that it was not Plaintiff's employer. (Defendants' Motion at 4.)

Defendants also contend that they are entitled to summary judgment on Plaintiff's retaliation claim because Plaintiff's alleged injuries were not "materially adverse." (Defendants' Motion at 28). The essential elements of a retaliation claim under Title VII are: (1) the employee engaged in a Title VII protected activity, (2) the employer acted adversely against the employee with regard to employment, and (3) 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). The Third Circuit has taken the position that the second prong of this test is only satisfied when the employer's retaliatory conduct constitutes a violation of 42 U.S.C. § 2000e-2(a)(1) or (2).

2000e-2(a):

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.

In the instant case, Plaintiff has claimed that in retaliation, her employment was first limited and then terminated. Upon being asked in her deposition specifically how it was that she had been retaliated against, Plaintiff asserted that Defendant DWH restricted her responsibilities and authority as the project manager. (Defendant's Motion at 27.) Furthermore, Plaintiff alleges that she was terminated in retaliation. (Plaintiff's Opposition at 7.) In support of this contention, when Claude Richards (executive director of VIHFA) was asked in his deposition whether he had written an exceptional reference letter on behalf of Plaintiff at the same time he had been informed that Plaintiff was not making timely deposits, Mr. Richards responded that it was possible. Mr. Richards further stated, "Again, I had no problem with [Plaintiff] Theresa other than the fact that she and [Plaintiff's supervisor] Mr. Hernandez could not get along. I found her to be a very capable, intelligent employee. (Deposition of VIHFA Executive Director, Claude Richards, 20.) Although Plaintiff's evidence is sparse, the Court finds that a reasonable jury could determine that Plaintiff's employment was limited and terminated not for any legitimate reason, but because of actions she took protected under Title VII.

Accordingly, Defendants' 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

Plaintiff is pursuing her claims of breach of employment contract and violation of 24 V.I.C. § 76 only against Defendant DWH (Plaintiff's Revised Amended Complaint at 12.) Once again, in response to Defendant DWH's contention that it is entitled to summary judgment on Plaintiff's breach of employment contract claim because Defendant DWH never employed Plaintiff, the Court reiterates that a reasonable jury could conclude that DWH acted as Plaintiff's employer. Furthermore, the Court does not agree with Defendants' argument that Defendant DWH is entitled to summary judgment on the breach of contract claim because Plaintiff has failed to produce a *document* proving the existence of a contract between DWH and Plaintiff. As discussed in relation to Plaintiff's Title VII claim, Plaintiff has produced evidence from which a reasonable jury could find that Defendant DWH subjected Plaintiff to a hostile work environment. In light of such evidence, this Court cannot find that a reasonable jury would be precluded from finding that DWH breached an employment contract it had with Plaintiff.

As explained, the Court finds that Defendants are not entitled to summary judgment on Plaintiff's violation of 24 V.I.C. § 76 claim on the basis that Defendant DWH was not Plaintiff's employer because a reasonable jury could find otherwise. Defendants argue that even if Defendant DWH was Plaintiff's employer, it would be exempt from the statute as an agent of VIHFA, a public employer. (Defendants' Motion at 72 - 73). For the purpose of this statute, 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...." Whether Defendant DWH is a public

employer is also a genuine question of material fact that remains to be determined. The Court concludes that a reasonable jury may find that as to Plaintiff, Defendant DWH acted as her private employer and was thereby subject to 24 V.I.C. § 76.

Defendants also claim that they are entitled to summary judgment on Plaintiff's 24 V.I.C. § 76 claim because Plaintiff was fired for lawful reasons. (Defendants' Motion at 28 - 72.) The Virgin Islands Wrongful Discharge Act, 24 V.I.C. § 76, provides in relevant part:

- (a) Unless modified by union contract, an employer may dismiss any employee:
 - (1) who engages in a business which conflicts with his duties to his employer or renders him a rival of his employer;
 - (2) whose insolent or offensive conduct toward a customer of the employer injures the employer's business;
 - (3) whose use of intoxicants or controlled substances interferes with the proper discharge of his duties;
 - (4) who wilfully and intentionally disobeys reasonable and lawful rules, orders, and instructions of the employer; provided, however, the employer shall not bar an employee from patronizing the employer's business after the employee's working hours are completed;
 - (5) who performs his work assignments in a negligent manner;
 - (6) whose continuous absences from his place of employment affect the interests of his employer;
 - (7) who is incompetent or inefficient, thereby impairing his usefulness to his employer;
 - (8) who is dishonest; or
 - (9) whose conduct is such that it leads to the refusal, reluctance or inability of other employees to work with him.

24 V.I.C. § 76(a). "Section 76(c) of the Wrongful Discharge Act establishes a presumption that an employee is 'wrongfully discharged' if the discharge is for a reason other than one of the nine (9) enumerated in section 76(a) as grounds for discharge." Hess Oil V.I. Corp. v. Richardson, 894 F.Supp. 211, 216 (D.V.I.1995). In the instant case, Defendants assert that Plaintiff was fired because she was grossly insubordinate (including Plaintiff's failure to follow orders and directives from supervisors), mishandled rent monies by not making timely deposits, failed to

timely submit scheduled reports and notices, and was frequently absent from work. (Defendants' Motion at 28 - 72.)

Plaintiff, on the other hand, contests the merit of these proffered legitimate reasons. Plaintiff stated in her Continued Deposition that she did not believe she had been insubordinate in her employment, defining insubordinate in her own words as “[b]latantly disruptive in the line of operations of business, blatantly being disrespectful, not following orders that are in compliance of procedures and policies, whether written or verbal.” (Plaintiff’s Continued Deposition, 141.) Although Plaintiff admits that she did not make timely deposits of rent monies, it has not been determinatively proven that this was a wilful and intentional disobedience of the employer’s directions. (Defendants’ Motion at 59 - 63.) Plaintiff disagrees that the reports and notices she submitted were untimely. (Defendants’ Motion at 67 - 68.) There are also genuine issues of material fact as to whether Plaintiff’s continuous absences affected Defendant DWH’s interests and as to the circumstances surrounding such absences. Furthermore, Plaintiff claims that the reasons Defendant cites are merely pretextual and that she was actually fired in retaliation, as discussed in relation to Plaintiff’s retaliation claim.

It is clear that there are genuine issues of material fact regarding Plaintiff’s breach of employment contract claim and Plaintiff’s 24 V.I.C. § 76 claim. Accordingly, with regard to Count III, Defendant VIHFA’s Motion is denied as moot and DWH’s Motion is denied.

E. Count VI - Plaintiff’s Claim of Negligent Infliction of Emotional Distress

Plaintiff is pursuing her claim of negligent infliction of emotional distress only against Defendant DWH (Plaintiff’s Revised Amended Complaint at 12.) 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). Although Plaintiff has cited many manifestations of physical harm as a result of Defendants' conduct in her Revised Second Amended Complaint, she has produced absolutely no evidence to support these allegations.

Similarly, Plaintiff has produced no evidence outside of the allegations in her Revised Second Amended Complaint to support 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).

Based on the complete lack of evidence produced by Plaintiff and her failure to respond to this issue in her opposition to Defendants' motion, the Court concludes that a reasonable jury could not find the requisite physical harm and foreseeability that would entitle Plaintiff to relief for negligent infliction of emotional distress against Defendant DWH. Accordingly, with regard to Count VI, Defendant VIHFA's Motion is denied as moot and DWH's Motion is granted.

F. Count VII - Plaintiff's Claim of Entitlement to Punitive Damages

It should be noted that Count VII has already been dismissed against Defendant VIHFA. (Order on VIHFA's Motion to Dismiss entered on October 7, 2003.) Therefore, the following discussion of Count VII pertains only to Defendant DWH:

Chapter 5 of Title 10 of the Virgin Islands Civil Rights Act provides that in an action filed by the Commission, “the person aggrieved may recover damages as provided *in this title.*” 10 V.I.C. § 71(b)(2) (emphasis added). This suggests that the availability of punitive damages is intended under the Act, whether the action is brought individually or by the Commission. Furthermore, punitive damages are available under both Title VII and the Virgin Islands Wrongful Discharge Act. See 42 U.S.C. §§ 1981a (a)(1); 1981(b) (providing for punitive damages under Title VII) and 24 V.I.C. § 79 (providing for punitive damages under the Virgin Islands Wrongful Discharge Act).

In examining the issue of entitlement to punitive damages in the context of a summary judgment motion, the court in Barry ex rel. Cornell v. Manor Care, Inc., 1999 WL 257663 (E.D.Pa. 1999), held that the trial record would determine whether punitive damages were available to Plaintiff at trial. Similarly, in the instant case, such determination will be left to the trial record regarding Plaintiff’s claims under 10 V.I.C. § 64, Title VII, and 24 V.I.C. § 76. Accordingly, with regard to Count VII, Defendant VIHFA’s Motion is denied as moot and DWH’s Motion is denied.

III. Conclusion

For the foregoing reasons, Defendants Virgin Islands Housing Finance Authority (VIHFA) and DWH Business Services, Inc. (DWH)’s Motion for Summary Judgment will be denied as to all Counts, with the exception that summary judgment will be granted to Defendant DWH on Plaintiff’s claim for negligent infliction of emotional distress. An appropriate Order is

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attached.

ENTER:

Dated: March 12, 2004

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.