IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
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HILARY HODGE,	)	
	)	CASE NO. ST-00-CV-726
Plaintiff,	)	
v.	)	ACTION FOR WRONGFUL DISCHARGE AND DAMAGES
	)	
DAILY NEWS PUBLISHING COMPANY, INC.,	)	JURY TRIAL DEMANDED
	)	
Defendant.	)	
	)	

MEMORANDUM OPINION

THIS MATTER is before the Court on the Motion for Reconsideration of Defendant Daily News Publishing, Inc. ("Defendant" or "Daily News"), filed by and through its counsel Kevin A. Rames, Esq., of the Law Offices of K.A. Rames, P.C. Plaintiff Hilary Hodge ("Plaintiff" or "Hodge") is represented by Lee J. Rohn, Esq., of the Law Offices of Rohn & Carpenter, LLC. Having considered Defendant's arguments and Plaintiff's opposition thereto, the Court will grant in part and deny in part Defendant's motion for reconsideration of the Court's Memorandum Opinion and Order dated December 4, 2009 ("December 4 Memorandum Opinion"),[1] which granted in part and denied in part Defendant's Motion for Summary Judgment.

BACKGROUND

Plaintiff's Complaint contains five (5) counts charging wrongful termination by the Daily News. Defendant moved for summary judgment asking that the Complaint be dismissed on the ground that there is no genuine issue of material fact and that summary judgment is appropriate.

[1] This Order was superseded by an Amended Memorandum Opinion dated December 17, 2009, which corrected mistyped citations to the Virgin Islands Wrongful Discharge Act found in one paragraph of the Opinion. No other changes – substantive, analytical, or otherwise – were made to the Memorandum Opinion.

In Count One, Hodge alleges that he was terminated from his employment in violation of the Wrongful Discharge Act ("WDA") because the Daily News wrongfully refused to allow him to return to his work and that the Daily News also violated the Workers' Compensation statute. After considering the provisions of the WDA covering the permissible grounds for termination, V.I. Code Ann. tit. 24, § 76 (1997), and the standard set forth in *Rajbahadoorsingh v. Chase Manhattan Bank, NA*, 168 F. Supp. 2d 496 (D.V.I. 2001), the Court determined that Plaintiff had presented sufficient evidence to raise a genuine issue of material fact under the WDA and denied summary judgment on that matter. With regards to Plaintiff's Worker's Compensation claim, the Court found that although the Daily News could point to facts from which the jury could conclude that Hodge's recitation of the facts concerning giving notice of his allegedly work-related condition was untrue, Hodge had tendered sufficient facts in the record to present this question as a genuine issue of material fact to survive Defendant's motion for summary judgment on this issue.

Count Two charges that, Defendant humiliated Plaintiff by refusing to allow Hodge to return to work and that this conduct constituted the torts of negligent and intentional infliction of emotional distress. The Court granted summary judgment in the Defendant's favor on these claims, finding that the barriers Hodge would face in establishing the elements for the intentional infliction of emotional distress claim under these facts would be insurmountable and also that there was no evidence of physical harm, which is required to present a successful negligent infliction of emotional distress claim.

Count Three claims that the conduct of the Daily News was wanton and outrageous, and that Hodge is therefore entitled to punitive damages. The Court agreed with Defendant that it was not proper to plead punitive damages as a separate cause of action. Rather than grant the

motion for summary judgment on the issue, however, the Court decided that the proper course of action was to allow Plaintiff to amend the Complaint removing the demand for punitive damages as a separate count of the Complaint and placing it in the *ad damnum* section of the Complaint.

In Count Four, Plaintiff complains that the actions of the Defendant were arbitrary and capricious and in violation of the duty of good faith and fair dealing. Count Five states that the actions of the Daily News were taken in bad faith to the detriment of Hodge. Although the Daily News controverted that it acted in a fraudulent and deceitful manner thereby violating its duty of good faith and fair dealing, Hodge pointed to evidence that, if believed, would indicate that the Daily News denied him part-time work when he was suffering from a disability and advised him that his position had been filled when that was not true. Thus, the Court found that this would be a sufficient basis to create a genuine issue of material fact for the jury to decide and denied the motion for summary judgment on this claim.

Defendant subsequently filed the Motion for Reconsideration presently before the Court.

STANDARD

Local Rule of Civil Procedure 7.3, which sets forth the pertinent standard for a motion for reconsideration, provides that "[a] motion to reconsider shall be based on: (1) intervening change in controlling law; (2) availability of new evidence; or (3) the need to correct clear error or prevent manifest injustice." LRCi 7.3.[2] "The granting of a motion to reconsider is 'an extraordinary remedy and should be used sparingly." *Gibbs v. Turnbull*, Civ. No. 1999-0061, 2008 WL 4067427, at *2 (D.V.I. Aug. 27, 2008) (citations omitted). Moreover,

> [t]he moving party has a heavy burden to establish an error sufficiently serious to merit amendment. The moving party must

[2] Pursuant to Super. Ct. R. 7, the Rules of the District Court govern the practice and procedure of the Superior Court to the extent that they are not inconsistent with the Rules of the Superior Court.

> demonstrate that the court failed to consider controlling decisions or factual matters that were put before it on the underlying motion and which, had they been considered, might reasonably have lead to a different result.

Id. (citations omitted).

"The purpose of a motion for reconsideration is to correct manifest errors of law or fact or to present newly discovered evidence." *Harsco Corp. v. Zlotnicki*, 779 F.2d 906, 909 (3d Cir. 1985). It is not proper, however, to use a motion for reconsideration as "a vehicle for registering disagreement with the court's initial decision, for rearguing matters already addressed by the court, or for raising arguments that could have been raised before but were not." *Bostic v. AT&T of the Virgin Islands*, 312 F. Supp. 2d 731, 733 (D.V.I. 2004).

DISCUSSION

Defendant raises four (4) issues in its Motion for Reconsideration: (1) Defendant is not an employee covered by the Virgin Islands Wrongful Discharge Act ("WDA"); (2) the Court's analysis under *Rajbahadoorsingh* is incomplete and erroneous; (3) the Worker's Compensation Act ("WCA") does not afford individuals a private right of action against an employer; and (4) the Daily News' Employee Manual is not a contract, but even if it is, it did not obligate the Daily News to reinstate Hodge after the twelve (12) weeks of leave under the Family Medical Leave Act. The Court will address each of these arguments in turn.

1. Employee versus Supervisor under the Virgin Islands Wrongful Discharge Act

Defendant argues that Plaintiff was, and has admitted to being, a supervisor of the Daily News photographers; and that he, therefore, falls outside the definition of an "employee" under the Virgin Islands Wrongful Discharge Act ("WDA"). V.I. Code Ann. tit. 24, § 62 (1997). Plaintiff maintains that Hodge was a supervisor in name only and is covered by the WDA.

Plaintiff further notes that this supervisor-versus-employee argument was improper and untimely as it was only first raised in Defendant's Reply to [Plaintiff's] Opposition to [Defendant's] Motion for Summary Judgment. Indeed, in Defendant's Motion for Summary Judgment, Defendant clearly states that it "do[es] not dispute that Hodge was an employee of the Daily News," even though the motion does go on to include a paragraph describing Hodge as a supervisor. (Defs.' Memo. in Supp. of Mot. for Summ. J. 11-12.)

Defendant generally points to *St. Thomas-St. John Hotel & Tourism Ass'n, Inc. v. Gov't of the V.I.*, 357 F.3d 297 (3d Cir. 2004) (*Hotel Association II*), as support for its contention that it is "well-settled law" that a supervisor is "outside of the definition of an 'employee'" under the WDA. (Def.'s Mot. for Recons. 3.) In *Hotel Association II*, the Third Circuit held that the provisions of the National Labor Relations Act ("NLRA") preempt the WDA as applied to supervisors, because "the WDA indirectly compels an employer to bargain collectively with supervisors by requiring that an employer who wishes to alter the WDA's grounds for terminating a supervisor enter into a collective bargaining agreement." *Id.* at 304. Because "this limitation constitutes pressure to bargain with supervisory employees, the WDA, as applied to supervisors, conflicts with Section 14(a) of the NLRA." *Id.*

Nevertheless, Defendant fails to note that the Third Circuit recognized in *Hotel Association II* that "[t]he District Court [] held that supervisors are covered by the WDA because supervisors are employees under [V.I. Code Ann. tit. 24, § 62]. Since plaintiffs do not appeal this issue, we do not address it." 357 F.3d at 301, n.2 (internal citations omitted). Furthermore, "Because the NLRA contains no express preemption provision, and because the NLRA regulates in an area of law traditionally regulated by the states, any NLRA preemption analysis starts 'with the basic assumption that Congress did not intend to displace state law.'" *St. Thomas-St. John*

Hotel & Tourism Ass'n, Inc. v. Gov't of the V.I., 218 F.3d 232, 238 (3d Cir. 2000) (*Hotel Association I*) (quoting *Bldg. & Construction Trades Council v. Associated Builders & Contractors of Massachusetts/Rhode Island*, 507 U.S. 218, 224 (1993)) (further citations omitted). *See also*, *Jagroop v. Island Finance Virgin Islands, Inc.*, 240 F. Supp. 2d 370, 372 (D.V.I. 2002). Despite the lack of an express preemption provision or any indication of congressional intent to usurp the entire field of labor-management relations, courts have found that some state laws are impliedly preempted by conflict with the NLRA, its provisions and its underlying goals and policies, where "the state law stands 'as an obstacle to the accomplishment and execution of the full purposes and objectives' of Congress." *Hotel Association I*, 218 F.3d at 238 (quoting *Livadas v. Bradshaw*, 512 U.S. 107, 120 (1994)) (further citations omitted).

In *Goodwin v. American Airlines, Inc.*, Civ. Act. No. 06-162, 2008 WL 1901774 (D.V.I. Apr. 22, 2008), the Virgin Islands District Court addressed the issue of whether another federal law, the Railway Labor Act ("RLA"), preempted the WDA even in the absence of a collective bargaining agreement. The District Court concluded that "[w]hen a question can be resolved under state law without interpreting a collective bargaining agreement, the RLA does not preempt state law." *Id.* at *4. In reaching its conclusion, the District Court noted that

> [t]he preemption the Third Circuit found [in *Hotel Association II*] was narrowly tailored to solve the question raised in the two *Hotel Association* cases: how a company can make management decisions without running afoul of either a union contract or the Wrongful Discharge Act, exactly the problem the NLRA addresses. **It does not follow that any case in which federal law might be raised is necessarily governed by *Hotel Association II*.**

Id. (emphasis added). As there was no collective bargaining agreement to interpret in *Goodwin*, state law applied. *Id.*

In the instant case, not only have the parties failed to mention the existence of a union contract or collective bargaining agreement, if any, but also, Plaintiff makes no claims under any federal laws, let alone one that would preempt the WDA. As there is no issue regarding a collective bargaining agreement for supervisors and the NLRA does not preempt the provisions of the WDA in its entirety, the Court must determine whether the WDA, by its own terms, includes supervisors in its definition of employee. The plain language of the WDA and a review of the case law reveal that supervisors are included in the WDA's definition of an employee. *See St. Thomas-St. John Hotel & Tourism Ass'n, Inc. v. Gov't of the V.I.*, 216 F. Supp. 2d 460, 463-64 (D.V.I. 2002) (*Hotel Association III*). *See also, Jagroop*, 240 F. Supp. 2d 370.

For the foregoing reasons, Defendant's Motion for Reconsideration will be denied with respect to the issue of whether supervisors are covered by the WDA's definition of an employee.

2. **Rajbahadoorsingh *Analysis***

Defendant asserts that the Court's analysis under the *Rajbahadoorsingh* test is both incomplete and erroneous because Hodge is not an employee under the WDA and Hodge has not shown by a preponderance of the evidence that the reason for his termination provided by the Daily News was a pretext. As explained in the previous section of this Memorandum Opinion, Hodge is a covered employee under the WDA. Defendant goes on to argue that "the Court did not undertake a rigorous analysis of Hodge's alleged evidence of pretext[, and] the Court impose[d] the lesser standard of a 'genuine issue of material fact,' rather than the required showing of 'proof by a preponderance of the evidence.'" (Def.'s Mot. for Recons. 12.)

As the Court indicated in its December 4 Memorandum Opinion, summary judgment is appropriate where the "pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that

the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c).[3] *See Skopbank v. Allen-Williams Corp.*, 7 F. Supp. 2d 601, 605, 39 V.I. 220, 227 (D.V.I. 1998). This standard is the proper starting point for any motion for summary judgment, and a motion for summary judgment must fail if a genuine issue of material fact exists.

The Court laid out the framework outlined in *Rajbahadoorsingh* in its December 4 Memorandum Opinion. Pursuant to that framework, a court must first determine whether or not the allegedly aggrieved employee has established a prima facie claim of wrongful termination from employment. 168 F.Supp.2d at 505. If the employee establishes a prima facie case, the burden of production then shifts to the employer to articulate in rebuttal a legitimate statutorily approved reason for the termination of the employee. *Id.* Finally, after the employer shows a legitimate statutorily approved reason for the discharge, the burden of production then shifts back to the employee to show by a preponderance of the evidence that the reasons proffered by the employer are pretextual. *Id.*

> To satisfy [the] burden [set forth in this third prong], the discharged employee must produce some direct or circumstantial evidence from which a factfinder could reasonably[:] (1) disbelieve the employer's articulated legitimate reasons[;] or (2) believe that a non-WDA approved reason was more likely than not a motivating or determinating (sic) cause of the employer's action.

Id. (citing *Fuentes v. Perskie*, 32 F.3d 759, 764 (3d Cir. 1994)) (further citations omitted).

The Court, having already laid out the above-referenced standards and having applied them to the facts of this case in its December 4 Memorandum Opinion, will not rehash its ruling now merely because Defendant disagrees with the Court's initial decision. Therefore, the Court will deny Defendant's Motion to Reconsider this issue.

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[3] The Federal Rules of Civil Procedure are applicable to proceedings in the Superior Court to the extent that they are not inconsistent with the Rules of the Superior Court. Super. Ct. R. 7.

3. Private Cause of Action under the Worker's Compensation Act

Defendant contends that the Court erred in its December 4 Memorandum Opinion denying Defendant's Motion for Summary Judgment with respect to Plaintiff's worker's compensation claim, because there is no private right of action for an aggrieved employee under the Worker's Compensation Act ("WCA"). Although the Court, having reviewed the case law concerning this topic, agrees that there is no private cause of action created by the WCA, the Court never addressed this particular issue in its December 4 Memorandum Opinion because this argument was not properly raised.

It is not uncommon for a court to find that an argument raised for the first time in a reply brief has been waived by the party's failure to include it in the opening brief and in consideration of the opposing party's lack of opportunity to adequately respond to the new issue. *Gov't of the V.I. v. AT&T of the Virgin Islands*, D.C. Civ. App. Nos. 2006-149, 2006-105, 2006-150, 2009 WL 1097513, at *5 (D.V.I. App. Div. Apr. 17, 2009) ("Because that issue is inadequately developed on the record before us and was raised for the first time in the Government's reply brief, it is waived."); *Pell v. E.I. DuPont de Nemours & Co.*, 539 F.3d 292, 309 n.8 (3d Cir. 2008) (finding an argument waived where it was asserted only in a reply brief); *Skretvedt v. E.I. DuPont de Nemours & Co.*, 372 F.3d 193, 202-03 (3d Cir. 2004) (stating that a party waives an issue unless the moving party raises it in its opening brief by more than a passing reference). The Court admonishes Defendant for this practice of inserting its most salient arguments on an issue in its reply brief rather than its initial motion. Nevertheless, for this matter to proceed with what amounts to a private right of action under the WCA would work a manifest injustice upon the Defendant.

In *Herman v. Hovensa*, Civ. No. SX-00-CV-184, 2007 WL 2903461, at *2-3 (Super. Ct. Aug. 7, 2007), the Court held that there is no private cause of action under the WCA for an employer's failure to file a claim with the Worker's Compensation Administration. The Court reasoned that the administrative scheme created under the WCA did not encompass a private cause of action. *Id.* at *3. Thus, in the instant case, Hodge cannot prevail on his claim that the Daily News violated the WCA when it failed to file a report with the Worker's Compensation Administration regarding Hodge's medical condition.

Hodge, citing V.I. Code Ann. tit. 24, § 285 (1997), argues that he is not raising an argument under the WCA, but that he is merely raising issues related to the WCA as further evidence of the retaliatory and unlawful nature of his termination, as well as further evidence of pretext in the Daily News' proffered explanation for his termination. In *Lake v. Trinity Service Group*, Civ. Act. No. 05-158, 2008 WL 4838149, at *4 (D.V.I. Nov. 4, 2008), the court held that there is no private cause of action under § 285 of the WCA. In reaching its conclusion, the court cited the holding of *Herman v. Hovensa*, used the same standard and a similar rationale, and looked to the language of the provision itself, which calls for the Administrator to enforce the provision of the statute. *Id.* In light of the *Lake* Court's analysis, to allow a private cause of action to proceed under the auspices of § 285 would be inconsistent with the underlying purposes of the legislative scheme. The Court will not allow Plaintiff to circumvent the statute and case law by allowing what amounts to a private cause of action under the WCA to masquerade as mere analogy or surplus evidence. Therefore, the Court will grant Defendant's Motion for Reconsideration with respect to this issue and dismiss Plaintiff's claim under the WCA, which claim shall no longer be a part of this case whether directly or through analogy.

4. Contractual Obligations under the Daily News Employee Manual

Defendant states

> [t]he Court found that the Daily News Employee Manual was an implied contract and found that the Daily News breached an implied covenant of good faith and fair dealing notwithstanding that Hodge had no "contractrual" expectation of job reinstatement after exceeding twelve weeks of Family Medical Leave Act leave under the clear wording of the Employee Manual.

(Def.'s Mot. for Recons. 4.). This matter was addressed in the Court's December 4 Memorandum Opinion and the Court will rely on its analysis in that Memorandum Opinion. Defendant has not cited any intervening change in controlling law, presented new evidence previously unavailable or demonstrated the need to correct clear error or prevent manifest injustice on this issue. As such, the Court will deny Defendant's Motion for Consideration with respect to this issue.

CONCLUSION

For the foregoing reasons, the Court will grant Defendant's Motion for Reconsider with respect to Defendant's assertions regarding the worker's compensation claim and deny the remainder of Defendant's Motion to Reconsider. The Court will dismiss Plaintiff's WCA claim, and it shall no longer be a part of this case whether directly of through analogy. The Court will direct Plaintiff to amend the previously amended Complaint to conform with this Memorandum Opinion and the accompanying Order. A separate Order will follow.

DATED: July 1, 2010

JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

ATTEST:

VENETIA H. VELAZQUEZ, ESQUIRE
Clerk of the Court

BY: Rosalie
ROSALIE J. GRIFFITH
Court Clerk Supervisor 7/2/10