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

Bevena Whitmore,	)	
	)	
Plaintiff,	)	Civ. No. 2000-63
	)	
v.	)	
	)	
HEPC Sugar Bay, Inc. and Wyndham Hotels and Resorts,	)	
	)	
Defendant.	)	

ATTORNEYS:

Archie Jennings, Esq.
St. Thomas, U.S.V.I.
For the plaintiff,

Charles E. Engeman, Esq.
David J. Comeaux, Esq.
St. Thomas, U.S.V.I.
For the defendant.

MEMORANDUM

Moore, J.

Defendants HEPC Sugar Bay, Inc. and Wyndham Hotels and Resorts [collectively "defendants"] move for summary judgment. Plaintiff Bevena Whitmore ["plaintiff" or "Whitmore"] opposes defendants' motion. For the reasons set forth below, this Court will grant defendants' motion

I. FACTS

Whitmore worked at the Wyndham Sugar Bay Beach Club and Resort from October, 1993 to February 19, 1999. She started as a

PBX operator and held this position until November, 1996, at which time she applied for and was hired as the payroll clerk. Whitmore was later removed from this position after poor evaluation reports as defendants found her performance unacceptable. Defendants subsequently placed her in the position of Engineering Office Coordinator. During her tenure in this position, Whitmore received evaluations ranging from competent to marginal, with more evaluations bordering on the latter. She was repeatedly informed that she needed to improve her reactions to stressful situations.[1]

On February 19, 1999, Whitmore was again written up for disciplinary problems and was suspended by her supervisor, Leroy Luke ["Luke"], until the matter could be reviewed by Human Resources and upper management. Refusing to leave, Whitmore went to the Executive Office to talk with management, but was unable to meet with anyone. Upon returning to her office, Luke again asked her to leave and Whitmore again refused. Luke then called security to escort her off the property, at which point Whitmore repeatedly stated that she quit. On the following Monday, Whitmore attempted to return to work, but was informed that she no longer worked there because she had quit.

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[1] Apparently plaintiff had a tendency to yell and scream at others (co-workers and supervisors) in tense situations. (Defs.' Mem. in Supp. of Mot. for Summ. J. at 3-4.)

In the following months, Whitmore requested and received meetings with various officers of the hotel – Jocelyn Goubourn, Director of Human Resources, and Rik Blyth, General Manager – to discuss her situation. After these meetings prove fruitless, Whitmore filed charges with the Equal Employment Opportunity Commission ["EEOC"] and the Virgin Islands Department of Labor on June 25, 1999, charging sexual harassment. Whitmore alleges several incidents created a hostile and abusive work environment, which are: (1) a co-worker "had tried to grope [her] in the office and tried to kiss [her]" and had later "grabbed his crotch in front of [her]" and told her she "need[ed] a man to get the job done"; (2) two other co-workers had repeatedly asked her out on dates; and (3) her supervisor (Luke) had called her "Ms. Piggy" and said she "looked like a stuffed doll."[2] When she received her right-to-sue letter from the EEOC, she filed a complaint with the Court alleging employment discrimination under 42 U.S.C. § 2000e, violation of her civil rights under 10 V.I.C. § 64, intentional infliction of emotional distress, negligent hiring or supervision, and wrongful discharge under 24 V.I.C. §

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[2] Defendants assert that plaintiff never alleged any sexual harassment until it was evident that she would not be rehired. (Defs.' Mem. in Supp. of Mot. for Summ. J. at 6.) Plaintiff counters that she had tried to inform defendants of the sexual harassment, but they would not listen. (Pl.'s Opp. to Defs.' Mot. for Summ. J. at 7-8.)

76.[3] This Court has federal jurisdiction under section 22(a) of the Revised Organic Act of 1954[4] and 28 U.S.C. § 1331.

II. DISCUSSION

A. Summary Judgment Standard

Summary judgment shall be granted if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue respecting any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c); *see also Sharpe v. West Indian Co.*, 118 F. Supp. 2d 646, 648 (D.V.I. 2000). The nonmoving party may not rest on mere allegations or denials, but must establish by specific facts that there is a genuine issue for trial from which a reasonable juror could find for the nonmovant. *See Saldana v. Kmart Corp.*, 42 V.I. 358, 360-61, 84 F. Supp. 2d 629, 631-32 (D.V.I. 1999), *aff'd in part and rev'd in part*, 260 F.3d 228 (3d Cir. 2001). Only evidence admissible at trial shall be considered and the Court

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[3] At the hearing on December 14, 2001, plaintiff withdrew her claim for wrongful discharge (Count V).

[4] 48 U.S.C. § 1612(a). The complete Revised Organic Act of 1954 is found at 48 U.S.C. §§ 1541-1645 (1995 & Supp.2001), *reprinted in* V.I. CODE ANN. 73-177, Historical Documents, Organic Acts, and U.S. Constitution (1995 & Supp.2001) (preceding V.I. CODE ANN. tit. 1).

must draw all reasonable inferences therefrom in favor of the nonmovant. *See id.*

B. Plaintiff's Title VII Claim Was Untimely Filed

The Supreme Court of the United States has recognized that Title VII protects individuals not only from economic or tangible discrimination, such as the denial or loss of a job or promotion, but also prohibits a "work environment abusive to employees because of their race, gender, religion, or national origin." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 22 (1993); *see also Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986) ("[A] plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment."). To constitute discrimination within Title VII, the harassment "must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'" *Meritor*, 477 U.S. at 67. This standard is intended to "take[] a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury." *Harris*, 510 U.S. at 21. When reviewing sexual harassment claims, courts in this jurisdiction must look to the totality of the circumstances. *See West v. Philadelphia Elec. Co.*, 45 F.3d 774, 753 (3d Cir. 1995); *see also Harris*, 510 U.S. at 23 (recognizing the totality

of the circumstances approach in hostile work environment claims).

In order for plaintiff to prevail in her Title VII claim, she must establish that: (1) she suffered intentional discrimination because of her gender, (2) the discrimination was pervasive and regular, (3) it detrimentally affected her, (4) it would have detrimentally affected a reasonable person of the same protected class in plaintiff's position, and (5) there is respondeat superior liability. *See West*, 45 F.3d at 753; *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (3d Cir. 1990). Moreover, plaintiff must have filed an employment discrimination charge with the EEOC within 300 days of the alleged discrimination, when there is a parallel state or territorial administrative agency for investigating discrimination complaints. *See* 42 U.S.C. § 2000e-5(e); *see also Rush v. Scott Specialty Gases, Inc.*, 113 F.3d 476, 480 (3d Cir. 1997); *Bostic v. AT&T of the Virgin Islands*, 166 F. Supp. 2d 350, 356 (D.V.I. 2001). As plaintiff filed her EEOC charge on June 25, 1999, she must establish that the alleged unlawful conduct occurred on or after August 28, 1998 (300 days before the date of filing).

Despite repeated questioning at her deposition, plaintiff has been unable to establish when any of the alleged sexual harassment took place. (Whitmore Dep. at 121-22, 127, 130-31,

133, 173-74. The only semi-established date of occurrence is for the incident involving a co-worker grabbing his crotch in front of Whitmore and stating that "this is going to take care of business . . . ." (*Id.* at 112.) Whitmore noted that this event happened "just after [the co-worker] was written up for harassing the PBX operator and then another girl up in the department . . . ." (*Id.*) As this co-worker was written up in October, 1997, (Goubourn Dep. ¶ 1), this event occurred well before the August 28, 1998 deadline. Thus, on its face, plaintiff's EEOC claim has been untimely filed. Therefore, as plaintiff has failed to establish that any of the alleged events occurred within the 300-day period required for EEOC claims, I will grant summary judgment in favor of defendants on plaintiff's Title VII claim.

C. Plaintiff's Territorial Claims Also Fail

Having found plaintiff's federal Title VII claim lacking, I could decline to exercise supplemental jurisdiction under 28 U.S.C. § 1367 to hear her purely local claims. *See* 28 U.S.C. § 1367(c)(3). As I find her purely local claims also lacking in merit and for the sake of judicial economy, however, I will use my discretion to exercise supplemental jurisdiction over these claims.

1. Virgin Islands Civil Rights Act

Plaintiff has no private cause of action for an alleged violation of her civil rights under chapter 5 of title 10 of the Virgin Islands Code. *See* 10 V.I.C. §§ 61-76; *Codrington v. Virgin Islands Port Auth.*, 33 V.I. 245, 260, 911 F. Supp. 907, 917 (D.V.I. 1996) ("Nowhere in the statute is it established that an aggrieved individual may directly bring an action for violation of § 64.") Recently, the Court of Appeals held that no private cause of action exists under chapter 5 of title 10 of the Virgin Islands Code. *See Figueroa v. Buccaneer Hotel Inc.*, 188 F.3d 172, 176-81 (3d Cir. 1999). Therefore, this claim must be dismissed.

2. Negligence Claim

Whitmore alleges that defendants were negligent in hiring, training and supervising her supervisor, Luke. Much like her local civil rights claim, however, plaintiff's negligence claim cannot survive. The Virgin Islands Workers' Compensation Act, 24 V.I.C. §§ 251-285, ["WCA"] provides in part: "Every employer shall pay compensation . . . for the disability or death of an employee resulting from a personal injury or occupational disease arising out of and in the course of his employment, irrespective of fault as a cause of the injury or death." 24 V.I.C. § 252(a). Virgin Islands courts interpret the "arising out of and in the

course of his employment" language very liberally. *See Jones v. James*, 17 V.I. 361, 364 (D.V.I. 1980) (noting that courts in this jurisdiction construe the time and place causation requirement of section 252(a) in an "extremely broad manner"); *Hammer v. Workmen's Compensation Comm'n*, 2 V.I. 56, 57 (D.V.I. 1945) ("[T]he injury arises out of the employment if it arises out of either the nature, conditions, obligations, or incidents of the employment."); *see also Chinnery v. Government of the Virgin Islands*, 865 F.2d 68, 71 (3d Cir. 1989) (noting the liberal interpretations of section 252(a) by Virgin Islands courts). Since Whitmore's negligence claim centers on the workplace, I find that these injuries clearly arose out of and in the course of her employment.

Since Whitmore's injuries are covered by the WCA, her exclusive remedy against defendants is a workers compensation claim. *See id.* § 284(a). She may not sue defendants in court. *See Chinnery*, 865 F.2d at 71 (noting that this provision establishes an exclusive remedy that renders an employer "not liable for negligence at common law"). The purpose of such an exclusive remedy provision is to "provide prompt payment of benefits" and "relieve employers and employees of the burden of civil litigation." *See id.* at 71 (quoting *Champlain Cable Corp. v. Employers Mutual Liab. Ins. Co.*, 479 A.2d 835, 840 (Del.

1984). Accordingly, plaintiff's negligence claims are barred by the WCA.

3. Intentional Infliction of Emotional Distress

Plaintiff argues that the actions of defendants' employees caused her harm through the intentional infliction of emotional distress. All but one of the incidents plaintiff experienced at the workplace do not rise up to the level of intentional infliction of emotional distress. If plaintiff cannot establish a hostile or abusive workplace environment under Title VII, she very likely also cannot establish a claim for intentional infliction of emotional distress. *See Codrington*, 33 V.I. at 258, 911 F. Supp. at 916 (citing *Stingley v. Arizona*, 796 F. Supp. 424, 431 (D. Ariz. 1992) ("holding that Title VII statutory discrimination occurs at a much lower threshold of inappropriate conduct than the threshold requirement for the tort of intentional infliction of emotional distress")). Whether the remaining incident, a male co-worker grabbing his crotch and making sexually suggestive comments, would support a claim of intentional infliction of emotional distress or is just an insult, annoyance or other triviality to which liability does not

extend, it is barred by the two-year tort statute of limitations. *See* 5 V.I.C. § 31(5)(A).[5]

The defendants properly raised the statute of limitations as the tenth defense in their answer to plaintiff's complaint, even though they did not mention it in their motion for summary judgement.[6] Although a statute of limitations defense ordinarily cannot be used as the basis of a Rule 12(b)(6) dismissal, "an exception is made where the complaint facially shows noncompliance with the limitations period and the affirmative defense clearly appears on the face of the pleading." *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1384 n.1 (3d Cir. 1994); *see also ALA, Inc. v. CCAIR, Inc.*, 29 F.3d 855, 859 (3d Cir. 1995) (stating that the court can dismiss under 12(b)(6) where an affirmative defense appears on the face of the complaint); *Continental Collieries, Inc. v. Shober*, 130 F.2d 631, 635 (3d Cir. 1942); CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 352-53 (1990) (referring to the statute of limitations as one of several "built-in" affirmative

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[5] The alleged crotch-grabbing incident occurred in October, 1997. Whitmore, however, did not file her action until March 29, 2000.

[6] It is well-established that a court may raise *sua sponte* the issue of the deficiency of the complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, so long as the plaintiff is afforded an opportunity to respond. *See Oatess v. Sobolevitch*, 914 F.2d 428, 430 n.5 (3d Cir. 1990); *Roman v. Jeffes*, 904 F.2d 192, 196 (3d Cir. 1990).

defenses and collecting cases). Thus, the Court may raise *sua sponte* a deficiency in the complaint under Rule 12(b)(6), which necessarily includes the "built-in" affirmative defense of the statute of limitations.

Plaintiff's verified complaint on its face demonstrates that it was filed outside the applicable two-year statute of limitations for a claim of intentional infliction of emotional distress. I nevertheless will give plaintiff thirty (30) days from the date of this memorandum to raise any arguments why her claim of intentional infliction of emotional distress is not barred by the statute of limitations.

III. CONCLUSION

Whitmore failed to timely file her EEOC claim. Therefore, this Court will grant defendants' motion for summary judgment for plaintiff's Title VII claim (Count I). In addition, as there is no private cause of action under 10 V.I.C. § 64 and the WCA bars plaintiff's negligence claim, Counts II and IV of Whitmore's complaint will be dismissed. Finally, the Court will give plaintiff thirty (30) days to show why her intentional infliction of emotional distress claim (Count III) should not be subject to dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure as barred by the statute of limitations.

ENTERED this 12th day of March, 2002.

For the Court

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
WILFREDO MORALES
Clerk of the Court

By:_____/s/_____
Deputy Clerk

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For the plaintiff,

Charles E. Engeman, Esq.
David J. Comeaux, Esq.
St. Thomas, U.S.V.I.
For the defendant.

ORDER

For the reasons set forth in the foregoing Memorandum of even date, it is hereby

ORDERED that defendants' motion for summary judgment (Docket No. 47) on Count I of plaintiff's complaint is **GRANTED**; it is further

ORDERED that Counts II and IV are **DISMISSED** with prejudice;

ORDERED that Count V is **DISMISSED** based on plaintiff's withdrawal of her wrongful discharge claim; and it is further

ORDERED that plaintiff shall have **thirty (30) days** from the date of this order to show why Count III of her complaint should

not be subject to dismissal under Rule 12(b)(6) of the Federal Rules of Civil Procedure as barred by the statute of limitations.

ENTERED this 12th day of March, 2002.

For the Court

_____/s/_____
Thomas K. Moore
District Judge

ATTEST:
WILFREDO MORALES
Clerk of the Court

By:_____/s/_____
Deputy Clerk

cc: Hon. R.L. Finch
Hon. G.W. Barnard
Hon. J.L. Resnick
Mrs. Jackson
Archie Jennings, Esq.
Charles E. Engeman, Esq.
David J. Comeaux, Esq.
St. Croix law clerks
St. Thomas law clerks
Michael Hughes