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Case No. 2008 -

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IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ELIZABETH COCHRANE PICHARDO

Appellant,

v.

CECIL BENJAMIN, COMMISSIONER OF LABOR, GOVERNMENT OF THE VIRGIN ISLANDS,
and COOL IT, INC. d/b/a AGAVE TERRACE RESTAURANT

Appellees,

SUPREME COURT OF THE VIRGIN ISLANDS
S. Ct. APP. 2007 - 061

PETITION FOR WRIT OF CERTIORARI

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ELIZABETH COCHRANE PICHARDO
4302 LA GRANDE PRINCESS
GRAND PRINCESS MANOR # A2
CHRISTIANSTED, ST. CROIX, US VIRGIN ISLANDS 00820
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(212) 841-0293 SEV.

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SUBJECT MATTER AND APPELLANT JURISDICTION

This court has jurisdiction pursuant to title ----- authorizing appeals of final orders from the Supreme Court of the United States Virgin Islands. This Court exercises plenary review of the reviewing court's application of legal precepts, while findings of facts are reviewed for clear error.

STATEMENT OF THE FACTS

The principal means of one's life is work and we identify ourselves by our work. I was employed in the Tourism Industry (Hotel/Restaurant/Retail/Tour), for the last 21 years. My pursuit for due process, a right, which is, guaranteed by our Supreme Law of the Land the US Constitution for the past seven years. I have resided in the United States Virgin Islands since the early 80's in Saint Thomas/ St. John. In 2005, I decided to move to the Island of Saint Croix or Santa Cruz. I reside at 4302 La Grande Princess, Grand Princess Manor #A2 Christiansted, Saint Croix, United States Virgin Islands 00820.

Appellant have travel out of United States Virgin Islands, now here between New York and Philadelphia seeking representation to find justice for the violation of Constitutional Rights.

Appellant denial of due process of the law that is guaranteed based upon the 14th Amendment of the Constitution of the United States, as applied to the states and territories. The Virgin Islands Department of Labor violates employee every day by allowing the employer and their attorneys dictate the outcome of cases denying most employees in the territory due process of the law. The monopoly and corruption which exist here in the United States Virgin Islands between judges, lawyers and business owners needs to stop. Complaints of discrimination and wrongful discharge get investigated arbitrary. In this case Mrs. Ruth Pfanner owner of Point Pleasant Resort and manager of Agave Restaurant until 1989, also, an employee of the Virgin Islands Department of Labor. On February 1, 1989 when Cool It Inc., Mr. Greg Miller and Jeff Fratianne management firm took over firing Forty-one employees a common practice here in the Virgin Islands. Out of Forty-one fired only Four were rehired and I was one of them. The United States Virgin Islands

Department of Labor needs to take responsibility and accountability. Labor laws need to be reviewed, amended and upheld. Corporations, lawyers and judges should not dictate what the labor department should or should not do with complaints filed by employees. Slavery to the best of my knowledge is over but here is still alive in every day living unfair labor practices, violations of our Constitutional Rights compounded by corruption within the justice system and monopolized legal system in issues of labor here in the United States Virgin Islands. A clear shows the corruption or conflict of interest amongst the Virgin Islands Department of labor, business owners, attorney and judges as in this case.

In 1989 do to Hurricane Hugo I left the Islands and attended Westchester Community College got a Marketing Degree, and more experience in banquets, sales and services. From 1990- 1997, I kept in touch with the owner and the employees. In 1997, I came back and contacted Greg Miller in reference to a position at Agave Terrence Restaurant. I was hired by Cool It Inc. for the second time in August 1998 as a waitress and this made a third time at Agave Terrence Restaurant. Mr. Henry Junnula and Daniel Hamilton supervisors at the time practice constructive dischargement and unfair labor practice. I was suspended for two days on heirs-say and then wrongfully discharged in 1999.

In 1999, District Judge Thomas Moore effectively threw out the labor law, Wrongful Discharge Act, charging that it violated federal labor policy and false testimony presented by the business associations. This Honorable Court overturned Judge Moore's decision stating erroneous legal analysis. This is the same judge sitting on the Supreme Court of the Virgin Islands, Justice Pro Team on this case. The president of Business Associations was Mr. John P. DeJongh today the Governor of the United States Virgin Islands. Attorney Kathleen Navin of Legal Services of the Virgin Islands who argued the Wrongful

Discharge Act before this Honorable Court and started handling my case filed in 2007 with an incomplete file. Legal Services have had my wrongful discharge case, which is a winning case, since April 1999 even though representations was not equal since Ms. Avis Blackman a legal services assistant not an attorney represent my case in the labor department. My constitutional rights have been violated and compromised do to corporate corruptions, donations and legal monopoly. Attorney Kathleen Navin is no longer with Legal Services of the Virgin Islands and I am still in a low-income American citizen.

Appellant implore to this Honorable Court to apply equity in this matter, as a pro-se litigant in a United States Territory where retaining representation on labor issues an civil rights proved impossible. Appellant have no faith in the justice system in the United States Virgin Islands, reinforced by Legal Services decision not to represent me in filing with this Honorable Court. The United States Virgin Islands, where not even legal services a federally funded agency for the purpose of providing civil legal assistance to low -income persons does not assist with discrimination cases since the 1980's. However, they receive donations from this legal corporation. Appellant Hope and Pray that this Honorable Court grants the Petition for writ of Certiorari.

SUMMARY FACTS

I have always believed in the ideology of our great country, the Constitution of the United States, “ that all men/women are created equal under the law and the right not to be deprived of Life, Liberty and the Pursuit of Happiness or property without due process of the law, that all men are equal before the law and that anyone, rich or poor, can demand the protection of the law. That the government is a government of laws, not men, No one is above the law. The due process clause of the Fourteenth Amendment to the Constitution is made applicable to the V.I. by the Revised Organic Act of 1954, sec. 3, 48 USC sec. 1561, reprinted in V.I. Code Ann., Historical Documents, Organic Acts, and U.S. Constitution at 159-60 (1995) (proceeding V.I. Code Ann tit 1).

Yes, I am unlearned in my understanding of citing cases and courts laws is not as an attorney but my rights as an American citizen have been violated. Historically, being of African ancestry in these American Virgin Islands and the upholding of the Labor Laws that protect the working people appear to be impossible. A case determination rendered without fact or proof of an investigation. The Department of Labor undoubtedly keeps violating and compromising labor laws that protect the employees’ civil rights at the work place especially in the private sector by not taking complaints and if taken not investigated and the administrative process lasting for years. According to the Revised Organic Act 1954 mandated a Wage Board within the Labor Department, which has not been in place for the past Fifteen (15) to twenty (20) years. Another example was the need for Bill No. 26-0220 – An Act amending Title 24 V.I.C., chapter 1 for the establishment of “Mandatory Meal and Rest Periods”. With this in mind, it is hardly surprising that systematic economic oppression coupled with economic competition has created and re-enforced the perception of inequality in the Department of Labor perpetuating the slave

mentally by allowing the corporations and their attorneys to dictate the out come of any complaint brought against any of the corporation and the monopoly which seems to exist in the legal system. The excessive delay in the administrative appeals process violated the appellant's right to procedural due process. The Department's failure to provide a timely hearing, and to timely issue a hearing decision is precisely the type of government action to which procedural due process applies. See, Anchorage Associates, et.al v. Virgin Islands Board of Tax Review and Tax Assessor, 1991 U.S.Dist LEXIS 2005 (D.V.I..1991). The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Matthews, 424 U.S. at 333,citing Armstrong v. Marnzo, 380 U.S. 545,552(1965)

CONCLUSION

For the foregoing Reasons, Appellant at the mercy of this Honorable Court and asks that the court reverse the decision of the Supreme Court of The Virgin Islands. Appellant as a pro-se litigant after seven (8) years have suffer discrimination , Wrongful Discharged not only from appellees but from the justice system in this United States Virgin Islands as a United State citizen which have affected her health mentally and physically. Appellant hopes and prays that this Honorable Court gives her the opportunity for justice in requesting the judgement sought in this case reparation through education and financial compensation.

Appellant has been suffering even more during this last year because of the actions of the court system and the search and refusal of legal representation here in the United States Virgin Islands.

Dated:

October 1, 2008

Respectfully Submitted,

By:

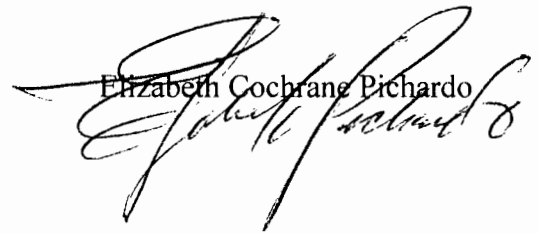
Elizabeth Cochran Richardo

Elizabeth Cochran Richardo,
Petitioner, pro se
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Grand Princess Manor # A2
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U.S. Virgin Islands 00820
(340) 719-1788 Home
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CETIFICATE OF SERVICE

I hereby certify that a true and exact copy was served on this 10th day of October 17, 2008, upon the Commissioner of labor, Government of the Virgin Islands, 2203 church street Christiansted, St. Croix, 00820, Micole L. Morgal, Ogletree,Deakins, Nash,Soak, and Steward, LLC, No. 1336 Beltjen Rd. St. Thomas, V.I. 00804, The Supreme Court of the Virgin Islands, 18 Strand Street, Fredricksted, St. Croix, 00840, NAACP, Legal Department, 4805 Mount Hope Drive, Baltimore, Ma 21215, Rev. Al Sharpton c/o National Action Network, 106 145th Street, New York, NY 10039, Mr. Jesse Jackson c/o Rainbow Push Coalition, 930 East 50th Street, Chicago, Ill. 60616, Minister Rasul H. Muhammad, Mosque # 29 5600 N:W. 7th Ave., Miami, Florida 33127, Mr. Roy Inns c/o CORE, Bronxville, NY. Mr. Cardona c/o Legal Services Corporation, 33 K Street, NW 3rd floor, Washington, D.C. 20007-3522, Mr. J. Mondesire c/o NAACP, 1619 Cesel Belmoore Ave., Philadelphia, PA

Date: October 17, 2008

Elizabeth Cochran Pichardo


**Supreme Court of the Virgin Islands
Official Docket**

Case No.: S.Ct. Civ. App. No. 2007-061 **Caption:** Elizabeth Pichardo (Petitioner/Appellant)
Cecil R. Benjamin, Commissioner of
Labor, Government of the Virgin Islands,
Cool It., Inc., d/b/a Agave Terrace
Restaurant (Respondents/Appellees)

NO.	FILED	ENTERED	DOCUMENT DESCRIPTION	CLERK
1	05/02/07	05/09/07	Notice of Appeal filed.	EMK
2	05/09/07	05/09/07	Transmittal Letter from Superior Court, with attached certified copy of Notice of Appeal filed on May 2, 2007, Information Sheet, Order dated March 30, 2007	EMK
3	05/09/07	05/09/07	Docketing Letter/Request for TPO issued	EMK
4	05/09/07	05/09/07	Letter issuing Civil Appeal Information Statement.	EMK
5	05/09/07	05/09/07	Record of Filing of Docket Fee entered	EMK
6	05/11/07	05/25/07	Civil Appeal Information Sheet filed.	EMK
7	05/11/07	05/25/07	Copy 5-Appellant's Copy of TPO filed. No Transcript will be Ordered. Note: The tape of the Department of Labor Administrative Proceeding is not transcribable.	EMK
8.	05/25/07	05/25/07	Briefing Schedule entered.	EMK
9.	05/25/07	05/25/07	Notice of Entry of Briefing Schedule	EMK
9.	7/19/07	7/19/07	Brief of Appellant filed.	EMK
			Certificate of Service of Brief of Appellant Elizabeth Pichardo served on July 19, 2007 on Attorneys Michol L. Morgan and Richard Davis filed.	EMK
10	7/19/07	7/19/07	Joint Appendix filed.	EMK
11	08/08/07	08/08/07	Motion for Enlargement of Time filed.	EMK
			Certificate of Service of Motion for Enlargement of Time on Kathleen Navin, Esquire and Micol L. Morgan, Esquire on August 8, 2007.	EMK

Supreme Court of the Virgin Islands
Official Docket

Case No.: S.Ct. Civ. App. No. 2007-061 **Caption:** Elizabeth Pichardo (Petitioner/Appellant)
Cecil R. Benjamin, Commissioner of
Labor, Government of the Virgin Islands,
Cool It., Inc., d/b/a Agave Terrace
Restaurant (Respondents/Appellees)

12.	08/15/07	08/15/07	Stipulation of the Parties to allow filing of Supplemental appendix filed.	EMK
13.	08/16/07	08/16/07	Disclosure of Corporate Affiliations and Financial Interest filed.	EMK
14.	08/16/07	08/16/07	Brief of Appellee Cool It, Inc. dba Agave Terrace Restaurant filed.	EMK
			Certificate of Service of Appellee Brief served on Kathleen Navin and Richard Davis, Assistant Attorney General	EMK
15.	08/16/07	08/16/07	Supplemental Joint Appendix filed.	EMK
16.	08/17/07	08/20/07	Order entered granting Appellee's brief shall be served on counsel for the appellant and upon the Court on or before September 14, 2007. Appellant's reply brief, if any shall be served and filed within fourteen (14) days after services of the appellee's brief	EMK
17.	08/20/07	08/20/07	Notice of Entry of Order issued. Copies directed to Chief Justice Rhys S. Hodge, Richard S. Davis, Esq., AAG, Kathleen Navin, Esq., Micol L. Morgan, Esq., Elizabeth Pichardo.	EMK
18.	09/10/07	09/10/07	Brief of Appellee Government of the Virgin Islands filed.	EMK
19.	09/14/07	09/14/07	Amendment to Certificate of Service filed evidencing that the certificate attached to the brief filed on September 12, 2007, was inadvertently not executed. The copies of the brief were served on counsel on that date.	EMK
20.	09/28/07	09/28/07	Reply Brief of the Appellant filed.	EMK
			Certificate of Service of Brief of the Appellant served on Micol L. Morgan and Richard Davis, Esquire on September 28, 2007.	EMK
21.	10/31/07	10/31/07	Certified copy of Docket Sheet filed.	TAT
22.	10/31/07	11/02/07	Order entered by Court. Chief Justice Rhys S. Hodge recuses himself from consideration of any issues	TAT

**Supreme Court of the Virgin Islands
Official Docket**

Case No.: S.Ct. Civ. App. No. 2007-061 **Caption:** Elizabeth Pichardo (Petitioner/Appellant)
Cecil R. Benjamin, Commissioner of
Labor, Government of the Virgin Islands,
Cool It., Inc., d/b/a Agave Terrace
Restaurant (Respondents/Appellees)

			arising on appeal.	
23.	11/02/07	11/02/07	Notice of Entry of Order issued.	TAT
24.	11/21/07	11/21/07	Order entered. The Supreme Court of the Virgin Islands will convene in its final session of the 2007 term on Monday and Thursday, December 17 and 20, 2007, to consider nine (9) appeals noted below. The session will commence at 10:00 a.m. on Monday, December 17, 2007 in Courtroom No. 2, Alexander A. Farrelly Justice Complex on St. Thomas. The session will continue on St. Croix at 11:00 a.m. on Thursday, December 20, 2007 in Courtroom 211, R.H. Amphlett Leader Justice Center. The following appeals are scheduled for consideration before the Supreme Court of the Virgin Islands on December 17 and 20, 2007. An Order setting the matters scheduled for Oral Argument will be forthcoming.	TAT
25.	11-21-07	11-21-07	Notice of Entry of Judgment/Order for Order Setting Oral Argument for December 17 & December 20, 2007 issued to all parties listed on the distribution list.	TAT
26.	11/21/07	11/21/07	Order entered and signed by Chief Justice Rhys S. Hodge on November 20, 2007. Thomas K. Moore, Retired Judge of the District Court is hereby appointed to sit as designated Justice of the Supreme Court for consideration of the above-referenced case.	TAT
27.	11/21/07	11/21/07	Notice of entry of Judgment/Order for Order dated November 20, 2007 prepared by Tacey Thomas, Deputy Clerk II on November 21, 2007. Copies directed to Justices of the Supreme Court, Hon. Thomas K. Moore, Kathleen Navin, Esq., Joel Feld, Esq., Micol Morgan, Esq., and Venetia H. Velazquez, Clerk of the Court.	TAT
28.	12/17/07	12/17/07	Record of Proceeding for Hearing held on December 17, 2007. Justice Maria M. Cabret, Justice Ive Arlington Swan and Justice Pro Tem Thomas K. Moore heard oral arguments of Kathleen Navin, Esq., on behalf of the Appellant and Micol Morgan, Esq., on	TAT

**Supreme Court of the Virgin Islands
Official Docket**

Case No.: S.Ct. Civ. App. No. 2007-061 **Caption:** Elizabeth Pichardo (Petitioner/Appellant)
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Labor, Government of the Virgin Islands,
Cool It., Inc., d/b/a Agave Terrace
Restaurant (Respondents/Appellees)

			behalf of the Agave Terrace.	
29.	4/16/08	4/16/08	SEALED Per Curiam Order entered.	MJB
30.	4/16/08	4/16/08	Order of The Court entered. Order that the Superior Court order affirming the decision of the Department of Labor is Affirmed. Order that copies of this order be directed to the parties.	MJB
31.	4/16/08	4/16/08	Notice of Entry of Order for Memorandum Opinion entered.	MJB
32.	4/30/08	4/30/08	Appellant's Petition for Rehearing	MJB
			Certificate of Service, Petition for rehearing was served on this 30 th day of April 2008 upon Micol L. Morgan , Esq. hand- delivered a copy to the official of Ogletree, Deakings, Nash , Smoak and Atewart, LLC The Tunick Bldg. 1336 Beltgen road, Ste.202, St. Thomas, U.S. Virgin Islands 00802, and upon Richard Davis, Esq. by hand- delivered a copy to the Department of Justice, GERS Building, 2 nd Floor, 48B-%0C Kronprindsens Gade, GERS Bldg.2 nd Floor, St. Thomas, U.S.V.I. 00801	
33.	5/22/08	5/22/08	Order of the Court entered. Appelles shall file an answer within ten (10) days of the entry of Order regarding the Petition for Rehearing.	TAT
34.	5/22/08	5/22/08	Notice of entry of order for, Order of the Court dated May 22, 2008 issued. Copies directed to Justices of the Supreme Court, Micol Morgan, Esq., Richard Davis, Esq., AAG, Supreme Court Law Clerks, Hon. Thomas K. Moore, Kathleen Navin, Esq., Glenda L. Lake, Esq.	TAT
35.	6/2/08	6/2/08	Response to Appellant's Petition for Rehearing.	MJB
			Certificate of Service, response to Appellant's Petition for Rehearing to be sent, postage paid, via U.S. Mail to: Elizabeth Pichardo Post Office Box 6150 St. Thomas, V.I. 00803. Kathleen Navin, Esq. Legal Services of the V.I. Inc. 1832 kongens Gade St. Thomas , VI 00802 Attorney for Petitioner , and Micol Morgan, Esq. Ogletree, Deakins, Nash Soak and Stewart,LLC The Tunick Building No.1336 Beltjen Road,Ste.202 St.	

Supreme Court of the Virgin Islands
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Case No.: S.Ct. Civ. App. No. 2007-061 **Caption:** Elizabeth Pichardo (Petitioner/Appellant)
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Restaurant (Respondents/Appellees)

			Thomas, VI 00802 Attorney for Agave Restaurant	
36.	6/05/08	6/05/08	Appellee Cool Int., Inc., D/B/A Agave Terrace Restaurant Opposition to Appellant's Petition for Rehearing filed by Micol L. Morgan, Esquire.	TAT
			Certificate of Service of the foregoing document served via hand delivery to Kathleen Navin, Esquire, No. 47 Kongens Gade St. Thomas, VI 00802 and Richard S. Davis, Esquire, Assistant Attorney General Department of Justice 48B-50C Kronprindsens Gade GERS Bldg., 2 nd Floor St. Thomas, VI 00802 on June 5, 2008.	
37.	08-19-08	08-19-08	Sealed Per Curiam Order of the Court.	cab
38.	08-19-08	08-19-08	Notice of Entry of Order for Sealed Per Curiam Order Of the Court directed to **SEALED COPY-FOR FILE ONLY**	cab
39.	08-19-08	08-19-08	Per Curiam Order of the Court dated August 19, 2008. Ordered that the Petition for Rehearing is DENIED. Copies directed to Justices of the Supreme Court, Justice Pro Tem Thomas K. Moore, Kathleen Navin, Esq., Richard S. Davis, Esq., AAG, Micol L. Morgan, Esq., Glenda L. Lake, Esq., Acting Clerk of the Court, Supreme Court Law Clerks, Supreme Court Secretaries, Order Book.	cab
40.	08-19-08	08-19-08	Notice of Entry of Order for Order of the Court dated August 19, 2008 prepared by Cheryl Burton, Deputy Clerk II. Copies directed to Justices of the Supreme Court, Justice Pro Tem Thomas K. Moore, Kathleen Navin, Esq., Richard S. Davis, Esq., AAG, Micol L. Morgan, Esq., Glenda L. Lake, Esq., Acting Clerk of the Court, Supreme Court Law Clerks, Supreme Court Secretaries, Order Book.	cab
	08-19-08	08-19-08	File Closed: August 18, 2008.	cab
41.	09-04-08	09-04-08	Mandate Issued with certified copy of Memorandum Opinion/Order of the Court dated April 16, 2008. Copies directed to Venetia H. Velazquez, Esq., Clerk Of the Superior Court, Kathleen Navin, Esq., Richard S. Davis, Esq., and Micol L. Morgan, Esq.	cab

Appellant Elizabeth Pichardo (hereafter "Pichardo") challenges the Superior Court's refusal to consider her due process claims in its Order affirming the decision of the Department of Labor (hereafter "DOL") that Cool It, Inc. d/b/a/ Agave Terrace Restaurant (hereafter "Agave") did not violate the Wrongful Discharge Act (hereafter "WDA") in firing her. Pichardo asks this Court to find that her due process rights were violated by the DOL's nineteen month delay in holding a hearing and the additional twenty-three month delay in issuing its decision. For the reasons stated below, we find that the Superior Court correctly declined to address Pichardo's due process arguments on a writ of review. Therefore, we will affirm the decision of the Superior Court.

I. BACKGROUND

Agave hired Pichardo on or about August 12, 1998 as a waitress but terminated her eight months later. As grounds for her dismissal, Agave cited numerous instances when Pichardo disobeyed instructions from managers, caused problems with service throughout the restaurant, and made it hard for co-workers to work alongside her.

On April 12, 1999, two days after her termination, Pichardo filed a complaint with the DOL alleging that Agave wrongfully discharged her. The DOL hearing was not scheduled until January 14, 2002 – two years and eight months later.² At the hearing, both parties submitted exhibits and had an opportunity to present witnesses, but Pichardo presented only her own testimony. The DOL's decision, which held that Pichardo was not wrongfully terminated, was issued on December 16, 2003 – nearly two years later. A

² Part of this delay was attributable to the Government being prohibited by a preliminary injunction from holding any hearings under the WDA until June 30, 2000. See *St. Thomas-St. John Hotel & Tourism Ass'n, Inc. v. Gov't of the Virgin Islands*, 41 V.I. 317 (D.V.I. June 3, 1999), *rev'd*, 218 F.3d 232, 245-46 (3d Cir. 2000).

month later, the Commissioner of Labor adopted the DOL decision, thereby making it a final order.

On February 20, 2004, Pichardo, acting *pro se*, petitioned the Superior Court for a writ of review, which, though initially denied as untimely, was subsequently granted. The DOL was ordered to deliver a copy of the hearing transcript within twenty days, but the court was notified three months later that the transcript was not transcribable. Thereafter, Pichardo moved to remand to the DOL for a rehearing on grounds of delay and lack of a transcript. The Superior Court instead issued a briefing schedule. On March 30, 2007, the court affirmed the DOL's ruling that Pichardo was not wrongfully terminated. Finding that it could not rule on her due process claim, the Superior Court stated:

Although this case has been plagued by unexplained delays a writ of review is not the proper method to address such complaints. The writ is to review the ALJ's decision not the administrative processes employed by Labor. These administrative delays, although egregious, have very little, if anything, to do with whether Agave terminated Pichardo for cause.

(J.A. at 7.)

II. DISCUSSION

A. Jurisdiction and Standard of Review

"The Supreme Court shall have jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court, or as otherwise provided by law." V.I. CODE ANN. tit. 4 § 32(a). This appeal of the Superior Court's final order is permissible under section 33(a) of title 4 of the Virgin Islands Code (hereafter "the Code"). Pichardo's Notice of Appeal was timely filed. *See* V.I.S.C.T.R. 5(a)(1) ("[I]f the Government of the Virgin Islands or an officer or agency thereof is a party, the notice of

appeal may be filed by any party within sixty days after [the date of entry of the judgment or order appealed from].”).

This Court exercises plenary review of the Superior Court’s decision that it lacked jurisdiction to hear Pichardo’s due process claim. *See Gov’t of V.I. v. Hodge*, 359 F.3d 312, 323 (3d Cir. 2004) (“We exercise plenary review in determining whether a court hierarchically below us had subject matter jurisdiction.”).

B. The Superior Court’s Jurisdiction on a Writ of Review

Pichardo’s argument that this Court should fashion a remedy to compensate her for the DOL’s delays rests entirely upon her contention that the Superior Court had the power to decide the constitutional issue on a writ of review. Therefore, we must first determine whether the Superior Court had jurisdiction to hear the due process claim on review of the DOL’s decision.

Title 24 of the Code is dedicated to the DOL and other labor-related issues, and section 70(a) explicitly provides a method of appeal for persons aggrieved by an adverse DOL decision, namely:

Any person aggrieved by a final order of the Commissioner . . . denying . . . the relief sought may obtain a review of such order by filing in the [Superior] Court . . . within 30 days of its issuance, a written petition praying that such decision of the Commissioner be modified or set aside.

Further, the first sentence of section 70(b) of title 24 of the Code limits the issues that may be considered by the Superior Court on review:

No objection that *has not been urged before the Commissioner* shall be considered by the Court unless the failure or neglect to urge such objection is excused because of extraordinary circumstances.

(emphasis added).

On the record before us, we can find no indication that Pichardo raised her objection to the delay in conducting the hearing with the Commissioner of Labor, nor is there any evidence that she took any action to induce the DOL to issue its decision in the many months following the hearing. Additionally, we note that Pichardo failed to allege in this Court or the Superior Court any “extraordinary circumstances” that prevented her from raising her constitutional challenge before the Administrative Law Judge (hereafter “ALJ”). Accordingly, because Pichardo failed to raise the DOL’s lengthy delay before the ALJ, we need not and do not determine whether the Superior Court was empowered to hear a due process claim in this context.

We do address another issue advanced by Pichardo, however. She argues that her petition should be governed by title 5, section 1422, rather than title 24, section 70(a).

Title 5, section 1422 reads, in full:

The writ of review shall be allowed in all cases *where there is no appeal or other plain, speedy, and adequate remedy*, and where the officer, board, commission, authority, or tribunal in the exercise of his or its functions appears to have exercised such functions erroneously, or to have exceeded his or its jurisdiction, to the injury of some substantial right of the plaintiff.

(emphasis added). Section 1422 is a general writ of review statute and is only applicable in the absence of another remedy. As title 24, section 70(a) specifically grants Pichardo the right to file a petition to review the DOL Commissioner’s decision, there is no basis for invoking the broader, catch-all provision of title 5, section 1422. *See Coady v. Vaughn*, 251 F.3d 480, 484 (3d Cir. 2001) (citing *Edmond v. U.S.*, 520 U.S. 651, 657, 117 S.Ct. 1573, 1578, 137 L.Ed.2d. 917 (1997) (“It is a well-established canon of statutory construction that when two statutes cover the same situation, the more specific statute

takes precedence over the more general one.”).

III. CONCLUSION

Title 24, section 70(b) of the Code clearly establishes that only those issues raised before the ALJ are properly reviewable by the Superior Court. Because Pichardo did not raise any claim regarding the DOL’s nineteen-month delay in granting her a hearing, the Superior Court lacked jurisdiction to review any potential prejudice she may have suffered due to the delays. It follows, then, that this Court has no jurisdiction to consider Pichardo’s due process arguments in this appeal. We therefore affirm the Superior Court’s decision.

ATTEST:

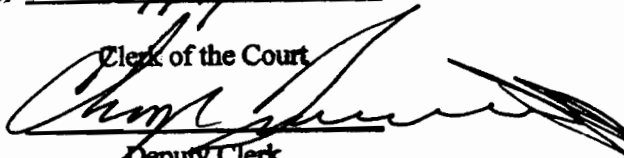
GLENDALAKE, ESQ.
Acting Clerk of the Court

By: 
Deputy Clerk

Dated: April 16, 2008

CERTIFIED A TRUE COPY

Date: 9/4/2008

By: 
Deputy Clerk

For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

ELIZABETH COCHRANE PICHARDO)	S. Ct. Civ. No. 2007-059
)	Re: Super. Ct. Civ. No. 587-2006
Appellant/Petitioner,)	
)	
vs.)	
)	
COMMISSIONER OF LABOR, ALBERT BRYAN¹, DEPARTMENT OF LABOR, GOVERNMENT OF THE VIRGIN ISLANDS, EMERALD BEACH RESORT (BEST WESTERN),)	
)	
Appellee/Respondent.)	

25
2008-05-27 PM 4:55
SUPREME COURT

On Appeal from the Superior Court of the Virgin Islands
Considered: December 20, 2007
Filed: May 27, 2008

BEFORE: RHYS S. HODGE, Chief Justice; MARIA M. CABRET, Associate Justice; and IVE ARLINGTON SWAN, Associate Justice.

JUDGMENT ORDER OF THE COURT

PER CURIAM.

In accordance with the premises considered and the memorandum opinion of even date, it is hereby

ORDERED that the dismissal of the writ of review is **AFFIRMED**; and it is further

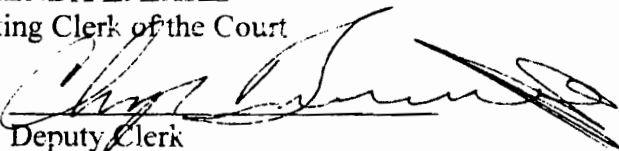
ORDERED that copies of this order be directed to the parties.

SO ORDERED this 27th day of May, 2008.

¹ The original caption listed Department of Labor Commissioner Cecil Benjamin as the defendant. This Court substitutes Albert Bryan, the current Commissioner of Labor as the defendant as required by Virgin Islands Supreme Court Rule 34(c).

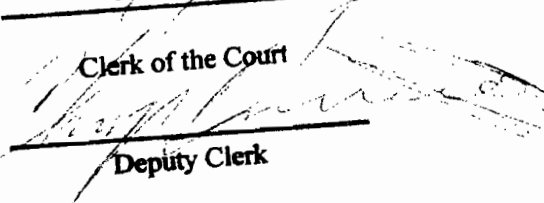
FOR THE COURT:

ATTEST:
GLENDA L. LAKE
Acting Clerk of the Court

By: 
Deputy Clerk

Dated: 6/2/2008

- Copies (with accompanying memorandum) to:
- Justices of the Supreme Court
- Judges of the Superior Court
- Elizabeth Cochrane Pichardo, *Pro Se*
- Michelle T. Meade, Esq.
- Glenda L. Lake, Esq., Acting Clerk of the Supreme Court
- Venetia Harvey Velazquez, Clerk of the Superior Court
- Supreme Court Secretaries
- Supreme Court Law Clerks
- Webmaster
- Order Book

CERTIFIED A TRUE COPY
Date: 6/2/2008
Clerk of the Court
By: 
Deputy Clerk

For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

ELIZABETH COCHRANE PICHARDO)	S. Ct. Civ. No. 2007-059
)	Re: Super. Ct. Civ. No. 587-2006
Appellant/Petitioner,)	
)	
vs.)	
)	
COMMISSIONER OF LABOR, ALBERT)	
BRYAN ¹ , DEPARTMENT OF LABOR,)	
GOVERNMENT OF THE VIRGIN ISLANDS,)	
EMERALD BEACH RESORT (BEST)	
WESTERN),)	
)	
Appellee/Respondent.)	

SUPREME COURT
2008-05-27 PM 4:55

On Appeal from the Superior Court of the Virgin Islands
Considered: December 20, 2007
Filed: May 27, 2008

BEFORE: RHYS S. HODGE, Chief Justice; MARIA M. CABRET, Associate Justice; and
IVE ARLINGTON SWAN, Associate Justice.

APPEARANCES:

Elizabeth Cochrane Pichardo (Argued),
Pro Se

Michelle T. Meade, Esq. (Argued)
Dudley, Clark & Chan, LLP
St. Thomas, U.S.V.I
Attorney for Appellee

MEMORANDUM OPINION

PER CURIAM. —

Before the Court is Appellant’s challenge to the Superior Court order dismissing her petition for writ of review as untimely. For the reasons stated below, we will affirm the dismissal.

¹ The original caption listed Department of Labor Commissioner Cecil Benjamin as the defendant. This Court substitutes Albert Bryan, the current Commissioner of Labor as the defendant as required by Virgin Islands Supreme Court Rule 34(c).

I. BACKGROUND

Elizabeth Cochrane Pichardo (“Appellant” or “Pichardo”), *pro se*, filed a discrimination complaint with the Virgin Islands Department of Labor against her employer, Emerald Beach Resort (Best Western) (“Appellee” or “Emerald Beach”) in November, 2000. After a long delay, the Department of Labor Administrative Law Judge (“ALJ”) issued a written decision on July 17, 2006 in which Emerald Beach prevailed.

While in New York for medical treatment, Pichardo claims she filed, via facsimile, a petition for writ of review (“petition”), titled “Notice for Appeal”, with the Superior Court, Division of St. Croix on August 18, 2006. As part of the joint appendix filed with this Court we have a fax confirmation report generated by Pichardo’s sending machine showing the successful transmission of seven pages to the Superior Court’s St. Croix fax number, supplied by a deputy clerk of the court. (J.A. at 30.) The Superior Court’s St. Croix Division did not docket or place in the record this faxed petition. Pichardo also faxed the petition to Mr. Edgar Philips, a friend of hers on St. Thomas, who allegedly hand-delivered a copy of the petition to the Superior Court’s St. Thomas Division on August 21, 2006. The joint appendix also contains a copy of her petition which includes a Superior Court stamp with the date and time of “2006 AUG 21 PM 2:08.” (J.A. at 32-37, backside.) The Superior Court’s St. Thomas Division did not docket or place in the record this hand-delivered petition, and the record does not reflect whether the court transferred the documents to the St. Croix Division. After returning to the Virgin Islands, Pichardo filed a third copy of the petition with the Superior Court in St. Croix on September 27, 2006, the only filing docketed in this appeal. Emerald Beach claims Pichardo never served them with the petition.

On October 6, 2006, the Superior Court dismissed the action for failure to comply with Superior Court Rule 15, requiring a certificate of the attorney to accompany the petition. Pichardo

filed a motion to vacate the dismissal,² which was granted on October 23, 2006. On January 17, 2007, the Superior Court granted Appellee's motion to reconsider this vacatur and dismissed the case for lack of jurisdiction on the grounds that the petition for writ of review filed on September 27, 2006 was untimely. Appellant filed this timely appeal on March 2, 2007.³

II. DISCUSSION

Pichardo appeals the Superior Court's dismissal of her petition for review for untimeliness.^{Equity} This Court has jurisdiction over timely appeals from final orders of the Superior Court. V.I. CODE ANN. tit. 4, § 32(a) (2004). The standard of review for this Court in examining the Superior Court's application of law is plenary. *St. Thomas-St. John Bd. of Elections v. Daniel*, Civ. No. 2007-96, 2007 WL 4901116, at *4 (V.I. Sept. 17, 2007). We review findings of fact for clear error. *Judi's of St. Croix Car Rental, v. Weston*, Civ. No. 2007-50, 2008 WL 901485, at *2 (V.I. Feb. 22, 2008). We exercise plenary review over the Superior Court's subject matter jurisdiction determination. *Id.*

The Department of Labor issued its decision on Pichardo's discrimination complaint on July 17, 2006. The Superior Court opined, and Pichardo does not challenge, that she had notice of the ALJ's decision by July 21, 2006. In determining the timeliness of the petition, the Superior Court relied on Superior Court Rule 15(a) which states that a petition for writ of review "shall be filed within 30 days after the date of the decision or determination complained of" Sup. Ct. R. 15(a). Notwithstanding the clear and unambiguous language of Rule 15(a), Superior Court judges have historically interpreted the rule to mean that the petition for review must be filed within thirty days of notice of the decision. *See, e.g., Tip Top Constr., Inc. v. Gov't*, 41 V.I. 72, 74-75 (V.I. Super. Ct. 1999) ("Notwithstanding the plain and unambiguous language of the rule, case law has interpreted

² The time to appeal the October 6, 2006. decision was stayed pending the outcome of the motion to vacate. *See* V.I.S.C.T.R. 5(a)(4).

³ Virgin Islands Supreme Court Rule 5(a)(1) provides a sixty day deadline to file an appeal when the Government of the Virgin Islands is a party.

the thirty (30) day filing period to run not from the date of the offending order, but from the date of notice of the order to the petitioner.” citing *In re Hodge*, 16 V.I. 548, 555 (V.I. Super. Ct. 1979)). We need not determine whether reading “notice” into the rule is incongruous with its plain language or whether the time limit therein is jurisdictional because the judicial review of an administrative order in employment discrimination cases is specifically provided for by title 24, section 457(a) of the Virgin Islands Code, requiring:

[a]ny person aggrieved by a final order of the department granting or denying in whole or in part the relief sought may obtain a review of such order by filing in a court of competent jurisdiction, *within 30 days of its issuance*, a written petition praying that such decision of the department be modified or set aside.

24 V.I.C. § 457(a) (emphasis added).

When the time to appeal or seek review is established by statute, timeliness is a jurisdictional issue, therefore, a petition filed out of time deprives the court of jurisdiction to entertain the appeal. {Equity}

See Bowles v. Russell, ___ U.S. ___, 127 S. Ct. 2360, 2366, 168 L.Ed.2d 96 (2007) (“As we have long held, when an appeal has not been prosecuted in the manner directed, within the time limited by the acts of Congress, it must be dismissed for want of jurisdiction.” (internal quotation marks omitted)); *see also Brown v. People*, Crim. No. 2007-063, 2008 WL 410114, at *1 (V.I. January 31, 2008) (citing *Bowles*, 127 S. Ct. at 2362) [The *Bowles* Court also noted that courts are without authority to apply equitable principles to disregard the time limits established by statute for prosecuting appeals.]

Bowles, 127 S. Ct. at 2366. Here, section 457(a)’s legislatively-mandated thirty-day time limit from the date of issuance is jurisdictional and may not be equitably modified by courts. *See Carreau v. Bd. of Trs. of Manchester Employees' Contributory Ret. Sys.*, 945 A.2d 687, 689 (N.H. 2008) (“Contrary to the petitioner’s assertions, we have no authority to create equitable exceptions to jurisdictional requirements. Statutory time requirements relative to the vesting of jurisdiction must

be distinguished from our own procedural rules.” (quoting *Bowles*, 127 S. Ct. at 2366) (internal quotation marks, ellipses and brackets omitted)).

Pichardo’s deadline to file her petition for review and to confer jurisdiction on the Superior Court was August 16, 2006, thirty days from the July 17, 2006 issuance of the ALJ’s order. 24 V.I.C. § 457(a). The Superior Court found that Pichardo filed the petition on September 27, 2006, more than thirty days past the deadline. Appellant’s assertion that the petition was filed by fax on August 18, 2006, or that it was filed in person on August 21, 2006, is of no significance since either date is beyond the statutory deadline to file the petition for review. *See id.*; *Carreau*, 945 A.2d at 689. Appellant makes no claim, and the record is void of any indication, that the petition for review was filed in any form or in any division of the Superior Court by the August 16, 2006 deadline. Accordingly, the petition was untimely and was properly dismissed by the Superior Court for lack of jurisdiction.

III. CONCLUSION

Because the record reflects that Pichardo’s petition for writ of review was not filed by the August 16, 2006 deadline, we affirm the Superior Court’s dismissal order.

Dated this 27th day of May, 2008.

ATTEST:

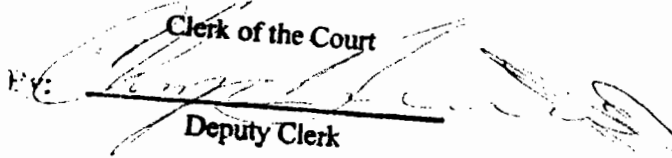
GLENDALAKE, Esq.
Acting Clerk of the Court

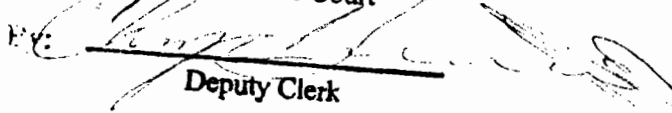
By: 
Deputy Clerk

Dated: 6/2/2008

CERTIFIED A TRUE COPY

Date: 6/2/2008


Clerk of the Court

BY: 
Deputy Clerk

RECEIVED AUG 20 2008

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

ELIZABETH PICHARDO,)
Petitioner,)
v.)
CECIL R. BENJAMIN, COMMISSIONER OF)
LABOR, GOVERNMENT OF THE VIRGIN)
ISLANDS, and COOL IT, INC. d/b/a AGAVE)
TERRACE RESTAURANT,)
Respondents.)

) S. Ct. Civ. No. 2007-061
) Re: Super. Ct. Civ. No. 085/2004

SUPREME COURT
2008 AUG 19 AM 3:03

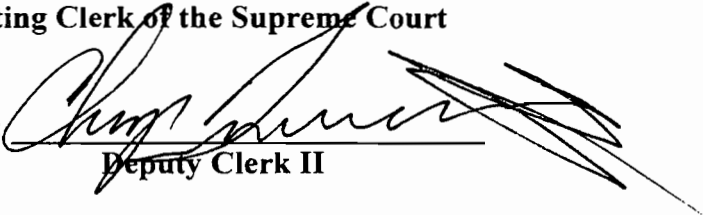
NOTICE OF ENTRY OF ORDER

TO: Justices of the Supreme Court
Justice Pro Tem Thomas K. Moore
Kathleen Navin, Esq.
Richard S. Davis, Esq.
Micole L. Morgan, Esq.
Glenda L. Lake, Esq., Acting Clerk of the Court
Supreme Court Law Clerks
Supreme Court Secretaries
Order Book

Please take notice that on August 19, 2008, an ORDER dated August 19, 2008, was entered by the Clerk in the above-entitled matter.

Dated: August 19, 2008

GLENDAL. LAKE, ESQ.
Acting Clerk of the Supreme Court

By: 
Deputy Clerk II

Pichardo (hereafter "Pichardo"), on April 30, 2008, pursuant to Supreme Court Rule 31. In her petition, Pichardo asks us to reconsider our April 16, 2008 holding that the Superior Court lacked jurisdiction to consider her constitutional claims on a writ of review.

This matter initially came before us on Pichardo's appeal of a Superior Court order holding that the reviewing court lacked jurisdiction to rule on her due process claims because a writ of review is not the proper method for raising such claims. After hearing oral arguments on this topic, we issued a Memorandum Opinion wherein we held that the Superior Court lacked jurisdiction to review any potential prejudice Pichardo may have suffered due to the Department of Labor's delays in bringing her case to hearing and issuing its opinion². We reasoned that title 24, section 70(b) of the Virgin Islands Code provides for Superior Court review of only those issues "urged before the Commissioner [of Labor]." 24 V.I.C. § 70(b). We noted that:

On the record before us, we can find no indication that Pichardo raised her objection to the delay in conducting the hearing with the Commissioner of Labor, nor is there any evidence that she took any action to induce the DOL to issue its decision in the many months following the hearing.

(Mem. Op. 5.)

In her Petition for Rehearing, Pichardo points this Court to an October 6, 2003 letter she wrote to the Commissioner of Labor in which she expresses her discontent with the Administrative Law Judge's delay in issuing a decision in her case. This letter was not, however, contained in the Joint Appendix filed contemporaneously with Pichardo's appellate brief. *See* V.I.S.C.T.R. 24(a) (stating that it is the duty of Appellant to file an appendix to the briefs containing all relevant parts of the Superior Court record referred to in the briefs). Nor did

² Pichardo filed a complaint with the Department of Labor, on April 12, 1999, alleging that she was wrongfully discharged by her employer, Agave Terrace Restaurant. There was an unexcused nineteen-month delay in holding a hearing in this matter and an additional twenty-three month delay in issuing the opinion, which ultimately held that Pichardo was not wrongfully terminated. Pichardo thereafter sought a writ of review in the Superior Court challenging the Department of Labor's decision and raising a due process claim.

Pichardo make specific reference to the letter in her brief as required by our rules. *See* VISCR 22(a)(3) (“[A statement of the issues presented for review] shall include a designation by reference to specific pages of the appendix or place in the proceedings at which each issue on appeal was raised, objected to, and ruled upon”); VISCR 22(d) (“All assertions of fact in briefs shall be supported by a specific reference to the record.”).

Nevertheless, we are not persuaded that the letter properly urged Pichardo’s objections before the Commissioner of Labor, as required by title 24, section 70(b) of the Virgin Islands Code. Rather, the letter simply states that Pichardo is “being denied [her] rights under the VI Rules and Regulations as promulgated on March 18, 1981.” (Ltr. of Elizabeth Pichardo to Cecil R. Benjamin, Commissioner of Labor, dated October 6, 2003). From this language, it is evident that Pichardo’s letter was merely an attempt to induce the Commissioner of Labor to issue an opinion in accordance with the Virgin Islands Rules and Regulations. Therefore, we find that the letter fails to sufficiently raise any alleged constitutional violations. *See Handa v. Clark*, 401 F.3d 1129, 1132 (9th Cir. 2005) (passing reference to constitutional claim is insufficient to raise claim); *see also Cooper v. Chao*, 71 Fed. Appx. 76, 77 (1st Cir. 2003) (unpublished opinion) (vague and cryptic assertions were insufficient to raise and preserve constitutional claims for appeal).

Accordingly, the Court having considered the premises, it is hereby

ORDERED that the Petition for Rehearing is **DENIED**; and it is further

ORDERED that copies of this order be directed to the parties.

SO ORDERED this 18th day of August, 2008.

ATTEST:

GLENDALAKE, ESQ.
Acting Clerk of the Court

By: 
Deputy Clerk

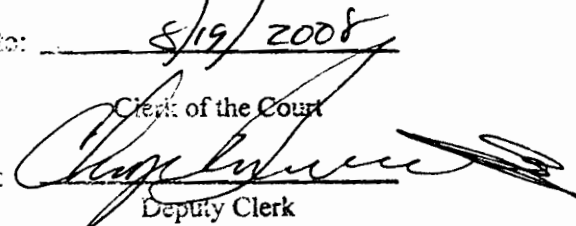
Dated: 8/19/2008

Copies to:
Justices of the Supreme Court
Justice *Pro Tem* Thomas K. Moore
Kathleen Navin, Esq.
Richard S. Davis, Esq.
Micol L. Morgan, Esq.
Glenda L. Lake, Esq., Acting Clerk of the Supreme Court
Supreme Court Law Clerks
Supreme Court Secretaries
Order Book

cas 8/19/08

CERTIFIED A TRUE COPY

Date: 8/19/2008

By: 
Deputy Clerk

CERTIFICATE OF SERVICE

I hereby certify that on this 2nd day of May, 2007 a true and exact copy of the foregoing Notice of Appeal was sent via U.S. mail, postage prepaid, and *via facsimile* to:

Joel H. Feld, Esq.
Assistant Attorney General
Department of Justice
48B-50C Kronprindsens Gade
GERS Bldg., 2nd floor
St. Thomas, USVI 00802

Micol L. Morgan, Esq.
Ogletree, Deakins, Nash, Smoak & Stewart, LLC
The Tunick Building
1336 Beltjen Road, Suite 202
St. Thomas. USVI 00802



* This notice of appeal was filed on May 2, 2007.

** Notice to the Trial Judge is being accomplished by both delivering and mailing a copy of this notice to Justice Edgar D. Ross at the Superior Court of the Virgin Islands, Division of St. Thomas & St. John.

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

ELIZABETH PICHARDO,

Appellant,

vs.

ALBERT BRYAN, COMMISSIONER OF LABOR,
GOVERNMENT OF THE VIRGIN ISLANDS,
COOL IT INC., d/b/a AGAVE TERRACE
RESTAURANT,

Appellees.

)
) S. CT. CIV. APP. NO. 2007-061
)
) (In Re: Sup. Ct Civ. No. 340/1985)
)
)

ORDER

Having participated in this matter at the trial level, the undersigned now hereby
recuses himself from consideration of any issues arising on appeal.

SO ORDERED this 31st day of October 2007.

DATED: *October 31, 2007*


RHYS S. HODGE
Chief Justice

ATTEST:

VENETIA H. VELAZQUEZ, ESQ.
Clerk of the Court


By: Deputy Clerk Designee

CERTIFIED A TRUE COPY

Date: *November 2, 2007*

VENETIA H. VELAZQUEZ
Clerk of the Court

BY: 
Deputy Clerk

Copy to: Hon. Maria M. Cabret
Hon. Ive Arlington Swan
Counsel of record

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

2008 APR 16 PM 5:07

SUPREME COURT

ELIZABETH PICHARDO,)	S. Ct. Civ. No. 2007-061
Appellant/Plaintiff,)	Re: Super. Ct. Civ. No. 2004-085
)	
v.)	
)	
CECIL R. BENJAMIN, COMMISSIONER)	
OF LABOR, GOVERNMENT OF THE)	
VIRGIN ISLANDS, and COOL IT, INC.)	
d/b/a/ AGAVE TERRACE RESTAURANT,)	
Appellees/Defendants.)	

On Appeal from the Superior Court of the Virgin Islands
Considered: December 17, 2007
Filed: April 16, 2008

BEFORE: MARIA M. CABRET, Associate Justice; IVE ARLINGTON SWAN, Associate Justice; and THOMAS K. MOORE, Justice Pro Tem¹.

APPEARANCES:

Kathleen Navin, Esq.
Legal Services
St. Thomas, U.S.V.I.
Attorney for Appellant

Richard S. Davis, Esq.
Assistant Attorney General
St. Thomas, U.S.V.I.
Attorney for Appellee Government of the Virgin Islands

Micol L. Morgan, Esq.
St. Thomas, U.S.V.I.
Attorney for Appellee Cool It, Inc.

ORDER OF THE COURT

PER CURIAM.

AND NOW, consistent with the reasons outlined in the Memorandum Opinion of even date, it is hereby

¹ Chief Justice Rhys S. Hodge was recused from this matter. By designation, Judge Moore sits in his place pursuant to V.I. CODE ANN. tit. 4 § 24(a).

ORDERED that the Superior Court Order affirming the decision of the Department of Labor is **AFFIRMED**; and it is further

ORDERED that copies of this order be directed to the parties.

SO ORDERED this 16th day of April, 2008.

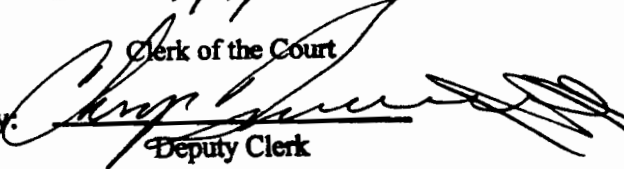
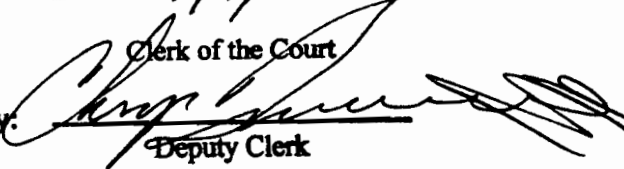
GLENDALAKE, ESQ.
Acting Clerk of the Court

By: 
Deputy Clerk

Dated: April 16, 2008

CERTIFIED A TRUE COPY

Date: 9/4/2008


Clerk of the Court
By: 
Deputy Clerk

Copies to:

Justices of the Supreme Court
Justices of the Superior Court
Justice Pro Tem Thomas K. Moore
Kathleen Navin, Esq.
Richard S. Davis, Esq.
Micol L. Morgan, Esq.
Glenda L. Lake, Esq., Acting Clerk of the Supreme Court
Venetia Harvey Velazquez, Esq., Clerk of the Superior Court
Supreme Court Law Clerks
Jacqueline Reovan
Arlene Sutton
Janiese Kelly
Order Book

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

ELIZABETH PICHARDO,

Appellant,

v.

ALBERT BRYAN, COMMISSIONER OF LABOR,
GOVERNMENT OF THE VIRGIN ISLANDS,
COOL IT INC., d/b/a AGAVE TERRACE
RESTAURANT,

Appellee,

S.Ct. Civ. No. 2007/061

Sup.Ct. Civ. No.340/1985

NOTICE OF ENTRY OF JUDGMENT/ORDER

TO: Hon. Maria M. Cabret
Associate Justice

Hon. Ive Arlington Swan
Associate Justice

Kathleen Vain, Esq.

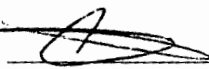
Joel H. Feld, Esq.

Micol L Morgan, Esq.

Please take notice that on October 31, 2007, an **ORDER OF THE COURT** dated October 31, 2007, was entered by the Clerk in the above-entitled matter.

Dated: November 2, 2007

VENETIA H. VELÁZQUEZ, ESQ.
Clerk of the Court

By: 
TICEY A. THOMAS
Deputy Clerk II

IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS & ST. JOHN

ELIZABETH PICHARDO,)	CIVIL NO. 85/2004
)	
Petitioner,)	
)	WRIT OF REVIEW
vs.)	
)	
CECIL R. BENJAMIN, COMMISSIONER OF)	
LABOR, GOVERNMENT OF THE VIRGIN)	
ISLANDS, COOL IT, INC, D/B/A AGAVE)	
TERRACE RESTAURANT,)	
)	
Respondents.)	
)	

MEMORANDUM AND ORDER

THIS MATTER is before the Court on Petitioner's Petition for Writ of Review. For the following reasons the Department of Labor's decision is affirmed.

FACTS

Elizabeth Pichardo ("Pichardo" or "Petitioner") worked as a server/cashier for Cool it, Inc. d/b/a/ Agave Terrace Restaurant ("Agave" or "Respondent") from August 12, 1998 until she was terminated on April 10, 1999. Pichardo filed a Wrongful Discharge Act ("WDA") complaint against Agave on April 12, 1999 with the Virgin Islands Department of Labor ("Labor"). A hearing was held before an Administrative Law Judge ("ALJ") on January 14, 2002. No transcript of the hearing was generated because the recording was of poor quality. The ALJ, after much delay, rendered a decision on December 16, 2003.

Petitioner was written up November 15, 1998 for smoking around the laundry area, leaving cigarette butts on the ground and not doing her "sidework" properly. Petitioner

claims that she was unaware that she could not smoke in the laundry area and that she was never told that her "sidework" was unsatisfactory. While working at Agave Pichardo was written up on January 20, 1999 for missing work. Petitioner defended against this written reprimand asserting that the schedule was changed and Agave never informed her of said change. Petitioner was again written up on February 13, 1999 for insubordination for refusing to set a table, resulting in a two shift suspension. Pichardo claims that she refused to set the table because she was too busy. On March 30, 1999 Petitioner was written up for spreading ill will by talking to coworkers about suing the restaurant and causing more problems to with service through out the restaurant, resulting in a two shift suspension. Petitioner claims that she was not told which employees said that she was talking about suing and that she was not given specifics about problems she was causing. Petitioner responded to all of the written reprimands on April 7, 1999.

Petitioner was not given a written reprimand but Respondent asserts that on November 7, 1998 a customer paid his check by credit card but did not leave a tip on the credit card. Petitioner claims that the tip was left in cash. Agave claims that they called the customer and he complained about her service. Additionally Respondent claims that Petitioner was often late for work.

DISCUSSION

An aggrieved party seeks judicial review or writ of review when he/she believes an officer, board, commission, authority or agency tribunal has exercised its functions erroneously in rendering an administrative order or decision. *V.I. Coalition of Citizens with Disabilities, Inc. v. Government of the Virgin Islands*, 47 V.I. 315, 320 (V.I.Super.Ct. 2005). Generally, "substantial evidence" is the standard of review of an administrative agency's

order or decision. *Id.* Substantial evidence is "such evidence that a reasonable mind might accept as adequate to support a conclusion; evidence beyond a scintilla." *Id.* (Citing *See also Tutu Park Ltd. v. V.I. Board of Tax Review*, 38 V.I. 119 (V.I.Super.Ct.1998)). An administrative decision supported by substantial evidence is not subject to reversal merely because it may also support a contradictory conclusion. *Id.* (Citing *See Port Norris Exp. Co., Inc. v. I.C.C.*, 697 F.2d 497 (3rd Cir.1982) (the possibility of drawing two inconsistent conclusions does not prevent an administrative agency's findings from being supported by substantial evidence)). The petitioner bears the burden of persuasion to affirmatively demonstrate nonconformity with statutory requirements (as would invalidate an assessment). *Id.* at 321 (Citing *See Tutu Park Ltd. v. V.I. Board of Tax Review*, 38 V.I. 119 (V.I.Super.Ct. 1998)).

Petitioner claims that she was wrongfully discharged from her job at Agave in violation of the WDA found at 24 V.I.C. §27 which provides that:

- (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.

(b) The Commissioner may by rule or regulation adopt additional grounds for discharge of an employee not inconsistent with the provisions enumerated in subsection (a) of this section.

(c) Any employee discharged for reasons other than those stated in subsection (a) of this section shall be considered to have been wrongfully discharged; however, nothing in this section shall be construed as prohibiting an employer from terminating an employee as a result of the cessation of business operations or as a result of a general cutback in the work force due to economic hardship, or as a result of the employee's participation in concerted activity that is not protected by this title.

Petitioner presents three issues for this Court to review. The first two relate to the delays in getting a hearing and the inability of Labor to produce a transcript of said hearings. Although this case has been plagued by unexplained delays a writ of review is not the proper method to address such complaints. The writ is to review the ALJ's decision not the administrative processes employed by Labor. These administrative delays, although egregious, have very little, if anything, to do with whether Agave terminated Pichardo for cause.

No objection that has not been urged before the Commissioner shall be considered by the Court unless the failure or neglect to urge such objection is excused because of extraordinary circumstances. *Thomas v. Abamar-BB*, 934 F.Supp. 164 (D.V.I. 1996). As this Court is without the hearing transcript it will assume that the objections raised to the ALJ's findings were raised during the hearing; affording Petitioner protection of claims that she may have lost due to the absence of said transcript.

The third issue is whether Respondent met its burden of proof by clear and convincing evidence in the hearing before the ALJ. The ALJ used a preponderance of evidence standard. *Pichardo v. Agave Terrace Restaurant*, Government of the Virgin Islands, Department of Labor, Hearing and Appeals Unit Case No. WD-192-99-STT, p. 5 (December 16, 2003). The proper stand for the ALJ to provide is substantial evidence. 24

V.I.C. §70(b), *Thomas*, 934 F.Supp. at 167. As stated above substantial evidence is "such evidence that a reasonable mind might accept as adequate to support a conclusion; evidence beyond a scintilla." *V.I. Coalition of Citizens with Disabilities, Inc.*, 47 V.I. at 320.

Preponderance of evidence is defined as evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. *Harris v. State*, 794 So.2d 1214, 1221 (Ala.Crim.App. 2000)(Citing Black's Law Dictionary 1182 (6th ed.1990)). Although the ALJ did not use the proper standard when he presided over the hearing this error worked in Petitioners favor as the ALJ applied a higher standard for Respondent. While using a higher standard the ALJ found that Petitioner was fired for cause.

The ALJ specifically found that Agave did not violate the WDA because it had grounds to terminate Petitioner's employment under 24 V.I.C. §§76(a)(4)&(9). 24 V.I.C. §76(a)(4) concerns an employee who disobeys an employers legal instructions. Respondent put forth six witnesses whose testimony covered topics that included that Petitioner was late 3 or 4 times a week, did not properly fill out tickets which were given to the cook to prepare the food, failed to follow the standards, and did not listen to manager's orders. Petitioner argues that the witnesses are interested witnesses because they still work for Agave and that the witnesses were all lying. The ALJ's decision reports the only evidence that the witnesses lied was Petitioners own testimony. Petitioner did not raise or address that she is also an interested witness in this matter.

In making a credibility choice among several interested witnesses the ALJ has the opportunity to observe demeanor, and therefore his decision must be given great weight and

accepted unless it is contrary to sound reason. *NLRB v. Imperial Bedding Co.*, 519 F.2d 1073, (5th Cir. 1975)(Citing *Bob's Casing Crews, Inc. v. NLRB*, 458 F.2d 1301, 1303 (5th Cir. 1972); *NLRB v. Transway, Inc.*, 410 F.2d 368, 369 (5th Cir. 1972)). It is not error for the ALJ to rely on an interested witness. To deprive an employer of the right to call a current employee to testify in such a proceeding would essentially deprive the employer of the ability to put on a defense. In a WDA claim current employees are the most likely witnesses. Petitioner makes no assertion that the witnesses were coerced or coached and presents no sound reason why the interested witnesses are to be disbelieved.

Petitioner also argued that the ALJ relied on hearsay evidence. An administrative hearing officer may rely on hearsay for her decision if the hearsay is not the sole basis for the decision. *Pappas v. State*, 135 Wash.App. 1008, (Wash.App.Div. 2006). Petitioner and Respondent presented the ALJ with non hearsay witness testimony and Petitioner's responses to Agave's written reprimands. And hearsay evidence combined with a party's refusal to deny or refute the allegations is sufficient to support findings of fact. *Id.* In this case Petitioner denies the allegations surrounding her firing for cause but did not respond to the written reprimands until she was suspended for the second time, and therein because she was not put on the work schedule. This is behavior that the ALJ can consider when he reviews the connected hearsay evidence.

Petitioner concedes that Respondent offered evidence of small infractions but that Respondent did not fire Petitioner for any of these reasons. The ALJ found that the termination was not wrongful in that Petitioner failed to follow reasonable Orders, not performing certain tasks and inability to work with other employees. It is the culmination of

a series of small infractions which was the basis for the termination. The WDA does not require one specific incident as a ground for a proper termination.

The facts presented show more than hearsay. Petitioner has failed in its burden to show how the ALJ was out of conformity with the statutory requirements or that the ALJ's decision was unreasonable. The ALJ's decisions were supported by reasonable evidence; evidence that a reasonable mind might accept as adequate to support a conclusion.


ORDER

In accordance with the foregoing, the premises considered, it is hereby


ORDERED that that the decision of the Department of Labor, case no. 192-99-STT is **AFFIRMED**; and it is further;

ORDERED that copies of this order shall be directed to the Respondent Agave's counsel of record and Petitioners Elizabeth Pichardo, *Pro Se*.

DATED: 30 MARCH 07

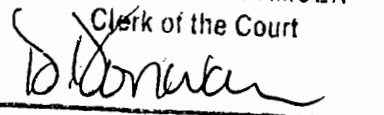


EDGAR D. MOSS
Senior Sitting Judge of the Superior
Court of the Virgin Islands

ATTEST: 
DENISE D. ABRAMSEN
CLERK OF THE COURT 3 130107

CERTIFIED A TRUE COPY

Date 4/2/07
DENISE D. ABRAMSEN
Clerk of the Court

BY 
Deputy

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

ELIZABETH PICHARDO,)

Petitioner,)

vs.)

COMMISSIONER OF LABOR)
CECIL R. BENJAMIN, DEPARTMENT OF LABOR,)
GOVERNMENT OF THE VIRGIN ISLANDS,)
COOL IT, INC. D/B/A AGAVE TERRACE)
RESTAURANT,)

Respondents,)

CIVIL NO. 85/2004

STIPULATION FOR SUBSTITUTION OF COUNSEL

The undersigned attorneys do hereby stipulate and agree that Ogletree, Deakins, Nash, Smoak & Stewart, LLC shall be substituted for Dudley, Topper and Feuerzeig; LLP, as attorneys for respondent, Cool It, Inc. d/b/a Agave Terrace Restaurant ("Agave").

All pleadings, orders, correspondence and other communications addressed to Agave in this litigation shall henceforth be served on the offices of Ogletree, Deakins, Nash, Smoak & Stewart, LLC at the address listed below.


RECEIVED

05 JAN -3 PM 4:36

TERRITORY COURT OF
THE VIRGIN ISLANDS

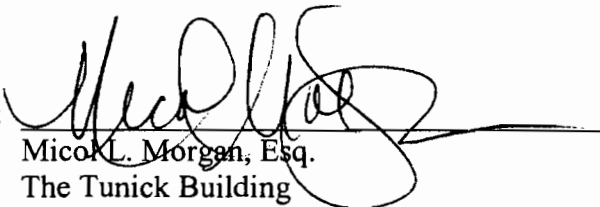
DUDLEY, TOPPER and FEUERZEIG, LLP

Dated: January __ __, 2005


By: 
Gregory H. Hodges, Esq.
Chad C. Messier
1000 Frederiksberg Gade
P.O. Box 756
St. Thomas, USVI 00804
Telephone: (340) 774-4422
Facsimile: (340) 715-4400

**OGLETREE, DEAKINS, NASH, SMOAK
& STEWART, LLC**

DATED: January 3, 2005

By: 
Micol L. Morgan, Esq.
The Tunick Building
1336 Beltjen Road, Suite 202
St. Thomas, USVI 00802
Telephone: (340) 714-1233
Facsimile: (340) 714-1245

SO ORDERED THIS 4th DAY OF January 2005.

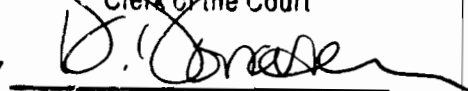

RHYS S. HODGE, Administrative Judge
Superior Court of the Virgin Islands

ATTEST:


DENISE D. ABRAMSEN
Clerk of the Court

CERTIFIED A TRUE COPY

Date 1/12/05
DENISE D. ABRAMSEN
Clerk of the Court

BY 
Deputy

DATED: JANUARY 11, 2005

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS/ST. JOHN

Plaintiff
Elizabeth Pichardo
Vs.
Commissioner of Labor, Cecil R. Benjamin, Dept. of
Labor, Govt. of the Virgin Islands

Defendant

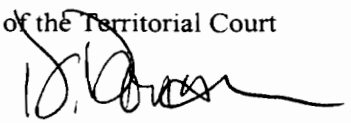
CASE NO. Civil No. 85/2004
ACTION FOR: Writ of Review

NOTICE
OF
ENTRY OF ORDER

TO: Micol Morgan Esquire Cecil R. Benjamin, Commissioner of Labor
Alexander Dawson - Legal Services Esquire E. Pichardo, P.O. Box 5164, St. Thomas, VI 00803
Richard S. Davis (A.G. Office) Esquire _____

Please take notice that on December 1, 2004 an Order was
entered by this Court in the above-entitled matter.

Dated: December 6, 2004

Denise D. Abramsen
Clerk of the Territorial Court

By: D. Donovan
Judicial Assistant

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

ELIZABETH PICHARDO,

Petitioner,

vs.

COMMISSIONER OF LABOR
CECIL BENJAMIN, DEPARTMENT OF
OF LABOR, GOVERNMENT OF THE
VIRGIN ISLANDS,

Respondents.

CIVIL NO. 85/2004

WRIT OF REVIEW

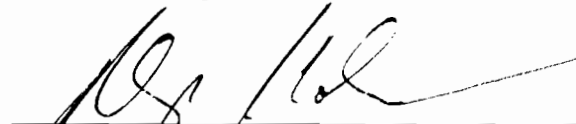
ORDER

This matter is before the Court upon the Petitioner's Motion for Extension of Time to Respond to the Court's Order of October 13th, 2004.

The Court finds that the Movant has alleged adequate basis to extend the time to respond. **NOW THEREFORE, IT IS SO ORDERED** that the Movant, Alexander Dawson, Esq., Attorney for the Petitioner, is allowed until December 12, 2004 to submit Petitioner's response.

ORDERED that this Order be served on all named parties.

DATED: December 1, 2004


HON. RHYS HODGE
Judge of the Territorial Court
of the Virgin Islands

ATTEST:

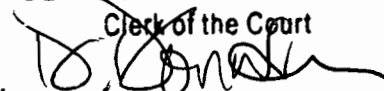
DENISE D. ABRAMSEN

Clerk of the Court

By: _____

CERTIFIED A TRUE COPY

Date 12/6/04
DENISE D. ABRAMSEN
Clerk of the Court

BY 
Deputy

DATED: DECEMBER 1, 2004

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

ELIZABETH PICHARDO)
)
Petitioner)
)
v.)
)
COMMISSIONER OF LABOR)
CECIL BENJAMIN, DEPARTMENT)
OF LABOR, GOVERNMENT OF)
THE VIRGIN ISLANDS,)
)
Respondent)

Civil No.: 85/2004
Petition for Writ of Review


RECEIVED
ON MAR 29 PM 2:48
TERRIT. ST. THOMAS & ST. JOHN

MOTION FOR RECONSIDERATION

COMES NOW, the Petitioner, Elizabeth Pichardo, Pro-Se, and moves this Honorable Court to reconsider its Order of March 17, 2004 denying Relief for Failure to Timely file and Appeal from the Department of Labor. Petitioner submits that she did not receive notice from the Department of Labor until January 26, 2004, when the Commissioner of Labor sent his Order and Affidavit, a copy of the Administrative Law Judge thereto, Petitioner submits that the time did not begin to run on December 16, 2003, but rather on January 20, 2004. The Appeal was filed on February 20, 2004 and returned on March 17, 2004, well within the thirty-day period allowed for an Appeal.

This is the interest of Justice. Petitioner prays to this Honorable Court to reconsider its Order of March 17, 2004 and allow Petitioner to prosecute her case on these merits.

Dated: March 29, 2004


ELIZABETH PICHARDO
P.O. Box 5164
St. Thomas, VI 00803
Tel. No.: (340) 775-4763

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

ELIZABETH PICHARDO,)

Petitioner,)

vs.)

COMMISSIONER OF LABOR,)
CECIL BEJAMIN, DEPARTMENT OF)
LABOR, GOVERNMENT OF THE)
VIRGIN ISLANDS,)

Respondents.)

CIVIL NO. 85/2004

WRIT OF REVIEW

FILED
2004 FEB 20 10:14 AM
ST. THOMAS

SUPPLEMENT TO MOTION FOR RECONSIDERATION

COMES NOW, Petitioner, ELIZABETH PICHARDO, through her undersigned counsel Legal Services of the Virgin Islands, Inc. (hereinafter "Legal Services"), by Samuel J. Ottley III, Esq., and hereby supplements its March 23, 2004 Motion for Reconsideration.

*Tip Top Construction
Ottley III*

Plaintiff would like to bring the case of Tip Top Construction v. Gov't of Virgin Islands, 41 V.I. 72 (Terr. Ct. 1999) to the Court's attention, which ruled that the 30 days begins running from the date of service. Again, It should also be noted that while the Commissioner signed the Order on January 20, 2004, the certificate of service states that the order was served on January 22, 2004. So Petitioner filed a timely writ of review, because she filed on February 20, 2004, which the Court has taken judicial notice of.

CERTIFICATE OF SERVICE

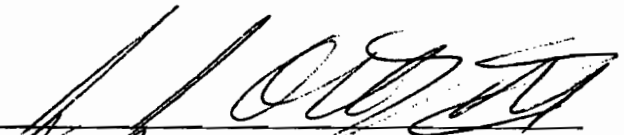
I hereby certify that the foregoing SUPPLEMENT TO MOTION FOR RECONSIDERATION was served by the U.S. mail, with first class postage thereon, and addressed to, Richard Davis, Esq., Dudley, Topper & Feurezrig, LLP, P.O. Box 756, St. Thomas, U.S.V.I. 00804 on this the 1 day of April, 2004.

A handwritten signature in black ink, appearing to be "J. J. Davis", is written over a horizontal line.

WHEREFORE, Petitioner prays that the Court will VACATE its March 17, 2004
ORDER, and GRANT Petitioner's February 20, 2004 petition for writ of review.

Respectfully submitted,

DATED: 4/1/04

By: 
SAMUEL J. OTTLEY III, ESQ.
LEGAL SERVICES OF THE VIRGIN ISLANDS
No. 47 Kongens Gade
St. Thomas, V.I. 00802
(340) 774-6720
(340) 777-8686 (fax)

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS/ST. JOHN

Plaintiff
 _____)
 Elizabeth Pichardo)
 Vs.)
)
)
 Commissioner of Labor, Cecil R. Benjamin, Dept. of)
 Labor, Govt. of the Virgin Islands)
Defendant)

CASE NO. Civil No. 85/2004

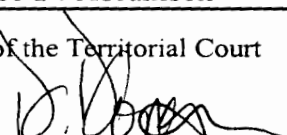
ACTION FOR: Writ of Review

NOTICE
OF
ENTRY OF ORDER

TO: Alexander Dawson - Legal Services Esquire Cecil R. Benjamin, Commissioner of Labor
Micol Morgan Esquire E. Pichardo, P.O. Box 5164, St. Thomas, VI 00803
Richard S. Davis (A.G. Office) Esquire _____

Please take notice that on November 4, 2004 an Order was entered by this Court in the above-entitled matter.

Dated: November 8, 2004

Denise D. Abramsen
 Clerk of the Territorial Court

 By: D. Donovan
 Judicial Assistant II

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

ELIZABETH PICHARDO,

Petitioner,

vs.

COMMISSIONER OF LABOR
CECIL BENJAMIN, DEPARTMENT OF
OF LABOR, GOVERNMENT OF THE
VIRGIN ISLANDS,

Respondents.

CIVIL NO. 85/2004

WRIT OF REVIEW

ORDER

This matter is before the Court upon the Petitioner's Motion for Extension of Time to Respond to the Court's Order of October 13th, 2004.

The Court finds that the Movant has alleged adequate basis to extend the time to respond. **NOW THEREFORE, IT IS SO ORDERED** that the Movant, Alexander Dawson, Esq., Attorney for the Petitioner, is allowed until November 30, 2004 to submit Petitioner's response.

ORDERED that this Order be served on all named parties.

DATED:

November 4, 2004

[Signature]

HON. RHYS HODGE
Judge of the Territorial Court
of the Virgin Islands

ATTEST:

Denise D. Abramsen
DENISE D. ABRAMSEN

Clerk of the Court

CERTIFIED A TRUE COPY

Date

Nov. 8, 2004

DENISE D. ABRAMSEN

Clerk of the Court

By: _____

BY

[Signature]

Deputy

DATED: NOVEMBER 4, 2004

IN THE TERRITORIAL COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS/ST. JOHN

Plaintiff
 Elizabeth Pichardo)
 Vs.)
 Commissioner of Labor, Cecil R. Benjamin, Department)
 of Labor, Government of the Virgin Islands)
Defendant)


CASE NO. Civil No. 85/2004
 ACTION FOR: Petition For Writ of Review

NOTICE
 OF
 ENTRY OF ORDERS(3)

TO: Samuel Ottley, III Esquire Elizabeth Pichardo
Richard S. Davis Esquire P.O. Box 5164, St. Thomas, VI
 _____ Esquire _____

Please take notice that on May 5, 2004 an Order was
 entered by this Court in the above-entitled matter.

Dated: May 7, 2004

Denise D. Abramsen
 Clerk of the Territorial Court

 By: Donna Donovan
 Judicial Assistant II

claims that she was unaware that she could not smoke in the laundry area and that she was never told that her "sidework" was unsatisfactory. While working at Agave Pichardo was written up on January 20, 1999 for missing work. Petitioner defended against this written reprimand asserting that the schedule was changed and Agave never informed her of said change. Petitioner was again written up on February 13, 1999 for insubordination for refusing to set a table, resulting in a two shift suspension. Pichardo claims that she refused to set the table because she was too busy. On March 30, 1999 Petitioner was written up for spreading ill will by talking to coworkers about suing the restaurant and causing more problems to with service through out the restaurant, resulting in a two shift suspension. Petitioner claims that she was not told which employees said that she was talking about suing and that she was not given specifics about problems she was causing. Petitioner responded to all of the written reprimands on April 7, 1999.

Petitioner was not given a written reprimand but Respondent asserts that on November 7, 1998 a customer paid his check by credit card but did not leave a tip on the credit card. Petitioner claims that the tip was left in cash. Agave claims that they called the customer and he complained about her service. Additionally Respondent claims that Petitioner was often late for work.

DISCUSSION

An aggrieved party seeks judicial review or writ of review when he/she believes an officer, board, commission, authority or agency tribunal has exercised its functions erroneously in rendering an administrative order or decision. *V.I. Coalition of Citizens with Disabilities, Inc. v. Government of the Virgin Islands*, 47 V.I. 315, 320 (V.I.Super.Ct. 2005). Generally, "substantial evidence" is the standard of review of an administrative agency's

order or decision. *Id.* Substantial evidence is "such evidence that a reasonable mind might accept as adequate to support a conclusion; evidence beyond a scintilla." *Id.* (Citing *See also Tutu Park Ltd. v. V.I. Board of Tax Review*, 38 V.I. 119 (V.I.Super.Ct.1998)). An administrative decision supported by substantial evidence is not subject to reversal merely because it may also support a contradictory conclusion. *Id.* (Citing *See Port Norris Exp. Co., Inc. v. I.C.C.*, 697 F.2d 497 (3rd Cir.1982) (the possibility of drawing two inconsistent conclusions does not prevent an administrative agency's findings from being supported by substantial evidence)). The petitioner bears the burden of persuasion to affirmatively demonstrate nonconformity with statutory requirements (as would invalidate an assessment). *Id.* at 321 (Citing *See Tutu Park Ltd. v. V.I. Board of Tax Review*, 38 V.I. 119 (V.I.Super.Ct. 1998)).

Petitioner claims that she was wrongfully discharged from her job at Agave in violation of the WDA found at 24 V.I.C. §27 which provides that:

- (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.

(b) The Commissioner may by rule or regulation adopt additional grounds for discharge of an employee not inconsistent with the provisions enumerated in subsection (a) of this section.

(c) Any employee discharged for reasons other than those stated in subsection (a) of this section shall be considered to have been wrongfully discharged; however, nothing in this section shall be construed as prohibiting an employer from terminating an employee as a result of the cessation of business operations or as a result of a general cutback in the work force due to economic hardship, or as a result of the employee's participation in concerted activity that is not protected by this title.

Petitioner presents three issues for this Court to review. The first two relate to the delays in getting a hearing and the inability of Labor to produce a transcript of said hearings. Although this case has been plagued by unexplained delays a writ of review is not the proper method to address such complaints. The writ is to review the ALJ's decision not the administrative processes employed by Labor. These administrative delays, although egregious, have very little, if anything, to do with whether Agave terminated Pichardo for cause.

No objection that has not been urged before the Commissioner shall be considered by the Court unless the failure or neglect to urge such objection is excused because of extraordinary circumstances. *Thomas v. Abamar-BB*, 934 F.Supp. 164 (D.V.I. 1996). As this Court is without the hearing transcript it will assume that the objections raised to the ALJ's findings were raised during the hearing; affording Petitioner protection of claims that she may have lost due to the absence of said transcript.

The third issue is whether Respondent met its burden of proof by clear and convincing evidence in the hearing before the ALJ. The ALJ used a preponderance of evidence standard. *Pichardo v. Agave Terrace Restaurant*, Government of the Virgin Islands, Department of Labor, Hearing and Appeals Unit Case No. WD-192-99-STT, p. 5 (December 16, 2003). The proper stand for the ALJ to provide is substantial evidence. 24

V.I.C. §70(b), *Thomas*, 934 F.Supp. at 167. As stated above substantial evidence is "such evidence that a reasonable mind might accept as adequate to support a conclusion; evidence beyond a scintilla." *V.I. Coalition of Citizens with Disabilities, Inc.*, 47 V.I. at 320.

Preponderance of evidence is defined as evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. *Harris v. State*, 794 So.2d 1214, 1221 (Ala.Crim.App. 2000)(Citing Black's Law Dictionary 1182 (6th ed.1990)). Although the ALJ did not use the proper standard when he presided over the hearing this error worked in Petitioners favor as the ALJ applied a higher standard for Respondent. While using a higher standard the ALJ found that Petitioner was fired for cause.

The ALJ specifically found that Agave did not violate the WDA because it had grounds to terminate Petitioner's employment under 24 V.I.C. §§76(a)(4)&(9). 24 V.I.C. §76(a)(4) concerns an employee who disobeys an employers legal instructions. Respondent put forth six witnesses whose testimony covered topics that included that Petitioner was late 3 or 4 times a week, did not properly fill out tickets which were given to the cook to prepare the food, failed to follow the standards, and did not listen to manager's orders. Petitioner argues that the witnesses are interested witnesses because they still work for Agave and that the witnesses were all lying. The ALJ's decision reports the only evidence that the witnesses lied was Petitioners own testimony. Petitioner did not raise or address that she is also an interested witness in this matter.

In making a credibility choice among several interested witnesses the ALJ has the opportunity to observe demeanor, and therefore his decision must be given great weight and

accepted unless it is contrary to sound reason. *NLRB v. Imperial Bedding Co.*, 519 F.2d 1073, (5th Cir. 1975)(Citing *Bob's Casing Crews, Inc. v. NLRB*, 458 F.2d 1301, 1303 (5th Cir. 1972); *NLRB v. Transway, Inc.*, 410 F.2d 368, 369 (5th Cir. 1972)). It is not error for the ALJ to rely on an interested witness. To deprive an employer of the right to call a current employee to testify in such a proceeding would essentially deprive the employer of the ability to put on a defense. In a WDA claim current employees are the most likely witnesses. Petitioner makes no assertion that the witnesses were coerced or coached and presents no sound reason why the interested witnesses are to be disbelieved.

Petitioner also argued that the ALJ relied on hearsay evidence. An administrative hearing officer may rely on hearsay for her decision if the hearsay is not the sole basis for the decision. *Pappas v. State*, 135 Wash.App. 1008, (Wash.App.Div. 2006). Petitioner and Respondent presented the ALJ with non hearsay witness testimony and Petitioner's responses to Agave's written reprimands. And hearsay evidence combined with a party's refusal to deny or refute the allegations is sufficient to support findings of fact. *Id.* In this case Petitioner denies the allegations surrounding her firing for cause but did not respond to the written reprimands until she was suspended for the second time, and therein because she was not put on the work schedule. This is behavior that the ALJ can consider when he reviews the connected hearsay evidence.

Petitioner concedes that Respondent offered evidence of small infractions but that Respondent did not fire Petitioner for any of these reasons. The ALJ found that the termination was not wrongful in that Petitioner failed to follow reasonable Orders, not performing certain tasks and inability to work with other employees. It is the culmination of

a series of small infractions which was the basis for the termination. The WDA does not require one specific incident as a ground for a proper termination.

The facts presented show more than hearsay. Petitioner has failed in its burden to show how the ALJ was out of conformity with the statutory requirements or that the ALJ's decision was unreasonable. The ALJ's decisions were supported by reasonable evidence; evidence that a reasonable mind might accept as adequate to support a conclusion.

ORDER

In accordance with the foregoing, the premises considered, it is hereby

ORDERED that that the decision of the Department of Labor, case no. 192-99-STT is **AFFIRMED**; and it is further;

ORDERED that copies of this order shall be directed to the Respondent Agave's counsel of record and Petitioners Elizabeth Pichardo, *Pro Se*.

DATED: 30 March 07



EDGAR D. MOSS
Senior Sitting Judge of the Superior
Court of the Virgin Islands

ATTEST: Denise D. Abramsen
DENISE D. ABRAMSEN
CLERK OF THE COURT 3 130107

CERTIFIED A TRUE COPY

Date 4/2/07
DENISE D. ABRAMSEN
Clerk of the Court

BY D. Donnan
Deputy

GOVERNMENT OF THE VIRGIN ISLANDS
DEPARTMENT OF LABOR
(HEARINGS AND APPEALS UNIT)

ELIZABETH PICHARDO)

Complainant,)

vs.)

AGAVE TERRACE RESTAURANT)

Respondent.)

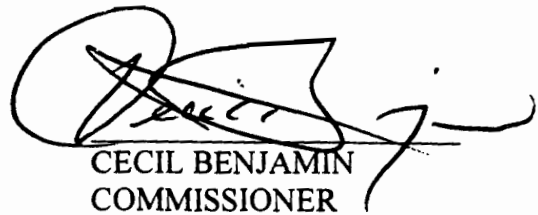
CASE NO. WD-192-99-STT

ORDER

The undersigned, having reviewed the attached Administrative Law Judge's Memorandum Opinion and Order in the above case, and being satisfied with the legal and factual conclusion reached therein, do hereby, adopt the Memorandum and Order as the final determination of this matter, and as a consequence, it is hereby

ORDERED that the Complainant's claim of Wrongful Discharge, has been **DISMISSED** with **PREJUDICE** and is **UPHELD**.

DATED: 20th day of Jan. 2004


CECIL BENJAMIN
COMMISSIONER

In the Matter of: *Elizabeth Pichardo v. Agave Terrace Restaurant*
Case No. WD-234-99-STT

CERTIFICATE OF SERVICE

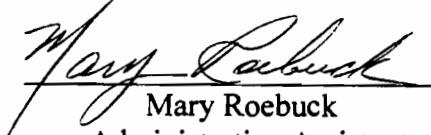
I HEREBY CERTIFY that on this 22nd day of January, 2004 a true and correct copy of the foregoing **MEMORANDUM OPINION AND ORDER** was served via US certified mail, return receipt requested, on

Elizabeth Pichardo
P.O. Box 5164
St. Thomas, V.I. 00802

Agave Terrace restaurant
#4 Smith Bay
St. Thomas, V.I. 00802

Avis B Blackman, Legal Assistant
Legal Services of the V.I., Inc.
The Community Law Center
#47 Kongens Gade
St. Thomas, V.I. 00802

Micole L. Morgal
1A Frederiksberg Gade
P.O. Box 756
St. Thomas V.I. 00804


Mary Roebuck
Administrative Assistant

VI DEPT. OF LABOR
HEARINGS & APPEALS UNIT
3012 VITRACO MALL, C:STED
ST. CROIX, US VI 00820

PLACE STICKER AT TOP OF ENVELOPE TO THE RIGHT
OF THE RETURN ADDRESS; FOLD AT DOTTED LINE
CERTIFIED MAIL™



7003 0500 0002 0537 6055

**RETURN RECEIPT
REQUESTED**

ELIZABETH RICHARDO
P.O. BOX 5164
ST. THOMAS, V.I. 00802

00802/3333



U.S. OFFICIAL MAIL
PENALTY FOR PRIVATE USE \$300
≅ 4.65 ≅
U.S. POSTAGE
PB METER 8500578

NAME _____
1st Notice _____ JAN 23 2004
2nd Notice _____
Return _____ FEB 07 2004

Robert J. Williams
Elizabeth Richardo

Robert J. Williams
Elizabeth Richardo

STK - New Barbud
330day!!



GOVERNMENT OF THE VIRGIN ISLANDS
DEPARTMENT OF LABOR
(HEARINGS AND APPEALS UNIT)

ELIZABETH PICHARDO)

Complainant)

Vs.)

AGAVE TERRACE RESTAURANT)

Respondent)


CASE NO. WD-192-99-STT

ORDER

This matter having come before the undersigned Administrative Law Judge in this matter on 14 January 2002, and having entered a Memorandum Opinion, it is hereby,

ORDERED that Complainant was not wrongfully discharged pursuant to Title 24 V.I.C. Section 76 and Complainant's Complaint is hereby **DISMISSED** with **PREJUDICE**.

DATED: 14th day of December, 2003


FRED VIALET, JR., J.D.
ADMINISTRATIVE LAW JUDGE
DEPARTMENT OF LABOR

GOVERNMENT OF THE VIRGIN ISLANDS
DEPARTMENT OF LABOR
(HEARINGS AND APPEALS UNIT)

ELIZABETH PICHARDO)	
)	
Complainant,)	CASE NO. WD-192-99-STT
)	
vs.)	
)	
AGAVE TERRACE RESTAURANT)	
)	
Respondent.)	
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MEMORANDUM OPINION

The Administrative Law Judge, having been duly appointed by the Virgin Islands Commissioner of Labor to conduct a hearing in the above styled case in accordance with Section 77(b) of the Virgin Islands Wrongful Discharge Act, 24 V.I.C. Section 76-79 (The "Wrongful Discharge Act") has, upon careful consideration of the Record herein, concluded that Elizabeth Pichardo (Complainant) has not been wrongfully discharged by Agave Terrace Restaurant (Respondent), within the meaning of the Wrongful Discharge Act.

CASE BACKGROUND

On 12 April 1999, Elizabeth Pichardo (hereinafter referred to as Complainant), filed a written complaint with the Virgin Islands Department of Labor. Complainant alleged that she was discharged from her employment with Agave Terrace Restaurant (hereinafter referred to as Respondent), in violation of the Wrongful Discharge Act, 24 V.I.C. Section 76 et. seq. (The Act).¹

¹ 24 V.I. Section 76 (a) (1)-(9) provides:

(a) Unless modified by contract, an employer may dismiss any employee:

- (1) who engages in a business that 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 willfully 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;

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Pursuant to the terms of the Act, the Department of Labor caused a copy of the Complaint and Notice of Hearing to be served on the Respondent, setting a 14 January, 2002 hearing date for this case. Whereupon this hearing was convened by the undersigned Administrative Law Judge, designated by the Commissioner of Labor for the purpose of receiving evidence and testimony concerning the complaint, on 14 January 2002, at 53A, 54A&B Kronprindsens Gade, St. Thomas, Virgin Islands. Complainant appeared and was represented by Legal Assistant Avis Blackman of Legal Services. Representing the Respondent was Attorney Micol Morgan of Dudley, Topper & Feuerzeig. The parties were advised of the procedures governing this hearing and given an opportunity to settle this matter. The parties, unwilling to settle this matter, indicated their willingness to proceed. The hearing started at 10:00 a.m., and ended at 5:35 p.m. However at 2:15 p.m. Legal Assistant Blackman requested a food break, which was granted, and the hearing resumed at 3:02 p.m. Complainant and Respondent chose to give written closing arguments. Complainant and Respondent were ordered to file closing arguments by 23 January, 2002, which both were filed on that date.

FINDINGS OF FACT

Complainant was hired by Respondent, and started working as a Waitress/Server/Cashier and signed Respondent's exhibits #2 Standards of Conduct, and #3 Orientation List which were duly admitted. The testimony of Respondent's first witness (Michael Guberg) stated that Complainant was late 3 to 4 times a week, not a Team player,

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- (5) who performs his work assignments in a negligent manner;
 - (6) whose continuous absences from his place of employment affect the interest of his employer;
 - (7) who is incompetent or inefficient, thereby impairing his usefulness to his employer;
 - (8) who is dishonest
 - (9) whose conduct is such that it leads to the refusal, reluctance or inability of other employees

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and could not work well with others. Respondent's second witness (Sanford Fahie) testified that Complainant did not follow procedures correctly in filling out Order Tickets which slowed him down as a cook and he complained to Henry Junnola. Respondent's Third witness (Steve Smith) testified that the Complainant was warned several times about her smoking, being loud, tardiness, taking drinks to customers with out a drink tray, took illegal breaks, did not follow directions, did not pay attention to detail and that Co-Workers did not want to work with her. Respondents Fourth witness (Henry Junnola) testified that Complainant was trained but failed to follow instructions, and did not give proper service, disrespected managers, would not write up Tickets correctly, was warned about smoking, did not do side work properly, had verbal outbreaks in the kitchen, and had a real negative attitude. Also Complainant threatened this witness, and said she would put a spell on him. This witness also testified that there were complaints from her co-workers about her conduct, and further stated that there were 4 write up's, that Complainant refused to sign, which were exhibits 5, 6, 7, and 8, which were put on as evidence and admitted. Lastly Complainant failed to follow the standards set out in the orientation checklist known as Respondent's exhibit 3. Respondents Fifth witness (Mr. Gregg Miller) who is the 12 year owner of the restaurant and involved with every aspect of it and responsible for the administration, hired Mrs. Pichardo, during his testimony Respondent's exhibits 6, 7, and 8 were admitted. These exhibits showed that the Complainant had been written up for Insubordination, for which she was suspended for 2 shifts, spreading ill will amongst the coworkers and being late. Mr. Miller further testified that the Complainant wrote improper tickets, not a team player, also that all the Managers found her not responding to their orders. On cross examination Mr. Miller testified that

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Complainant was suspended for refusing to do her work and submitted evidence of a check where no tip was left and that the customer had complained of slow service. On redirect examination of Mr. Miller, exhibit #6 was also admitted showing that Complainant was not cooperative by refusing to sign the write up. Respondent submitted 8 exhibits which were admitted, the first was exhibit #1, Agave Terrace Restaurant cashiers rules; exhibit #2, Agave Terrace Restaurant standard of conduct, exhibit #3, Agave Terrace Restaurant orientation list; exhibit #4, Customers check; exhibit #5, communication to write up to Complainant dated 11th November 1998; exhibit #6, communication write up to Complainant dated 23rd January 1999; exhibit #7, communication write up to Complainant dated 13th February 1999; lastly exhibit #8, communication write up to Complainant dated 30th March 1999. In putting on Complainant's case, Complainant testified that all of the Respondent's witnesses had lied. Complainant submitted 7 exhibits of which exhibit #1, the employee complaint were admitted; exhibit #2, an unemployment insurance benefit decision dated 2nd July 1999 was admitted; exhibit #3, a verification of wages was not submitted and therefore not admitted; exhibit #4, a letter signed by Gregg Miller was admitted; exhibit #5, a photo that was called a Performance of Complaint was not admitted; exhibit #6, the reason for termination by Respondent was admitted; exhibit #7, a verification of an unemployment benefit was admitted.

Complainant brought fourth no witnesses except herself and did not prove her testimony that all of Respondent's witnesses were lying.

DISCUSSION

The Administrative Law Judge finds from the testimony of all parties who appeared

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as witnesses, the documents and exhibits submitted at the hearing, by both Complainant and Respondent, as well as closing written arguments by both Complainant and Respondent, that the Respondent has met its burden. The Respondent has established by a preponderance of the evidence and testimony that the Complainant was not wrongfully discharged. Also, the undersigned finds sufficient evidence in the sworn testimony of the witnesses to support Respondent's decision not to continue Complainant's employment for disobeying reasonable Orders, not performing certain tasks and inability to work with other employees, under 24 V.I.C. section 76(a) (4), which provides:

"Who willfully and intentionally disobeys reasonable and lawful rules, orders and instructions of the employer..."

And under section 76 (a)(9),

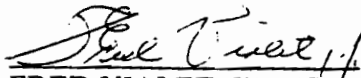
"Whose conduct is such that it leads to the refusal, reluctance or inability of other employees to work with him"

However in (a)(5) and (a)(7) of section 76 under 24 V.I.C. those charges were not proved with a preponderance of evidence against the Complainant.

COLCLUSION

For the evidence put forth under 24 V.I.C. section 76 (a)(4) and (a)(9), we hold that the Complainant was not wrongfully discharged by the Respondent. An Order is herein attached.

DATED: 16th day of December, 2003


FRED VIALET, JR., J.D.
ADMINISTRATIVE LAWJUDGE
DEPARTMENT OF LABOUR