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

[redacted]	)	
	)	
Plaintiff;	)	2005-CV-71
	)	
vs.	)	
	)	ACTION FOR DAMAGES
ASSOCIATED UNIVERSITIES, INC., d.b.a., National Radio Astronomy Observatory (NRAO),	)	
	)	JURY TRIAL DEMANDED
Defendant.	)	

MOTION FOR SUMMARY JUDGMENT OF DEFENDANT; MEMORANDUM

COMES NOW Defendant Associated Universities, Inc., d.b.a. National Radio Astronomy Observatory ("NRAO"), and pursuant to Fed. R. Civ. P., Rule 56(b), moves this Court for summary judgment in its favor. This Motion is supported by the following Memorandum, and the separate Statement of Facts provided pursuant to LRCi 56.1(a)(1).

RESPECTFULLY SUBMITTED this 9th day of September, 2007.

/s/ Edward L. Barry

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MEMORANDUM

This is a lawsuit brought by [redacted] arising out the termination of his employment as a technician with the National Radio Astronomy Observatory ("NRAO") radio telescope facility in St. Croix.

NRAO and Its Work

By way of background, Defendant Associated Universities, Inc. is a New York not-for-profit educational corporation formed in 1946 by 9 sponsoring universities[1] to, among other things, collaboratively undertake scientific research on a scale exceeding the resources of any single university, some of it in association with the federal government. (Statement of Facts, ¶ 1.)

Associated Universities, Inc. joined forces with the National Science Foundation (an independent federal agency) to create the National Radio Astronomy Observatory ("NRAO") in the 1950's. NRAO designs, constructs and operates radio telescope systems throughout the world. (SF, ¶ 2.)[2] The National Science Foundation owns and subsidizes these facilities. (SF, ¶ 3.)[3] Associated Universities, Inc. (as the cognizable legal entity) acts through NRAO, and is said to be a "science management corporation."

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[1] These are: Columbia University, Cornell University, Harvard University, The Johns Hopkins University, Massachusetts Institute of Technology, the University of Pennsylvania, Princeton University, the University of Rochester, and Yale University.

[2] The term "telescope" is something of a misnomer because these instruments are not optical (although the data collected by the antennae *can* be synthesized by computer into a visual image). Also— and contrary to a popular Hollywood portrayal of these antennae— the term "radio" does not refer to any kind of sound emanating from the distant universe, but instead refers to radio *waves*, i.e., particular frequencies and wavelengths of the electromagnetic radiation that is collected for analysis by the antennae. These frequencies/wavelengths are different from visible light (also a form of electromagnetic radiation).

[3] The National Science Foundation does not itself conduct scientific research, but rather awards grants or fellowships to individual researchers, and enters into contracts or "cooperative agreements" with research institutions as authorized by federal legislation. *See, generally, COMSAT Corp. v. National Science Foundation*, 190 F.3d 269 (4th Cir. 1999).

The research conducted by scientists through NRAO is advanced, sophisticated, and profoundly important. Astronomers and astrophysicists "study virtually all types of astronomical objects known, from planets and comets in our own Solar System to galaxies and quasars at the edge of the observable universe." (SF, ¶ 4.) In the last two years, for example, scientists using NRAO facilities have studied the formation of multiple-star systems; have discovered the "first negatively-charged molecule in space"; have studied the growth of black holes; and have discovered "eight new complex, biologically-significant molecules in interstellar space" that may represent "the molecular precursors to life" found in the same primordial clouds of matter that give birth to stars and planets. (*See*: NRAO educational website, www.nrao.edu.)

In short, NRAO provides the wherewithal for scientific inquiry into the most essential questions about the universe and our place within it.[4]

The St. Croix Radio Telescope: An Essential Link in the Chain

The giant dish antenna on the east end of St. Croix is an integral part of all of this. It is tied to an enormous network of similar impressive structures spanning the continental United States and beyond. St. Croix's is the easternmost antenna station of the "Very Long Baseline Array" (VLBA) system, comprised of 10 stations; the westernmost is in Hawaii on a dormant volcano. The remaining 8 are in the continental United States. (SF, ¶ 5.)

> The VLBA is the world's largest, full-time astronomical instrument, consisting of a series of 10 radio antennas spread out across North America from Hawaii to the Virgin Islands. Each antenna is 82 feet (25 meters) in diameter, weighs 240 tons, and is nearly as tall as a ten

[4] "We still do not know one thousandth of one percent of what nature has revealed to us." (Albert Einstein.) And: "Somewhere, something incredible is waiting to be known." (Carl Sagan.)

> story building. The antennas, controlled by the Array Operations Center in Socorro, New Mexico, function together as one instrument with very high resolution and sensitivity.

(NRAO educational website, www.nrao.edu.) The combined effect of these 10 antennae is extraordinary. Their collective power is said to compare to some giant imaginary optical telescope that would allow a person standing in New York to read a newspaper located in Los Angeles. (*Id.*)

Optimal astronomical studies require that all 10 dishes be functional. (SF, ¶ 6.) The loss of function or production of any one antenna in the Array is potentially significant, but the loss of St. Croix's facility is often critical. (*Id.*) That is because St. Croix's antenna is at the far eastern terminus of the Array; the next easternmost antenna is located in Hancock, New Hampshire. The loss of St. Croix causes a reduction of almost 700 miles in the "baseline" (geographic length) of the "array," which materially diminishes observation power (in roughly the same way as a reduction in size of a glass lens of an optical telescope lessens its magnification/resolution power). (*Id.*)

Quoting further from the NRAO's educational website:

> The data from each of the ten antennas are recorded onto magnetic discs and shipped to the Array Operations Center where they are combined in pairs in a correlator, [a] specialized supercomputer... . The correlated data are then delivered to the astronomers who proposed the observations for further analysis.

(*Id.*)

As indicated above, this data— at least the data from the St. Croix facility— is not electronically transmitted to New Mexico in "real time" or otherwise. It is instead locally recorded onto a data storage device, electronically processed by the station (to, among other things, superimpose ultra-precise time markers onto the astronomical

observation data), then physically transported by air courier to New Mexico. There the data is fed to the supercomputer along with the correlative data from the 9 other stations. (SF, ¶ 7.)

Actually, during the time Plaintiff [redacted] was employed by NRAO in St. Croix, the data storage device used was a specialized reel-to-reel tape, as opposed to a computer "disc" or hard drive, which is now in use in St. Croix and elsewhere. (*Id.*)[5] That tape needed to be monitored and manually changed on a regular, periodic basis. (SF, ¶¶ 8-9.) This task, simple and mundane though it may have been, was critical. If the tape was not timely changed, it would run out. If the tape ran out, all subsequent astronomical observation data received by the St. Croix antenna for centralized computer synthesis with the data of other stations would be lost. (SF, ¶ 8.) Forever.

The VLBA system is a precious scientific resource, and its use is reserved for a very limited number of scientists whose proposed research projects are first rigorously screened and reviewed by the scientific/academic community, and only then approved as worthy of use of the system. (SF, ¶ 10.) Often there is a long waiting list for use of the system. (*Id*.)

To illustrate: A doctoral candidate in astrophysics from any number of universities worldwide might— after his proposal had survived an arduous screening process (and perhaps competition for a grant)— stand in line a year to actually use the VLBA and collect the astronomical observation data necessary to his or her doctoral thesis. His particular research requirements would have to be communicated to NRAO well in advance, then logistically planned and executed by the NRAO staff. The

[5] This tape was an inch wide, 3.2 *miles* long, and about 1/6th the thickness of a human hair. A reel of tape could hold a little over 10 hours of data before it ran out. (SF, ¶ 7.)

positions and movements of all 10 antennae would be precisely choreographed by remote computer-control from the Array Operations Center in New Mexico to focus on some feature of interest in a galaxy millions of light-years away, for example. Observational data from each of the 10 stations might be collected for several days.

If there were a significant malfunction of any of the 10 radio telescopes in the observation process, or if there were a loss of data through simple human error, scientific quality of the project would thereby be compromised. The observation phase of a project representing years of work by an individual scientist might be aborted. Substantial human effort, as well as precious use-time of a resource of unique importance to the worldwide scientific community, would be squandered.

The success of any NRAO-facilitated research project depends on many people doing many things. That includes employees at the antenna sites simply making sure data is being properly recorded. In St. Croix, during the period of Plaintiff's employment, that meant showing up at the station and changing tapes when needed. Without fresh tape, incoming data could not be captured, processed or scientifically analyzed.

Plaintiff's Job Performance in St. Croix

Plaintiff [redacted] was hired by NRAO on November 1, 2000 to work at the St. Croix station as a "senior technician." (SF, ¶ 11.) The advertised job description involved "minimum supervision" and the exercise of "considerable discretion," as well as a specified level of knowledge in applied mechanics and electrical technology. (SF, ¶ 12.) The position also entailed "fluctuating and non-standard work hours, including rotating on-call status and night and weekend call-ins." (SF, ¶ 13.) The job required a

commitment to maintaining the operational status and productivity of the antenna, and that included capturing and preserving the astronomical observation data. (SF, ¶ 9.)

Plaintiff lost observational data on January 8, 2002 due to his failure to check and adhere to a weekend work schedule. (SF, ¶ 14.) It was by no means the first such incident. (SF, ¶ 15.) In an Interoffice Memo from Supervisor Paul J. Rhodes the following day, Plaintiff was given detailed instructions designed to prevent future data loss. (SF, ¶ 16.) These included arriving at the station an hour before a scheduled tape change; notifying the New Mexico operations center of actual hours worked and any deviations from his posted schedule; regularly checking in when he was on-call; and monitoring and verifying in writing the amount of tape both used and needed during weekends. (*Id.*) Quoting this Memo to Plaintiff:

> I want to make sure that you understand the seriousness of the lost data due to missing a scheduled tape change. As I told you on the phone, you have had more missed tape changes in the past year that any other Station Technicians have in 5 or more years. We have discussed this situation several times and I have offered suggestions that you seem to have ignored. * * * Further losses of data on your part will lead to disciplinary action up to and including discharge.

(*Id.*)

Less than a month later— on February 3, 2002, "no tape was available at the St. Croix VLBA Station causing the loss of about 2 hours of data." (SF, ¶ 17.) Quoting the ensuing Memo from Supervisor Rhodes to Plaintiff:

> The suggestions that I previously made can no longer be considered voluntary, but are **mandatory job requirements** for your continued employment with the Observatory. In addition to the list below [again reciting instructions for checking schedules and monitoring tape usage and capacity, etc.], you agreed that whenever you are placed "On Call" you would call Array Operations every

> four hours… . You will use this call to determine the status of the station and the amount of time remaining on the mounted tapes. Operations has been informed to log the time and date of all of your calls.
>
> If your performance improves in the future I will review these mandatory requirements and amend them as required. If your future performance in this area fails to improve or you miss another tape change I will recommend that your employment with the Observatory be terminated.

(SF, ¶ 18.; *emphasis in original*.)

Yet later that same year, there were more problems related to communications regarding "tape shortage," as well as Plaintiff's personal unavailability, all contrary to specific instructions. (SF, ¶ 19.)

Plaintiff wrote to NRAO:

> I am pleading for mercy. I have really screwed up and realize my job is on the line here. * * * There's been a lot going on here that may have been distracting my judgment lately. Maybe I should take a little vacation and get my affairs in order.

(SF, ¶ 20.)

Supervisor Rhodes, in a memo dated December 17, 2002, gave Plaintiff *another chance*, conditioned upon Plaintiff's participation in the NRAO's "Employee Assistance Program" (offered to counsel employees with personal problems, including alcohol issues). (SF, ¶ 21.) Plaintiff did participate.[6]

On July 2, 2003, Plaintiff was notified that he was not awarded a salary increase due to "performance issues" partially detailed above. (SF, ¶ 22.)

Problems with Plaintiff's unreliability persisted. (SF, ¶ 23.) For example, on September 8, 2003, a critical and time-sensitive antenna hardware installation project

[6] Defendant does not presently have the records relating to Plaintiff's counseling in the Employee Assistance Program. They do not appear necessary for purposes of this Motion.

requiring Plaintiff's assistance was scheduled at the beginning of a regular workday. Plaintiff had been "notified of a scheduled installation for that date that required the attention of both Site Technicians," but nevertheless showed up late, without explanation. (SF, ¶ 24.) A week later, the pattern was repeated: Plaintiff was late for a scheduled two-person maintenance job that was to have begun at the beginning of the workday. (SF, ¶ 25.)

Plaintiff even at this time persisted in his noncompliance with the strict remedial instructions regarding regular, frequent and reliable communication to "Operations." (SF, ¶ 26.) These instructions from NRAO, as noted, were designed to assure his regular (and verifiable) attendance during scheduled working hours, and his agreed-upon availability during times when he was "on call."

On September 29, 2003, Plaintiff was given the choice of whether to resign (with a voluntary payment from NRAO) or be discharged. Plaintiff signed a letter of resignation that day. (SF, ¶ 27.)

LEGAL ARGUMENT

Summary Judgment Standard

The standard for summary judgment is of course a familiar one. A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Glenn Distributors Corp. v. Carlisle Plastics, Inc.*, 297 F.3d 294, 299 (3rd Cir. 2002). "A genuine dispute exists if there are material facts upon which a reasonable jury could rule in favor of the non-movant or which could be resolved in favor of either party." *Regan v. Estate Questa Verde*, 2006 WL 3613280, 2006 U.S. Dist.

LEXIS 89538 (D. VI. App 2006), *quoting Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 247-248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986) "To be material, such a fact must be determinative of the case, or likely to affect its outcome." *Id., quoting Anderson*, 477 U.S. at 248.

Once the moving party has made the requisite prima facie showing, it is incumbent upon the party resisting summary judgment to come forward with specific controverting facts. *Celotex Corporation v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986); Fed. R. Civ. P., Rule 56(c). Although the Court's function in this process is not generally to weigh the evidence *per se*, the summary judgment standard nevertheless "does not require a court to turn a blind eye to the weight of the evidence; the opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Big Apple BMW, Inc. v. BMW of North America, Inc*., 974 F.2d 1358 (3d Cir. 1992), *citing Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986).

Summary judgment is "no longer a disfavored procedural shortcut," *Big Apple BMW*, 974 F.2d at 1362, *citing Celotex*, 477 U.S. at 327; it serves the salutary purpose of a "just, speedy and inexpensive" adjudication of those cases for which a jury's services are not required. *Bachman v. Hecht,* 659 F.Supp. 308, 314 (D. VI 1986); Fed. R. Civ. P., Rule 1. Moreover, "fairness to defendants is as much a policy of Rule 56 as are fairness to plaintiffs and the convenience to the district court." *In re School Asbestos Litigation*, 977 F.2d 764, 794 (3rd Cir. 1992), *citing Celotex*, 477 U.S. at 327.

Analysis

Plaintiff's lawsuit, in which he claims that his discharge was unlawful, is misguided and ill-considered in the extreme.[7] The Virgin Islands Wrongful Discharge Act, 24 V.I.C. §§ 76, *et seq*., specifically authorizes the termination of employment when the employee, *inter alia*, "performs his work assignments in a negligent manner" or when his "continuous absences from his place of employment affect[s] the interests of his employer." 24 V.I.C. § 76(a)(5) and (6).

Filmmaker Woody Allen once famously said that "80% of success is just showing up." Plaintiff did not show up. Plaintiff repeatedly failed to come to work on time and change the tapes (or do other work essential to the ability of the system to function). Plaintiff repeatedly caused the loss of precious scientific data. His irresponsibility "affect[ed] the interests of his employer" within the meaning of 24 V.I.C. § 76(a) (6). To assert this is to grossly understate the problem. To deny it would be preposterous.

The entire VLBA system— representing an investment of many millions of dollars in public funds and an unquantifiable investment of intellectual capital— was designed for the sole purpose of research by the "best and the brightest" of the world's scientific community, who competed rigorously and waited very patiently to use this

[7] The Complaint, drafted by Attorney Lee Rohn, alleges, for example that "Plaintiff was never notified of any displeasure with his work performance warranting termination… " *Id.,* ¶ 24. This, and many other allegations of the Complaint, amount to outrageous Rule 11 violations. However, the factual *allegations* are not important for summary judgment purposes. What counts is the factual *evidence* adduced. *E.g., El v. Southeastern Pennsylvania Transp. Authority,* 479 F.3d 232, 237, n.6 (3rd Cir. 2007) (commenting that "plaintiffs who have not come forward with hard evidence to support their necessary allegations cannot survive a summary judgment motion by the defense"); *Berckeley Inv. Group, Ltd. v. Colkitt,* 455 F.3d 195, 201 (3d Cir.2006) ("[S]ummary judgment is essentially 'put up or shut up' time for the non-moving party: the non-moving party must rebut the motion with facts in the record and cannot rest solely on assertions made in the pleadings… .")

precious facility. That entire system broke down when essential data was lost.[8] Occasional loss of data from human error is inevitable. But repeated loss due to persistent, inexcusable neglect by an employee is neither to be expected nor tolerated. That, again, seems to overstate the obvious.

NRAO repeatedly cautioned Plaintiff about the gravity of the problems he was causing. NRAO even gave Plaintiff a set of very specific and detailed instructions that, if followed, would help Plaintiff with time management and prevent data loss from his scheduling oversights and errors. Plaintiff failed to follow these instructions, with expected results. And when it appeared that Plaintiff had a personal problem that may have contributed to his substandard job performance, Defendant— in what appears to have been the *third* "second chance" extended to Plaintiff— provided free counseling through NRAO's Employee Assistance Program. All to no avail.

"The standard for granting summary judgment under Rule 56 'mirrors the standard for a directed verdict [now denominated a "judgment as a matter of law"] under ... Rule 50(a), which is that the trial judge must direct a verdict if, under the governing law, there can be but one reasonable conclusion as to the verdict'." *Huang v. BP Amoco Corp*., 271 F.3d 560, 564 (3rd Cir. 2001), *quoting Anderson, supra*, 477 U.S. at 250.

There could be "but one reasonable conclusion as to the verdict" in the case *sub judice* if this case were to proceed to trial, and that is a defense verdict. Plaintiff, by the

[8] The work of NRAO transcends economics. But economics are not irrelevant. Given the multimillion-dollar annual operational costs of the VLBA system, and the limited number of observation hours in a year (8,760 hours maximum theoretical), a single hour of lost observation time represents a significant loss in dollar terms. The economic waste of an aborted two-day research project is of course substantial.

incontrovertible evidence, has no cause of action arising out of the termination of his employment with NRAO.[9]

CONCLUSION

For the foregoing reasons, the Court should enter summary judgment of dismissal, with prejudice. An appropriate proposed judgment is attached.

RESPECTFULLY SUBMITTED this 10th day of September, 2007.

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[9] Defendant has confined its legal discussion to the Virgin Islands Wrongful Discharge Act (Count I), on the belief that these same core facts demonstrate Plaintiff's additional Counts to be so frivolous as to be unworthy of analysis. Suffice it to say that there can be no credible contention that Defendant breached its employment contract generally (Count III), or breached a duty of good faith and fair dealing to Plaintiff arising out of either the provisions of written internal NRAO policies or by common law. (Counts II and IV.) It is also absurd to suggest that Defendant engaged in unconscionable or outrageous conduct of any kind, let alone of the sort that would give rise to the tort of intentional infliction of emotional distress, entitling Plaintiff to punitive damages. (Counts V and VI.) *See: Restatement (Second) of Torts* § 46, *cmt. d* (1965); *Claytor v. Chenay Bay Beach Resort*, 42 V.I. 379, 79 F. Supp. 2d 577, 583 (D.V.I. 2000) ; *Manns v. Leather Shop, Inc*., 36 V.I. 214, 960 F. Supp. 925, 930 (D.V.I. 1997).