

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

RONNIE HAGER, ADMINISTRATOR OF THE ESTATE OF NANCY L. HAGER,)	
)	
Plaintiff,)	Civil Action No. 7:01CV00053
)	
v.)	<u>Memorandum Opinion</u>
)	
FIRST VIRGINIA BANKS, INC.,)	
and)	By: Samuel G. Wilson
)	Chief United States District Judge
FIRST VIRGINIA BANK–SOUTHWEST,)	
)	
Defendants.)	

Plaintiff Ronnie Hager is the widower of Nancy L. Hager (“Hager”) and the administrator of her estate. Plaintiff brings this employment action for damages and injunctive relief against his wife’s alleged former employers, Defendants First Virginia Banks, Inc. (“FVBI”) and First Virginia Bank–Southwest (“FVBSW”) (collectively “Defendants”). Plaintiff claims violations of the Americans with Disabilities Act, 42 U.S.C. § 12101 (“ADA”), and intentional infliction of emotional distress arising from Defendants’ repeated failure to accommodate Hager’s disability.¹ The court has jurisdiction over the ADA claim pursuant to 28 U.S.C. § 1331 and may exercise supplemental jurisdiction over Plaintiff’s state law claim pursuant to 28 U.S.C. § 1367. This matter is before the court on Plaintiff’s motion requesting the court to reconsider its final order

¹Nancy Hager, the original plaintiff in this action, died on November 1, 2001. The court substituted Ronnie Hager as party plaintiff on November 29, 2001 and granted him leave to file an amended complaint, which he filed on December 28, 2001.

dismissing Plaintiff's claim as untimely. The court will grant Plaintiff's motion, and, accordingly, will reconsider Defendants' respective motions to dismiss.

With respect to the ADA claim: (1) the court will grant FVBI's 12(b)(1) motion to dismiss because FVBI was not Hager's employer as defined by the ADA; and (2) the court will grant in part and deny in part FVBSW's 12(b)(1) motion to dismiss Plaintiff's claims as untimely.

Regarding the intentional infliction of emotional distress claim: (1) the court will decline to exercise supplemental jurisdiction over FVBI in the absence of any federal claim against it; (2) the court will deny FVBSW's 12(b)(1) motion because Plaintiff's claim is not barred by the Virginia Worker's Compensation Act; and (3) the court will deny without prejudice FVBSW's 12(b)(6) motion because Plaintiff's has sufficiently stated a claim for purposes of notice pleading.

I.

FVBSW is a wholly owned subsidiary of FVBI (Plaintiff's Memorandum in Opposition to the Defendant's Motion to Dismiss, p14.), a bank holding company that owns various other "member banks" throughout Virginia, Tennessee, and Maryland. FVBSW maintains its principle office in Roanoke, Virginia, while FVBI's central office is located in Falls Church, Virginia. Different officers manage the Defendants' daily business operations. (Hager Aff. ¶ 4; Jones Dep. at 13.)

In December 1995, Hager went to work as a bank teller at the George Wythe Branch of Premier Bank in Wytheville, Virginia. (Compl. ¶ 8.) In September 1997, FVBSW acquired Premier Bank and retained Hager as a teller at the George Wythe Branch. On December 2, 1998, while employed at FVBSW, Hager underwent abdominal surgery for "anterior and posterior repair with reduction of enterocele for symptomatic pelvic prolapse." (Amend. Compl. ¶ 9.)

Hager returned to her former position at the second drive-through window in January 1999. By the time she returned, Hagers' supervisors were aware that, due to her surgery, Hager was medically restricted from lifting over 20 pounds and would require frequent access to the bathroom.

In mid-February 1999, Hager's supervisors moved her from the second drive-through window to the first drive-through window. Working at the first drive-through window violated Hager's medical restrictions because it uniquely required her to push and pull a coin vault approximately 500 times per week to process heavy business change. About a week after moving to the first window, Hager asked to return to the second window because of her difficulty in processing the change. Despite her request she was not moved. Instead, Hager's supervisors permanently placed her at the first drive-through window beginning in mid-March 1999.

On May 5, 1999, Hager's supervisor's "wrote her up" for refusing to lift heavy bags of coins through the drive-through window. Hager again unsuccessfully requested that she be taken off the first window because processing the bags of coins violated her medical restrictions.

On June 11, 1999, Hager's supervisors informed her that she would have to work the first drive-through window by herself for one hour. Hager insisted that she was medically restricted from working that long without going to the bathroom. Hager then telephoned the Vice-President of FVBSW, Mr. Chris Hess, (Jones Dep. at 12.), and made a similar protest. Notwithstanding these objections, Hager was required to work for one hour that evening without using the bathroom. Hager "knew . . . then that Mr. Hess was not going to honor the restrictions imposed by [her] physician." (Amend. Compl. ¶ 15)

On June 14, 1999, Hager's physician sent a letter to Hager's supervisors advising them

again of Hager's medical restrictions, including her need for constant access to the bathroom, and requesting that they appropriately accommodate Hager's condition.

Around September 28, 1999, Hager visited her physician due to increased pain in her shoulder and lower back. Upon examining her, Hager's physician faxed a note to her supervisors informing them that they should move Hager from the first drive-through window because she was medically unfit to work there. Hager, however, remained at the first window.

On approximately September 30, 1999, Mr. Hess asked Hager whether she could continue performing her duties as a teller. Hager responded that she could, but only if she worked at the second-drive through window. Again, Hager remained at the first window, but Mr. Hess informed her that he would be in touch with her after speaking with the bank's attorneys.

On October 4, 1999, Hager advised her supervisor that she had discovered a large amount of blood in her stool and requested leave to go to the doctor. Hager's supervisor, however, refused her request, informing her that she could not miss work to go to the doctor. Later that day, Hager informed her physician about her bleeding, and her physician immediately faxed another request that Hager be moved from the first drive-through window. The next day, October 5, 1999, Hager's supervisors moved her to the second window.

Hager's physician examined her on November 11, 1999 (Veteran's Day), and discovered that her bowels had completely collapsed. On November 16, 1999, Hager stopped working, based on her doctor's orders, to avoid any further injury.

On May 24, 2000, Hager filed a signed, "official complaint" for employment discrimination with the Virginia Council on Human Rights ("VCHR"). (Defendants' Joint Response to Plaintiff's Motion to Reconsider, Exhibit A at 3.) The complaint is a standard form

document. Hager filed the complaint against her employer, whom she named as “First VA Bank, Inc [George Wythe Branch].” (*Id.* at 1.) Hager indicated that her employer’s principal officers were Bonita Jones and Chris Hess. She indicated that Ms. Jones was “Vice President – George Wythe, Wytheville.” She did not indicate Mr. Hess’s title but did indicate that he worked in Roanoke, Virginia. The paragraph above the signature page in Hager’s complaint provides that “[t]o the best of my knowledge, the information provided on this form is accurate.” (*Id.* at 3.)

By letter dated September 12, 2000, the VCHR advised Hager that it would not investigate her complaint because it was untimely, but would forward her complaint to the EEOC. (FVBSW’s Brief in Support of its Motion to Dismiss, Exhibit A-2.) Upon receiving the complaint the EEOC prepared a charge of discrimination. Hager signed the charge on December 8, 2000, and filed it with the EEOC on December 11, 2000. (Plaintiff’s Response to Defendant’s Motion to Dismiss at 2.) Hager received a right to sue letter from the EEOC on December 22, 2000, and commenced the present action on January 19, 2001.

II.

A. ADA Claim

The parties agree that Hager’s cause of action under the ADA survives her death.² They

²The court agrees with the parties’ conclusion that Hager’s ADA claim survives her death, but for different reasons. The Fourth Circuit has not addressed the question of survival of claims under the ADA. Consequently, the court finds it necessary to analyze the issue here.

Whether Hager’s ADA claim survives her death is a question of federal law. *Fariss v. Lynchburg Foundary*, 769 F.2d 958, 962 n.3 (4th Cir. 1985). The ADA is silent as to whether a cause of action survives a plaintiff’s death. Thus, the court must look to federal common law to determine the survival of Hager’s claim. *Smith v. Dept. of Human Services*, 876 F.2d 832, 834 (10th Cir. 1989). Federal common law has long recognized that actions which are penal in nature do not survive the death of a party. *Id.* at 834-35 (citing *Schreiber v. Sharpless*, 110 U.S. 76, 80 (1884)). To determine whether a statute is penal or remedial, courts examine the statute according to the following factors: (1) whether the purpose of the action is to redress individual

also agree that Hager's claim for compensatory damages survives. However, they have not agreed on the survival of Hager's claims for liquidated damages, exemplary damages, and injunctive relief. The court finds that Hager's claim for liquidated damages must be dismissed because the ADA does not provide for liquidated damages. 42 U.S.C. § 1981a. But even if it does, liquidated damages are penal in nature, Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 125 (1985) (ADEA case), and, therefore, the court dismisses them pursuant to federal common law. See Schreiber v. Sharpless, 110 U.S. 76, 80 (1884) (providing that penal actions do not survive the death of a party). Likewise, Hager's claim for exemplary damages is plainly penal and will be dismissed. Additionally, Hager's claim for injunctive relief in the form of reinstatement is obviously moot.

FVBI and FVBSW have filed separate motions to dismiss Plaintiff's ADA claim for lack of subject matter jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). For the reasons that follow, the court will grant FVBI's 12(b)(1) motion, and FVBSW's 12(b)(1) motion

wrongs or wrongs to the public; (1) whether the recovery runs to the individual or the public; and (3) whether the recovery is disproportionate to the harm suffered. Murphy v. Household Finance Corp., 560 F.2d 206, 208 (6th Cir. 1977). An application of this three-factor analysis convinces this court that the ADA is remedial.

First, the primary purpose of the ADA is "to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities." 42 U.S.C. § 12101(b)(2). In other words, Congress intended that the ADA would provide disabled Americans with a means to redress the individual wrongs they have suffered. Second, recovery under the ADA benefits the party bringing the action, rather than the general public. Third, the recovery authorized by the ADA is not disproportionate to the harm suffered. Although the ADA authorizes the award of punitive damages in addition to compensatory damages, the punitive damages must be based on the harm caused to the particular person discriminated against, and may not exceed certain limits. See 42 U.S.C. § 1981a. Accordingly, the court concludes that the ADA is a remedial statute such that a cause of action brought under the ADA survives the death of the plaintiff.

will be granted in part and denied in part.³

1. Standard of Review

There are two distinct ways that a motion pursuant to 12(b)(1) of the Federal Rules of Civil Procedure may attack subject matter jurisdiction. First, a Rule 12(b)(1) motion may attack the factual sufficiency of the allegations, asserting simply that the complaint “fails to allege facts upon which subject matter jurisdiction can be based.” Adams v. Bain, 697 F.2d 1213, 1219 (4th Cir. 1982). When a court considers this type of 12(b)(1) motion, “the facts alleged in the complaint are assumed to be true and the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration.” Id.

Alternatively, “a Rule 12(b)(1) motion may contest ‘the existence of subject matter jurisdiction in fact, quite apart from any pleadings.’” White v. CMA Construction Co., Inc., 947 F.Supp. 231, 233 (E.D.VA 1996) (quoting Mortensen v. First Fed. Sav. and Loan Ass’n, 549 F.2d 884, 891 (3d Cir. 1977)); Adams, 697 F.2d at 1219. Because this category of 12(b)(1) motion challenges the court’s “very power to hear the case,” Mortensen, 549 F.2d at 891, the court is free to weigh all the evidence in determining whether jurisdiction exists. Adams, 697 F.2d at 1219; Mortensen, 549 F.2d at 891. “In short, no presumptive truthfulness attaches to the plaintiff’s allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.” White, 947 F.Supp. at 233 (quoting Mortensen, 549 F.2d at 891).

³With respect to both defendants’ 12(b)(1) motions, the burden is on the plaintiff, as the party asserting jurisdiction, to prove that federal jurisdiction is proper. Mc Nutt v. General Motors Acceptance Corp., 298 U.S. 178, 189 (1936).

2. FVBI's 12(b)(1) motion

FVBI contends that this court does not have subject matter jurisdiction over Hager's claim, brought pursuant to 42 U.S.C. § 12101 et seq., because FVBI is not Hager's "employer" as that term is defined by the statute at 42 U.S.C. § 12111(5)(A). Such a 12(b)(1) motion falls within the latter category discussed above because it challenges the court's "very power to hear the case." Accordingly, the court will consider all the evidence to determine whether or not subject matter jurisdiction exists. See White, 947 F.Supp. at 233 (considering all the evidence to rule on defendant's 12(b)(1) motion to dismiss on the grounds that defendant was not plaintiff's "employer" within the meaning of 42 U.S.C. § 2000e(b)).

If, in fact, FVBI is not Hager's "employer" as provided under the ADA, then this court lacks jurisdiction, and Hager's ADA claim against FVBI must fail. See Hukill v. Auto Care, Inc., 192 F.3d 437, 441 (4th Cir.) ("A district court lacks subject matter jurisdiction over an FMLA claim if the defendant is not an employer as that term is defined in the FMLA."); Woodward v. Virginia Bd. of Bar Examiners, 598 F.2d 1345, 1346 (4th Cir. 1979) (affirming dismissal of Title VII claim for lack of subject matter jurisdiction because defendant was neither an "employer," an "employment agency," nor a "labor organization" as those terms are defined in Title VII). "Because Title VII, the ADEA, and the ADA define employer essentially the same way" the court may "rely on case law developed under all three statutes." Swallows v. Barnes & Noble Book Stores, Inc., 128 F.3d 990, 993 n. 2 (6th Cir. 1997).

In the Fourth Circuit there is a "strong presumption" that "when a subsidiary hires employees," "the subsidiary, not the parent company, is the employer." Johnson v. Flowers Industries Inc., 814 F.2d 978, 980 (4th Cir. 1987) (ADEA case). This presumption is based on

the principle that a parent corporation exercises control over its subsidiaries as a shareholder and thus receives the benefits of the doctrine of limited liability. “Under the doctrine of limited liability, a shareholder is not responsible for the acts of a corporation.” Id. Thus, a court should find that a parent is the employer of its subsidiary’s personnel “only if it controls the subsidiary’s employment decisions or so completely dominates the subsidiary that the two corporations are the same entity.” Id. Plaintiff has not established that either situation exists between the FVBI and FVBSW.

First, FVBI does not control FVBSW’s employment decisions. There is nothing in the record indicating that FVBI has ever “hired, fired, promoted, paid, transferred, or supervised” any employee at FVBSW. Johnson, 814 F.2d at 982. While FVBI’s contracts with FVBSW to provide for a fee certain human resources services including employee benefit plans and employee administrative employee policies, FVBSW independently chose to participate in those plans and to adopt those policies. And although employee’s of FVBSW may report perceived acts of discrimination to the human resources department at FVBI, FVBSW alone decides whether to implement FVBI’s recommended response. (Bayly Dep. at 48.) While there is some conflicting testimony in the deposition of Terrence Bayly, a vice-president in the human resources department of FVBI, regarding FVBI’s hypothetical ability to fire a CEO of FVBSW who patently refused to hire black employees, such a power, even if it exists, has little to do with the day to day personnel decisions at FVBSW and, thus, cannot constitute “control” of FVBSW’s employment decisions.

Regarding the parent domination test, the Johnson court suggested some situations in which a parent corporation “might so dominate the subsidiary’s operations that the parent and the

subsidiary are one entity and thus one employer.” Id. at 981.

For example, the subsidiary may be highly integrated with the parent’s business operations, as evidenced by the commingling of funds and assets, the use of the same work force and business offices for both corporations, and the severe undercapitalization of the subsidiary. The parent might also fail to observe such basic corporate formalities as keeping separate books and holding separate shareholder and board meetings.

Id.

Hager has failed to establish that FVBI and FVBSW are so excessively entangled. There is nothing in the record to indicate that FVBI excessively interfered with the daily business operations of FVBSW. FVBI and FVBSW maintain separate boards of directors, officers, work forces and office buildings. As mentioned above, there is conflicting testimony in the deposition of Terrence Bayly as to whether FVBI may exercise some managerial control over FVBSW regarding certain administrative policies. However, FVBI “retains the benefits of limited liability even if it exercised some control over” FVBSW. Id. at 980. Likewise, the fact that FVBSW’s customers may access any ATMs within FVBI’s network fails to establish the kind of “excessive control” contemplated by the Johnson court. Accordingly, the court finds that Hager has failed to establish that FVBI was her “employer” under the ADA, and, therefore, FVBI’s motion to dismiss for lack of subject matter jurisdiction will be granted.⁴

3. FVBSW’s 12(b)(1) motion

FVBSW offers several arguments in support of its motion to dismiss Hager’s ADA claim

⁴Because FVBI is not Hager’s “employer” under the ADA, the court declines to consider FVBI’s alternative arguments to support its 12(b)(1) and 12(b)(6) motions. In addition, the court declines to exercise supplemental jurisdiction over Hager’s remaining state law claim. 28 U.S.C § 1367; United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966) (“Certainly, if the federal claims are dismissed before trial . . . the state claims should be dismissed as well.”). Hager is free to file that claim in state court.

for lack of subject matter jurisdiction. The court will consider those arguments in turn.

First, FVBSW argues that the ADA bars Hager's claim because she failed to file her complaint with the VCHR or the EEOC within the applicable limitations period.⁵ The ADA expressly adopts and incorporates the administrative procedures specified in Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, and compliance with those procedures must occur before a federal court may entertain a suit that seeks recovery for an alleged violation of the ADA. See 42 U.S.C.A. § 12117(a); Dao v. Auchan Hypermarket, 96 F.3d 787, 789 (5th Cir. 1996); McSherry v. Trans World Airlines, Inc., 81 F.3d 739, 740, n.3 (8th Cir. 1996). Under section 706(e) of Title VII, 42 U.S.C. § 2000e-5(e), a complainant must file charges with the EEOC within 180 days of the occurrence of the alleged discrimination. If, however, as is the case here, a complainant initially institutes proceedings with a state or local agency with authority to grant or seek relief from the alleged discrimination, the time limit for filing with the EEOC is extended to 300 days. Id.; Tinsley v. First Union National Bank, 155 F.3d 435, 340 (4th Cir. 1998) (holding that the VCHR is a Title VII deferral agency extending the EEOC limitations period to 300 days). The limitations period begins on the date that the alleged unlawful employment practice occurs, Martin v. Southwestern Virginia Gas Co., 135 F.3d 307, 310 (4th Cir. 1998); Tinsley, 155 F.3d at 439, and operates like a statute of limitations as to any later judicial proceeding, Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982).

Section 706(c) of Title VII, 42 U.S.C. § 2000e-5(c) provides that a complainant may not file a charge with the EEOC "before the expiration of sixty days after proceedings have been

⁵FVBSW's 12(b)(1) motion, like the one asserted by FVBI, challenges the court's subject matter jurisdiction apart from the factual allegations in the complaint, so the court will consider all the evidence in determining whether or not to grant it.

commenced under the State or local law, unless such proceedings have been earlier terminated.”

“The purpose of the presumptive sixty-day deferral period in a deferral state is comity—to provide states and localities the first opportunity to combat discrimination, free from premature federal intervention.” Puryear v. County of Roanoke, 214 F.3d 514, 517 (4th Cir. 2000) (citing Love v. Pullman Co., 404 U.S. 522, 526 (1972)). The net effect of sections 2000e-5(c) and 2000e-5(e) is that a complainant who wishes to file a charge of discrimination with the EEOC must file the charge with the appropriate state or local agency within 240 days of the alleged discriminatory conduct in order to ensure that the charge may be filed with the EEOC within the 300-day limit. EEOC v. Commercial Office Products Co., 486 U.S. 107, 108 (1988). Even if the complainant files with the appropriate state or local agency after 240 days, however, “the charge still may be timely filed with the EEOC if the state or local agency terminates its proceedings before 300 days.” Id. A state agency may “terminate” its proceedings for purposes of section 706(c) by entering into a “worksharing agreement” with the EEOC, wherein the state elects to waive its period of exclusive jurisdiction during the deferral period, while retaining concurrent jurisdiction over the discrimination charges. Puryear, 214 F.3d at 518 (citing Commercial Office Prod., 486 U.S. at 111-12 (concluding that a state agency’s waiver of the 60-day deferral period, pursuant to a worksharing agreement similar to the one in this case, “terminated” its proceedings under section 2000e-5(c)).

The VCHR and the EEOC have executed such a worksharing agreement. Their worksharing agreement “designates each agency as the other’s agent for the purpose of receiving and drafting charges of discrimination. . . . Under the terms of the [worksharing agreement], a claim received by one agency is deemed received by the other, initiating each agency’s

proceedings for purposes of Title VII, section 706(c).” Id. at 518-19 (internal quotations and citations omitted); see also, Green v. Los Angeles County Superintendent of Schools, 883 F.2d 1472, 1480 (9th Cir. 1989) (finding that a state agency’s waiver in a worksharing agreement is self-executing such that a complaint filed with a state agency is deemed immediately filed with the EEOC).

Accordingly, the court finds that when Hager filed her complaint with the VCHR on May 24, 2000, she effectively filed a charge of discrimination with the EEOC. The applicable period of limitations is 300 days, and “[a] disabled plaintiff’s employment discrimination cause of action accrues on the date that the alleged employment practice occurs,” Martin, 135 F.3d at 310. Thus, section 706(c) bars Hager from bringing a claim for any discriminatory employment practice by FVBSW that occurred before July 30, 1999.

FVBSW argues that the alleged discriminatory “employment practice,” Martin, 135 F.3d at 310, that initiated Hager’s cause of action occurred in mid-March 1999, when FVBSW permanently placed her at the first drive-through window, because all the other alleged incidents of failure to accommodate are merely consequences of that placement. Relying on the principle cited in Martin that “[a]n employer’s refusal to undo a discriminatory decision is not a fresh act of discrimination,” 135 F.3d at 310 (citation omitted),⁶ FVBSW characterizes Hager’s permanent placement at the first window as a decision not to implement her doctor’s restrictions. The court

⁶The Fourth Circuit articulated this principle in the context of a failure to accommodate case in which the employee was discharged as a result of his disability, and held that the employee’s cause of action accrued when the employer “informed him that his discharge . . . was imminent.” Martin, 135 F.3d at 310. The court believes that a decision to discharge an employee rather than accommodate his disability is sufficiently analogous to a decision to place an employee in a position that violates her medical restrictions rather than one that does not such that the Martin principle quoted above is applicable in this case.

finds that characterization overly broad. Instead, the court regards FVBSW's decision in mid-March as limited to the particular duties FVBSW would require Hager to perform. In assigning Hager the particular duties of the first drive through window, processing heavy business change, FVBSW decided to ignore only her lifting restrictions. It follows, then, that only the two subsequent alleged instances of FVBSW's failure to accommodate Hager's lifting restrictions were merely consequences of FVBSW's prior discriminatory decision: FVBSW's refusal on September 28 to implement the doctor's request to move Hager from the first window, and FVBSW's similar denial of Hager's personal request to move from the first window on September 30. The court regards FVBSW's alleged refusal to allow Hager to go to the doctor on October 4th as a decision independent of the one made in mid-March. In sum, then, the court is convinced that because the incidents of September 28 and 30 are merely consequences of FVBSW's mid-March decision to place Hager at the first window, a decision that occurred outside the limitations period, they may not form the basis of Hager's disability discrimination claim.

Accordingly, every incident of discrimination in Hager's complaint is barred by the applicable period of limitations under section 706(c) except FVBSW's October 4 refusal to allow Hager to see her doctor. In attempting to avoid this statutory bar, Hager raises the continuing violation doctrine.

Typically, a claim based on allegedly discriminatory acts that occur outside of the limitations period is time-barred. However, if those acts are part of a "continuing violation," they may form the basis for a timely claim. To qualify as a continuing violation, the alleged discriminatory acts must constitute "a series of separate but related acts" such that they are "manifested in a continuing violation." Stringfield v. Christopher Newport University, 64

F.Supp.2d 593, 596 (E.D.VA 1999) (quoting Jenkins v. Home Ins. Co., 635 F.2d 310, 312 (4th Cir. 1980) (per curiam), affirmed 202 F.3d 260 (4th Cir. 1999). “Moreover, there must be a present violation within the statutory period.” Id. (citing Hill v. AT&T Techs, Inc., 731 F.2d 175, 180 (4th Cir. 1984) (internal quotations and citation omitted)).

The test for a continuing violation involves three factors: (1) whether the alleged acts involve the same type of discrimination; (2) whether the alleged acts are frequent; and (3) whether the alleged acts have a degree of permanence which would trigger an employee’s awareness and duty to assert his or her rights. Id.; Williams v. Enterprise Leasing Co., 911 F.Supp. 988 (E.D.VA 1995) (citing Berry v. Board of Supervisors of Louisiana State University, 715 F.2d 971 (5th Cir. 1983)); Demuren v. Old Dominion University, 33 F.Supp.2d 469, 478-79 (E.D.Va. 1999), aff’d 188 F.3d 501 (4th Cir. 1999). The third factor is the most important and requires the plaintiff to prove, at the least, that she ““failed to perceive the alleged discriminatory animus causing the claimed injury prior to the statutory period, and that such recognition would not reasonably have occurred until a point in time within the statutory period.”” Stringfield, 64 F.Supp.2d at 596 (quoting Williams, 911 F.Supp. at 997). In Williams, the court explained that the third factor alone may undo a plaintiff’s continuing violation claim:

‘[Plaintiff] has admitted that he believed, at every turn, that he was being discriminated against. A knowing plaintiff has an obligation to file promptly or lose his claim. This can be distinguished from a plaintiff who is unable to appreciate that he is being discriminated against until he has lived through a series of acts and is thereby able to perceive the overall discriminatory pattern.’

911 F.Supp. at 997 (quoting Sabree v. United Brotherhood of Carpenters and Joiners, 921 F.2d 396, 402 (1st Cir. 1990)).

Here, Hager’s disability discrimination allegations, even if true, do not place her within the

scope of the continuing violation doctrine as articulated by Williams' interpretation of Berry because Hager's allegations preclude her from establishing the third and "essential" prong of the Berry test.⁷ See Demuren, 33 F.Supp.2d at 478 (finding the doctrine of continuing violation inapplicable because plaintiff failed to establish the third Berry prong). In her complaint, Hager expressly asserts that, on June 11, 1999, she "knew . . . that [FVBSW] was not going to honor the restrictions imposed by [her] physician." (Amend. Compl. ¶ 15). Thus, on June 11, prior to the applicable period of limitations, Hager was aware that FVBSW's separate and distinct incidents of failure to accommodate her disability "'established a visible pattern of discriminatory mistreatment.'" Stringfield, 64 F.Supp.2d at 597 (quoting Williams, 911 F.Supp. at 997). Hager therefore cannot establish that she "failed to perceive the alleged discriminatory animus causing the claimed injury prior to the statutory period" Williams, 911 F.Supp. at 997. Hager's awareness "triggered" her duty to assert her rights, *i.e.*, the "obligation to file promptly or lose [her] claim." Sabree, 921 F.2d at 402. "In light of the Fourth Circuit's adherence to the Berry factors and the essential nature of the third factor," Stringfield, 64 F.Supp.2d at 597, the court concludes that the doctrine of continuing violation does not apply to Hager's claim. Accordingly, the court will grant FVBSW's motion to dismiss with respect to claims for alleged acts of discrimination that occurred prior to July 30, 1999.⁸

⁷ The court assumes without deciding that Hager's allegations, if true, satisfy the first two prongs of the Berry test, thereby establishing the prerequisite that "the defendant's alleged actions constituted a pattern or practice of discrimination." Stringfield, 64 F.Supp.2d at 596 (internal quotations and citation omitted).

⁸Since the alleged incidents of September 28 and 30 were not separate acts of discrimination, the only alleged incident of discrimination that survives FVBSW's motion to dismiss for failing to file within the applicable limitations period is the incident that occurred on October 4.

Next, FVBSW contends Hager's VCHR complaint was not an effective filing with the EEOC because the complaint was not verified by oath or affirmation as Congress requires for EEOC charge of discrimination. 42 U.S.C. § 2000e-5(b) (providing that an EEOC charge of discrimination "shall be in writing under oath or affirmation"). The court disagrees and concludes that even though Hager's VCHR complaint was not verified by oath, it was an effective filing with the EEOC because the worksharing agreement executed by the EEOC and the VCHR relieved Hager of the oath requirement.

Congress has empowered the EEOC to enter into worksharing agreements and has provided that "such agreements may include provisions under which the Commission shall . . . relieve any person or class of persons in such State or locality from requirements imposed under this section." 42 U.S.C. § 2000e-8(b). Here, the worksharing agreement provides as follows: "In order to facilitate the assertion of employment rights, the EEOC and the FEPA each designate the other as its agent for the purpose of receiving . . . charges." Worksharing Agreement between VCHR and EEOC for Fiscal Year 2000. (visited Oct. 31, 2001)

<<http://www.chr.state.va.us/workshare3.htm>>. The court finds that this provision relieves a party filing with the VCHR of the oath requirement Congress requires for an EEOC charge. To find otherwise would contradict the Fourth Circuit's express conclusion that "[u]nder the terms of the [worksharing agreement], a claim received by one agency . . . initiate[s] [the other] agency's proceedings for purposes of Title VII, section 706(c)." Puryear, 214 F.3d at 518-19 (internal quotations and citations omitted).

FVBSW also contends that this court lacks subject matter jurisdiction because Hager failed to name FVBSW in the complaint she filed with the VCHR. Again, the court is

unpersuaded. “Title VII does not require procedural exactness from lay complainants: ‘EEOC charges must be construed with utmost liberality since they are made by those unschooled in the techniques of formal pleadings.’” Alvarado v. Board of Trustees of Montgomery Community College, 848 F.2d 457 (4th Cir. 1988).⁹ In her VCHR complaint, Hager indicated that her employer was “First VA Bank, Inc. [George Wythe Branch].” She also listed FVBSW officers and included the phone number of FVBSW’s George Wythe Branch. The court finds this information was sufficient to provide FVBSW with the notice that the naming requirement is intended to provide. See id. at 460.

B. Intentional Infliction of Emotional Distress Claim

1. FVBSW’s 12(b)(1) motion

FVBSW’s moves to dismiss Plaintiff’s claim for intentional infliction of emotional distress¹⁰ under Rule 12(b)(1) on the grounds that the claim is barred by the Virginia Workers Compensation Act. The court will deny FVBSW’s motion because the Act is inapplicable to Plaintiff’s claim. The exclusivity provision of the Act, § 65.2-307, limits an employee to the remedies provided under the Act where the employee’s injuries occur “by accident.” An injury that occurs “by accident” “is restricted to those injuries resulting from an identifiable incident that results in a sudden mechanical or structural change in the body not a gradually incurred injury.” Lichtman v. Knouf, 248 Va. 138, 139-40, 445 S.E.2d 114, 115 (Va.1994) (concluding that the Virginia Workers’ Compensation Act does not apply to a claim for emotional distress

⁹The court finds Alvarado’s interpretive principle applicable to Hager’s VCHR complaint since, under the circumstances, a filing with the VCHR is a filing with the EEOC.

¹⁰The parties agree that Hager’s state law claim survives her death. Va. Code Ann. § 8.01-25 (Michie 2000).

allegedly inflicted over a period of time). Plaintiff claims emotional distress arising out of an eight month period of FVBSW's failure to accommodate her disability. Consequently, her alleged injury did not occur "by accident," and the Virginia Workers' Compensation Act does not bar her claim.

2. FVBSW's 12(b)(6) motion

FVBSW further argues that Plaintiff has failed to state a claim for intentional infliction of emotional distress. Specifically, FVBSW contends that Plaintiff has not alleged conduct that rises to the level required to state a claim for intentional infliction of emotional distress under Virginia law. The parties agree on the legal standard that applies to FVBSW's claim.¹¹ Under Virginia law, the alleged conduct must be so intolerable as to offend against "the generally accepted standards of decency and morality." Womack v. Eldridge, 210 S.E.2d 145, 148 (Va. 1974). To elaborate, the alleged conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Russo v. White, 400 S.E.2d 160, 162 (Va.1991) (citation omitted). The court notes that courts disfavor claims for intentional infliction of emotional distress and reserve them for only the most egregious circumstances. See Ruth v. Fletcher, 377 S.E.2d 412, 415-16 (Va. 1989). The court finds that Plaintiff's claim satisfies the minimal requirements of notice pleading, but the court lacks sufficient facts to determine whether the alleged conduct satisfies the stringent standard required for an intentional infliction of emotional

¹¹To state a claim for intentional infliction of emotional distress, Plaintiff must show that: (1) the wrongdoer's conduct is intentional or reckless; (2) the conduct is outrageous and intolerable; (3) the wrongdoer's conduct caused the emotional distress; (4) the distress is severe." Russo v. White, 241 Va. 23, 26, 400 S.E.2d 160, 162 (Va. 1991) (citation omitted).

distress claim. Consequently, at this time, the court denies without prejudice FVBSW's motion to dismiss the intentional infliction of emotional distress claim.

III.

For the reasons stated, Plaintiff's motion to reconsider will be granted. With respect to Plaintiff's ADA claim, the court will grant FVBI's 12b(1) motion to dismiss, and FVBSW's 12b(1) motion to dismiss will be granted in part and denied in part. With respect to Plaintiff's IIED claim, FVBSW's 12(b)1 motion is denied, and its 12b(6) motion to dismiss will be denied without prejudice.

ENTER this ____ day of January, 2002.

CHIEF UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION**

RONNIE HAGER, ADMINISTRATOR OF)	
THE ESTATE OF NANCY L. HAGER,)	
)	Civil Action No. 7:01CV00053
Plaintiff,)	
)	
v.)	<u>Order</u>
)	
FIRST VIRGINIA BANKS, INC.,)	
)	By: Samuel G. Wilson
and)	Chief United States District Judge
)	
FIRST VIRGINIA BANK–SOUTHWEST,)	
)	
Defendants.)	

In accordance with the Memorandum Opinion entered this day, it is hereby

ORDERED and ADJUDGED

(1) That Plaintiff’s motion to reconsider is **GRANTED**.

(2) That First Virginia Banks, Inc.’s motion to dismiss Count I of the complaint pursuant to Fed. R. Civ. Pro. 12(b)(1) is **GRANTED**, and that, consequently, the court **DECLINES** to exercise supplemental jurisdiction over First Virginia Banks, Inc. with respect to Count II.

(3) That First Virginia Bank Southwest’s motion to dismiss Count I of the complaint pursuant to Fed. R. Civ. Pro. 12(b)(1) is **GRANTED IN PART and DENIED IN PART**.

(4) That First Virginia Bank Southwest’s motion to dismiss Count II of the complaint pursuant to Fed. R. Civ. Pro. 12(b)(1) is **DENIED**.

(5) That First Virginia Bank Southwest's motion to dismiss Count II of the complaint pursuant to Fed. R. Civ. Pro. 12(b)(6) is **DENIED** without prejudice

ENTER this ____ day of January, 2002.

CHIEF UNITED STATES DISTRICT JUDGE