IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
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LAVERNE MILLS-WILLIAMS, Plaintiff,	CASE NO: ST-15-CV-574
v.	ACTION FOR DAMAGES
GOVERNOR KENNETH E. MAPP, RANDOLPH KNIGHT, CLAUDE WALKER, ESQ., AND THE OFFICE OF THE GOVERNOR, Defendants,	

MEMORANDUM OPINION

THIS MATTER is before the Court on Defendants' Motion to Dismiss Second Amended Complaint (filed on November 23, 2015) and Plaintiff Laverne Mills-Williams's Motion to Amend Second Amended Complaint (filed on December 14, 2015). For the reasons expounded below, the Court will grant the motion to dismiss and deny the motion to amend for futility.

Factual Background[1]

Defendant Kenneth Mapp was elected Governor of the Virgin Islands in November 2014 and sworn into office in January 2015. Mapp hired Defendant

[1] The motions under consideration are a motion to dismiss and a motion to amend a complaint that has been challenged for futility. Accordingly, the facts as recounted here strictly reflect the facts as Mills-Williams pleaded them as well as common knowledge; they do not reflect evidentiary findings of the Court or allegations from Defendants.

Randolph Knight to be his chief of staff and hired Emile Henderson, who Plaintiff now proposes to add as a Defendant, to be his chief counsel in the new administration. Mapp appointed Defendant Claude Walker to be Attorney General in August 2015 (the Legislature later confirmed him in December 2015). After Mapp's election, Henderson recruited Plaintiff Laverne Mills-Williams to join his staff as his Deputy Attorney. Henderson told Mills-Williams that the Mapp administration "was going to be unlike other administrations and that it was going to be ethical, do all actions by the book and be a reputable administration." Mills-Williams accepted the job offer and joined the administration.

Sometime later, the St. Croix Avis newspaper (sometimes "The Avis") submitted a request to the territorial government for information[2] under the "Freedom of Information Act"[3] and Mills-Williams was assigned responsibility for responding to The Avis's request. Because the requested information related to Mapp, Knight, and Henderson, Mills-Williams concluded that they must be "walled off" from the request as a matter of law. Nonetheless, Mills-Williams learned[4] that Mapp wanted to review any documents that Mills-Williams was planning to send to The Avis. Believing such a request to be improper, Mills-Williams told her supervisor, Henderson, that it would be unlawful for Mapp to review the documents. Henderson told Mills-Williams that he agreed and would advise Mapp to that effect. Then, on

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[2] Mills-Williams's pleadings do not provide more detail concerning what specifically The St. Croix Avis requested.
[3] The Court infers that this means V.I. Code Ann. tit. 3, §§ 881-884.
[4] The pleadings do not specify how.

September 14, 2015, Mills-Williams provided The Avis with the information it had requested. According to Mills-Williams's pleadings, the documents she provided to The Avis tended to show "improper spending of funds by Governor Mapp and Randolph Knight without the approval of the legislature as well as improper credit card charges, putting alcohol purchases on a Government credit card, falsely certifying social events were business meetings and other illegal or improper acts."

Afterward, Henderson informed Mills-Williams that Mapp and Knight were upset that she had sent documents to The Avis without giving them an opportunity to review and redact them. Furthermore, he instructed her not to send The Avis any more information and to stall any other requests. Mills-Williams responded by telling Henderson that those instructions were illegal and she would not obey them. On September 30, 2015, Henderson called Mills-Williams, told her that Mapp had decided to transfer her to the Department of Justice and instructed her to report for work there on October 5, 2015. Although he initially told her the transfer was for budgetary reasons, Mills-Williams says Henderson later told her the transfer was due to her having twice told him that Mapp and Knight's conduct was unlawful. Mills-Williams reported for work at the Department of Justice as directed. On October 7, 2015, she received "a letter of termination" from Mapp formally ending her assignment to the Governor's staff. She never received a Notice of Personnel Action memorializing the transfer. At the Department of Justice, Mills-Williams was transferred between several offices.

On October 28, 2015, Mills-Williams filed this law suit.[5] On October 29, 2015, The Avis reported the suit and Attorney General Walker placed Mills-Williams on leave with pay. Walker also advised her that there was no available funding source and she would have to wait to receive her back pay until a source was identified. Mills-Williams alleges that Walker in the meanwhile filled two other funded positions without offering them to her and that he still (as of the date of the second amended complaint) maintains more than one vacant funded position.

On November 13, 2015, Mapp wrote and published a press release concerning Mills-Williams in which he stated that she "associate[es] with a convicted criminal [and] associate[es] with an attorney who knowingly associates with persons involved in drug trade," that Mills-Williams is "the kind of person who would be influenced by associating with others to engage in unethical behavior," and that Mills-Williams is "not able to keep confidence or be trusted with confidential information." Mapp then went onto a talk radio program and repeated substantially the same allegations.

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[5] In a flurry of activity, Mills-Williams filed a First Amended Complaint later on the same day — October 28, 2015 — that she filed her original Complaint. The primary effect of the amendment was to remove Emile Henderson as a defendant. Then, on October 29, 2015, she filed her Second Amended Complaint, the primary effect of which was to add Claude Walker as a defendant. It is not clear which version of the complaint Mills-Williams ultimately served on Defendants and there is no record that the Court under the previous judge ever approved the First or Second Amended Complaints. Mills-Williams may have been relying in part on Fed. R. Civ. P. 15(a), notwithstanding the Supreme Court's holding in *Santiago v. V.I. Housing Authority*, 57 V.I. 256 (V.I. 2012). Nonetheless, Defendants have not challenged the Second Amended Complaint on these grounds, and the Court believes acceptance of the Second Amended Complaint is appropriate under Super. Ct. R. 8.

Finally, on an unspecified date[6] Mapp terminated Mills-Williams's employment at the Department of Justice and retroactively changed her employment status from "leave with pay" to "leave without pay."

Procedural Background and Legal Standard

On November 23, 2015, Defendants moved to dismiss Mills-Williams's Second Amended Complaint for failure to state a claim. Fed. R. Civ. P. 12(b)(6) (as incorporated by Super. Ct. R. 7). On December 14, 2015, Mills-Williams moved to amend her Second Amended Complaint in order to, inter alia, re-name Emile Henderson as a defendant, to clarify that Mapp, Walker, and Henderson were named in both their official and individual capacities, and to bring a new cause of action for defamation.[7] Defendants opposed Mills-Williams's proposed amendments on the grounds of futility, i.e. that the proposed amendments would neither survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6) nor cure the deficiencies in the Second Amended Complaint that Defendants identified in their Motion to Dismiss. The standard for assessing a motion to amend challenged on futility grounds matches the standard for a motion to dismiss under Rule 12(b)(6). *See, e.g., Walton v. Mental Health Association*, 168 F.3d 661, 665 (3d Cir. 1999). *See also David v. AMR Services*

[6] Likely at the same time as the press release, but the pleadings do not specify. The allegation first appears in a filing dated November 19, 2015.

[7] Mills-Williams had filed a motion to amend her Second Amended Complaint on November 20, 2015, but the Court had not yet acted on the motion when she withdrew the November 20 motion and replaced it with the December 14 motion.

Corp., 42 V.I. 420, 426 (D.V.I. 2000). Therefore, the Court will consider both the motion to dismiss and the motion to amend simultaneously.

In evaluating the sufficiency of Mills-Williams's Second Amended Complaint and proposed Third Amended Complaint, the Court must 1) identify the legal elements of each count; 2) identify well-pleaded factual allegations; and 3) compare the well-pleaded allegations against the legal elements and assess whether those allegations, if true, would plausibly lead to the conclusion that the claimant is entitled to relief. *Joseph v. Bureau of Corrections*, 54 V.I. 644, 649-650 (V.I. 2011) (relying heavily on *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), *Robles v. HOVENSA, L.L.C.*, 49 V.I. 491 (V.I. 2008), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)).

Pleadings need not contain more than a "short and plain statement of the claim showing that the pleader is entitled to relief" in the form of "simple, concise, and direct allegations." Fed. R. Civ. P. 8(a)(2), 8(d)(1). The complainant generally does not need to lay out factual allegations in great detail, *Conley v Gibson*, 355 U.S. 41, 48 (1957), and the rules require judges to construe even substandard pleadings flexibly "so as to do justice." Fed. R. Civ. P. 8(e). Nonetheless, the claimant must provide enough detail such that there is a factual "showing," *Twombly*, 550 U.S. at 555 n. 3 (expounding Fed. R. Civ. P. 8(a)(2)), and not merely an "assertion devoid of further factual enhancement" or "an unadorned, the defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. "[L]egal conclusions couched as factual allegations" are not adequate. *Joseph*, 54 V.I. at 650.

"If there are sufficient . . . facts [alleged] that the [C]ourt can draw a 'reasonable inference that [D]efendants [are] liable' . . . then the claim is plausible. *Id.* at 650 (quoting *Santiago v. Warminster Tp.*, 629 F.3d 121, 130 (3d Cir. 2010)). "The plausibility determination is a 'context-based' determination which should be guided by the [C]ourt's 'judicial experience and common sense. *Id.* (quoting *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009)). "Plausibility requires that [Mills-Williams] allege facts that are more than simply 'consistent with [Defendants'] liability' and must permit the [C]ourt to infer more than the mere possibility of misconduct." *Id.* (quoting *Fowler*, 578 F.3d at 211).

Analysis

Between the Second Amended Complaint and the proposed Third Amended Complaint, Mills-Williams's pleadings contain four counts: Misrepresentation (Count I), violation of the Whistleblower Protection Act (Count II), tortious interference with an employment contract (Count III), and defamation (Count IV). The Court considers each claim in turn.

Misrepresentation

Mills-Williams accuses Defendants of "misrepresentation." Her pleadings do not specify whether she means fraudulent[8] or negligent misrepresentation, but her later filings have indicated she may mean both (despite listing it as a single claim), so the Court will consider both. Specifically, Mills-Williams points to Emile Henderson's representations that the Mapp administration "was going to be unlike other administrations and that it was going to be ethical, do all actions by the book and be a reputable administration" and her reliance on those statements in taking a job with the government as the basis of her claim. To succeed on a fraudulent misrepresentation claim, the allegations in Mills-Williams's pleadings must show: 1.) that Henderson made a misrepresentation of fact, opinion, intention, or law; 2.) that he knew or had reason to know his statement was false; 3.) for the purpose of inducing Mills-Williams to act on the misrepresentation; 4.) that she justifiably relied on the misrepresentation; and 5.) that her reliance caused her pecuniary loss.. *Merchants Commercial Bank v. Oceanside Village, Inc.*, 2015 V.I. LEXIS 146 (V.I. Super. Ct. Dec. 18, 2015). *Cf. Isaac v. Crichlow*, 63 V.I. 38 (V.I. Super. Ct. 2015).[9]

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[8] Also called "intentional misrepresentation" or just plain "fraud." *Merchants Commercial Bank v. Oceanside Village, Inc.*, 2015 V.I. LEXIS 146, *11-12 (V.I. Super. Ct. Dec. 18, 2015).

[9] Although the Court is not aware of any authoritative statement of the law of fraudulent misrepresentation in the Virgin Islands post-dating *Banks v. International Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011) and *Government of the Virgin Islands v. Connor*, 60 V.I. 597 (V.I. 2014), the Court is persuaded that Judge Francois's *Banks* analysis in *Merchants* is sound and adopts her holding as its own here.

To succeed on a negligent misrepresentation claim, the allegations in Mills-Williams's pleadings must show: 1) that Henderson supplied her with false information for her guidance; 2) that he did so in the course of his employment; 3) that he failed to exercise reasonable care or competence in obtaining or communicating the information; 4) that Mills-Williams justifiably relied on the information; and 5) that her reliance caused pecuniary harm. *Merchants Commercial* Bank, 2015 V.I. LEXIS 146 at *25-30. *See also Turnbull v. University of the Virgin Islands*, 2016 V.I. LEXIS 22 (V.I. Super. Ct. Mar. 2, 2016) (following *Merchants Commercial Bank*).[10]

Mills-Williams's pleadings (and proposed amendments) fail to allege facts sufficient to support either fraudulent or negligent misrepresentation for three independent reasons. First, and most important, Henderson's alleged statements are pure puffery. The facts in this case are not relevantly different from *McDonald v. Davis*, 2009 U.S. Dist. LEXIS 17309 (D.V.I. Mar. 5, 2009), where the District Court considered a misrepresentation claim from a former employee of the *Virgin Islands Daily News* newspaper who claimed, inter alia, to have joined the newspaper as a reporter in reliance on the paper's representation that it was "the best small newspaper in America." *Id.* at *7, 13-14. Judge Gómez there rejected the claim as "incontestably non-actionable puffery." *Id.* (citing, inter alia, to *Cook, Perkiss and*

[10] Although the Court is not aware of any authoritative statement of the law of negligent misrepresentation in the Virgin Islands post-dating *Banks* and *Connor* the Court is persuaded that Judge Francois's *Banks* analysis in *Merchants* is sound and adopts her holding as its own here.

Liehe, Inc. v. Northern Cal. Collection Serv., Inc., 911 F.2d 242, 246 (9th Cir. 1990), for the proposition that "general assertions of superiority" are not "factual misrepresentations."). *Cf. Angrisani v. Capital Access Network, Inc.*, 175 Fed. App'x. 554 (3d Cir. 2006) (". . . statements that can be categorized as "puffery" or vague and "ill-defined opinions" are not assurances of fact and do not constitute misrepresentations."). Henderson's statements were likewise vague, ill-defined assertions of superlativeness. By their very nature, they fall outside the set of statements whose falsity or "accordance with the truth," Restatement (Second) of Torts § 525 cmt. b, are ascertainable by a judge or jury.[11]

Second, Mills-Williams's pleadings (and proposed amendments) do not include any factual allegations showing that her reliance on Henderson's statements caused pecuniary loss. Certainly, Mills-Williams's allegation that she was ultimately terminated from her employment and did not receive all the pay due to her shows a pecuniary loss for the purposes of a motion to dismiss, but her pleadings only show "but-for" causation (i.e. that she could not have lost her pay and job if she had not relied on Henderson and joined the government in the first place). They do not show that Henderson's alleged misrepresentations were a substantial factor in bring out her lost pay. *Molloy v. Independence Blue Cross*, 56 V.I. 155, 180 n.6 (V.I. 2012) (citing *Sealey-Christian v. Sunny Isle Shopping Ctr., Inc.*, 52 V.I. 410, 432 (V.I.

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[11] If Henderson's statements were actionable, the Court shudders to imagine the torrent of litigation that would ensue when campaign contributors and voters sue political office holders for failing to deliver on campaign promises of ethical, by-the-book governance.

2009) (finding that causation for a tort requires the Plaintiff to show that the tort was both the "but-for" cause of the injury and "a substantial factor in bringing about the result.") The causal relationship between Mills-Williams joining the government in reliance on Henderson's statements and her getting fired from the government (and not receiving full pay) is too attenuated; even the narrative as she herself recounts it shows that any pecuniary loss she suffered had its proximate cause in the events surrounding The St. Croix Avis's Freedom of Information Act request, not Henderson's job pitch months earlier.

Finally, Mills-Williams has neither alleged that Henderson knew his statements were false (fraudulent misrepresentation), not even "generally," Fed. R. Civ. P. 9(b) (as incorporated by Super. Ct. R. 7), nor has she alleged facts that tend to show that Henderson failed to exercise due care in obtaining his information or communicating his statements (negligent misrepresentation).[12] Rather, her pleadings merely recount the content of Henderson's statements and allege her reliance on them in deciding to join the government.

Some of the above-noted deficiencies might be easily curable through yet another amendment to the pleadings (e.g. a general allegation of knowledge), but since some are not (e.g. the non-cognizable puffery), the Court will dismiss Mills-Williams's claim for misrepresentation.

[12] To the extent that Mills-Williams is arguing that Henderson was merely an agent acting "on behalf of all Defendants except Walker," her pleadings are similarly lacking in allegations of knowledge or negligence.

Whistleblower Protection Act

The Whistleblower Protection Act protects employees who "report . . . a violation . . . of a law . . . to a public body" from "discharge, threat[s], or . . . discriminat[ion] . . . regarding the employee's compensation, terms, conditions, location, or privileges of employment." V.I. Code Ann. tit. 10, § 122. *See also Hodge v. Superior Court of the Virgin Islands*, 2009 U.S. Dist. LEXIS 83943 (D.V.I. Sept. 11, 2009), *aff'd*, 404 Fed. App'x 641 (3d Cir. 2010); *Johnson v. Government of the Virgin Islands*, 35 V.I. 27 (V.I. Terr. Ct. 1996). A "public body" is defined broadly to include, inter alia: "a territorial officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the territorial government." V.I. Code Ann. tit. 10, § 121(d)(1).

Defendants challenged Mills-Williams's Second Amended Complaint on the grounds that it identified Mills-Williams's transmittal of documents to the St. Croix Avis newspaper as Mills-Williams's "report . . . [of] a violation . . . of a law." Defendants argued, and the Court agrees, that a private newspaper does not qualify as a "public body" under the statutory definition, which includes only governmental and quasi-governmental officers and organizations.[13] Mills-Williams's proposed

[13] Section 121(d) reads in full:

"Public body" means all of the following:

(1) a territorial officer, employee, agency, department, division, bureau, board, commission, council, authority, or other body in the executive branch of the territorial government;
(2) an agency, board, commission, council, member, or employee of the legislative branch of the territorial government;
(3) any other body which is created by the territory or which is primarily funded by or through territorial authority, or any member or employee of that body;

Third Amended Complaint attempts to cure this problem by identifying two exchanges between Mills-Williams and Emile Henderson (wherein she told Henderson that Mapp was acting illegally) as the whistleblowing events that prompted Defendants to transfer her out of her position in the Governor's Office, put her on leave, deny her pay, and ultimately terminate her employment.

Defendants challenge Mills-Williams's amended claim on the strength of the District Court's holding in *Hodge*.[14] In that case, the District Court rejected a whistleblower claim from an employee of the V.I. Superior Court who cited a memorandum he submitted to the Presiding Judge as his protected whistleblower report. In the memo, the employee accused the Administrative Judge and the Court Administrator of improperly interfering with his duties. The District Court held that, in order for an internal report to qualify as "protected conduct," the reporting "employee must make it clear to the employer the employee's actions go beyond the employee's assigned tasks and job duties." *Hodge*, 2009 U.S. Dist. LEXIS 83943 at *18-19. Since the Superior Court employee's report was "exactly the type of activity he was required to perform in fulfilling his duties," *id.*, the District Court rejected the claim. Similarly, Defendants point to *Garcetti v. Ceballos*, 547 U.S. 410 (2006), as

(4) a law enforcement agency or any member of a law enforcement agency;
(5) the judiciary and any member of the judiciary.

[14] Defendants also challenged Mills-Williams's claim on the grounds that Defendants do not qualify as "employers" under the Whistleblowers Protection Act since an employer is defined as "a person who has one or more employees." V.I. Code Ann. tit. 10, § 121(b). However, this objection collapses upon review of the next sentence in the Code: "Employer includes an agent of an employer and the Government of the Virgin Islands." As employees of the Government, Defendants Mapp, Knight, Walker, and proposed Defendant Henderson all qualify as agents of an employer.

persuasive authority. In *Garcetti*, the United States Supreme Court held that a Los Angeles County deputy district attorney's phone call and memorandum to his supervisors identifying problems with a warrant were not protected speech because it was "made pursuant to official responsibilities." *Id.* at 424.

Despite the strength of the underlying policy analyses in *Johnson* and *Garcetti*, the Court cannot adapt the holding of either to this case. *Garcetti* does not construe the Virgin Islands Whistleblower Protection Act or any statute at all; rather, it is a First Amendment analysis that wholly inapplicable here since Mills-Williams has not brought a constitutional claim. *Hodge* at least construes the correct statute, but the Court disagrees with its analysis.[15] When interpreting the V.I. Code, the Court must begin, and usually end, with the statutory text. *See, e.g., Murrell v. People*, 54 V.I. 338, 352 (V.I. 2010). Title 10 requires only that an employee report a violation (or suspected violation) to a public body. The language is categorical and does not exclude certain categories of reports or violations. In creating the rule that reports are excluded if an employee makes it in the normal course of their employment, the District Court did not rely on the statutory text, but rather imported the rules from *Hutchins v. Wilentz, Goldman & Spitzer*, 253 F.3d 176, 193 (3d Cir. 2001) (applying the Federal False Claims Act), and *Skare v. Extendicare Health Serv., Inc.*, 515 F.3d 836, 841 (8^{th} Cir. 2008), neither of which address the V.I. Code. Notwithstanding

[15] Which this Court is empowered to do, notwithstanding Hodge's affirmance before the Third Circuit. *Hamed v. Hamed*, 63 V.I. 529 (V.I. 2015).

Hodge's (and *Garcetti*'s) policy logic, the Court will not step on the Legislature's prerogatives and insert exceptions to statutes that are not found in the Code itself. The Supreme Court of Michigan,[16] interpreting an identical statute, came to the same conclusion, holding that the text of the statute is "unambiguous" and will not bear an exception:

> Finally, there is no language in the statute that limits the protection of the WPA to employees who report violations or suspected violations only if this reporting is outside the employee's job duties. . . . There is no limiting language that requires that the employee must be acting outside the regular scope of his employment. The WPA protects an employee who reports or is about to report a violation or suspected violation of a law or regulation to a public body. The statutory language renders irrelevant whether the reporting is part of the employee's assigned or regular job duties.

Brown v. Mayor of Detroit, 734 N.W.2d 514 (Mich. 2007).

Even so, the Court finds that the plain meaning of the statutory text as written, especially the phrase "report . . . a violation," will not bear the particular facts as alleged in Mills-Williams's pleadings. Mills-Williams says her supervisor, Emile Henderson, approached her after she released documents to The Avis and told her that "the Governor and Randolph Knight were very upset that Plaintiff had released

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16 Although the Court does not possess definitive legislative history on this point, it appears that the Virgin Islands Legislature incorporated Michigan's whistleblower statute, which contains substantially identical text and was enacted two years earlier. Mich. Comp. Laws §§ 15.361-362. Therefore, the Court will consider the decisions of the Michigan Supreme Court to be highly persuasive in interpreting Virgin Islands Whistleblower Protection Act. *See, e.g.*, *Rivera-Moreno v. Government of the Virgin Islands*, 61 V.I. 279, 295-296, 311-315 (V.I. 2014) (consulting decisions of the California Supreme Court to interpret V.I. Code Ann. tit. 5, § 1301-1325).

the documents without affording them the opportunity to review them and redact documents. It was also made clear to Plaintiff that she was to stonewall any additional Freedom of Information requests and not to produce any more documents." Mills-Williams then alleges that she "reported to her supervisor Chief Legal Counsel Henderson . . . that the directive to not produce any more documents was illegal and that the Governor and Knight should be told that Counsel could not follow illegal directives." In this instance the alleged violation of law is Mapp and Knight's directive to Mills-Williams not to produce more documents to the public. But the unique factual circumstances alleged here preclude the Court from holding that Mills-Williams's alleged conduct is protected by Title 10. In essence, Mills-Williams is claiming to "report" an illegal directive from Mapp and Knight to the very person who just delivered that directive to her. This strains the plain English sense of the phrase "report a violation"[17] past the breaking point. At most, Mills-Williams reported her legal opinion; but opinions are not "violations of law," i.e. illegal acts.

Mills-Williams's other alleged instance of whistleblowing occurred when, "[s]ometime before the submission of the documents to the St. Croix Avis, Plaintiff learned that the Governor wanted to review the documents before submission." Then,

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[17] In drafting the Whistleblowers Protection Act, the Legislature had the opportunity to create the statute as it determined. Instead of protecting employees when they "mention," "talk about," or "discuss" violations of law, the Legislature chose to protect instances where employees "report." Although "report" can carry many shades of meaning and definition, in the context of the Whistleblower Protection Act, the Court holds that it carries the meaning of delivering factual information that the recipient did not already know (or that the reporter had no reason to think the recipient knew).

"[a]s a direct and proximate result, Plaintiff determined the Governor's actions were unlawful and she reported the Governor's illegal conduct to her superior in the Executive Branch of the Territorial Government, the Chief Legal Counsel, Henderson." The problem in this instance is not that Mills-Williams was merely offering her legal opinion,[18] but rather that the content of her communication was not a "violation." In reading the proposed Third Amended Complaint, the move from "the Governor wanted to review the documents" (paragraph 18 of the proposed Third Amended Complaint) to "[a]s a direct and proximate result, Plaintiff determined the Governor's actions were unlawful" and "illegal conduct" (paragraph 19 of the proposed Third Amended Complaint) is incongruous and jarring. Construing the statement that Mapp wanted to review the documents charitably,[19] it is plausible to infer that Mills-Williams means that Mapp actually planned to review whatever information or documents she ultimately decided to deliver to The Avis. But, assuming arguendo that Mapp's pre-release review of documents would be illegal (or at least that Mills-Williams believed it would be illegal) such a review would have been a contingent, future event at the time Mills-Williams reported it to Henderson. Reports of this sort

[18] It is possible that this instance of alleged whistleblowing falls into the same category of merely reporting a legal opinion, but the pleadings do not identify precisely how Mills-Williams learned that Mapp "wanted to review the documents." It is plausible that Henderson did not know Mapp's desire to review documents.

[19] If the pleadings were to be construed literally instead, a person merely "wanting" something without any actus reus is so plainly outside the realm of possible violations of law in the western legal tradition, that the Court would be willing to dismiss the claim as implausible on that basis alone.

are not covered by the Whistleblowers Protection Act. Again, as the Michigan Supreme Court explained:

> The reference in [Section 122] to "a violation or a suspected violation of a law" plainly envisions an act or conduct that has actually occurred or is ongoing. A common dictionary definition defines "violation" in part as "the act of violating: the state of being violated[.]" This definition contemplates an existing act that has occurred or is ongoing. That is, "a violation or a suspected violation" refers to an existing violation. The provision must therefore be read in the context of some conduct or act that has already occurred or is occurring, and not some conduct or act that may or may not occur. [Section 122] contains no language indicating that future, planned, or anticipated acts amounting to a violation or a suspected violation of law are included within the scope of the [Whistleblowers Protection Act]. Consequently, a stated intention to commit an act amounting to a violation of a law in the future does not constitute "a violation or a suspected violation of a law" for purposes of [Section 122] as a matter of law.

Pace v. Edel-Harrelson, 878 N.W.2d 784, 788 (Mich. 2016) (citing, inter alia, *Grundtner v. Univ. of Minnesota*, 730 N.W.2d 323 (Minn. Ct. App 2007)). Therefore, the Court is satisfied that Mills-Williams Second Amended Complaint and proposed Third Amended Complaint do not state a claim for relief under the plain meaning of Title 10.

Interference with Contract

To show intentional[20] interference with her employment contract, Mills-Williams must show 1.) that she had a contract with a third party; 2.) that Defendants knew about the contract; 3.) that Defendants interfered with her contract using improper means or improper motive; and 4.) damages. *Donastorg v. Daily News Publishing Co., Inc.*, 63 V.I. 196 (V.I. Super. Ct. 2015).[21] *See also Merchants Commercial Bank v. Oceanside Village, Inc.*, 2015 V.I. LEXIS 146 (V.I. Super. Ct. Dec. 18, 2015) (following *Donastorg*), *Kiwi Construction, LLC v. Pono*, 2016 V.I. LEXIS 1 (V.I. Super. Ct. Jan. 15, 2016) (also following *Donastorg*). Defendants offer two arguments for dismissal: 1) Mills-Williams has not alleged the existence of a contract, and 2) she has not alleged it was made with a third party.

The Court finds Defendants' first argument (that Mills-Williams has not alleged the existence of a contract) unconvincing. Mills-Williams pleadings show that she provided legal services to the Government for some time until her termination in November 2015. Furthermore, her pleadings show that she was placed on leave with pay; therefore it is plausible to infer that the Government gave Mills-Williams money at some point. Since it is not usually a coincidence that a lawyer would provide

[20] Notwithstanding Mills-Williams's labeling the cause of action "tortious interference," the Court will employ the label found in recent case law.

[21] Although the Court is not aware of any authoritative statement of the law of contract interference in the Virgin Islands post-dating *Banks* and *Connor* the Court is persuaded that Judge Francois's *Banks* analysis in *Donastorg* is sound and adopts her holding as its own here.

services to the same entity that provides the lawyer with money, the pleadings have more than adequately shown a plausible contractual relationship between Mills-Williams and the Government of the Virgin Islands. Lastly, Mills-Williams's proposed Third Amended Complaint repeatedly alleges a contract had formed. Of course, the terms of that relationship, i.e. the respective duties and rights of the parties, remain to be pleaded. Defendants' citations to *Phaire v. Merwin*, 3 V.I. 320 (D.V.I. 1958) and *Manning v. Bouton*, 18 V.I. 457 (D.V.I 1981) are still relevant insofar as they stand for the proposition that the contractual rights, duties, and means of dispute resolution are subject to, or even primarily defined by, relevant laws, regulations, union agreements, etc. and not necessarily any unique bargain struck by an individual employee and the Government. However, these caveats cannot render the governmental employment relationship categorically non-contractual.

The Court finds Defendants' second argument (that Plaintiff has not alleged a contract was made with a third party) far more compelling. To fully understand why, it is helpful to identify precisely how Defendants have allegedly interfered with Mills-Williams's employment contract. From a close reading of the pleadings, the Court has identified four allegations that likely qualify as contract interference (under the plausible inference that an employment contract might have terms concerning these issues): Mills-Williams's transfer to the Department of Justice (at Henderson's directive and allegedly pursuant to Mapp's decision), her being placed on leave with pay (at Walker's directive), her being placed on leave without pay (at Mapp's directive), and her being terminated from employment altogether (also at Mapp's directive). The common thread here is that in every instance, the facts as alleged involve a Defendant or proposed Defendant taking action in their capacity as an agent of Mills-Williams's employer, the Government of the Virgin Islands. Indeed, it is impossible for anyone except an agent of the government to effect a transfer, put an employee on leave, deny her pay, and fire her. In pleading interference in a contractual relationship, Mills-Williams has not shown that she had a third-party contract in which Defendants meddled – Defendants, as government agents, *are* the third party. *See also Sorber v. Glacial Energy VI, LLC*, 2013 V.I. LEXIS 69 (V.I. Super. Ct. Nov. 22, 2013). Nor will it do for Mills-Williams to argue that she named Defendants in both official and personal capacities. The facts as pleaded, and not the labels applied, are what matter, *Joseph*, 54 V.I. at 650, and the facts as pleaded do not plausibly show any interference from Defendants acting outside the scope of their employment.

Therefore, Mills-Williams's pleadings fail not in identifying a contract, but in identifying a third party. Mills-Willliams has pleaded facts that come closer to establishing a plain vanilla breach of contract claim instead of the rarer tortious interference with contract claim. But Mills-Williams has not pleaded breach of contract, and the parties have not briefed the issue, so the Court will not conduct any further analysis in determining whether such a claim might survive a motion under Rule 12.

Defamation

Finally, Mills-Williams moves to amend her Second Amended Complaint to include a cause of action for defamation. After she filed her original Complaint in this case, Governor Mapp terminated Mills-Williams's employment and stated in both a press release and a radio broadcast that she associates with drug criminals. To recover for defamation, Mills-Williams must show: 1) that Defendants made a false and defamatory statement about her; 2) that Defendants made an unprivileged publication of that statement to a third party; 3) that Defendants exhibited fault amounting at least to negligence; and 4) either that she suffered special harm or that special harm need not be demonstrated. *Simpson v. Capdeville, P.C.*, 2016 V.I. Supreme LEXIS 11, *12 (V.I. April 18, 2016) (citing *Joseph v. Daily News Publishing Co., Inc.*, 57 V.I. 566, 585-588 (V.I. 2012)).

Defendants argue that Mills-Williams's proposed new cause of action for defamation fails for futility because Mapp's statements are privileged. As the governor, Mapp has "[a]n absolute privilege to publish defamatory matter concerning another in communications made in the performance of his official duties. . . ." Restatement (Second) of Torts § 591. The Court agrees.[22]

Mills-Williams correctly points out the immunity under Section 591 does not extend outside the scope of official duties, Restatement (Second) of Torts § 591 cmt. f. However, the privilege does extend to the "outer perimeter" of Mapp's duties, Restatement (Second) of Torts § 591 cmt. b, and the facts as pleaded show Mapp's alleged defamatory conduct falling squarely inside that scope. Mapp, via a press conference and talk radio, explained his reasons for taking a personnel action pursuant to his authority and responsibilities as Governor in a high profile situation of public interest. Section 591 contemplates this exact scenario.[23]

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[22] Although a fair reading of *Joseph*, 57 V.I. at 586, permits the conclusion that the Supreme Court has already adopted Section 591 into Virgin Islands common law pursuant to *Banks v. International Rental & Leasing Corp.*, 55 V.I. 967 (V.I. 2011), the Court, out of an abundance of caution, will re-baptize the section with an express *Banks* analysis. Virgin Islands courts have a modest history of applying Section 591 (or at least of assuming its applicability). *Moorehead v. Millin*, 19 V.I. 155, 159-162 (D.V.I. 1982) (applying Section 591 to give absolute privilege to the Lieutenant Governor); *Thomas v. Nicholson*, 21 V.I. 561 (V.I. Terr. Ct. 1985); *Bryan v. Bernier*, 21 V.I. 333, 335 n. 2 (D.V.I. 1985). The practice of extending the privilege against defamation to governors is exceedingly widespread; "[a]ll of the state courts that have considered the question have agreed that the absolute privilege . . . protects the superior officers of the state governments, including at least the governor . . . ." Restatement (Second) of Torts § 591 cmt. c. The same reasons that have compelled other jurisdictions to protect their chief executives from defamation claims, namely that it is "important that officials of government should be free to exercise their duties unembarrassed by the fear of . . . suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effective administration of policies of government," *Barr v. Matteo*, 360 U.S. 564, 571 (1959), are equally applicable here. Therefore, the Court holds that Section 591 is the soundest rule for the Virgin Islands.

[23] Comment f reads, in excerpt: "[T]he head of a . . . state department may be authorized to issue press releases giving the public information concerning the conduct of the department, or events of public interest that have occurred in connection with it; and if he is so authorized [to make press releases] he is within the scope of his official duties . . . ."

Mills-Williams also cites to *Small v. Government of the Virgin Islands*, 20 V.I. 65 (V.I. Terr. Ct. 1983) (citing to *Davis v. Knud-Hansen Memorial Hospital*, 635 F.2d 179 (3d Cir. 1980) for the proposition that Mapp in his personal capacity is not immune to suit. This line of argument is unavailing because *Small* and *Davis* concern statutory immunity under the Organic Act, whereas Section 591 is a common law privilege pertaining to defamation specifically. Mills-Williams also argues that the privilege does not extend to a case like this where she is requesting injunctive relief, i.e. for "reinstatement to her position and for Defendants to retract the defamatory statements." Pl.'s Reply at 24. This argument is perplexing, because Mills-Williams's proposed Count IV plainly states that she suffered damages, her request for reinstatement pre-dates her claim for defamation and obviously relates not to her defamation claim but to her whistleblower claim, and a cursory review of the proposed Third Complaint shows no request for the Court to order a retraction of the alleged defamation (nor is the Court aware of any legal authority for such an order).

The facts as Mills-Williams has alleged them in her proposed Third Amended Complaint show that the alleged defamation falls squarely inside the privileged zone of Mapp's official duties. Therefore, Mills-Williams's proposal to add a cause of action for defamation will be denied for futility.[24, 25]

Conclusion

Mills-Williams's allegations of misrepresentation fail because Henderson's statements were plain puffery; her allegations of Whistleblowers Protection Act violations fail because she never reported a violation under the Act; her allegations of interference with a contract fail because agents of an employer are by definition incapable of interfering with that employer's contract; and her allegations of defamation fail because of the Governor's executive privilege. Therefore, the Court will grant Defendants' motion to dismiss and deny Mills-Williams's motion to amend as futile. The matter will be dismissed without prejudice.

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[24] Mills-Williams attempts to shoehorn the other defendants into liability for Mapp's press release and radio interview, but the Court finds that her assertions of liability are just that: assertions ("[t]he [Defendants] through [the press release] falsely accused Plaintiff ..."). The only facts alleged in the proposed Third Amended Complaint concern Mapp drafting the release and giving the interview.

[25] Although she did not include a claim for defamation in her Second Amended Complaint, Mills-Williams did include a paragraph accusing "Defendants other than Walker" of "falsely claiming she was transferred for failure to know what she was doing." Mills-Williams proposes to amend this allegation to specify that Defendants made these claims "to other government employees and others." Notwithstanding the proposed amendment, this falls short of the pleading requirements for defamation, which, in order to give Defendants at least minimal notice of the accusation, should include the names of persons to whom the defamatory statements were published, the dates of publication, and the specific content of the statements. *See Illaraza v. Hovensa, L.L.C.*, 2010 U.S. Dist. LEXIS 56212 (D.V.I. June 7, 2010). *See also Sanchez v. Bumann*, 2015 U.S. Dist. LEXIS 46272 (D.V.I. Apr. 9, 2015).

An appropriate Order shall accompany this Memorandum Opinion.

DATED: August 30, 2016

Kathleen Mackay
Judge of the Superior Court
of the Virgin Islands

ATTEST:
ESTRELLA H. GEORGE
Acting Clerk of the Court

BY:
LORI BOYNES-TYSON
Court Clerk Supervisor 8/30/16

A CERTIFIED TRUE COPY
DATE 8/31/2016
ESTRELLA H. GEORGE
ACTING CLERK OF THE COURT
BY
COURT CLERK II