

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

MELINDA SORBER,	) CIVIL NO. ST-10-CV-588
	)
Plaintiff,	)
	)
v.	) ACTION FOR WRONGFUL
	) DISCHARGE, BREACH OF
GLACIAL ENERGY VI, LLC., CHERYL	) CONTRACT, DAMAGES,
ROUSSEAU, KEITH LOCKWOOD, MARK	) CIVIL CONSPIRACY,
FINLEY, JOHN DOE 1, JOHN DOE 2, JOHN	) TORTIOUS INTERFERENCE
DOE 3, JANE DOE 1, JANE DOE 2, AND JANE	) WITH CONTRACT, AND
DOE 3,	) PRIMA FACIE TORT
	)
	) JURY TRIAL DEMANDED
	)
	)
Defendants.	)

MEMORANDUM OPINION

In a Motion to Dismiss, Defendants Glacial Energy VI, LLC, Cheryl Rousseau, Keith Lockwood and Mark Finley contend that Counts III and V of the Verified Complaint should be dismissed for failure to state a claim upon which relief can be granted.¹ This Court finds that Plaintiff Melinda Sorber has sufficiently set forth facts necessary to support Count III, civil conspiracy. This Court also finds that Count V alleges facts that are identical to the facts alleged in Count I, and is thus duplicative. The Court will, therefore, grant in part and deny in part the Motion to Dismiss.

FACTS

On July 13, 2009, Glacial hired Sorber as a contract employee to work in its Information Technology Department. Subsequently, on January 7, 2010, Glacial offered to hire Sorber as a full-time employee. Sorber accepted Glacial's offer and became a full-time employee on January 13, 2010.

During her employment, Sorber worked for approximately 80 consecutive days and, then requested vacation leave. Before this request, Sorber had not used any of her vacation leave. On September 19, 2010, Lockwood, Glacial Energy's Chief Operating Officer, sent a text message to Sorber's mobile phone denying her request. Sorber replied to Lockwood's text message

¹ Defendants Glacial Energy VI, LLC, Cheryl Rousseau, Keith Lockwood and Mark Finley are represented by Adam K. Gusman, Esq. Plaintiff Melinda Sorber is represented by Christopher Allen Kroblin, Esq., of Erika A. Kellerhals, P.C.

stating that she had worked 80 consecutive days and needed the time off. Lockwood texted in response that they must part ways and that the details of her termination would be sent to her.

On the following day, September 20, 2010, Sorber received a termination letter from Glacial stating that Glacial was in the process of reorganizing the Information Technology Department and had determined that her services were no longer necessary.

On October 19, 2010, Sorber filed a five-count complaint in this case. Count I alleges a violation of the Wrongful Discharge Act. Count II asserts a breach of contract claim. Count III sues the Defendants for civil conspiracy. Count IV argues that the Defendants are liable for tortious interference in her employment contract. Finally, in Count V Sorber contends that the Defendants are liable for prima facie tort.

The Defendants filed their Motion to Dismiss Count III and Count V of Plaintiff's Verified Complaint on November 12, 2010, pursuant to FED. R. CIV. P. 12(b)(6), contending that the Verified Complaint should be dismissed for failure to state a claim upon which relief can be granted. In the Motion to Dismiss, the Defendants assert that Count III, alleging civil conspiracy, is precluded by the Wrongful Discharge Act and the intracorporate doctrine. Regarding Count V, the Defendants contend that the prima facie tort claim is also precluded by the Wrongful Discharge Act and is duplicative of Sorber's other claims.

DISCUSSION

I. STANDARD OF REVIEW

"[W]hen ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint."² All reasonable inferences are drawn in favor of the non-moving party.³ A court must ask whether the complaint "contain[s] either direct or inferential allegations respecting all the material elements necessary to sustain recovery under *some* viable legal theory."⁴ "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions."⁵ "To survive a motion to dismiss, a . . . plaintiff must allege facts that 'raise a right to relief above the speculative level on the assumption that the allegations in the complaint are true (even if doubtful in fact).'"⁶

² *Erickson v. Pardus*, 127 S.Ct. 2197, 2200 (2007) (citing *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007)).

³ *Alston v. Parker*, 363 F.3d 229, 233 (3d Cir. 2004).

⁴ *Bell Atlantic Corp. v. Twombly*, 127 S.Ct. 1955, 1965 (2007).

⁵ *Id.* at 1964-65 (internal citations omitted).

⁶ *Victaulic Co. v. Tieman*, 499 F.3d 227, 234 (3d Cir.2007) (quoting *Twombly*, 127 S.Ct. at 1965).

II. COUNT III ASSERTS SUFFICIENT FACTS TO SUPPORT A CLAIM FOR CIVIL CONSPIRACY AND IS NOT BARRED BY THE WRONGFUL DISCHARGE ACT OR THE INTRACORPORATE DOCTRINE

The Defendants argue that the Virgin Islands Wrongful Discharge Act⁷ provides the exclusive remedy for the alleged claims relating to Sorber's termination and specifically, the Wrongful Discharge Act precludes an action for civil conspiracy. In opposition, Sorber asserts that, by its very nature, civil conspiracy must coexist with another underlying cause of action and thus, is not barred by the Wrongful Discharge Act.

"[A] civil conspiracy consists of an agreement or combination to perform a wrongful act that results in damage to the plaintiff. A conspiracy may also consist of an agreement to do a lawful act by unlawful means."⁸ This Court agrees with Sorber's position that a civil conspiracy also "requires a separate underlying tort as predicate for liability."⁹ Defendants are correct that the Wrongful Discharge Act is the Virgin Islands Legislature's exclusive attempt to delineate the boundaries of permissible reasons for termination of employees in the Territory. But, the Verified Complaint alleges facts to show that a violation of the Wrongful Discharge Act is the underlying tort of the civil conspiracy claim. After thorough review of caselaw in this jurisdiction and review of the Wrongful Discharge Act, the Court finds no support for Defendants' contention that the Wrongful Discharge Act preempts a claim for civil conspiracy. The Court, therefore, finds that Sorber's civil conspiracy claim survives as a separate action in addition to her claim under the Wrongful Discharge Act.

The Defendants further assert that the intracorporate doctrine precludes Sorber's civil conspiracy claim, and therefore should be dismissed. Under the intracorporate conspiracy doctrine, "an entity cannot conspire with one who acts as its agent."¹⁰ However, "a conspiracy may exist between a corporation and an officer 'if the officer is acting in a personal, as opposed to official, capacity.'"¹¹ Moreover, such actions must be motivated by a *solely* personal bias and not partially to benefit the corporation.¹² Thus, crucial to this discussion is whether the Defendants acted outside of the scope of their employment when they terminated Sorber's employment.

⁷ V.I. CODE ANN. tit. 24, § 76 (1997).

⁸ *Gov't Guar. Fund Repub. Fin. v. Hyatt Corp.*, 955 F. Supp. 441, 456 (D.V.I. 1997).

⁹ *In re Orthopedic Bone Screw Prods. Liab. Litig.*, 193 F.3d 781, 789 (3d Cir. 1999).

¹⁰ *Gen. Refractories Co. v. Fireman's Fund Ins. Co.*, 337 F.3d 297, 313 (3d Cir. 2003) (citing *Heffernan v. Hunter*, 189 F.3d 405, 413 (3d Cir.1999)).

¹¹ *Heffernan v. Hunter*, 189 F.3d 405, 412 (3d Cir. 1999) (quoting *Robison v. Canterbury Vill., Inc.*, 848 F.2d 424, 431 (3d Cir. 1988)); see also *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769-70 n. 15 (1984) (explaining that many courts have created an exception to the intracorporate doctrine "for corporate officers acting on their own behalf").

¹² See *Hartman v. Bd. Tr. Cmty. Coll. Dist. No. 508, Cook County, Ill* 4 F.3d 465, 470 (7th Cir. 1993) (the court, in the context of the intracorporate doctrine, questioned whether it was appropriate to hold corporate agents liable when their actions within the scope of employment were prompted, only partially, by personal racial animus. The court concluded that a conspiracy could only be established if the employees' actions were solely the result of personal bias).

Sorber states, in her Verified Complaint, that since she became a full-time employee she had not taken any accrued vacation time other than flex time approved by her then-manager. After her request for vacation time, Sorber states that she was told that vacation time was not an option, despite her entitlement to take vacation time. Sorber further alleges that the Defendants terminated her “to further [their] own personal desire to retaliate against Plaintiff for prior performance reviews given by Sorber of her co-workers,¹³ who were friends with one or more of the Defendants.”¹⁴ Defendants claim that as corporate officers they are responsible for, *inter alia*, making decisions or formulating recommendations regarding the hiring and firing of employees and making and carrying out personnel decisions.¹⁵

The Court notes that the mere fact that [employees] have ‘mixed motives’ . . . does not remove their conduct from the scope of the agency.”¹⁶ In addition, “managers of a corporation jointly pursuing its lawful business do not become ‘conspirators’ when acts within the scope of their employment are said to be . . . retaliatory.”¹⁷ However, Sorber has stated facts that purport to show that Defendants action did not further Glacial’s interest. Specifically, Sorber states: “[s]aid retaliatory motive was not in the interest of Glacial who had never given Plaintiff a poor performance review . . .” The Court finds that although the Defendants contend that they terminated Sorber’s employment and issued the termination letter on Glacial’s behalf, Sorber’s alleged facts support an inference that the Defendants acted outside the scope of their employment and, thus were acting in a personal capacity. This Court, therefore, concludes that the intracorporate doctrine does not defeat Sorber’s civil conspiracy claim.¹⁸

¹³ (Compl. ¶ 42.)

¹⁴ (Compl. ¶ 20.)

¹⁵ (Def. ’s Reply to Pl. ’s Opp’n to Defs. ’s Partial Mot. Dismiss.)

¹⁶ See *Gen. Refractories Co.*, 189 F.3d at 313 (internal citations omitted) (discussing the intracorporate doctrine in the context of attorney-client conspiracies).

¹⁷ *Travis v. Gary Cmty. Mental Health Ctr., Inc.*, 921 F.2d 108, 110 (7th Cir. 1990).

¹⁸ See, e.g., *Rice v. Meriden Hous. Auth.*, No. CV030479556, 2004 WL 870816, at *4 (Conn. Super. Ct. Mar. 31, 2004) (denying a motion to strike plaintiff’s claim for civil conspiracy against defendant employee finding that plaintiff-former employee sufficiently plead facts that defendant-employee abandoned his role as an attorney for the housing authority when defendant took significant personal control over the operation of the housing authority for the purpose of getting rid of the plaintiff and protecting his personal interests, concocted a plan to terminate plaintiff and created pretextual reasons for plaintiff’s termination); *Pittman v. Larson Distrib. Co.*, 724 P.2d 1379, 1390 (Colo. App. 1986) (concluding that defendants-employees “were not in not acting in good faith on behalf of the corporation in their dealings” regarding plaintiff’s termination and finding “evidence of conspiratorial conduct between Larson and Fitzsimmons in their individual capacities” and not within the scope of their employment. Evidence showed that defendants reduced plaintiff’s commission for solely personal reasons, namely jealousy, and when plaintiff requested back-pay of the reduced commission, defendants terminated plaintiff.); see also *Miller v. O.S. Shipping & Trading Corp.*, No. X06CV010166810S, 2001 WL 1468917, at *1 (Conn. Super. Ct. Nov. 7, 2001); *Texas-Ohio Gas, Inc. v. Mecom*, 28 S.W.3d 129 (Tex. Ct. App. 2000); *Koster v. P & P Enter., Inc.*, 539 N.W.2d 274 (Neb. 1995); *Greenberg v. Mount Sinai Med. Ctr. Greater Miami, Inc.*, 629 So. 2d 252 (Fla. Dist. Ct. App. 1993).

III. COUNT V IS DUPLICATIVE AND FAILS TO SURVIVE THE MOTION TO DISMISS

Count V alleges a cause of action for prima facie tort. The Defendants contend that Count V alleges facts that are practically identical to the facts alleged in Count I, making Count V duplicative and materially indistinct from Count I. In contrast, Sorber argues that Count V seeks redress for the Defendants' fraudulent conduct in falsifying the termination letter.

In alleging a cause of action for prima facie tort, Sorber must show that the action does not fit within the category of any other tort. Here, the tort alleged is the wrongful discharge by issuing a false document. The Court finds that the allegation of the fraudulent termination letter is subsumed within Count I's wrongful discharge claim because Sorber is essentially claiming that the termination letter served as a pretext for the discharge and was, therefore, unjustified. Count I's wrongful discharge claim is a cause of action based upon termination of employment for reasons not enumerated in the Wrongful Discharge Act. After careful review of the Verified Complaint, the Court is persuaded by the Defendants' argument that the facts alleged in Count V are essentially the same facts alleged in Count I, namely that the Defendants terminated Sorber after her request for vacation leave and issued the termination letter based on a fraudulent premise. Finding that Count V is duplicative of Count I, this Court will dismiss Count V.¹⁹

CONCLUSION

This Court finds that Count III, the civil conspiracy claim, is not precluded by the Wrongful Discharge Act because the violation of the Wrongful Discharge Act is the underlying tort in the claim. The Court also finds that the intracorporate doctrine is inapplicable because the Verified Complaint sets forth facts to show that the Defendants acted outside of the scope of their employment. The Court, however, will dismiss Count V since it alleges facts that are identical to the facts alleged in Count I, and is thus duplicative. The Court, by separate Order, will grant in part and deny in part the Defendants' Motion to Dismiss.

DATED: June 7, 2011

CERTIFIED A TRUE COPY

Date: 6-16-2011
Venetia H. Velazquez, Esq.
Clerk of the Court

By: [Signature]
Court Clerk

[Signature]
JAMES S. CARROLL III
Judge of the Superior Court
of the Virgin Islands

¹⁹ See, e.g., *Dias v. WVC St. John, Inc.*, 49 V.I. 802, 802 (D.V. I. 2008) (stating that "no claim for prima facie tort lies if the action complained of fits within another category of tort."); *Pourzal v. Marriott Int'l Inc.*, Civ. No. 2001-140, 2006 WL 2471695, at *3 (D.V.I. Aug. 17, 2006) (dismissing "claims that are duplicative or indistinct from other asserted claims."); *Eddy v. Virgin Islands Water & Power Auth.*, 36 V.I. 200 (D.V.I. 1997).

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) JURY TRIAL DEMANDED

)

)

ORDER

AND NOW, pursuant to the Memorandum Opinion of today's date, it is hereby

ORDERED that the Defendants Glacial Energy VI, LLC, Cheryl Rousseau, Keith Lockwood and Mark Finley's Motion to Dismiss Count III and Count V of Plaintiff's Verified Complaint is **DENIED** as to Count III's civil conspiracy claim and **GRANTED** as to Count V's cause of action for prima facie tort; and it is further

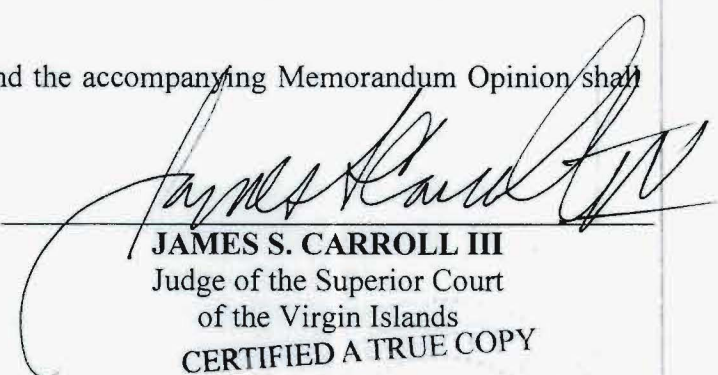
ORDERED that Count V of the Complaint is **DISMISSED** and Plaintiff Melinda Sorber shall file an amended complaint **within fourteen (14) days from the date of entry of this Order**; and it is further

ORDERED that a copy of this Order and the accompanying Memorandum Opinion shall be directed to counsel.

DATED: June 7, 2011

ATTEST: VENETIA H. VELAZQUEZ, ESQUIRE
Clerk of the Court
BY: 

LORI BOYNES-TYSON
Court Clerk Supervisor


JAMES S. CARROLL III

Judge of the Superior Court
of the Virgin Islands

CERTIFIED A TRUE COPY

Date: 6-16-2011

Venetia H. Velazquez, Esq.
Clerk of the Court

By: 

Court Clerk