

SUPERIOR COURT OF THE VIRGIN ISLANDS

DIVISION OF ST. THOMAS AND ST. JOHN

VERMALIE CHARLES,

Plaintiff,

v.

CBI ACQUISITIONS, LLC,

Defendant.

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MEMORANDUM OPINION

Before the Court is Defendant CBI's motion for summary judgment seeking dismissal of Plaintiff's wrongful discharge claim. Because the record fails to support CBI's argument that Charles was a statutory supervisor under Section 2(11) of the National Labor Relations Act or that Charles was a member of a union that was party to a union contract modifying the grounds for discharge under the Virgin Islands Wrongful Discharge Act, CBI is not entitled to summary judgment, and the motion must be denied.

FACTUAL & PROCEDURAL HISTORY

On June 17, 2015, Vermalie Charles filed a wrongful discharge action against her former employer, CBI Acquisitions, LLC, d/b/a Caneel Bay Resort.¹ Charles had worked for CBI from October 29, 2007, until the termination of her employment on December 20, 2013.² On October 30, 2015, CBI filed a motion for summary judgment which this Court denied on May 9, 2016,

¹ See Complaint, p. 1.

² See *id.*

because CBI failed to produce evidence demonstrating that Charles was a supervisor within the meaning of § 2(11) of the NLRA, or that a union contract covering Charles' employment modified one or more of the grounds for discharge under 24 V.I.C. § 76(a).³ Following the conclusion of discovery, CBI re-filed its motion for summary judgment on February 26, 2018, presenting arguments identical to those in its first motion but attaching new evidence.⁴

STANDARD

Motions for summary judgment are governed by V.I. R. CIV. P. 56, under which the Court must "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."⁵ "A factual dispute is deemed genuine if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party[,]'"⁶ and a fact is material only where it "might affect the outcome of the suit under the governing law[.]"⁷

"[T]he party moving for summary judgment possesses the initial burden of identifying evidence indicating that there is an absence of any issue of material fact."⁸ "If the moving party does so, the burden shifts to the non-moving party to present affirmative evidence from which a jury might reasonably return a verdict in [its] favor."⁹ But, "[i]f a moving party fails to carry its initial burden of production, the nonmoving party has no obligation to produce anything, even if

³ See *Charles v. CBI Acquisitions, LLC*, No. ST-15-CV-279, 2016 V.I. LEXIS 62, at *35-36 (V.I. Super. Ct. May 9, 2016).

⁴ Cf. Motion for Summary Judgment filed February 26, 2018, and Motion for Summary Judgment filed October 30, 2015.

⁵ V.I. R. CIV. P. 56(a).

⁶ *Greene v. V.I. Water and Power Co.*, 65 V.I. 67, 73 (V.I. Super. Ct. 2016) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)).

⁷ *Williams v. United Corp.*, 50 V.I. 191, 194 (V.I. 2008) (quoting *Anderson*, 477 U.S. at 248).

⁸ *United Corp. v. Hamed*, 64 V.I. 297, 309 (V.I. 2016) (quoting *Martin v. Martin*, 54 V.I. 379, 391 (V.I. 2010)) (citations omitted).

⁹ *Hawkins v. Greiner*, 66 V.I. 112 (V.I. Super. Ct. 2017) (citation and internal quotation marks omitted).

the nonmoving party would have the ultimate burden of persuasion at trial.”¹⁰ “A party asserting that a fact cannot be or is genuinely disputed must . . . (B) support the assertion by (i) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (ii) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.”¹¹

“The [C]ourt must credit all reasonable inferences from the evidence on record in favor of the nonmoving party in considering whether there are any disputed issues of material fact”¹² and “must take the non-moving party's conflicting allegations as true if supported by proper proofs.”¹³ Further, the Court “should not weigh the evidence, make credibility determinations, or draw ‘legitimate inferences’ from the facts when ruling upon summary judgment motions because these are the functions of the jury.”¹⁴ “The Court's role in deciding a motion for summary judgment is not to determine truth, but rather to determine whether a factual dispute exists that warrants trial on the merits.”¹⁵ The Court must deny summary judgment where a factual dispute exists¹⁶ and must grant summary judgment if the non-moving party cannot establish an essential element of its claim.¹⁷

¹⁰ *United Corp.*, 64 V.I. at 309-10 (citing *Martin*, 54 V.I. at 391) (internal quotation marks omitted).

¹¹ V.I. R. CIV. P. 56(c)(1).

¹² *Walters v. Walters*, 60 V.I. 768, 794 (V.I. 2014) (citing *Burd v. Antilles Yachting Servs.*, 57 V.I. 354, 358 (V.I. 2012) and *Mt. Holly Gardens Citizens in Action, Inc. v. Township of Mount Holly*, 658 F.3d 375, 381 (3d Cir. 2011)).

¹³ *Simpson v. Golden Resorts, LLLP*, 56 V.I. 597, 605 (V.I. 2012) (citations and internal quotation marks omitted).

¹⁴ *Williams*, 50 V.I. at 197 (citing *Anderson*, 477 U.S. at 255).

¹⁵ *Hawkins*, 66 V.I. at 117 (citing *Williams*, 50 V.I. at 195).

¹⁶ See *id.* (citing *Sealey-Christian v. Sunny Isle Shopping Center*, 52 V.I. 410, 423 (V.I. 2009)).

¹⁷ See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986) (explaining that summary judgment is mandated “against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial”).

DISCUSSION

24 V.I.C. § 76 provides for a claim of wrongful discharge as follows:

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

- (1) who engages in a business which conflicts with his duties to his employer or renders him a rival of his employer;
- (2) whose insolent or offensive conduct toward a customer of the employer injures the employer's business;
- (3) whose use of intoxicants or controlled substances interferes with the proper discharge of his duties;
- (4) who wilfully and intentionally disobeys reasonable and lawful rules, orders, and instructions of the employer; provided, however, the employer shall not bar an employee from patronizing the employer's business after the employee's working hours are completed;
- (5) who performs his work assignments in a negligent manner;
- (6) whose continuous absences from his place of employment affect the interests of his employer;
- (7) who is incompetent or inefficient, thereby impairing his usefulness to his employer;
- (8) who is dishonest; or
- (9) whose conduct is such that it leads to the refusal, reluctance or inability of other employees to work with him.

...

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

The structure of 24 V.I.C. § 76 “establishes a presumption that an employee is ‘wrongfully discharged’ if the discharge is for a reason other than one of the nine (9) enumerated in section 76(a) as grounds for discharge.”¹⁸ A plaintiff only bears the burden of pleading — and ultimately proving — that the plaintiff was discharged, and the permissible grounds for discharge

¹⁸ *Frurup-Alie v. V.I. Hous. Fin. Auth.*, 2004 U.S. Dist. LEXIS 9084, at *15 (D.V.I. Mar. 12, 2004) (quoting *Hess Oil V.I. Corp. v. Richardson*, 32 V.I. 336, 344, 894 F. Supp. 211, 216 (D.V.I. 1995)).

set forth in sections 76(a)(1)-(9) and 76(c) are affirmative defenses that the defendant is required to plead and prove.¹⁹ Thus, an employer is not entitled to summary judgment on a wrongful discharge claim asserted under § 76 when the discharged employee demonstrates the existence of a genuine issue of material fact regarding the lawfulness of the employee's termination.²⁰

Initially, the parties have not yet reached the issue of whether CBI's termination of Charles' employment was lawful or pre-textual. Instead, CBI's motion for summary judgment argues that Charles was either a supervisor or a union member at Caneel Bay, and that because supervisors and union members are excluded from VIWDA coverage, Charles' action must be dismissed.²¹

I. Legal standard for "supervisor" within the meaning of Section 2(11)

CBI asserts entitlement to judgment on preemption grounds, contending that Charles fails to present "any admissible evidence to support her position that she was not a supervisor in her role at Caneel, and thus entitled to coverage under the WDA."²² This argument is based upon the holding in *St. Thomas-St. John Hotel & Tourism Ass'n. Inc.*, in which the Third Circuit Court of Appeals determined that Section 14(a) of the NLRA preempts the VIWDA with respect to wrongful discharge claims filed by individuals who qualify as former "supervisors" under Section 2(11) of the NLRA, resulting in the preclusion of those individuals from filing wrongful discharge claims.²³ While courts in the Virgin Islands have followed the holding in *St. Thomas-St. John Hotel*, the Virgin Islands Supreme Court has not yet ruled on this issue.²⁴ For reasons

¹⁹ *Rennie v. Hess Oil V.I. Corp.*, 62 V.I. 529, 543-544 (V.I. 2015) (agreeing with the District Court in *Gumbs-Heyliger v. CMW & Assocs. Corp.*, 2014 U.S. Dist. LEXIS 160451, *9-10 (D.V.I. Nov. 13, 2014)).

²⁰ *Frorup-Alie*, 2004 U.S. Dist. LEXIS 9084, at *16-17.

²¹ See Memorandum of Law in Support of Motion for Summary Judgment, pp. 2-5.

²² See Reply in Support of Defendant's Motion for Summary Judgment, p. 2.

²³ See 357 F.3d 297, 304-305 (3d Cir. 2004).

²⁴ Until the Virgin Islands Supreme Court rules on the issue, this Court is bound by the *St. Thomas-St. John Hotel* ruling that supervisors within the meaning of Section 2(11) of the NLRA are excluded from VIWDA coverage. See

explained later in this opinion, this Court opines that the foundation of the *St. Thomas-St. John Hotel* opinion is questionable. For now, assuming for argument that the conclusion of *St. Thomas-St. John Hotel* is correct that supervisors within the meaning of Section 2(11) of the NLRA are excluded from VIWDA coverage, this Court must determine whether Charles was a supervisor within the meaning of Section 2(11).

As a preliminary matter, CBI's suggestion that Charles must present evidence to prove that she was not a supervisor is without merit. Because "[u]nder Virgin Islands law, [a party] is not required to prove a negative"²⁵ a wrongful discharge claimant is not required to plead and prove that she was *not* a supervisor to survive a summary judgment motion. Moreover, U.S. Supreme Court decisions interpreting federal statutes are binding on the Superior Court,²⁶ and the U.S. Supreme Court in *NLRB v. Kentucky River Cmty. Care, Inc.* ruled that the burden of proving the applicability of the supervisory exception falls on the party asserting it.²⁷ Thus, the burden falls on CBI to establish that Charles was a supervisor within the meaning of Section 2(11).

Defoe v. Phillip, 56 V.I. 109, 119 (V.I. 2012) ("In addition to previously holding that "decisions of our predecessor court, the Appellate Division of the District Court of the Virgin Islands, are not binding on us," *Judi's of St. Croix Car Rental v. Weston*, 49 V.I. 396, 403 n.7 (V.I. 2008), we have also recently held that this Court — unlike the Superior Court — is not compelled to treat the Third Circuit's interpretation of Virgin Islands local law as binding precedent").

²⁵ *Rennie*, 62 V.I. at 544 ("As we have previously emphasized, '[u]nder Virgin Islands law, [a party] is not required to prove a negative.' *Bryan v. Fawkes (Bryan II)*, 61 V.I. 416, 473 (V.I. 2014). This is because the Legislature has decreed that '[i]n civil cases the affirmative of the issue shall be proved.' 5 V.I.C. § 740(5) (emphasis added). Thus, we conclude that, to state a claim under section 76, Rennie only needed to plead that HOVIC was his employer and that HOVIC wrongfully discharged him, and was not required to anticipate in his complaint any affirmative defenses HOVIC might raise in its answer, such as the permissible grounds for discharge set forth in section 76(a)(1)-(9)").

²⁶ *Antilles Sch., Inc. v. Lembach*, 64 V.I. 400, 418 (V.I. 2016) ("[S]tate and territorial courts must follow, as binding precedent, decisions of the United States Supreme Court that interpret the United States Constitution, federal statutes, and federal treaties. See *Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209, 221, 51 S. Ct. 453, 75 L. Ed. 983 (1931)").

²⁷ *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706, 711-712 (2001) ("The burden of proving the applicability of the supervisory exception, under *Morton Salt*, should thus fall on the party asserting it. In addition, it is easier to prove an employee's authority to exercise 1 of the 12 listed supervisory functions than to disprove an employee's authority to exercise any of those functions, and practicality therefore favors placing the burden on the party asserting supervisory status. We find that the Board's rule for allocating the burden of proof is reasonable and consistent with the Act, and we therefore defer to it.").

29 U.S.C.S. § 152(11), often referred to as “Section 2(11)”, defines “supervisor” as:

[A]ny individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.²⁸

The Court in *Kentucky River* stated that “it is settled law that the NLRB’s interpretation of ambiguous language in the National Labor Relations Act is entitled to deference”²⁹ and that “[c]ourts must defer to the requirements imposed by the Board if they are ‘rational and consistent with the Act,’ and if the Board’s ‘explication is not inadequate, irrational or arbitrary’”.³⁰ Finding the term “independent judgment” in the above definition to be “indisputably ambiguous[,]”³¹ the Court added that “[s]uch deference is particularly appropriate when the statutory ambiguity is compounded by the use of one ambiguous term — ‘independent judgment’ — to modify another, equally ambiguous term — namely, ‘responsibly to direct.’”³²

Observing that the high Court has directed courts to generally defer to the Board’s interpretations of the NLRA regarding ambiguous terms such as “responsibly to direct,”³³ this Court notes that the Board in *Oakwood Healthcare, Inc.*, explained that by adding “responsibly to direct” to the definition of supervisor, the drafters of § 2(11) “sought to distinguish two classes of workers: true supervisors vested with ‘genuine management prerogatives,’ and employees

²⁸ 29 U.S.C.S. § 152(11).

²⁹ *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 725-726 (2001).

³⁰ *Id.* at 721 (quoting *Allentown Mack Sales & Service, Inc. v. NLRB*, 522 U.S. 359, 364 (1998)).

³¹ *Ky. River Cmty. Care, Inc.*, 532 U.S. at 725.

³² *Id.* at 726.

³³ Courts are directed to defer to the Board’s interpretations of the NLRA regarding ambiguous terms, provided that the Board’s findings are rational and consistent with the NLRA and supported by explanations that are not inadequate, irrational, or arbitrary. See *NLRB v. Ky. River Cmty. Care, Inc.*, 532 U.S. 706, 721 (2001).

such as straw bosses, lead men, and set-up men who are protected by the Act even though they perform ‘minor supervisory duties.’”³⁴ Moreover, this Court finds the following standard from *Modesto Hospitality, LLC, d/b/a Doubletree Hotel Modesto Employer*,³⁵ a decision in which the Board determined the supervisory status of hotel “housekeeping supervisors”, instructive for analyzing § 2(11) status. Additionally, the Board’s analysis is apposite in evaluating Charles’ alleged Section 2(11) status as a former “housekeeping supervisor.”

II. ANALYSIS OF SECTION 2(11) STATUS

The traditional test for determining supervisory status is: (1) whether the employee has the authority to engage in, or effectively recommend, any of the 12 criteria listed in Section 2(11) of the Act; (2) whether the exercise of such authority requires the use of independent judgment; and (3) whether the employee holds the authority in the interest of the employer . . . The burden of proving supervisory status lies with the party asserting that such status exists . . . The Board has frequently warned against construing supervisory status too broadly because an employee deemed to be a supervisor loses the protection of the Act . . . Supervisory status must be established by a preponderance of the evidence . . . Lack of evidence is construed against the party asserting supervisory status . . . “[W]henever the evidence is in conflict or otherwise inconclusive on particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” . . . Mere inferences or conclusionary statements, without detailed, specific evidence of independent judgment, are insufficient to establish supervisory authority . . . The Board insists upon evidence sufficient to establish a finding of actual statutory authority. Job descriptions are only paper authority and are not given any controlling weight by the Board . . . Supervisory status cannot be established solely by secondary indicia, such as the perception of

³⁴ *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686, 687-688 (2006) (internal quotations and citations omitted) (The Board further provided the following: “Thus, the dividing line between these two classes of workers, for purposes of Section 2(11), is whether the putative supervisor exercises ‘genuine management prerogatives.’ Those prerogatives are specifically identified as the 12 supervisory functions listed in Section 2(11) of the Act. If the individual has authority to exercise (or effectively recommend the exercise of) at least one of those functions, 2(11) supervisory status exists, provided that the authority is held in the interest of the employer and is exercised neither routinely nor in a clerical fashion but with independent judgment.”).

³⁵ *Modesto Hospitality, LLC, d/b/a Doubletree Hotel Modesto Employer*, 2008 NLRB Reg. Dir. Dec. LEXIS 59 (2008).

supervisory status, attendance at meetings, or participation in training classes. While the Board has examined secondary factors not set forth in Section 2(11) of the Act, these factors, in the absence of statutory indicia, are insufficient to establish supervisory status . . . [internal citations, quotation marks, and emphasis omitted].³⁶

II. Defendant fails to establish that Plaintiff was a “supervisor” within the meaning of under Section 2(11), and thus, there exists a genuine issue of material fact sufficient to deny summary judgment.

Charles contests CBI’s argument that she performed supervisory functions with independent judgment sufficient to meet the definition of “supervisor” under the NLRA.³⁷ Specifically, the parties only dispute the first two parts of the three-part test for determining supervisory status that workers are supervisors if: 1) they hold the authority to engage in any 1 of the 12 listed supervisory functions in Section 2(11) of the NLRA, 2) their exercise of such authority “requires the use of independent judgment,” as opposed to “routine or clerical” judgments, and, finally, 3) their authority is held “in the interest of the employer.”³⁸

Regarding the first part of the test, CBI argues that Charles exercised the supervisory powers to “assign”, “discipline other employees, or responsibly to direct them”, and to “adjust their [subordinates’] grievances or effectively to recommend such action”.³⁹ CBI does not argue nor does the record reflect that Charles, as a housekeeping supervisor, had the authority to hire, transfer, suspend, lay off, recall, promote, discharge, or reward housekeeping staff. CBI submits as evidence of Charles’ possession of supervisory authority her job description and title of

³⁶ *Id.* at *9-*12.

³⁷ Plaintiff’s Counterstatement of Undisputed Facts, p. 1 (Charles contends that although her title was ‘Housekeeping Supervisor’, she did not perform any supervisory functions or exercise independent judgment).

³⁸ *NLRB v. NSTAR Elec. Co.*, 798 F.3d 1, 8-9 (1st Cir. 2015) (citing *Ky. River*, 532 U.S. at 712-13).

³⁹ See Memorandum of Law In Support of Motion for Summary Judgment, pp. 2-5.

“Housekeeping Supervisor.”⁴⁰ But, because “the Board has long held that job titles and descriptions prepared by employers are not controlling; rather the Board looks to the authority actually possessed and the work actually performed by the alleged supervisor[,]”⁴¹ neither Charles’ title nor her job description is sufficient to establish that Charles actually possessed or performed supervisory authority under Section 2(11). As an example, in *CNN America, Inc.*, the Board determined that an employer failed to prove that employees designated as “shift supervisors” had any supervisory authority because the employer failed to prove that the “shift supervisors” actually exercised Section 2(11) functions.⁴²

Regarding the second part of the test, CBI contends that the testimony of then-manager Nikolay Hotze, an employee corrective action form signed by Charles, and Charles’ employee performance reviews demonstrate that Charles, using independent judgment, recommended that employees be disciplined and assigned employees to do tasks.⁴³ In addition to the actual possession of supervisory authority, the use of independent judgment in exercising supervisory authority is a necessary element for establishing supervisory status. Section 2(11)’s contrast of ‘independent judgment’ with actions that are ‘of a merely routine or clerical nature’ indicates

⁴⁰ See Motion for Summary Judgment, Exhibit 2: The responsibilities listed in the ‘Housekeeping Supervisor’ job description include: “Recommend hiring, developing, counseling, motivating and disciplining staff in accordance with hotel policies and procedure”; “Support and uphold hotel philosophy concerning hiring, employee relations, supervision, and disciplinary action”; “Apply principles of logical thinking to a wide range of nonstandard intellectual and practical problems in order to perform and direct many and varied complex tasks”; “Supervise, direct, coordinate, influence and persuade staff in order to maintain service standards of hotel”; “Interact with people beyond giving and receiving instructions, particularly interaction with supervisor, subordinates, co-workers, and guests in completing assignments, resolving staff and guest complaints”; “Interpret and comply with a variety of instructions furnished in written, oral, diagrammatic, or schedule form”.

⁴¹ *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686 at n. 24 (citing, e.g., *Heritage Hall*, 333 NLRB 458, 458-459 (2001) (“It is well settled that employees cannot be transformed into statutory supervisors merely by vesting them with the title or job description of supervisor.”)).

⁴² *CNN Am., Inc.*, 2014 NLRB LEXIS 710, at *93-*95 (2014) (“We affirm the judge’s finding that CNN failed to prove TVS shift supervisors possessed any of the statutory supervisory indicia . . . In sum, CNN failed to establish that the shift supervisors exercised any of the supervisory criteria of supervisory status”).

⁴³ See Memorandum of Law In Support of Motion for Summary Judgment, pp. 3-5.

that there exist differing degrees of the exercise of any of the § 2(11) functions and that the degree of the exercise of the functions must not be of a merely routine or clerical nature but must require the use of independent judgment in order to be supervisory.⁴⁴ To exercise independent judgment, an employee must not be dictated to or controlled by detailed instructions, but rather, must make discretionary choices.⁴⁵ “Additionally, the judgment must ‘rise above the merely routine or clerical’ for it to be truly supervisory, even if it is made free of control of others and involves forming an opinion by discerning and comparing dat[a].”⁴⁶ Thus, for Charles to have made discretionary choices in exercising a § 2(11) power, her choices must not have been dictated by policy or instructions or of a routine or clerical nature.

To determine whether Charles used independent judgment to “assign”, “discipline”, “responsibly to direct”, or “effectively . . . recommend [discipline]”, any housekeeping staff, first, the Court considers the testimony of Hotze. Hotze testified that Charles supervised between eight and twelve housekeepers depending on the number of rooms that Charles inspected per day⁴⁷ and that Charles’ oversight included “staffing the cleanliness of the rooms, opening the rooms to the Front Desk to say they’re clean and ready to go.”⁴⁸ Hotze further testified that Charles “could be part of a disciplinary hearing”⁴⁹ but that any final decision to discipline an employee was made by Hotze and the human resources director.⁵⁰ These

⁴⁴ See *Modesto Hospitality, LLC, d/b/a Doubletree Hotel Modesto Employer*, 2008 NLRB Reg. Dir. Dec. LEXIS 59, at *14-*15 (“In *Oakwood*, the Board recognized the spectrum between situations involving little discretion where there are detailed instructions for the actor to follow from situations where the actor is wholly free from constraints”).

⁴⁵ See *Id.* at *14 (“While judgment is not independent if it is dictated or controlled by detailed instructions, it is independent where the policy allows for discretionary choices”).

⁴⁶ *Id.* at *14-*15.

⁴⁷ See Motion for Summary Judgment, Exhibit B: Deposition of Nikolay Hotze, pp. 6-7.

⁴⁸ *Id.*, p. 7.

⁴⁹ *Id.*, p.10.

⁵⁰ *Id.*

statements lack the specificity necessary to demonstrate that Charles made discretionary choices, beyond a routine or clerical nature, in exercising any § 2(11) authority.⁵¹

Second, the Court examines the following text from the employee corrective action form:

I Vermalie Charles assigned room 80 to Maria [a housekeeper], I went to check the room and found that the room was not clean properly, the screen and the louver next to the entrance door was dirty and has cobweb between the louvers. I called Adlyn [Salaam] and told her that Maria need to go back to room 80 because the screen and the louvers were dirty, she told me she had open the window and showed Maria that it need to be clean when she took Maria to the room. When I went to the room after she said she was finish with the room, the window and louver was still dirty. I also gave her [Maria] room 143 to clean for the next day arrival she did not go to the room; she kept on saying that she was leaving at 3:30 so she couldn't clean the room.

.... WARNING DECISION (Action to be Taken): Maria on page 43 #7b of the employee hand book it states that "Failure to obey or perform work as required by or assigned will not be tolerated." I have spoken to you several times about the cleanliness of your rooms; you are not cleaning the rooms good we have to always be sending you back to a room this is unacceptable. [sic]⁵²

Notably, Charles signed the corrective action report on a line labeled "Witness Signature", the housekeeper in question on a line for the "Employee Signature", and Manager Salaam on a line titled "Supervisor Signature."⁵³ Additionally, the statement in the form—"Maria on page 43 #7b of the employee hand book it states that '[f]ailure to obey or perform work as required by or assigned will not be tolerated'"⁵⁴—indicates that the housekeeper violated the hotel policy by not cleaning the room as required. The Court also observes that Charles attested that "[i]n my

⁵¹ See *Modesto Hospitality, LLC, d/b/a Doubletree Hotel Modesto Employer*, 2008 NLRB Reg. Dir. Dec. LEXIS 59, at *11 ("Mere inferences or conclusionary statements, without detailed, specific evidence of independent judgment, are insufficient to establish supervisory authority") (internal citations omitted).

⁵² See Motion for Summary Judgment, Exhibit 14A: Employee Corrective Action Report.

⁵³ *Id.*

⁵⁴ *Id.*

position as Housekeeping Supervisor[,] my role was limited to inspecting rooms and reporting to Adlyn Sala[a]m if work was performed in a sub-par manner.”⁵⁵ Because the report shows that Charles’ decision to report the housekeeper to Manager Adlyn Salaam was in keeping with routine procedures since Charles’ job as housekeeping supervisor was to inspect hotel rooms for cleanliness, and further, was circumscribed by the hotel policy concerning the “failure to obey or perform work as required or assigned”, the Court finds that Charles’ report of the housekeeper’s failure to perform her work did not require the use of independent judgment, but rather was dictated by hotel policy and procedure.

Regarding whether Charles used independent judgment to assign housekeeping staff to rooms, in *Modesto*, the Board found that housekeeping supervisors at a hotel did not use independent judgment by assigning the housekeeping team members to particular locations in the hotel because the assignments did not require sufficient discretion.⁵⁶ The Board reasoned that “there is little difference between the rooms in one section and those in another, and section assignments are routinely made in accordance with the room attendants’ stated preferences”, concluding that “any decision-making in this regard does not rise above the routine or clerical.”⁵⁷ Similarly, here, there is no evidence that Charles’ decisions to assign Maria to clean rooms 80, and 143 were discretionary choices rather than choices dictated by the hotel’s routine cleaning needs or policy of assigning available housekeepers to rooms or areas in need of cleaning. In the *Modesto* decision, the Board further found that “even assuming that housekeeping supervisors

⁵⁵ See Plaintiff’s Affidavit, p. 2; see also p. 1 (“In my capacity as Housekeeping Supervisor, I performed duties that were far from being supervisory in nature, [sic] instead I inspected rooms to see how well they were cleaned and maintained for guests’ satisfaction and comfort”).

⁵⁶ *Modesto Hospitality, LLC, d/b/a Doubletree Hotel Modesto Employer*, 2008 NLRB Reg. Dir. Dec. LEXIS 59, at *15-*16.

⁵⁷ *Id.* at *16.

occasionally reassign employees based on their own discretion, there is no evidence that the reassignment of housekeeping employees involves any individualized assessments of employees' skill sets and weighing of these skills against the Employer's particular needs",⁵⁸ and instead, "any transfers are based upon common sense efficiencies and routine job priorities set by the Employer."⁵⁹ Here, in the same way, the record does not reflect that the assignment of a housekeeper to a room involved an individualized assessment or a weighing of housekeepers' skill sets against the hotel's particular needs on a given day sufficient to confer the use of independent judgment necessary to establish supervisory status. Accordingly, the Court finds that Charles as a housekeeping supervisor did not assign work using independent judgment.

Third, CBI asserts that Charles' employee performance reviews from the years 2009, 2010, and 2011, demonstrate that Charles used independent judgment in the performance of her supervisory functions.⁶⁰ The forms provide that:

- Charles "now need [sic] to communicate clearly and listen actively to her internal guests"⁶¹ (where the record indicates that "internal guests" mean housekeeping staff);
- One of Charles' competencies was "judgment" which comprised "making decisions, filter[ing] biases, . . . [and] consistently achieving high standards in tasks completed";⁶²

⁵⁸ *Id.* at *16-*17.

⁵⁹ *Id.* at *17; see also *Thyme Holdings, LLC v. NLRB*, 2018 U.S. App. LEXIS 13936, at *7 (D.C. Cir. May 22, 2018) ("An individual who merely gives an 'ad hoc instruction that the employee perform a discrete task' or makes assignments 'solely on the basis of equalizing workloads' does not exercise 'independent judgment'" (quoting *Oakwood Healthcare, Inc.*, 348 NLRB at 689, 693).

⁶⁰ See Memorandum of Law In Support of Motion for Summary Judgment, p. 4.

⁶¹ Memorandum of Law In Support of Motion for Summary Judgment, Exhibit 22.

⁶² *Id.*

- Charles was required to “[p]rioritize work, set[] plan for the day, know[] when to deviate from the plan and know[] when to ask for help”;⁶³
- Charles was advised to “work with [her] staff to get results, help them by training, coaching and praising them”;⁶⁴
- Charles was instructed to “praise, coach and coun[s]el the employees that she supervises more”;⁶⁵
- Charles was told that “at time[s] it seems that you [Charles] think you are not a part of management and that is wrong thinking”.⁶⁶

Based on the aforementioned definitions of independent judgment and supervisory authority, none of these excerpts sufficiently demonstrate supervisory authority. Finally, CBI’s assertion that Charles “direct[ed] many and varied complex tasks” and that her performance of those functions was “not of a routine or clerical nature because Charles “appl[ied] the principles of logical thinking to a wide range of nonstandard intellectual and practical problems”⁶⁷ is a legal conclusion couched as factual allegation rather than evidence that Charles used independent judgment in exercising supervisory authority.

Further, because the Board has directed that “[t]he sporadic exercise of supervisory authority is not sufficient to transform an employee into a supervisor[,]”⁶⁸ even if this Court were to find that Charles exercised supervisory functions part of the time, CBI has failed to establish that Charles spent a sufficient amount of time performing supervisory work to be deemed a

⁶³ *Id.*

⁶⁴ Memorandum of Law In Support of Motion for Summary Judgment, Exhibit 24.

⁶⁵ Memorandum of Law In Support of Motion for Summary Judgment, Exhibit 23.

⁶⁶ Memorandum of Law In Support of Motion for Summary Judgment, Exhibit 24.

⁶⁷ Memorandum of Law In Support of Motion for Summary Judgment, pp. 3-4.

⁶⁸ *Luminant Generation Company, LLC, 2018 NLRB Reg. Dir. Dec.* LEXIS 80, at *18 (2008) (citations omitted).

supervisor under Section 2(11). “[T]he legal standard for a supervisory determination is whether the individual spends a regular and substantial portion of his/her work time performing supervisory functions.”⁶⁹ While “[t]he Board has not adopted a strict numerical definition of substantiality”, it “has found supervisory status where individuals have served in a supervisory role for at least 10-15 percent of their total work time.”⁷⁰ Thus, the Court concludes that Charles was not a “supervisor” within the meaning of Section 2(11). Just as the Board in *Modesto* determined that the housekeeping supervisors “spen[t] the vast majority of their time functioning in a quality control capacity”,⁷¹ and thus, were “at best . . . minor lead persons whom the Employer ha[d] not vested with ‘genuine management prerogatives’”,⁷² similarly here, the facts indicate that Charles was in a quality control, rather than a supervisory, position. Accordingly, for the multitude of aforementioned reasons, the Court concludes that there exist genuine issues of material fact sufficient to deny summary judgment. Thus, the portion of CBI’s motion alleging that there is an absence of any issue of material fact on the basis that Charles was a “supervisor” within the meaning of Section 2(11) must be denied.

As a final matter, this Court has noticed that case law in this territory has failed to acknowledge the trend⁷³ in U.S. Supreme Court and Board decisions interpreting Section 2(11)’s definition of “supervisor” narrowly and is concerned that this may give the misleading impression that the term “supervisor” should be construed more broadly than the law permits. The decisions of the U.S. Supreme Court and the Board make clear that the Section 2(11)

⁶⁹ *Oakwood Healthcare, Inc.*, 348 NLRB at 694.

⁷⁰ *Id.*

⁷¹ *Modesto Hospitality, LLC, d/b/a Doubletree Hotel Modesto Employer*, 2008 NLRB Reg. Dir. Dec. LEXIS 59 at *13.

⁷² *Id.*

⁷³ *See, e.g., Gumbs-Heyliger v. CMW & Assocs. Corp.*, 2014 U.S. Dist. LEXIS 92932 (D.V.I. July 9, 2014).

analysis for determining supervisory status is fact-intensive.⁷⁴ Even claimants who exercise minor supervisory functions are not precluded from filing VIWDA claims if the evidence is not sufficient to support that the employee meets all requirements for supervisory status.

Further, having determined that Charles was not a supervisor, the Court need not apply the holding in *St. Thomas-St. John Hotel* that the NLRA precludes the application of the VIWDA to supervisors. But, because the Court's analysis to determine whether Charles was a supervisor consumed judicial resources, and since the Court will likely repeat this sort of analysis in future wrongful discharge cases, the Court finds it appropriate to opine that it finds the reasoning of the *St. Thomas-St. John Hotel* Court questionable but its ruling nonetheless in accordance with the plain language of Section 14(a). Specifically, this Court finds the Third Circuit's analysis was flawed in two respects. First, as observed by the Court in *Canton v. V.I. Humanities Council*,⁷⁵ the Third Circuit appears to have based its holding in part on a conflation of employment contracts and union contracts, as evinced by the statement that "if the WDA is applied to supervisors, the only way for an employer to alter or expand the WDA's nine enumerated grounds for terminating a supervisor/employee would be to enter [into] a 'union contract' with the supervisor."⁷⁶ The *Canton* Court commented that an employer cannot enter into a union contract with a supervisor because the parties to a "union contract" are an employer and a labor union, whereas the parties to an individual employment contract are an employer and employee.⁷⁷ Second, this Court opines that, even assuming for argument that the Third Circuit

⁷⁴ The Court is referring to aforementioned decisions, including, for example, *NLRB v. Kentucky River Cmty. Care, Inc.*, 532 U.S. 706 (2001), *Oakwood Healthcare, Inc.*, 348 N.L.R.B. 686 (2006), and *Modesto Hospitality, LLC, d/b/a Doubletree Hotel Modesto Employer*, 2008 NLRB Reg. Dir. Dec. LEXIS 59 (2008).

⁷⁵ 2017 V.I. LEXIS 116 (V.I. Super. Ct. 2017).

⁷⁶ *St. Thomas - St. John Hotel & Tourism Ass'n*, 357 F.3d 297, 303 (3d Cir. 2004).

⁷⁷ *Canton v. V.I. Humanities Council*, 2017 V.I. LEXIS 116, at *11 (V.I. Super. Ct. 2017) (citing BLACK'S LAW DICTIONARY (9th ed. 2009), which defines "collective-bargaining agreement" as "[a] contract between an employer

meant to state “on behalf of a supervisor” instead of “with a supervisor” in the above quote, the *St. Thomas-St. John Hotel*’s Court’s assertion that the VIWDA’s grounds for discharge limit an employer’s ability to terminate supervisors for failure to master aspects of management, is not supported with any examples, calling into question whether the VIWDA exerts pressure on employers to collectively bargain with unions representing supervisors, with respect to the terms of discharge beyond the nine grounds for discharge under § 76(a).

To explain, Section 14(a) provides:

Supervisors as union members. Nothing herein shall prohibit any individual employed as a supervisor from becoming or remaining a member of a labor organization, but no employer subject to this Act [29 USCS §§ 151-158, 159-169] shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining.⁷⁸

In *Beasley v. Food Fair of North Carolina, Inc.*,⁷⁹ the U.S. Supreme Court held that § 14 (a) precluded the enforcement, with respect to discharged supervisors only, of a North Carolina right-to-work law that provided a damage action for employees discharged because of union membership.⁸⁰ The Court determined that the second clause of § 14 (a) “reliev[es] the employer of obligations under ‘any law either national or local, relating to collective bargaining’ applies to any law that requires an employer ‘to accord to the front line of management the anomalous status of employees.’”⁸¹ The Court concluded that “Congress’ dominant purpose in amending §§ 2 (3) and 2 (11), and enacting § 14 (a) was to redress a perceived imbalance in labor-

and a labor union regulating employment conditions, wages, benefits, and grievances. . . . Also termed . . . union contract”).

⁷⁸ 29 U.S.C.S. § 164.

⁷⁹ 416 U.S. 653 (1974).

⁸⁰ *Id.* at 657-662.

⁸¹ *Id.* at 662.

management relationships that was found to arise from putting supervisors in the position of serving two masters with opposed interests.”⁸² The Court explained that the legislative history of Section 14(a) indicates that, “[e]mployers were not to be obliged to recognize and bargain with unions including or composed of supervisors, because supervisors were management, obliged to be loyal to their employer’s interests, and their identity with the interests of rank-and-file employees might impair that loyalty and threaten realization of the basic ends of federal labor legislation.”⁸³ Thus, if a state law pressures an employer to bargain with a union representing supervisors, the employer need not deem the supervisor an employee for the purposes of that law.

The Third Circuit in *St. Thomas-St. John Hotel* held that Section 14(a) preempts the VIWDA with respect to supervisors, whether or not they are in a union. The Court reasoned that, while the VIWDA “does not directly require that an employer collectively bargain with supervisors”, it “indirectly compels an employer to bargain collectively with supervisors by requiring that an employer who wishes to alter the WDA’s grounds for terminating a supervisor enter into a collective bargaining agreement [on behalf of supervisors]. . . constitut[ing] pressure to bargain with supervisory employees”, in contravention of § 14(a).⁸⁴ The Court reasoned that an “employer may consider it essential that a supervisor’s mastery of . . . aspects of management be a condition of employment” and that these aspects of management may extend beyond the work qualities enumerated in the nine grounds for discharge permitted under the VIWDA.⁸⁵ The Court did not offer any examples of how the nine statutory grounds (especially the broader

⁸² *Id.* at 661-662.

⁸³ *Id.* at 659-660.

⁸⁴ *St. Thomas - St. John Hotel & Tourism Ass’n*, 357 F.3d at 304.

⁸⁵ *Id.* at 303.

grounds—nos. 5, 7, 8, or 9) for discharge fail to encompass the mastery of managerial skills.

Accordingly, the premise that an employer would be unable to terminate a supervisor for failure to master the aspects of management under any of the reasons under § 76(a) is without support, raising doubt as to whether § 76(a) actually exerts pressure on an employer to collectively bargain with supervisors to modify the terms for discharge.

Nevertheless, the Court observes that because the VIWDA relates to collective bargaining, the Third Circuit's ruling is in accordance with the second half of Section 14(a), which provides "that no employer subject to this Act [29 USCS §§ 151-158, 159-169] shall be compelled to deem individuals defined herein as supervisors as employees for the purpose of any law, either national or local, relating to collective bargaining."⁸⁶ This Court cannot opine regarding whether the Third Circuit's application of § 14(a) to the VIWDA is supported by the legislative intent of § 14(a) without case law clarifying the scope of the phrase "relating to collective bargaining" or access to the Congressional reports of 1947, further illuminating the legislative intent of § 14(a).⁸⁷

III. Legal standard for the modification of 24 V.I.C. § 76(a)'s grounds for discharge by union contract

Because a plaintiff only bears the burden of pleading and proving that the plaintiff was discharged,⁸⁸ and because "[u]nder Virgin Islands law, [a party] is not required to prove a negative",⁸⁹ a defendant is required to plead and prove that a union contract modifies any of the grounds for discharge.

⁸⁶ 29 U.S.C.S. § 164.

⁸⁷ The U.S. Supreme Court cited the Congressional reports of 1947 in *Beasley v. Food Fair of North Carolina, Inc.*, and this Court cannot access those reports on LexisNexis or Westlaw.

⁸⁸ *Rennie*, 62 V.I. at 543-544 (agreeing with the District Court in *Gumbs-Heyliger v. CMW & Assocs. Corp.*, 2014 U.S. Dist. LEXIS 160451, *9-10 (D.V.I. Nov. 13, 2014)).

⁸⁹ *Rennie*, 62 V.I. at 544.

IV. Because Defendant has not shown that Plaintiff was a member of a union, a genuine issue of material fact remains sufficient to deny summary judgment.

CBI contends that if Charles was not deemed a supervisor under the NLRA, then she necessarily would have been a member of a labor union and her employment would have been governed by the collective bargaining agreement.⁹⁰ CBI submits a purported union contract⁹¹ between CBI and United Steelworkers of America, for the period of September 1, 2012, through August 31, 2015,⁹² that provides that covered employees are “full-time employees employed in the classifications listed in Exhibit ‘A[.]’”⁹³ The attached “Exhibit A” does not list Charles’ title, “Housekeeping Supervisor”, but lists “Housekeepers”, “House-person”, and “Head Housepersons.” Additionally, the majority of the remaining information in Exhibit “A” is blacked out.⁹⁴ Recognizing that Charles denies that she was represented by a collective bargaining unit,⁹⁵ the Court finds that, at a minimum, the evidence submitted by CBI is insufficient to establish that there is no genuine issue of material fact to warrant a finding at the summary judgment stage that Charles’ was as a member of a collective bargaining unit. Moreover, CBI has failed to submit evidence of any grievance procedures that altered the grounds for discharge under the VIWDA, and thus, a genuine issue of material fact also remains as to whether the alleged union contract would have modified the VIWDA’s grounds for discharge.

CONCLUSION

⁹⁰ See Memorandum of Law In Support of Motion for Summary Judgment, p. 5.

⁹¹ The union contract is signed only by CBI and not United Steelworkers, but Charles does not contest its authenticity.

⁹² See Motion for Summary Judgment, Exhibit 1, p. 1 and p. 45.

⁹³ *Id.*, p. 2.

⁹⁴ *Id.*, p. 46.

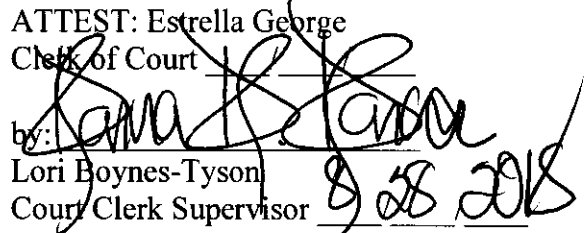
⁹⁵ See Motion for Summary Judgment, Exhibit D: Deposition of Vermalie Charles, p. 142.

For the foregoing reasons, Defendant CBI's motion for summary judgment will be denied. An Order consistent with this Opinion shall follow.

Dated: August 21, 2018

ATTEST: Estrella George
Clerk of Court

by:


Lori Boynes-Tyson
Court Clerk Supervisor


HON. MICHAEL C. DUNSTON
JUDGE OF THE SUPERIOR COURT
OF THE VIRGIN ISLANDS