IN THE SUPERIOR COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. THOMAS AND ST. JOHN
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MELINDA SORBER, Plaintiff,	) **CIVIL NO. ST-10-CV-588**
v.	) **ACTION FOR WRONGFUL DISCHARGE, CIVIL CONSPIRACY, AND TORTIOUS INTERFERENCE WITH CONTRACT**
GLACIAL ENERGY VI, LLC, CHERYL ROUSSEAU, KEITH LOCKWOOD, and MICHAEL B. GIERY, Defendants.	) **JURY TRIAL DEMANDED**

MEMORANDUM OPINION

THIS MATTER is before the Court on the Defendants' Renewed Motion for Judgment as a Matter of Law under Federal Rule of Civil Procedure 50.[1] At the close of the Plaintiff's case, the Defendant moved for a directed verdict pursuant to Rule 50 and the Court denied the Motion. The Defendant renewed the Motion after the close of all of the evidence. The Court finds that, as per Federal Rule of Civil Procedure 50, a reasonable jury would not have a legally sufficient evidentiary basis to find for the Plaintiff on any of her claims. The Court will grant the Motion and enter judgment in favor of the Defendants on all counts.

FACTS

On January 7, 2010, Glacial Energy V.I, LLC hired Melinda Sorber in the position of "Manager of Application Support." As the Manager of Application Support, Sorber was responsible for directing, assigning, and prioritizing the work of the four other employees in the Application Support Subdivision. Sorber also gave feedback on employee performance, including an instance where she gave an unfavorable opinion on her immediate supervisor, Ronald Petty. Petty was discharged the following day. Sorber also voiced her opinions on operating matters such as the sales reporting system that Glacial used.

During the time immediately leading up to her termination, Sorber worked for approximately eighty (80) consecutive days and then requested vacation leave in terms which were ambiguous as to the start and duration of the leave. Before this request, Sorber had not used any of her vacation leave.

On Thursday, September 16, 2010, Sorber and Keith Lockwood, Glacial Energy's Chief Operating Officer, began a series of text message communications during which Sorber informed

[1] Christopher Kroblin, Esq., of Kellerhals Ferguson Fletcher Kroblin LLP, represents the Plaintiff. David Cattie, Esq., and Micol Morgan, Esq., of Ogletree Deakins Nash Smoak & Stewart, LLC represent the Defendants.

Lockwood that she might be taking the day off on Friday, September 17, 2010. On the 17th, Sorber purchased a plane ticket to travel to New York on the following day. On Saturday, September 18, 2010, at around 3:00 p.m., Sorber sent an email to Lockwood and Application Support informing them she would be on vacation until October 2.

Around 7:30 p.m. on September 18, 2010, Lockwood reinitiated the text message conversation and informed Sorber that he was expecting her to be at work on Monday, September 20, 2010. Lockwood further stated that it was an inopportune time to take vacation. Sorber replied to Lockwood's text message stating that she had worked eighty (80) consecutive days and needed the time off. Lockwood texted that the proposed vacation was "[n]ot an option," and that he would not wait two weeks for her.

At 10:00 a.m. on Sunday, September 19, 2010, Sorber asked, "Are you saying I'm not allowed to take vacation?" Lockwood texted in response that Sorber's recent actions at work coupled with her leaving for two weeks showed poor judgment. Sorber stated that she regretted the timing of the vacation but would be happy to discuss it upon her return. Lockwood replied that there was nothing to discuss, that he realized that the time had come for them to part ways, and that the details of her termination would be emailed to her.

Lockwood testified that he spoke with Michael B. Giery, of Glacial's legal department, before he terminated Sorber. On the following day, September 20, 2010, Sorber received a termination letter from Cheryl Rousseau, director of Human Resources, stating that Glacial was in the process of reorganizing the Information Technology Department and had determined that her services were no longer necessary. At the time she received the letter, both Lockwood and Sorber understood and believed she had already been terminated via Lockwood's final text message from the previous evening.

STANDARD

In deciding a renewed motion for judgment as a matter of law under Rule 50, "the Court must 'consider the evidence in the light most favorable to the non-moving party.'"[2] The motion must be denied "if there is evidence reasonably tending to support the recovery by the plaintiff as to any of its theories of liability."[3]

But, where the record is deficient of the minimum evidence from which a jury might reasonably afford relief, granting a motion for directed verdict is appropriate.[4] Before a case is left to the jury, there "is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it . . . ."[5]

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[2] *Virgin Island Maritime Serv., Inc. v. Puerto Rico Maritime Shipping Authority*, 978 F. Supp. 637, 645 (D.V.I.1997) (quoting *Walmsley v. City of Philadelphia*, 872 F.2d 546, 551 (3d Cir.1989).
[3] *Walmsley*, 872 F.2d at 551.
[4] *J.I. Hass Co. v. Gilbane Building Co.*, 881 F.2d 89, 91 (3d Cir.1989).
[5] *Anderson v. Liberty Lobby*, 477 U.S. 242, 251 (1986).

DISCUSSION

Count 1: Virgin Islands Wrongful Discharge Act

To succeed on a Virgin Islands Wrongful Discharge act claim, a plaintiff must prove that: "(1) he was an employee; (2) of a covered employer; (3) he was discharged; and (4) the discharge was wrongful."[6] However, the U.S. Court of Appeals for the Third Circuit has held that the WDA, as applied to statutorily defined supervisors, is preempted by the National Labor Relations Act.[7]

The Court finds that, as a matter of law, the Defendants have proven that Sorber was a supervisor as defined by the National Labor Relations Act. As the evidence on the record does not provide a legally sufficient basis for a reasonable jury to find that Sorber was not a supervisor under the National Labor Relations Act, judgment as a matter of law is appropriate. Further, even if this were not the case, the Court finds that the Plaintiff has failed to prove that Sorber was a covered employee because the evidence on record shows she was employed in a bona fide executive capacity. Finally, the undisputed evidence on record shows that Sorber's discharge was otherwise not wrongful under the WDA.

a. Sorber was a supervisor under the National Labor Relations Act

The NLRA defines a 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."[8]

The Supreme Court has found that an employee need only perform one of the statutory supervisory functions to qualify as a supervisor.[9]

Here, the testimony and evidence shows that Melinda Sorber, in the interest of Glacial, had the authority to assign work to other employees and direct other employees in their work, as an exercise of her independent judgment. As evidenced by her own testimony as to her job duties and responsibilities, the testimony of Lockwood and Steve Marcella, a member of the Application Support Subdivision, and email documents showing the nature and structure of the Subdivision, Sorber managed a team of four people to whom she would assign work based on

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[6] *Rajbahadoorsingh v. Chase Manhattan Bank, NA.*, 168 F. Supp. 2d 496, 504–05 (D.V.I. 2001).
[7] *See St. Thomas-St. John Hotel & Tourism Ass'n Inc. v. Gov't of the V.I.*, 357 F.3d 297, 304 (3d Cir. 2004); *Fraser v. Kmart Corp.*, CIV 2005-0129, 2009 WL 1124953 (D.V.I. Apr. 24, 2009).
[8] 29 U.S.C. § 152(11) (2006).
[9] *NLRB v. Health Care & Retirement Corp. of America*, 511 U.S. 571, 573–74 (1994); *see also NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 702, 713 (2001) ("Employees are statutory supervisors if (1) they hold the authority to engage in any 1 of the 12 listed supervisory functions, (2) their exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment, and (3) their authority is held 'in the interest of the employer'").

her independent determinations. The Defendants presented emails showing that Sorber distributed and reassigned work to the other employees in Application Support, and Marcella testified that Sorber assigned him the tickets and reprimanded him when he attempted to choose his own work. He also testified that she critiqued his work, and that she was the one to whom he would request vacation.

Based upon the record before it, the Court finds that Sorber was a supervisor under the National Labor Relations Act. As a supervisor under the NLRA, her WDA claim is preempted.

b. Sorber was not a covered employer under the Virgin Islands Wrongful Discharge Act.

To succeed on a WDA claim, Sorber must prove that she is a covered employee. Even if she were not a supervisor under the NLRA, the testimony and evidence shows that she is not a covered employee under the WDA and, therefore, is not entitled to recover. The WDA does not apply to "bona fide executives,"[10] but neither the Virgin Islands Code nor V.I. caselaw provides a definition of this term. However, the Code of Federal Regulations persuasively defines an employee employed in a bona fide executive capacity as:

> (1) compensated on a salary basis at a rate of not less than $455 per week . . . ;
> (2) whose primary duty is management of the enterprise in which the employee is employed or of a customarily recognized department or subdivision thereof;
> (3) who customarily and regularly directs the work of two or more other employees; and
> (4) who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring, firing, advancement, promotion, or any other change of status of other employees are given particular weight.[11]

The Court adopts this definition, and finds that the Defendants' uncontested evidence shows that Sorber was a bona fide executive as a matter of law. First, Sorber's salary of $150,000 per year is undisputed and in excess of $455 per week as required by element (1).

As described above, Sorber managed a team of four people in a subdivision of the Information Technology department. The Defendants presented emails showing that Sorber distributed and reassigned work to the other employees in Application Support. Marcella testified that Sorber assigned him the tickets he was to work on. He also testified that she critiqued his work, and that she was the one to whom he would request vacation leave. Sorber testified that she was able to reassign work and set work priorities for the other workers in Application Support. This evidence satisfies elements (2) and (3).

Finally, by Sorber's own admission, her input as to Ron Petty's work performance was given particular weight in the decision to terminate him. Lockwood also testified that Sorber had input on hiring and firing decisions. Finally, as evidenced by the text message that Lockwood sent to Sorber, Lockwood's decision to promote an employee, demote an employee, and fire a third employee was based on Sorber's input. This satisfies element (4).

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[10] V.I. Code Ann. tit. 24, § 2 (1997).
[11] 29 C.F.R. § 541.100 (West 2013).

As the evidence on record shows that Sorber fits the definition of an employee employed in a bona fide executive capacity, the Wrongful Discharge Act does not apply to her and she cannot succeed on her claim.

c. Sorber was terminated for a permissible reason under the Wrongful Discharge Act.

Even if the Court found that there is legally sufficient evidence for a trier of fact to determine the question of supervisory and bona fide executive status, Sorber would still not have a legally sufficient basis to succeed on her WDA claim because the undisputed evidence presented shows that she was terminated for the WDA-permissible reason of insubordination.

The WDA allows a covered employer to discharge an employee who "willfully and intentionally disobeys reasonable and lawful rules, orders, and instructions of the employer."[12] Sorber testified that she was in the Virgin Islands when she received the text message from Lockwood stating that he expected her to come to work on Monday, September 20, 2010. She also testified that, when she received that text message, there was nothing physically preventing her from going to work on September 20. Additionally, Sorber recognized Lockwood's denial of her vacation request when she affirmed that it was an inopportune time to take vacation, but she felt entitled to vacation leave because she had worked for eighty days without a day off.

Sorber argues that her alleged insubordination was a pretext, and that Lockwood held personal animus against her for her role in the termination of Ron Petty, who Lockwood testified was his friend, and because she disagreed with him about the implementation of a new sales report system. Even drawing the inference that these two facts created animus in Lockwood, Sorber offers no evidence that Lockwood was acting outside of his capacity of Chief Operating Officer when he terminated her for taking unauthorized vacation leave. In other words, even if there was some animus, Sorber was still insubordinate and therefore her termination under the WDA was proper.

Count 2: Civil Conspiracy

"[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."[13] Although an agreement or combination can be inferred from circumstantial evidence, there is no such evidence in this case.

The Plaintiff argues the civil conspiracy was to falsify the termination letter and to violate the WDA. The Defendants argue that there must be an underlying tort to bring an action for civil conspiracy, and so the WDA cannot be a basis for the claim. As the Court has already explained why the Defendants have not violated the WDA, the Court does not need to decide whether a civil conspiracy claim can succeed when the underlying wrongful act is not a common law tort.

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[12] 24 V.I.C. § 76.

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

Sorber further argues that fraudulent conduct on the part of an employer is a proper underlying tort, and that the Defendants engaged in fraudulent conduct when they falsified her employment record by putting a false reason for her discharge in the termination letter. This argument holds no weight because even if the Court accepts that the letter is fraudulent, Melinda Sorber testified that she has not been harmed by the letter in any way, and harm is an essential element to this claim. Moreover, the letter, which was received on the Monday, merely explains the details of the termination, and Sorber and Lockwood both testified that they felt the termination was effective on Sunday. Keith Lockwood also testified he felt the termination was effective at the same time.

Finally, there is no evidence that anyone involved in the preparation of the letter was acting solely on personal animus. Instead, the evidence all clearly supports that the Defendants were acting as agents of Glacial. As it is well established that a corporation cannot conspire with itself,[14] the Plaintiff has not provided legally sufficient evidence to succeed on this claim.

Count 3: Tortious Interference with Contract

A claim of tortious inference with contract requires proof of intentional and improper interference with the performance of a contract between another and a third person.[15] This intentional and improper interference occurs by inducing or otherwise causing the third party to not perform the contract.[16] As this Court previously explained, a tortious interference with contract claim can proceed in context of at-will employment.[17] However, a person or corporation cannot tortiously interfere with its own contract. As there is no evidence that the Defendants were acting outside the scope of their employment when Sorber was discharged, judgment as a matter of law is appropriate.

As previously stated, the testimony and evidence show that the actual termination occurred via text message sent by Lockwood on Sunday September 19. Lockwood testified, and no evidence disputes, that he solely made the decision to terminate Melinda Sorber. Further, there is no evidence that Keith Lockwood was acting solely on personal animus when he terminated Melinda Sorber, and so he was acting in his position as Chief Operating Officer of Glacial. As he was acting as an agent of Glacial, Lockwood cannot be liable for tortious interference. In addition, the Plaintiff has provided no evidence that Cheryl Rousseau and Michael Giery were acting outside the scope of their employment. The evidence that they were consulted either before Sorber was fired via text message, or in the preparation of the termination letter, only bolsters the proposition that they were acting in their capacity as Glacial employees. As the Plaintiff has failed to submit more than a scintilla of evidence that the Defendants were acting outside the scope of their employment when Sorber was fired, judgment as a matter of law in favor of the Defendants is appropriate on this count as well.

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[14] *Id.* (citing *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984)).
[15] Restatement (Second) of Torts, § 766 (1979).
[16] *Id.*
[17] *Id.*

CONCLUSION

Based on the evidence on record, and viewing the evidence in the light most favorable to Sorber, the Court finds that no reasonable jury could rule in favor of Sorber on any of her claims. Accordingly, the Court will grant the Rule 50 Motion for Judgment as a Matter of Law and enter judgment on the Third Amended Complaint in favor of the Defendants.

DATED: November 22, 2013

JAMES S. CARROLL III
Senior Sitting Judge of the Superior Court
of the Virgin Islands

ATTEST: VENETIA H. VELAZQUEZ, ESQUIRE
Clerk of the Court
BY:
LORI BOYNES-TYSON
Court Clerk Supervisor 11/25/2013

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MELINDA SORBER, Plaintiff, v. **GLACIAL ENERGY VI, LLC, CHERYL ROUSSEAU, KEITH LOCKWOOD, and MICHAEL B. GIERY,** Defendants.	**CIVIL NO. ST-10-CV-588** **ACTION FOR WRONGFUL DISCHARGE, CIVIL CONSPIRACY, AND TORTIOUS INTERFERENCE WITH CONTRACT** **JURY TRIAL DEMANDED**

JUDGMENT

AND NOW, for the reasons stated in the Court's Memorandum Opinion of even date, it is hereby

ORDERED that the Defendants' Renewed Motion for Judgment as a Matter of Law is **GRANTED**; and it is further

ORDERED that judgment is entered in favor of Defendants Glacial Energy VI, LLC, Cheryl Rousseau, Keith Lockwood, and Michael B. Giery and against Plaintiff Melinda Sorber; and it is further

ORDERED that the Third Amended Complaint against Glacial Energy VI, LLC, Cheryl Rousseau, Keith Lockwood, and Michael B. Giery is **DISMISSED**; and it is further

ORDERED that a copy of this Order shall be directed to counsel of record.[1]

DATED: November 22, 2013

JAMES S. CARROLL III
Senior Sitting Judge of the Superior Court
of the Virgin Islands

ATTEST: VENETIA H. VELAZQUEZ, ESQUIRE
Clerk of the Court
BY: LORI BOYNES-TYSON
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[1] Christopher Kroblin, Esq., of Kellerhals Ferguson Fletcher Kroblin LLP, represents the Plaintiff. David Cattie, Esq., and Micol Morgan, Esq., of Ogletree Deakins Nash Smoak and Stewart, LLC, represents the Defendants.