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

LAVERNE MILLS-WILLIAMS, Plaintiff, v. GOVERNOR KENNETH E. MAPP, RANDOLPH KNIGHT, CLAUDE WALKER, ESQ. and THE OFFICE OF THE GOVERNOR, Defendants.	)	CIVIL NO. 574/2016 ACTION FOR DAMAGES JURY TRIAL DEMANDED

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS

Defendants Kenneth Mapp ("Mapp"), in his capacity as Governor of the Virgin Islands, Randolph Knight ("Knight"), in his capacity as Chief of Staff of the Governor of the Virgin Islands, Claude Walker, Esq., in his capacity as the Attorney General of the Virgin Islands" ("Walker") and the Office of the Governor, by and through its undersigned counsel, hereby submit their memorandum in support of its motion to dismiss Plaintiff's unverified Second Amended Complaint ("Complaint").

1. PROCEDURAL BACKGROUND

On or about October 28, 2015, Plaintiff filed an initial complaint in this matter against Kenneth Mapp in his capacity as the Governor of the Virgin Islands, Randolph Knight in his capacity as Chief of Staff of the Governor of the Virgin Islands and Emile Henderson, III, ("Henderson") in his capacity as Legal Counsel for the Governor. It appears that on that same day, October 28, 2015, Plaintiff filed a First Amended Complaint removing Henderson from the lawsuit. On October 29, Plaintiff again amended her complaint to add Walker. In Count I of her

Complaint, Plaintiff alleges a claim of misrepresentation against all of the Defendants except Walker. Count II of the Complaint alleges a violation of the Whistleblower Act against all defendants and in Count III Plaintiff alleges that Mapp, Knight and Walker tortiously interfered with her employment contract. For all of the reasons set forth below, Plaintiff's Complaint must be dismissed.

2. STANDARD FOR MOTION TO DISMISS

The adequacy of a complaint is governed by the general rules of pleadings set forth in Rule 8 of the Federal Rules of Civil Procedure. *Robles v. HOVENSA*, L.L.C., 49 V.I. 491, 499 (VI. 2008). Rule 12(b) permits a moving party to seek the dismissal of a complaint based on certain enumerated defenses. A defendant may seek dismissal of a claim pursuant to Rule 12(b)(6) based on a plaintiff's failure to state a cause of action upon which relief may be granted. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009); *Bell Atlantic Corp v. Twombly*, 550 U.S. 544 (2007).

To determine whether a complaint can survive a 12(b)(6) motion, the court must perform a three step inquiry as follows:

> First, the court must take note of the elements a plaintiff must plead to state a claim so that the court is aware of each item the plaintiff must sufficiently plead. Second, the court should identify allegations that, because they are no more than conclusions, are not entitled to the assumption of truth. These conclusions can take the form of either legal conclusions couched as factual allegations or naked factual assertions devoid of further factual enhancement. Finally, where there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement of relief. Plausibility requires that the plaintiff allege facts that are more than simply consistent with a defendant's liability and must permit the court to infer more than the mere possibility of misconduct.

Joseph v. Bureau of Corrections, 54 V.I. 644, 649-650 (VI. 2011) (internal citations omitted); *Adams v. N. W. Co. Int'l*, 2015 V.I. LEXIS 123, *5 (V.I. Super. Ct. Oct. 6, 2015). As such, the

court is required to distinguish between facts and legal conclusions. Unlike factual allegations, legal conclusions are not entitled to an assumption of truth. *Iqbal,* 129 S. Ct. at 1950. When considering factual allegations, the court is required to accept as true the well-pleaded factual allegations in the complaint and determine whether there are sufficient facts to "plausibly suggest" that the respondent is liable to the petitioner for some wrongful conduct. *Id.*

For a claim to survive a motion to dismiss it must be facially plausible. *Iqbal* requires that a complaint contains "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Iqbal* 129 S. Ct. at 1949. "The plausibility standard requires more than 'a sheer possibility that a defendant has acted unlawfully.'" *Wheatley v. Magras*, 2012 V.I. LEXIS 3, *6 (V.I. Super. Ct. Jan. 11, 2012) (citing *Iqbal*, 129 S. Ct. at 1949); *Joseph*, 54 V.I. 644 at 650 (noting that "the plausibility standard requires that the plaintiff allege facts that permit the court to infer more than the "mere possibility of misconduct.") Only a complaint that states a plausible claim for relief can survive a motion to dismiss.

After *Twombly/Iqbal*, it is clear that bald and conclusory recitations and barebones allegations can no longer survive a motion to dismiss. Mere recitals of the elements of a cause of action and conclusory statements are not sufficient to state a claim. *Iqbal*, 129 S.Ct. at 1949. "Factual allegations must be enough to raise the right to relief above the speculative level" and a "plaintiff's obligation to provide the basis for his entitlement of relief requires more than labels and conclusions and a formulaic recitation of the element of a cause of action will not do." *Twombly*, 550 U.S. at 555. A legal conclusion couched as a factual allegation cannot be accepted as true or embossed with a presumption of truthfulness. *Id.* (quoting *Papasan v. Allain*, 478 U.S. 256, 286 (1986)). Even though "Rule 8 does not require detailed factual allegations, it does demand more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Wheatley*

2012 V.I. LEXIS 3 at 6. Thus, to survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a plausible claim for relief. Applying the standard set forth above, this Court should dismiss Plaintiff's Complaint because it fails to form the basis for entitlement to relief.

When ruling on a motion to dismiss, the court may consider public records, matters incorporated into the pleading by reference, documents attached to the complaint, matters integral to or upon which a plaintiff's claim is based, and indisputably authentic documents that a respondent or defendant attaches as an exhibit to a motion to dismiss. *Bostic v. AT&T of the Virgin Islands*, 166 F. Supp. 2d 350 (D. V.I. 2002); *Lessard v. Jersey Shore State Bank*, 702 F. Supp. 96 (M.D. Pa. 1988); *Envtl. Ass'n of St. Thomas v. Dep't of Planning & Natural Res.*, 2002 V.I. LEXIS 12, *7 (V.I. Terr. Ct. 2002)(holding when considering a 12(b)(6) motion a court may consider undisputed documents relied upon by the plaintiff even if such documents are not attached to plaintiffs complaint.)

3. DISCUSSION

A. Under Virgin Islands Law There has Been No Violation of the Whistleblower Protection Act

In her Complaint, Plaintiff alleges that Defendants violated the Whistleblower Protection Act ("WPA"). Specifically, Plaintiff alleges that in her position as Deputy Legal Counsel for the Office of the Governor she was assigned the task of responding to the St. Croix Avis' request for public information. She further alleges that she was assigned to this task by Knight and Rochelle Cornerio, the Deputy Chief of Staff. Compl. ¶ 11.[1] Since Governor Mapp, Knight and Henderson

[1] Plaintiff does not disclose how this task was assigned to her- whether she was told to do so verbally or in writing by Knight and Cornerio or whether someone told her that Knight and/or Cornerio wanted her to respond to the Avis request for information.

were the subject of the request she believed the proper procedures were to wall them off from any information regarding the production of the documents and she walled them off. Compl. ¶¶ 12 and 13. She also claims that before the submission of the documents to the St. Croix Avis, she learned that the Governor wanted to review the documents before she submitted them to the Avis.[2] Compl. ¶ 14. Plaintiff alleges that she had discussions with Henderson and it was concluded that the Chief Legal Counsel would inform the Governor that it was inappropriate for him to review the documents that the Avis had requested. Compl. ¶ 15. Plaintiff alleges that she gathered the documents and provided them to the St. Croix Avis on September 14, 2015. Compl. ¶ 16. Plaintiff claims that after she had provided the documents to the Avis, Henderson informed her that Governor Mapp and Knight were very upset that she released the documents without allowing them to review and redact the documents and she was not to produce any more documents. Compl. ¶ 18. Plaintiff alleges that she told Henderson that the directive would be illegal and he should tell the Governor that she would not follow it. Compl. ¶ 19. Plaintiff then alleges that in retaliation for her disclosure of the documents she was transferred to the Department of Justice on October 5, 2015, was not paid for work performed after October 2, 2015, as the Office of the Governor refused to provide any NOPA transferring her to Justice. She also alleges that after she filed her whistleblower complaint she received a letter from Acting Attorney General Walker informing her that she would be placed on leave without pay as there

[2] Plaintiff does not disclose from whom she learned that the Governor wanted to review the documents before she submitted them to the Avis. Nowhere in the Complaint does Plaintiff allege that she spoke to Governor Mapp and he told her that he wanted her to review the documents before they were submitted. Rather she makes the vague statement that "she learned" that the Governor wanted to review the documents before they were submitted to the Avis.

was no source of funds to actually pay her. Compl. ¶¶ 34-38. These allegations do not support a claim for violation of the Virgin Islands WPA. Section 122 of the WPA states as follows:

> An employer shall not discharge, threaten, or otherwise discriminate against an employee regarding the employee's compensation, terms, conditions, location, or privileges of employment because the employee, or a person acting on behalf of the employee, reports or is about to report, verbally or in writing, a violation or a suspected violation of a law or regulation or rule promulgated pursuant to law of this territory or the United States to a *public body* unless the employee knows that the report is false, or because an employee is requested by a public body to participate in an investigation, hearing or inquiry held by that public body, or a court action.

10 V.I.C. § 122 (emphasis). To bring a whistleblower action, the Plaintiff must show: (1) he engaged in conduct protected under the WPA; (2) his employer took adverse action against him; and (3) there was a causal connection between the protected conduct and the adverse action. *Hodge v. Superior Court of the V.I.*, 2009 U.S. Dist. LEXIS 83943, *14 (D.V.I. 2009) citing *Johnson v. Gov't of the Virgin Islands,* 35 V.I. 27, 31 (Terr. Ct. 1996). In *Hodge,* the employee alleged that the Superior Court retaliated against him for sending a memorandum regarding unlawful and unethical conduct by Superior Court personnel to the Presiding Judge. *Id* at 3. The court rejected the Plaintiff's contention that the report was protected under the WPA. The court explained that the WPA protects an employee's report to a "public body" of a violation or suspected violation of a law, regulation or rule under the territorial law or United States law. Section 121(d) of the WPA defines a "public body" as

> (d) "Public body" means all of the following:
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> > **(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;
>
> **(4)** a law enforcement agency or any member or employee of a law enforcement agency;
>
> **(5)** the judiciary and any member or employee of the judiciary.

Plaintiff alleges that she provided documents to the St. Croix Avis. Compl. ¶ 16. The St. Croix Avis does not fall within the clear and unambiguous definition of public body in the WPA. Since Plaintiff did not report any alleged violation to a public body she did not engage in any conduct protected under the WPA. Moreover, this case is distinguishable from *Johnson*, (supra). There, the court held that Plaintiff had sufficiently pled a cause of action under the WPA where the Plaintiff provided information regarding the inadequate care and treatment of patients at the Herbert Grigg Home to a Senator. Section 121(d)(2) considers a public body as "an agency, board, commission, member, or employee of the legislative branch of the territorial government." Thus, a senator falls within the definition of public body and the plaintiff in *Johnson* was considered a whistleblower. Unlike the plaintiff in *Johnson*, Plaintiff Mills-Williams did not provide a report of any violation law to any public body as defined by Virgin Islands law. Therefore, her whistleblower claim must be dismissed as a matter of law.

A plaintiff's allegations also falls outside of the purview of the WPA where the employee fails to "make it clear to the employer the employee's actions go beyond the employee's assigned tasks and job duties." *Hodge*, V.I., 2009 U.S. Dist. LEXIS 83943 at 14-18. In this instance, Plaintiff alleges that in her position as Deputy Legal Counsel she was assigned the task by her supervisors or superiors to respond to the Avis' open records request. Compl. ¶ 11. Plaintiff cannot be characterized as a whistleblower for performing a task to which she was assigned. Besides literally handing the documents to the Avis, Plaintiff has not alleged that she

informed the Avis that the documents contained evidence of improper spending. Neither did Plaintiff allege that she prepared a report or internal memorandum in which she opined that the documents contained evidence of improper spending. In fact the only discussions that Plaintiff allege she had with respect to the production of the documents before she produced the documents to the Avis were with her supervisor, the Chief Legal Counsel. Compl. ¶ 15. And those conversations, according to Plaintiff's Complaint, concerned walling off Governor Mapp, Knight and Henderson from the documents she had gathered as part of her assignment and during the normal course of performing her duties. The allegations in the Complaint squarely support the conclusion that Plaintiff produced the documents "during the ordinary course and scope of [her] duties" as the Deputy Legal Counsel, not as a whistleblower. *Hodge*, 2009 U.S. Dist. LEXIS 83943, at 18 (noting that the Plaintiff's internal complaint prepared during the ordinary course and scope of his duties as Assistant General Counsel was exactly the type of activity he was required to perform in fulfilling his duties as legal advisor to the Court and the plaintiff never made it clear to the Superior Court his complaints went beyond his opinions on proper internal procedures). See, *Share v. Extendicare Health Servs.*, 515 F.3d 836, 841 (8th Cir. Minn. 2008)(holding that whistleblowers statute does not grant protection to an employee whose duties require him or her to ensure legal compliance). *Langer v. Dep't of the* Treasury, 265 F.3d 1259, 1266 (Fed. Cir. 2001) (holding that Assistant District Counsel with the Internal Revenue Service ("IRS") whose duty included reviewing action taken by other agencies was merely carrying out his required every day responsibilities and was not protected under Whistleblower Act); see also *Garcetti v. Ceballos*, 547 U.S. 410, 413 (U.S. 2006).

In *Garcetti*, supervising deputy district attorney Cebellos, who was also the calendar deputy, was asked by defense counsel to review a case in which the defense counsel claimed

that the affidavit police used to obtain a critical search warrant was inaccurate. Cebellos examined the affidavit that had been used to obtain the search warrant in the criminal case, determined that the affidavit contained serious misrepresentations, and wrote one of his supervisors a disposition memorandum recommending dismissal of the case. Subsequently, Cebellos was called by the defense at trial and recounted his observations about the affidavit. Cebellos claimed that after these events he was subjected to a series of retaliatory employment actions, including reassignment from his calendar deputy position to a trial deputy position, transfer to another courthouse, and denial of a promotion. In *Garcetti*, the Supreme Court held that *"when* public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." The Supreme Court held that deputy district attorney Cebellos wrote his memorandum because that was what he was employed to do as a calendar deputy. In *Garcetti* the Supreme Court elaborated further and stated that:

> Ceballos did not act as a citizen when he went about conducting his daily professional activities, such as supervising attorneys, investigating charges, and preparing filings. In the same way he did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case. When he went to work and performed the tasks he was paid to perform, Ceballos acted as a government employee. The fact that his duties sometimes required him to speak or write does not mean his supervisors were prohibited from evaluating his performance.
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> ... Employers have heightened interests in controlling speech made by an employee in his or her professional capacity. Official communications have official consequences, creating a need for substantive consistency and clarity. Supervisors must ensure that their employees' official communications are accurate, demonstrate sound judgment, and promote the employer's mission. ... If Ceballos' superiors thought his memo was inflammatory or misguided, they had the authority to take proper corrective action.

Garcetti, 547 U.S.at 422-423. Thus, employees are not shielded from managerial discipline for expressions made while performing official responsibilities. *Id.* The actions that Plaintiff allege she took – responding to an open records request to the Office of the Governor by a newspaper, and discussing with and advising the Chief Legal Counsel of internal procedures for the production of the documents - were tasks she was hired to do. She does not become a whistleblower by producing documents in response to a document request or by complaining to her supervisor. Under no set of facts alleged in her complaint can Plaintiff show she is entitled to relief. Plaintiff has failed to state a plausible whistleblower claim and her "the-defendant-unlawfully-harmed-me accusation" is not a sufficient basis for Defendants' liability and Count I must be dismissed with prejudice.

B. **Plaintiff has Failed to State a Claim for Misrepresentation**

Plaintiff alleges that Defendants, except for Walker, engaged in misrepresentations to her. She alleges that Henderson, on behalf of Governor Mapp and Knight and the Office of the Governor, represented to her that "this 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." Plaintiff further alleges that in reliance on these representations she left her "situation" and accepted the position of Deputy Legal Counsel. Compl. ¶ ¶ 8-9. These allegations cannot form the basis of a misrepresentation claim as they are statements as to future events and expectations. In *Angrisani v. Capital Access Network, Inc.*, 175 Fed. Appx. 554, 556 (3d Cir. 2006), the Third Circuit held that "[s]tatements as to future or contingent events, as to expectations and probabilities, or as to what will be or is intended to be done in the future, do not constitute misrepresentations even though they turn out to be false, at least where they are not

made with intent to deceive, and where the parties have equal means of knowledge. Similarly, statements that can be categorized as 'puffery' or vague and 'ill-defined opinions' are not assurances of fact and do not constitute misrepresentations." *Id.* Nowhere does Plaintiff allege that any Defendant knew at the time the alleged representation were made that they false or deceitfully made. It should be pointed out that although Plaintiff brought her misrepresentation claim against Governor Mapp and Knight, absolutely nowhere in the complaint does she allege that Governor Mapp and/or Knight personally made any representations to her or even had any discussions with her. Rather she speculates, without any factual basis, that Henderson's alleged statement to her was made on Defendants' behalf.

Additionally, in *Alexander v. CIGNA* Corp., 991 F. Supp. 427, 436 (D.N.J. 1997) the court held that it would be "manifestly unreasonable" for the plaintiff to rely on statements that were "replete with predictions of future events." The court held that statements such as "'relationship would be long lasting", "'agreement one in perpetuity", "COMPAR would take CIGNA into the twenty-first century and beyond"; "COMPAR was the program for the 1990's and beyond," and "COMPAR program was like a marriage" cannot serve as the basis for a misrepresentation or fraud claim just because they were believed when made and subsequently turn out to be not true. The court held the use of the words "will," "plan" or "expect" indicate their future orientation and do not constitute misrepresentation. *Id.* Similarly, statements by Henderson 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" are his future expectations, desires and opinions and cannot form the basis for a misrepresentation claim. Moreover, the representations that Plaintiff asserted were made by Henderson are vague and non-specific. Plaintiff could not have detrimentally relied on such representations. Plaintiff's speculative allegations and

formulaic recitation of the elements of misrepresentation do not state a plausible claim for relief and cannot survive a motion to dismiss. In light of the foregoing, Count II must be dismissed.

C. <u>Plaintiff Has Failed To State a Claim for Tortious Interference With Contract</u>

In Count III of her Complaint, Plaintiff alleges that Governor Mapp, Knight and Walker "tortuously interfered with Plaintiff's employment contracts." Compl. ¶ 50. In *Donastorg v. Daily News Publ. Co.*, 2015 V.I. LEXIS 105, *135 (V.I. Super. Ct. Aug. 19, 2015) Judge Francois conducted the three-part analysis mandated by *Banks v. International Rental & Leasing Corp.*, 55 V.I. 967, 979 (V.I. 2011) and concluded that in order to prove tortious interference[3] with contract in the Virgin Islands, a plaintiff must demonstrate (1) the existence of a contract between the plaintiff and a third party, (2) that the defendant knew of that contract, (3) that the defendant intentionally interfered with that contract using improper means or with an improper motive and (4) the defendant's conduct caused damages. *Id.* at 147. Thus, in order to prevail on her claim for tortious interference with her employment contract, Plaintiff must identify the specific contract between Plaintiff and a third party, prove that Mapp, Knight and Walker had knowledge of the contract, and show that they intentionally interfered with the contract. *Donastorg*, 2015 V.I. LEXIS 105, at 148. Except for the conclusory statement that Governor Mapp, Knight and Walker "tortiously interfered with Plaintiff's employment contracts", which is not entitled to any presumption of truth, Plaintiff has not alleged any facts to support the

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[3] Although in *Donastorg* the court refers to "intentional interference with contract" courts have held that "intentional interference with contract," and "tortious interference with contract," are synonymous and pled identically. *Debjo Sales, LLC v. Houghton Mifflin Harcourt Publ'g Co.*, 2015 U.S. Dist. LEXIS 56504, *17 (D.N.J. Apr. 29, 2015). *Critical Nurse Staffing, Inc. v. Four Corners Health Care Corp.*, 2014 U.S. Dist. LEXIS 82857, *7 (D. Utah June 17, 2014)(noting that the plaintiff's second and third claims are titled intentional interference with contract and tortious interference with contract are repetitive and redundant of one another).

existence of an employment contract. Plaintiff failed to specify the contract, the parties to the contract, the date of the contract, the terms of the contract, and what obligations were created by the contract. In the Virgin Islands, the hiring of a public employee does not automatically create a contractual relationship. *See, e.g., Manning v. Bouton,* 18 V.I.457 (D.V.I. 1981); *Phaire v. Merwin,* 3 V.I. 320 (D.V.I. 1958). In the absence of any allegation supporting the existence of a contract, Plaintiff has failed to allege the most basic and fundamental element to support a cause of action for tortious interference with contract. *Id.* Plaintiff's bare-bones conclusory statement that Defendants tortiously interfered with her employment contract does not state a plausible claim. Accordingly, Plaintiff's claim for tortious interference with her employment contract as alleged in Count III must be dismissed.

Even if Plaintiff could conjure up an employment contract from the dearth of facts alleged in the Complaint, her Complaint is devoid of any facts that would show that a third party interfered with the contract. Because of this infirmity, her claim for tortious interference of contract must fail as a matter of law. A party to a contract or its agents cannot be liable for tortious interference with its own contract. In *Sorber v. Glacial Energy VI, LLC*, 2013 V.I. LEXIS 69, *14 (V.I. Super. Ct. Nov. 22, 2013), the court held that 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. It further explained that "a person or corporation cannot tortiously interfere with its own contract". *Id.*[4] In *Sober*, the court held that a claim for tortious interference against the chief operating officer, attorney and director of human resources

[4] See also, Restatement 2d of Torts, § 766 (2nd ed. 1979)("One who intentionally and improperly interferes with the performance of a contract… between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.")

of Glacial Energy V.I., LLC, could not stand as at the time the plaintiff was terminated the defendants were not third parties but were acting as agents or employees of Glacial Energy. *Sorber*, 2013 V.I. LEXIS 69, at 14.

Likewise, the Office of the Governor and the Government also acts through its agents, officers and employees. Such agents and officers cannot be considered third parties. Significantly, the Complaint specifically states that "Defendant Kenneth Mapp… was Plaintiff's employer at all times relevant", that Knight was the Chief of Staff of the Governor and Walker the acting attorney general at the time of the allegations in the complaint. The complaint also states that the Office of the Governor was Plaintiff's employer. Compl. at ¶¶ 3 -6. Governor Mapp, cannot be held liable for tortious interference with Plaintiff's self-professed employment contract, as based on the allegations in the complaint, Governor Mapp was Plaintiff's employer and cannot be considered a third party to any employment contract with Plaintiff and the Office of the Governor or Government of the Virgin Islands.[5] Additionally, Chief of Staff Knight and Acting Attorney General Walker cannot be held liable for tortious interference as they are not third parties and were acting in their official capacities at the time of the allegations alleged in the Complaint. It is evident that Count III must be dismissed for failure to state a claim.

D. <u>Plaintiff Served at the Pleasure of the Governor</u>

Plaintiff, as the Deputy Counsel to the Governor, was not a career or regular employee and served at the pleasure and discretion of the Governor. It is well-established that Virgin Islands law creates "three categories of public employees—exempt service, 'regular' career

[5] Section 11 of the Revised Organic Act provides that the Governor " shall appoint, and may remove, all officers and employees of the executive branch of the government of the Virgin Islands, except as otherwise provided in this or any other Act of Congress, or under the laws of the Virgin Islands." 48 USCS § 1591.

service, and 'not regular' career service." *Liburd v. Govt' of the Virgin Islands,* 2013 U.S. Dist. LEXIS 34658, at * 24 (D.V.I. Mar. 13, 2013). *Williams-Jackson v. Public Emples. Rels. Bd.*, 52 V.I. 445, 452 (VI. 2009); *McIntosh-Luis v. DeJongh,* 2012 U.S. Dist. LEXIS 45362, at * 16 (D.V.I. 2012) (holding that "[a] career service employee is also a regular employee only if he has been appointed to his position in accordance with the Personnel Merit System and has completed his probationary period.") Plaintiff has alleged no facts in the Complaint that would plausibly show that Plaintiff, as Deputy Legal Counsel, was a regular or career service employee. Rather, the factual allegations suggest that Plaintiff's position as Deputy Legal Counsel was an exempt position. As an exempt employee, Plaintiff can be terminated without cause, and she has no property right in continued employment. *Liburd,* 2013 U.S. Dist. LEXIS 34658 at 25. In her Complaint, Plaintiff alleges that Henderson asked her to work for the administration and as a result she "left her situation and accepted the position of Deputy Counsel for the Office of the Governor. In her position as Deputy Legal Counsel she had discussions with the Chief Legal Counsel to the Governor and advised him to "inform the Governor as to how inappropriate" the Governor's action would be if he reviewed the documents before she submitted them to the Avis. These allegations show that Plaintiff, as Deputy Legal counsel, held a confidential position to policy makers in the Office of the Governor. As a result, the Governor can terminate her with or without cause. Plaintiff is not entitled to reinstatement as Deputy Legal Counsel in the Office of the Governor. Surely, a Governor should be able to select his own legal counsel. *See, e.g. Gov't of the V.I. v. Seafarers International Union*, 57 V.I. 649, 658 (VI. 2012)

4. **CONCLUSION**

Plaintiff's Complaint should be dismissed as Plaintiff has failed to state a plausible claim. Plaintiff has failed to allege facts to support her claim that she is whistleblower under the Virgin Islands Whistleblowers Protection Act, that Defendants made misrepresentations to her, that she has an employment contract with which Defendants tortiously interfered or that she has a property interest in her employment.

WHEREFORE, Defendants respectfully request that the Court dismiss this matter with prejudice.

RESPECTFULLY SUBMITTED,

CLAUDE E. WALKER, ESQ.
ACTING ATTORNEY GENERAL

Dated: November 23, 2015

BY: _____

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CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2015, a true and correct copy of the foregoing Motion, Memorandum and proposed order were mailed, postage prepaid, to:

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