

Employment Law

Assignment 2 (Sexual Harassment)

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Statement of Facts

- The statement of facts serves multiple purposes for the plaintiff:
 - The “formal” function is to present sufficient facts to satisfy the pleading standard (Rule 8 and Twombly/Iqbal).
 - But an effective complaint also presents the facts in a way that makes a good first impression with the court:
 - * Show the court your client has a good claim
 - * Show the court you are a credible advocate
 - An effective statement of facts tells a compelling, persuasive story, without hyperbole or overt argumentation. Also, remember Rule 11.
- The only facts you’re given are about the conduct by Wolfgang (the crew boss) and co-workers.
- Ideally, you’d want to seek additional facts from Lewis (or other witnesses she identifies), to support the elements of her claim (see below).

Cause of Action

Sexual Harassment: Two Theories

- The given facts suggest a “hostile environment” claim.
 - Consider whether there was a promise/threat (explicit or implied) of favorable/unfavorable treatment if Lewis accepted/rejected Wolfgang’s advances. You’d need to ask Lewis about this, and if so, whether Wolfgang followed through.
 - Where an (express or implied) threat of adverse consequences is unfulfilled, the claim should be analyzed under the hostile environment theory.
- As the Supreme Court notes in Ellerth and Faragher, “hostile environment” and “quid pro quo” aren’t really distinct claims. They’re just different ways of identifying the nature of the wrongful conduct and harm to the plaintiff.
 - The choice typically comes down to which theory is best supported by the factual allegations. Where the allegations support both theories, a plaintiff may assert both (since the FRCP and most state rules allow alternative pleading).

Elements of a Hostile Environment Claim

- To state a hostile environment claim, the complaint must allege (1) that the plaintiff was subjected to sexual harassment and (2) that the employer may be held liable.
- Harassment
 - Unwanted conduct (i.e. sexual advances, comments, etc.) that is “so severe and pervasive as to

- alter the conditions of employment and create an abusive working environment”. (Faragher)
- The conduct must be both objectively and subjectively offensive.
 - * A reasonable person would find the conduct offensive, and
 - * The plaintiff did find the conduct offensive.
- Employer’s liability.
 - Direct liability based on the employer’s negligence. This requires that the plaintiff plead (and ultimately prove) that the employer knew about the harassment and failed to take reasonable action prevent or correct it.
 - Vicarious liability. This requires that the plaintiff plead (and ultimately prove) that the perpetrator of the harassment was a supervisor with immediate (or higher) authority over the plaintiff.
 - * Note that Ellerth and Faragher (and the cases that the Court cites in those decisions) involved harassment by a supervisor. Where the perpetrators of the harassment are other non-supervisory employees, vicarious liability doesn’t apply. In those cases, the employer may be held liable only for its own negligence in failing to act reasonably to address harassment it knows about.
 - * The employer has an affirmative defense to vicarious liability if it can establish (1) that it exercised reasonable care to prevent or correct harassment (e.g. by having an anti-harassment policy and complaint process), and (2) that the plaintiff unreasonably failed to take advantage of preventative/corrective opportunities provided by the employer.
 - * Note that this affirmative defense doesn’t apply where the employer is liable for its own negligence in addressing known harassment (because that liability is already premised on the employer’s failure to take reasonable action).

Pleading Hostile Environment

- Harassment
 - For the harassment element, the complaint should reiterate the various forms of conduct by Wolfgang and the crew members, and assert that the conduct was unwelcome.
 - Whether the alleged conduct was “severe and pervasive” is a legal conclusion. The plaintiff may assert that it was, but under *Twombly/Iqbal*, the court won’t simply accept that allegation on its fact. Rather, on a Rule 12(b)(6) motion, the court will assess whether, assuming the alleged conduct took place, a jury could find that it was severe and pervasive.
 - The allegations about Wolfgang’s repeated conduct ought to suffice. As a plaintiff’s lawyer, I’d be less confident with just the allegations about co-worker conduct.
- Employer liability
 - Lewis may assert that the employer is vicariously liable for the harassment by Wolfgang.
 - * It’s probably sufficient to say that, as crew boss, Wolfgang had direct supervisory authority over the crew members including Lewis.
 - * Even under *Twombly/Iqbal*, this ought to be a plausible inference based on a general description of the crew boss role.
 - For the co-workers’s conduct, Lewis would have to allege that the employer knew about it and failed to act reasonably.
 - * If she didn’t make a formal complaint or otherwise tell anyone about the crew members’ conduct, she’d need to allege some other facts to support an inference that the company knew (or should have known)
 - * She might assert that Wolfgang observed the crew members’ conduct (which isn’t stated

in the problem, so you'd need to ask her about that) and his knowledge is attributable to the company by virtue of his supervisory role.

- * Whether this would suffice depends (among other things) on whether it was part of Wolfgang's role as crew boss to report problems or relay complaints from crew members.