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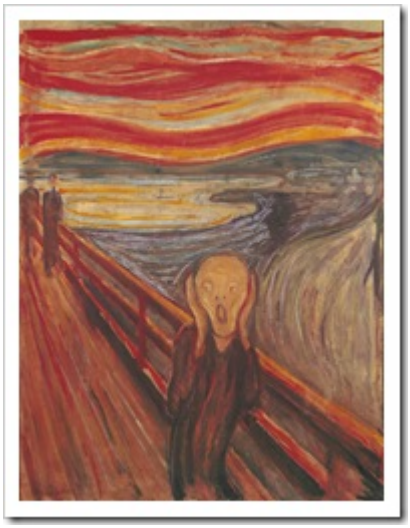
Sorry boss, I didn't know you were having sex in the office!!

The West Virginia Supreme Court recently issued an opinion dealing with one of those stereotypically awkward situations, where an employee allegedly stumbles into a room where the boss is having sex with a co-worker. The decision was *Roth v. DeFeliceCare, Inc.*, -- W. Va. --, - S.E.2d --, 2010 WL 2346248 (June 8, 2010) (per curiam). It was a 3-2 decision, in which the 3-vote majority consisted of Justices Robin Davis, Margaret Workman, and Thomas McHugh. Justices Menis Ketchum and Brent Benjamin dissented, and Justice Ketchum wrote a dissenting opinion.

The Facts--Sex at Work



These are the facts according to the complaint in the lawsuit: Tricia Roth was a respiratory therapist working at DeFeliceCare, Inc. in Ohio County, West Virginia, and she was about to go on vacation. She was directed by Leslie DeFelice (the male boss/owner) to come to work sometime during the weekend preceding her vacation in June 2006. She was not told a specific time to come to work during that weekend. When she came to work as ordered, she "observed Defendant [Leslie] DeFelice and/or Michelle Kelly partially clothed and in a compromising position". Mr. DeFelice instructed Ms. Roth to go into a conference room and wait--meanwhile Mr. DeFelice and the other employee got all their clothes back on. Mr. DeFelice then talked to Ms. Roth and told her to forget about what she had just seen, and threatened Ms. Ross with the loss of her respiratory therapy license and the loss of her employment.

Ms. Roth then went on vacation. When she got back from vacation and returned to work, she had a meeting with Mr. DeFelice that didn't go well. Ms. Roth told Mr. DeFelice that she hadn't told anyone about his sexual encounter at work. Mr. DeFelice proceeded to fire Ms. Roth because "he did not like how she was dressed" and "he did not like the style[/]color of her hair".

Ms. Roth Files Suit--Case Dismissed

Ms. Roth then filed suit on legal theories centering around sex discrimination and sexual harassment, and--bada bing!--the case promptly got dismissed.

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Limitations periods
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Punitive damages
Religious discrimination
Result for employee
Result for employer
Retaliation claims

Sorry boss, I didn't know you were having sex in the office!!

Ms. Roth's complaint (the document which starts the lawsuit and describes the plaintiff's allegations) focused on the sexual incident I have described above, but also made allegations about other sexual harassment--I will discuss those details below.

Motion to Dismiss Under Rule 12(b)(6)

The important thing to understand about the appeal to the WV Supreme Court is that the defendants immediately filed a motion to dismiss (under Rule 12(b)(6)) based only on the complaint filed by Ms. Roth--there was no evidence that had been accumulated through depositions, affidavits, and the like. The basis for the motion to dismiss was that Ms. Roth had "failed to state a claim upon which relief may be granted." That motion is based solely "on the pleadings", and is based on no other evidence.

A motion to dismiss on the pleadings must assume the truthfulness of the allegations in the plaintiff's complaint, and argues roughly this: even if everything the plaintiff says is true, she still can't win, because there is nothing about those allegations that would allow her any recovery in court.

Let's use this as an example to illustrate a motion to dismiss on the pleadings (under Rule 12(b)(6)):

- Suppose my boss fires me, and hands me a notarized resolution issued by the board of directors of my corporate employer saying: "We hereby fire Drew M. Capuder because his socks don't match. We hate people that can't clothe themselves with minimal competence. We infer from that characteristic that such people are incompetent employees. Furthermore, we, the board of directors and management of Drew's employer, harbor an intense personal hatred for such people. We fire Drew with the greatest joy and abandon." My boss hands me the board resolution and says "you're fired, and the company security will escort you out immediately". I say to my boss, "that's discriminatory". My boss replies: "Of course it is--we despise people who can't dress themselves properly". My boss, who recorded the termination meeting, then hands me a nicely packaged CD recording of the termination meeting as the company security guard quickly ushers me out of the building.
- I file suit for discrimination and wrongful discharge. I initiate the lawsuit by filing a document called a "complaint" which sets out a brief statement of the facts and the legal theories on which I am relying.
- My employer's defense counsel looks at my complaint, and says to herself: "I don't have to answer this silly-assed lawsuit. I will file a motion to dismiss, because there is nothing about Drew's idiotic allegations that our legal system recognizes as valid legal claims". So the defense lawyer files a motion to dismiss, based only on the allegations in my complaint, under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure. *This is the same kind of motion that the defendants filed against Ms. Roth.*
- The trial judge reviews the motion to dismiss and my response. The trial judge then takes about 6 nanoseconds to decide that the defendant's motion should be granted, and--bada bing!--my case is dismissed. *This is the same type of decision which the judge made in Ms. Roth's case (and the correctness of that decision was the issue on appeal)*.
- The trial judge in my case made the *correct* decision because, assuming (for purposes of the motion to dismiss) everything I said in my complaint was true,

Sex discrimination
Sexual harassment
Sexual orientation
Summary judgment
Title VII of the Civil Rights Act of 1964
US Legislation
US Supreme Court
Vacancies
WV Human Rights Act
WV Legislation
WV Supreme Court

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WV Supreme Court

there is nothing about those allegations that establishes any sort of recognized claim for wrongful discharge. In other words, my complaint would not allow me to win in court. It's as simple as that.

- Contrary to some popular understanding, the law does not prohibit all forms of employment discrimination. The law only prohibits employment discrimination in which the employer's decision is based on *protected characteristics*. Those characteristics include race, age, gender, national origin, disability, and religion (and there are other characteristics like certain types of whistle blowing, military service, jury duty, etc.). So if my employer *discriminates* against me because my socks don't match, there is nothing about being a fashion moron that constitutes a *protected characteristic*. My employer is free to lawfully discriminate, and make adverse employment decisions, on that basis. *The point of the motion to dismiss in Ms. Roth's case was that there was nothing about her allegations that involved discrimination based on her sex (gender)--and that was the main issue under review on appeal*.

Standards for Dismissal Under Rule 12(b)(6); ***Iqbal*** is Rejected

When an employer (or any other defendant) is trying to dismiss a lawsuit under Rule 12(b)(6), the deck is stacked in favor of the employee in the sense that this will be a decision based on only the sufficiency of the allegations in the complaint. The WV Supreme Court has applied these rules in scrutinizing the adequacy of the complaint:

- "liberally construe the complaint so as to do substantial justice";
- keep in mind that "the preference is to decide cases on their merits";
- "construe the complaint in the light most favorable to the plaintiff, taking all the allegations as true";
- dismiss the complaint only if it "appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief", and
- the rules concerning pleadings require that the complaint merely give "fair notice" of the allegations, and the complaint itself is "not required to set out facts upon which the claim is based". (This principle arises out of Rule 8(a) which states that a complaint shall contain a "short and plain statement of the claim showing that the pleader is entitled to relief". Rule 9(b) then states that allegations of "fraud or mistake" shall be stated "with particularity", but that "[m]alice, intent, knowledge, and other condition of mind of a person may be averred generally." The comparable federal Rule 8(a) was the basis for the US Supreme Court in 1957 formulating the "notice" concept for pleadings in *Conley v. Gibson*, 355 U.S. 41 (1957).)

This last item, the "fair notice" requirement, is key to understanding this case and dismissal motions under Rule 12(b)(6). The point of the complaint in West Virginia is to give "fair notice" of the allegations, and it is not required to set out the allegations in more detail. The "more detail" is something that the parties explore under the "discovery phase" of the lawsuit when documents are requested, depositions are taken, etc.

The US Supreme Court has recently adopted a more stringent system for evaluating complaints in the Rule 12(b)(6) context (the feds have the same rule), with the decisions being *Ashcroft v. Iqbal,* 129 S. Ct. 1937 (2009), and *Bell Atlantic Corporation v. Twombly,* 550 U.S. 544 (2007). In *Iqbal*, the US Supreme Court held:

> ***[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true to state a claim to relief that is plausible on its face.***

The US Supreme Court held that "bare assertions" are not entitled to be accepted as true in evaluating a motion to dismiss under Rule 12(b)(6).

The WV Supreme Court in *Roth v. DeFeliceCare, Inc.*, on the other hand, rejected the "more stringent" federal requirement, and stuck with the "fair notice" principles.

The *Iqbal* decision was a 5-4 split, and has generated a good bit of controversy. Members of Congress have taken steps toward legislatively overturning it. The US House bill (H.R. 4115), called the Open Access to Courts Act of 2009, is in committee, and hearings have been conducted by the House Judiciary Committee. The Bill has not emerged from the Judiciary Committee. In the Senate, a comparable bill called the "Notice of Pleadings Restoration Act of 2009" (S. 1504) has been introduced, and it has not emerged from the Senate Judiciary Committee. Both of these bills would return federal law to the "notice pleading" principles formulated in *Conley v. Gibson*, 355 U.S. 41 (1957).

Roth's **Hostile Work Environment** Claim

The trial court dismissed Ms. Roth's claim for hostile work environment, which includes claims for sexual harassment.

To "establish a claim for sexual harassment based upon a hostile or abusive work environment" under WV Human Rights Act, the plaintiff must prove

- 1. The subject conduct was unwelcome,
- 2. *It was based on the sex of the plaintiff,*
- 3. It was sufficiently severe or pervasive to alter the [plaintiff's] conditions of employment and create an abusive work environment, and
- 4. It was imputable on some factual basis to the employer.

The key element for this appeal was the second element. The trial court determined that the weird circumstance described by Ms. Roth in her complaint, when she allegedly stumbled into an area where her boss and another female employee were in some sort of sexual activity, was not any sort of hostile work environment that was "*based on the sex of the plaintiff*" (element 2 above). (For this purpose, the courts use "sex" and "gender" interchangeably.)

The WV Supreme Court's opinion discussed whether these allegations could form the basis for a hostile work environment "*based on sex*", and Justice Ketchum's dissent discusses that as well. I am a bit confused by the Court's opinions (the majority and the dissent) because some of the analysis seems to assume that the only the facts *alleged* in support of a hostile work environment are the facts relating to the episode of the boss allegedly being in sexual activity with a female coworker. However, the Supreme Court's opinion makes it clear that there were significant other allegations that supported a claim for hostile work environment:

> Defendant DeFeliceCare authorized, directed and acquiesced in the allowance of pervasive, explicit and habitual harassment which included but is not limited to: subjecting [Ms. Roth] to such sexually

> explicit conduct, threats of loss of license, loss of employment and termination for unwanted sexually explicit conduct she observed.

The key language in that portion is a "pervasive, explicit and habitual harassment which included but is not limited to" the boss's alleged sexual activity with the coworker described in the complaint. Based on notice pleading requirements, and if the issue is whether the complaint puts the defendant on notice concerning a claim of hostile work environment or sexual harassment, that allegation alone should end the argument. In other words, there were allegations that there were sexual activities creating a hostile work environment above and beyond the episode involving the boss and coworker.

Another allegation in the complaint that is relevant to this issue is:

> Ms. Roth was "subjected to improper and sexually explicit conduct by her superiors including the president and CEO Defendant DeFelice... thereby creating a hostile and abusive environment for employment".

Again, that is clearly making allegations of a hostile work environment that involve superiors other than Mr. DeFelice. So the complaint's allegations of hostile work environment were not limited to the boss/co-worker-being-partially-undressed episode.

Ultimately, the WV Supreme Court concluded that Ms. Roth's allegations in her complaint were sufficient to satisfy the pleadings requirements for a hostile work environment claim.

Ms. Roth's Claim for "Quid Pro Quo" Sexual Harassment

Ms. Roth also alleged that she was terminated because of the sexual harassment. This is a claim under the WV Human Rights Act for what is generally known as "quid pro quo sexual harassment", which involves an allegation that a tangible employment decision—here, termination—was related to the sexual harassment. For such a claim, the plaintiff must prove that she was a member of a protected class (here, female), that there was an adverse employment decision (here, termination), and that "but for the plaintiff's protected status, the adverse decision would not have been made."

The trial court also dismissed this claim, again on the theory that the complaint did not present any allegation that the termination was based on Ms. Roth's sex. The WV Supreme Court disagreed and reversed this decision.

The WV Supreme Court discussed whether Ms. Roth's encounter with her boss and coworker, and the subsequent termination, could be considered "based on the sex" of Ms. Roth, and described a statement made at oral argument by the plaintiff's attorney, to the effect that a woman might have been fired, and a man might have been retained under the circumstances, because *men* might view such sexual activity as something to be "admired" (so by inference, there would be no termination), but a woman employee might be disadvantaged under comparable circumstances. The Court described that theory as "speculative at best", and then focused on what was the real issue: "whether the appellants' *complaint* was "sufficiently pleaded".

For Ms. Roth's discrimination claim over her discharge, on the issue of whether her discharge was based on her sex, a relevant allegation was that Mr. DeFelice fired Ms. Roth stating that "he did not like how she dressed" and "he did not like the style/color of her hair". That seems to me to be a pretty gender-based reason for termination (again, that is Ms. Roth's allegation, and it must be accepted as true in this procedural context).

Ms. Roth's Claim Discharge in Violation of a Substantial Public Policy

Ms. Roth also alleged wrongful termination under the doctrine first announced by the WV Supreme Court in *Harless v. First National Bank in Fairmont*, 162 W. Va. 116, 246 S.E.2d 270 (1978), where termination will be actionable if the "motivation" of the employer "is to contravene some substantial public policy principle." That doctrine has been applied in a number of settings, including whistleblower circumstances, situations where an employee invokes a right such as self defense (in the setting of a store robbery), privacy rights under some circumstances to refuse drug tests, and situations where the employee is terminated because of some testimony in a legal proceeding.

The trial judge decided that the facts did not support any conclusion that there was a "substantial public policy" that the employer was trying to "contravene". The WV Supreme Court disagreed and reversed on this decision as well.

Ms. Roth submitted the following three alleged "substantial public policies" at issue which she claimed made the termination unlawful, and the trial court rejected all of them. The WV Supreme Court concluded that the second and third policies could be viable, so that it reversed the decision to dismiss this wrongful discharge claim under the *Harless* doctrine:

- First: the plaintiff invoked West Virginia statutes concerning public nudity, and the trial court dismissed that as a relevant substantial public policy; and the West Virginia Supreme Court agreed.
- Second: Ms. Roth contended that the sex discrimination and sexual harassment laws under the WV Human Rights Act created substantial public policies, and the West Virginia Supreme Court has previously made it clear under the *Harless* doctrine that those statutes in fact established substantial public policies which could form the basis of a wrongful discharge claim. However, the trial court implicitly rejected that theory—the trial court didn't expressly discuss it. The West Virginia Supreme Court disagreed, based on the analysis that I have described above in discussing the hostile work environment claim. This policy and the next (third) policy were raised by Ms. Roth's counsel in her opposition to the motion to dismiss, and the WV Supreme Court said the trial court should have addressed them in reaching its decision. In other words, the trial court should not have limited its consideration of potential public policies to those described in the complaint.
- Third: Ms. Roth alleged that there was another lawsuit by another female employee for sexual harassment that preceded her own, and in that lawsuit, there had been allegations of a sexual relationship between Mr. DeFelice and the co-worker that was in a state of partial undress with Mr. DeFelice when Ms. Roth walked in right before her vacation. In that other lawsuit, there had been testimony denying the relationship between Mr. DeFelice and the (partially

> clothed) co-worker. Thus, Ms. Roth had the potential for having testimony in that other lawsuit that could have contradicted the testimony that Mr. DeFelice and the other co-worker were not involved in any sort of relationship. Ms. Roth's lawyer alleged that DeFeliceCare was violating a substantial public policy in potentially terminating Ms. Roth for her possible testimony in that other lawsuit. The trial court rejected this theory, but the West Virginia Supreme Court disagreed, and concluded that this was a viable theory for a "substantial public policy" being violated. In other words, Ms. Roth's theory was that she was fired because her observation of the sexual encounter between Mr. DeFelice and the coworker could have been damaging to Mr. DeFelice and his company in that other lawsuit, such that Mr. DeFelice was motivated to terminate Ms. Roth.

So the WV Supreme Court thought the second and third theories above constituted substantial public policies so the dismiss of the *Harless* claim was inappropriate.

Ms. Roth's Claim for Retaliation

Ms. Roth also alleged retaliation under the West Virginia Human Rights Act. Retaliation under that Act required that Ms. Roth engaged in some "protected activity" either in the form of (a) opposition to discriminatory behavior, or (b) in the form of participating in connection with some proceeding under the Act. As far as I can tell, the only protected activity alleged by Ms. Roth was the "opposition", so that was the only type of protected activity discussed in the WV Supreme Court's opinion.

The "opposition" protected activity includes "opposition to a practice that the plaintiff reasonably and in good faith believes violated the provisions" of the WV Human Rights Act. The opposition

> "must be reasonable in the sense that it must be based on a set of facts and a legal theory that are plausible. Further, the view must be honestly held and must be more than a cover for troublemaking. Thus, even if there was no actionable sexual harassment, the plaintiff could still have engaged in a protected activity if she complained about being sexually harassed."

The trial court dismissed this claim, and the WV Supreme Court agreed because Ms. Roth had never "engaged in any protected activity". She had simply never done anything to express any opposition to any of the sexual conduct she claims to have experienced or heard about.

Ms. Roth's Claim for Intentional Infliction of Emotional Distress

Ms. Roth also alleged a claim for "intentional infliction of emotional distress", which is an extremely hard claim to prevail upon in an employment setting. The WV Supreme Court described the claim this way:

> One who by extreme or outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for bodily harm.

The conduct must be

> so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.

Wow, that sounds tough to satisfy, especially in the workplace, and there are relatively few cases in which plaintiffs have succeeded on that theory. But keep in mind that the issue for purposes of the Supreme Court's decision was whether Ms. Roth's *pleadings* were sufficient to support this claim. The trial court had focused on the fact that there was no allegation that the employer had terminated Ms. Roth in an "outrageous manner".

But the West Virginia Supreme Court disagreed, and said that the following *allegations in the complaint* were sufficient::

- 1. Mr. DeFelice called Ms. Roth and asked her to come to the office, and when she complied with that request she was placed "by her employer into unwantedly observing Mr. DeFelice Ms. Kelly in a sexually compromising position."
- 2. Because of that observation, Mr. DeFelice "threatened" Ms. Roth "not only with termination from her employment, but with possibly losing her respiratory therapist license, which was her means of making a living."
- 3. Ms. Roth was then terminated "within the same week", allegedly because Mr. DeFelice "did not like how she dressed or the style and color of her hair." (The Court thought it was significant that there was a close proximity in time for these allegations.)

Again, this is not the same thing as saying these allegations alone, without any other evidence, would satisfy the requirements for intentional infliction of emotional distress *at trial*. but it is to say that, with these allegations in the complaint, the Court could *not* conclude "beyond doubt" that Mr. Roth "can prove no set of facts in support of [her] claim which would entitle [her] to relief." Thus, the WV Supreme Court reversed the trial court's decision to dismiss the claim for intentional infliction of emotional distress.

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