United States District Court
Middle District of Florida
Jacksonville Division

TERESA MACMARTIN,

Plaintiff,

v. **NO. 3:22-cv-610-BJD-LLL**

MARINE MANAGEMENT SERVICES, INC., A CORPORATION; CROWLEY PERSONNEL, LLC, A LIMITED LIABILITY COMPANY, FUGRO ENTERPRISE, INC., A CORPORATION,

Defendants.

Report and Recommendation

Defendants Marine Management Services, Inc. (MMS), Crowley Personnel, LLC (Crowley), and Fugro Enterprise, Inc. (Fugro) (collectively defendants) move to dismiss Plaintiff Teresa MacMartin's First Amended Complaint, doc. 8 (AC), for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Docs. 17, 18. Plaintiff has responded in opposition, docs. 23, 24. Fugro also moves to strike certain allegations from the amended complaint, doc. 18 at 23-25; a request plaintiff opposes, doc. 23 at 19-20. These motions have been referred to me for a report and recommendation for appropriate resolution, doc. 26. For the reasons discussed below, I respectfully recommend defendants' motions be denied in part and granted in part.

Background[1]

MMS is a marine staffing company which provides recruitment, project support, and marine and offshore crewing to companies around the world. AC ¶ 18. Crowley is a payroll company for MMS. AC ¶ 19.[2] According to plaintiff, "Fugro purports to be the world's leading geo-data specialist, collecting and analyzing comprehensive information about the Earth and the structures built upon it." AC ¶ 20.

On November 10, 2020, plaintiff agreed to work on a vessel owned by Fugro, named the Fugro Enterprise (vessel), signing a crewmember employment agreement (employment agreement), parts of which are excerpted in the amended complaint and central to plaintiff's causes of action. AC at count VII (breach of contract claim based on the employment agreement), ¶¶ 25-28. The employment agreement is not attached to the amended complaint; it is, however, attached to Crowley/MMS defendants' motion to dismiss, doc. 17-1, uncontroverted, and properly considered here.[3]

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[1] The Court makes no finding regarding the factual allegations summarized here; rather, for the purposes of a motion to dismiss, I take plaintiff's well-pleaded factual allegations as true, without making credibility assessments or engaging in fact-finding. *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009). The factual background, therefore, is mostly drawn from the amended complaint and may be different than facts ultimately proved should the case proceed passed the motion to dismiss stage. *Smith v. City of Atl. Beach*, No. 3:18-cv-1459-J-34MCR, 2020 WL 708145, at *2, n.2 (M.D. Fla. Feb. 12, 2020).

[2] Crowley and MMS are represented by the same counsel, and when appropriate, will be referred to as the "Crowley/MMS defendants."

[3] *Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002) ("[A] document attached to a motion to dismiss may be considered by the court without converting the motion into one for summary judgment only if the attached documents is: (1) central to the plaintiff's claim; and (2) undisputed.").

Although both MMS and Crowley's names appear at the top of the employment agreement, the agreement states that it is entered into between MMS and plaintiff for her to work upon the vessel as second cook, for a "6 weeks/6 weeks" rotation. Doc. 17-1 at 1-2. The employment agreement also prohibits sexual or other forms of harassment, and explains that, if plaintiff was "on voyage at the time [she] becomes sick or injured, [she] will be paid [her] normal basic renumeration until [she] [has] been repatriated. [She] will be provided with any medical care on-board should that become necessary . . . ." Doc. 17-1 at 5-7, AC ¶¶ 26-27. The employment agreement also requires plaintiff to abide by Fugro's standards and policies and to notify Fugro's captain/master or other crewmember in charge about injuries suffered by her while on board. AC ¶ 28, doc. 17-1 at 6.

The very same day she signed the employment agreement, plaintiff boarded the vessel off the coast of New Jersey and New York. AC ¶ 31. When she embarked, there were about 20 crew members on the vessel; plaintiff was just one of three or four women on the crew; and the only woman on the marine crew, which handled the operations of the vessel. AC ¶¶ 32, 33. As second cook, plaintiff worked on the night shift. She cooked, baked, washed dishes, cleaned, sanitized food preparation and dining areas, and generally tidied the galley and mess area. AC ¶¶ 24, 33. She worked primarily in the galley. AC ¶ 36. Plaintiff describes the galley as the small kitchen area of the vessel, barely able to contain four people comfortably, with a single point of entry leading to "a little open standing area where [she] would cook and clean during

her shift." AC ¶ 36. While on the vessel, plaintiff was assigned to a cabin that connected to crewmember Neil Bennett's cabin, through a shared bathroom. AC ¶ 35.

Plaintiff alleges that on November 15, 2020, she was working at night in the galley when Bennett entered her workspace and unzipped his pants. AC ¶¶ 34, 37. According to plaintiff, she was shocked. *Id.* Limited by the small quarters of the galley, she quickly turned away as "Bennett laughed and claimed he was 'just adjusting' his shirt.'" AC ¶ 38. Plaintiff immediately told Bennett's supervisor, chief engineer Robert Falcone, who told Bennett not to do that. AC ¶¶ 39-40. The next night, plaintiff was again working in the galley, when Bennett came in and out several times; at one point he stood close to her, pinning her to the sink, and placed his hand on her back. AC. ¶¶ 41, 42. Plaintiff alleges he was standing "so close to her that she could feel his breath on her face." AC ¶ 41. Plaintiff believed Bennett was trying to kiss her until he yelled, "Great biscuits! Great biscuits!" and walked away. AC ¶ 42.

Plaintiff then reported the incident to the vessel's captain, Eddie Poindexter who agreed Bennett's behavior was unacceptable and told plaintiff to write a formal complaint, give the complaint to Falcone, and that plaintiff should contact the ship superintendent Bruce Grimball. AC ¶¶ 43, 44. Plaintiff submitted a formal complaint to Grimball. AC ¶ 45. Plaintiff complained that she was in fear living next to Bennett and sharing a bathroom; but rather than moving plaintiff's living quarters away from Bennett, Fugro installed a "barrel bolt" inside plaintiff's cabin, which did not dissuade her fears. AC ¶¶ 45, 46. Plaintiff further alleges that after the bolt was installed, Bennett made "obscene and disturbing noises, such as snorting like a pig, outside the restroom

door in an attempt to intimidate and taunt her." AC ¶ 48. Fugro also switched Bennett's shift, so he would work at opposite times of plaintiff, but this did little to discourage his attentions. AC ¶¶ 51, 52. She alleges he continued to "menacingly hover around [her], stare at her for four to five minutes at a time; and make other countless microaggressions in attempt to assert his power over her." *Id*. For example, on one occasion, plaintiff alleges that Bennett coughed on everything in the entire mess area, although he knew it was plaintiff's job to keep everything sanitized to comply with COVID-19 protocols. AC ¶ 53.

On November 17, 2020, BreAnn Hanenkrat, an assistant at Crowley, texted plaintiff to check on her; plaintiff responded that she was "being harassed by Bennett on the [v]essel, but that she believed Captain Poindexter was handling it." AC ¶ 55. She did not hear from Crowley again while on the vessel. AC ¶ 56.

On December 5, 2020, plaintiff emailed Captain Poindexter and told him that Bennett was still harassing her. AC ¶ 57. Captain Poindexter again told plaintiff to contact the ship superintendent, Grimball. AC ¶ 58. But when plaintiff called Grimball a few days later, Grimball told her to "just get over it" and called her "petty and unprofessional." *Id*. Plaintiff, feeling as though the defendants would no longer help her, "lived in constant fear of physical harm by Bennett" for the rest of the vessel's voyage, heightened by a "lack of safe living space" and "the tight quarters in general aboard the vessel." AC ¶¶ 59, 60.

On December 22, 2020, the vessel docked and the crew, including plaintiff, left the ship. AC ¶ 62. The same day, plaintiff contacted Fugro's human resources

department who assured her that they would be in touch by January 4, 2021; but Fugro never contacted her. AC ¶ 63. On December 29, 2020, plaintiff emailed her direct supervisor at Crowley, Lisa Haynie, reminding her of the harassment she suffered on the vessel and asked when her next assignment would be. Haynie did not immediately respond. AC ¶ 72.

About a month later, plaintiff received an email from Fugro that said, "it no longer needed a person to fill an employment position with the company, and that it would no longer consider her application." AC ¶ 73. Plaintiff recalls that she was confused by the email because she "never directly applied for a job with Fugro." *Id.* Plaintiff then contacted Crowley to request a copy of her employment agreement, which was provided to her. AC ¶ 74. Plaintiff contacted Haynie around the end of January, who told her that there might be a job for her on the vessel, "but the earliest the [v]essel would depart was March 1, 2021, which much later than what [plaintiff] had expected because, based on her [employment agreement], she should have been back on board on or around February 2, 2021 (i.e. six weeks after she disembarked the [v]essel . . . .)."AC ¶ 76. Plaintiff told Haynie she would be interested in the job only if she could be assured that Bennett would not also be on board. AC ¶ 77.

On March 1, 2021, after having no further contact since their January conversation, plaintiff again contacted Haynie, who told her the vessel was still in the shipyard. AC ¶ 79. Haynie offered plaintiff alternative jobs in the union sector; but plaintiff refused because they were not what she originally agreed upon, and she did not view union positions as equivalent to the second cook position. AC ¶¶ 79, 81.

Crowley contacted plaintiff about a week later about a position on the vessel, but it could not assure plaintiff that Bennett would not also be on board. AC ¶ 81. Plaintiff therefore declined the position. *Id.* Plaintiff alleges that because of the harassment, she could not sleep while on the vessel and that she suffered—and still suffers from—anxiety, nausea, difficulty breathing, and insomnia. AC ¶ 68.

On June 2, 2022, she filed suit against the defendants. Doc. 1. On June 6, 2022, United States District Judge Brian J. Davis struck her complaint as an impermissible shotgun pleading and directed plaintiff to file an amended complaint or her claims would be dismissed without prejudice. Doc. 7. Plaintiff timely amended, bringing a seven-count complaint, AC, doc. 8, alleging sexual harassment (count I) and retaliation (count II) in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, and the Florida Civil Rights Act of 1992, Fla. Stat. § 760.10 (FCRA) (counts III and IV), negligence under the Jones Act (count V), maintenance and cure (count VI), and breach of contract (count VII).

Standard

To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The Supreme Court has explained this requires that "a complaint . . . contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility

when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*

In deciding a Rule 12(b)(6) motion, a district court should construe the complaint broadly and view the allegations in the light most favorable to the plaintiff. *Levine v. World Fin. Network Nat'l Bank*, 437 F.3d 1118, 1120 (11th Cir. 2006). "A well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and that a recovery is very remote and unlikely." *Twombly*, 550 U.S. at 556 (internal citation and quotation omitted).

Analysis[4]

I. Counts III and IV should be dismissed because FCRA does not apply

Defendants argue counts III and IV should be dismissed because the Florida Civil Rights Act has no application to plaintiff's claims. Docs. 18 at 12, 17 at 9. I agree. The purpose of the FCRA is "to secure for *all individuals within the state* freedom from discrimination because of race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status and thereby preserve their interest in personal dignity . . . and to promote the interests, rights, and privileges of individuals within the state." Fla. Stat. § 760.01(2) (emphasis added). In fact, the Eleventh Circuit has emphasized the FCRA protects "Floridians within the State from invidious discrimination." *Sinclair v. De Jay Corp.*, 170 F.3d 1045, 1047 (11th Cir. 1999).

[4] Fugro argues that plaintiff's amended complaint should be dismissed in its entirety because it is a shotgun pleading. Docs. 18 at 4-9. I do not recommend dismissing the amended complaint as an impermissible shotgun pleading, and instead address the merits of the amended complaint.

Plaintiff is a resident of Springfield, Missouri, and the actions giving rise to her claims occurred while she was in a vessel off the coast of New Jersey and New York. AC ¶¶ 17, 31. She does not describe any significant relationship to the state of Florida. Plaintiff instead focuses on her alleged employers (defendants), arguing that, because they qualify as statutory employers under the FCRA,[5] she may seek its protection. Doc. 24 at 10. Plaintiff further argues that because each of the defendants maintain offices and operate in Florida and her work location was designated as Jacksonville, the state of Florida has an interest in protecting her interests. Doc. 24 at 10 (citing AC ¶ 23 ("[Plaintiff's] pay slip reflected her work location was Jacksonville, Florida (at sea).").

There are few cases regarding the application of the FCRA to a plaintiff without ties to the state where the alleged discriminatory or unlawful acts occurred outside the state of Florida or its territorial waters. Fugro, however, has identified one well-reasoned decision out of the Southern District of Florida that has addressed this issue, and I find it persuasive here. *See Hampton v. Tem Enters.,* No. 1:19-cv-23575-UU, 2019 U.S. Dist. LEXIS 213572, at *10-14 (S.D. Fla. Dec. 9, 2019).

In *Hampton*, the plaintiffs were flight attendants who resided outside Florida and worked for a private charter airline headquartered in south Florida. The plaintiffs were fired while they were stationed in Nevada; they alleged that the airline committed age discrimination in violation of both the Age Discrimination in Employment Act,

[5] Fugro also argues plaintiff did not adequately allege it was an employer under the FCRA for counts III through IV. Doc. 18 at 13-14.

29 U.S.C. §§ 621 *et seq.*("ADEA") and the FCRA. *Id.* In deciding a motion to dismiss brought by the airline, *Hampton* explained that there was no claim that the flight attendants ever lived or worked in Florida, thus they were not "individuals within the state" within the meaning of the FCRA when terminated. *Id.* at *12. Nor was there a claim the plaintiffs "ha[d] had some other significant relationship with Florida that would give the state an interest in protecting them." *Id.* at *13. Thus, *Hampton* found the plaintiffs had not adequately alleged they were authorized to sue under the FCRA.[6] *Id.* at 13-14.

Plaintiff, citing *Mousa v. Lauda Air Luftfahrt, A.G.*, 258 F. Supp. 2d 1329, 1341 (S.D. Fla. 2003) and *Sinclair*,[7] argues that because there is no geographical limitation in the FCRA, and the FCRA "says nothing about where the employees must work," plaintiff is authorized to sue. Doc. 24 at 9-10. I agree with *Hampton*, however, and find that *Sinclair* and *Mousa* do not control, as their focus was on who may be sued under the FCRA, instead of the issue before this Court—determining who is a proper plaintiff under the FCRA. *Hampton*, 2019 U.S. Dist. LEXIS 213572, at *11-12.

> As the Eleventh Circuit has noted, "the very purpose of the FCRA" is "protecting Floridians within the State from invidious discrimination." *Sinclair v. De Jay Corp.*, 170 F.3d 1045, 1047 (11th Cir. 1999). Because it is a protective statute, rather than a punitive one, the focus should be on the alleged victim of the discrimination: the employee. *Cf. id.* at 1046–47 (where plaintiff worked in Florida office of a company that had approximately 100 employees

[6] In considering whether the FCRA extended to plaintiffs, *Hampton* examined whether the plaintiffs had "the authority" to sue under the FCRA. *Id.*

[7] *Sinclair*, 170 F.3d at 1048.

> nationwide, but fewer than 15 employees in Florida, employer could still be sued as an "employer" under the FCRA; the employer's proposed contrary interpretation "fails fairly to address the legislative intent of the FCRA" which is to protect "Floridians within the State"); *accord Mousa v. Lauda Air Luftfahrt, A.G.*, 258 F. Supp. 2d 1329, 1340–41 (S.D. Fla. 2003) (foreign citizens who work exclusively abroad can be counted toward the fifteen-employee jurisdictional count).
>
> *Sinclair* and *Mousa* address different inquiries than the inquiry before the Court: those cases deal with who may be sued under the FCRA, not who may sue. Even though [the flight attendants] would be counted in deciding whether [the airline] is an FCRA "employer," this does not mean that they can avail themselves of the right to sue afforded by the Florida Legislature to "individuals within the state." Plaintiffs' proposed interpretation would write those four words out of the statute. That result is impermissible. *See United States v. Menasche*, 348 U.S. 528, 538–39 (1955) ("It is our duty to give effect, if possible, to every clause and word of a statute…." (internal quotations omitted)).

Id. Plaintiff's focus on defendant employers[8] is, therefore, unpersuasive. The mere fact that her pay stub reflected her location as Jacksonville, Florida,[9] as plaintiff argues, is not enough to make her "an individual within the state" as required by the FCRA, Fla. Stat. § 760.01(2), when there is no specific allegation in the amended complaint that she lives or has lived in Florida; that the alleged wrongful acts occurred in Florida; or that she visited defendants' Florida locations, trained here, or embarked on a vessel off the territorial waters of the state.

[8] I decline to address Fugro's argument relevant to counts III and IV that plaintiff has failed to allege it is an employer under the FCRA, doc. 18 at 9, 14-15, as I find plaintiff is not authorized to sue under the FCRA.

[9] I note employment agreement at issue contains no such provision, *see* doc. 17-1.

Plaintiff also cites *Schultz v. Royal Caribbean Cruises, Ltd.*, 465 F. Supp. 3d 1232 (S.D. Fla 2005) in support of her position. However, I find *Schultz* distinguishable. In *Schultz*, a Wisconsin resident sought to work on a foreign-flag vessel operating in international waters; he was offered employment, but the defendant withdrew the offer after it concluded that a history of depression made plaintiff unfit for duty at sea. The plaintiff then brought suit under the Americans with Disabilities Act and the FCRA. *Id.* at 1242-44. *Schultz* found that the FCRA applied to his claim, in large part, because there was no allegation the plaintiff was seeking to invoke the FCRA outside of Florida. *Id.* 1277-79. *Schultz* explained, "[p]laintiff only complains that [d]efendant discriminated against him *in Florida* because this is where the [d]efendant gave him his offer letter and later withdrew it." *Id.* at 1277 (emphasis in original). *See also id.* at 1279 ("Plaintiff only seeks to apply the FCRA to conduct that occurred within the state of Florida . . . And while there are cases suggesting the FCRA applies extraterritorially, we need not answer that question because the statute—as applied in this case—targets only conduct that took place in Florida."). Here, there is no overt allegation in the amended complaint that the alleged wrongful conduct, such as harassment or a retaliatory act, occurred in the state of Florida. And while plaintiff makes general allegations about the citizenship of the defendants, AC ¶¶ 18-20, this is not enough to bring the case under FCRA's purview under the reasoning in *Schultz* relied upon by

plaintiff.[10] *See* docs. 23 at 11 n.14 and 24 at 10.[11] Thus, I respectfully recommend count III and IV be dismissed.[12]

II. Plaintiff has sufficiently alleged defendants are joint employers

a. Title VII claims[13]

Defendants argue counts I through IV (plaintiff's Title VII and FCRA claims) should be dismissed because plaintiff fails to sufficiently allege that Fugro and Crowley/MMS defendants were joint employers. Docs. 17 at 11-13, 18 at 9.

"It is possible for two or more businesses to be held liable for violations of Title VII under the 'joint employer' theory of recovery." *Kaiser v. Trofholz Techs., Inc.*, 935 F. Supp. 2d 1286, 1293 (M.D. Ala. 2013) (citing *Virgo v. Riviera Beach Assoc., Ltd.*, 30 F.3d 1350, 1359-61 (11th Cir. 1994)). *See also Rodriguez v. City of Clermont*, No. 5:08-cv-204-Oc-10GRJ, 2009 WL 395737, at *4 (M.D. Fla. Feb. 17, 2009) (explaining both Title VII and the FCRA recognize theories of joint employer status and liability). The joint

[10] *Schultz* found the FCRA applied on three different grounds; I address only the grounds here relied on by plaintiff. *See* docs. 23 at 11 n. 14 and 24 at 10.

[11] I do not imply the FCRA cannot apply extraterritorially; I find it does not apply under the facts as pled here. *See Mousa*, 258 F. Supp.2d at 1341 (explaining the FCRA, unlike Title VII, does not contain clauses limiting extraterritorial effect).

[12] "The [FCRA] was patterned after Title VII, and Florida courts have construed the act in accordance with decisions of federal courts interpreting Title VII . . . ." *Wilbur v. Correctional Servs. Corp.*, 393 F.3d 1192 n.1 (citation omitted). Thus, even if the presiding district court disagrees with my analysis of whether plaintiff may sue under the FCRA, my analysis below of plaintiff's Title VII claims also applies to her claims made under the FCRA. *Id.*

[13] Fugro also argues that plaintiff's claim against it under the Jones Act fails because plaintiff has not adequately alleged it was her employer, or that the defendants were joint employers. I address this argument in section VI., below.

employer theory recognizes that, although independent, business entities sometimes share or co-decide matters important to the terms and conditions of employment. *Virgo*, 30 F.3d at 1360 (quoting *NLRB v. Browning-Ferris Indus.*, 691 F.2d 1117, 1122 (3d Cir. 1982)). The question of whether there is a joint employer relationship is a factual one, *id.,* with the Court considering whether the entity "exercise[d] sufficient control over the terms and conditions of a plaintiff's employment." *Kaiser*, 935 F. Supp. at 1293 (citing *Virgo*, 30 F.3d at 1360). The Court considers whether an entity is a joint employer by analyzing: "(1) the means and manner of the plaintiff's work performance; (2) the terms, conditions, or privileges of the plaintiff's employment; and (3) the plaintiff's compensation." *Id.* (citing *Llampallas v. Mini-Circuits, Inc.*, 163 F.3d 1236, 1245 (11th Cir. 1998)).

1. *Crowley*

Crowley[14] argues that plaintiff "fails to make any allegations regarding the control of any of the various [defendant] entities over plaintiff." Doc. 17 at 11-12. Plaintiff responds that the amended complaint contains sufficient factual allegations to find that Crowley was a joint employer at this stage, particularly because among the individuals that she reported the alleged harassment to—Haynie and Hanenkrat—were employed by Crowley. Doc. 24 at 11. According to plaintiff: 1) Crowley was the payroll company for MMS; 2) Crowley's information was listed on the employment agreement; 3) Crowley issued her paychecks; 4) Hanenkrat, the assistant to plaintiff's

[14] MMS does not join in this argument. Doc. 17 at 11-12.

direct supervisor, Haynie, texted plaintiff to check in on her, and that plaintiff reported the harassment to her; 5) plaintiff emailed Haynie about the harassment and asked for her next assignment; 6) Crowley provided plaintiff with the employment agreement; and 7) Haynie scheduled a call with plaintiff to tell her about other jobs. Doc.24 at 11. "While plaintiff is not required to conclusively establish [Crowley] [was her] joint employer[] at the pleading stage, plaintiff must at least allege *some* facts in support of this legal conclusion." *Smith v. Ch2M Hill, Inc.*, No. 1:10-cv-02936-CC-RGV, 2011 WL 13128411, at *7 (N.D. Ga. Mar. 3, 2011) (citation and quotations omitted) (emphasis in original). At this stage of the proceedings, mindful of my obligation to accept plaintiff's allegations as true, I find the plaintiff has made sufficient, plausible allegations, "to raise a reasonable expectation that evidence will reveal [Crowley] was indeed her joint employer for purposes of Title VII liability." *Kaiser*, 935 F. Supp. 2d at 1293. If Haynie and Hanenkrat worked directly for Crowley, as plaintiff alleges, Crowley did not just pay plaintiff, but set the terms and conditions of her employment. Thus, Crowley retained some control of her employment. I note, however, that this matter is not settled; whether Crowley qualifies as plaintiff's employer within the meaning of Title VII can be argued at summary judgment "after the parties have had an opportunity to uncover facts through discovery to support or refute this claim." *Id.*

2. *Fugro*

Fugro also argues counts I through IV should be dismissed for failure to allege defendants were plaintiff's joint employers. Doc. 18 at 8. It does not identify any specific portion of the amended complaint it finds insufficient but argues, generally,

that plaintiff relies on conclusory allegations Fugro and Crowley are joint defendants, without any indication they have interrelated operations, centralized control of labor relations, common management, and/or common ownership or financial control. Doc. 18. In support of its argument, Fugro cites *Pouyeh v. Bascom Palmer Eye Inst.*, No. 12-cv-23580, 2014 WL 11394983, at *3 (S.D. Fla. Aug. 4, 2014), *aff'd*, 613 F. App'x 802 (11th Cir. 2015), doc. 18 at 9.

I do not find *Pouyeh* persuasive, and thus do not find that plaintiff's failure to plead interrelated operations or common management renders her pleading deficient. *Pouyeh* found the University of Miami was not the prospective employer for the allegedly discriminatory residency program and rejected the plaintiff's argument that the University and an entity operated as joint employers. *Id.* at *3. First, I note that in *Pouyeh*, the agreements between the allegedly joint employers were referenced in the plaintiff's complaint and provided for the court's review. *Id.* Thus, the court was able to conclusively conclude "there was little interrelation of operations." *Id.* Here, I am unaware of the nature of the relationship between Crowley and MMS, or Fugro and the Crowley/MMS defendants, and must accept the allegations in the amended complaint as true.

Second, *Pouyeh* based its decision on a series of factors (interrelated operations, centralized control of labor relations, common management, and common ownership or financial control) outlined in *McKenzie v. Davenport-Harris Funeral Home*, 834 F.2d 930 (11th Cir. 1987); those do not apply here. *Id.* In *McKenzie*, the circuit faced the

question of whether two defendants should be treated as a "single entity" or "single employer," not whether the parties were "joint employers." *McKenzie*, 834 F.2d at 933. *See Llampallas*, 163 F.3d at 1244 (distinguishing between a "single employer theory of jurisdiction," and a "joint employer theory of liability."). In short, *Pouyeh* is not on all fours with the case before the Court, and I decline to follow it.

Plaintiff further argues the amended complaint contains sufficient factual allegations to find Fugro was a joint employer at this stage: 1) plaintiff worked on a vessel owned and operated by Fugro, AC ¶ 21; 2) she alleged she was to abide by Fugro's standards and policies and notify it of any issues, AC ¶ 28; and 3) she contends that she reported the alleged harassment to all levels of Fugro. I agree. While the alleged joint employment relationship between Fugro and the Crowley/MMS defendants could have been more succinctly drafted, it is sufficient to survive a motion to dismiss. Thus, I respectfully recommend Crowley and Fugro's motions to dismiss counts I through IV for failure to sufficiently allege defendants as plaintiff's joint employers be denied.

III. Plaintiff states a claim for sexual harassment under Title VII

Defendants also move to dismiss count I, alleging plaintiff failed to adequately plead sexual harassment under Title VII. Docs. 17 at 3-5, 18 at 15-17. "Title VII of the Civil Rights Act of 1964 makes it unlawful for an employer 'to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.'" *Hulsey v. Pride Rest., LLC*, 367 F.3d 1238, 1244 (11th Cir. 2004) (quoting Title

VII, 42 U.S.C. § 2000e-2(a)(1)). To establish a hostile environment sexual harassment claim under Title VII,[15] plaintiff must establish:

> (1) she belongs to a protected group; (2) that she has been subjected to unwelcome sexual harassment; (3) that the harassment was based on her sex; (4) that the harassment was sufficiently severe or pervasive to alter the terms and conditions of employment and create a discriminatorily abusive working environment; and (5) that a basis for holding the employer liable exists.

Id. (citations omitted).

The defendants argue the allegations in the amended complaint fail to meet the fourth element because plaintiff's claims of harassment was not sufficiently severe or pervasive. Docs. 17 at 3-5, 18 at 15-17. "Establishing that harassing conduct was sufficiently severe or pervasive to alter an employee's terms or conditions of employment includes a subjective and an objective component." *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1246 (11th Cir. 1999) (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993)). Under this test, plaintiff must "subjectively perceive" the conduct to be severe and pervasive enough to alter the terms or conditions of her employment; and her "subjective perception must be objectively reasonable." *Id.* Four factors are considered in this analysis: 1) frequency of alleged conduct, 2) severity of the conduct; 3) "whether the conduct is physically threatening or humiliating or a mere offensive utterance[,]" and 4) whether the conduct "unreasonably interferes" with the plaintiff's performance at work. *Id.* (citing *Allen v. Tyson Foods*, 121 F.3d 642, 647 (11th Cir. 1997)

[15] *See* AC ¶ 88.

(additional citations omitted). A court must proceed in this analysis with "common sense, and an appropriate sensitivity to social context, to distinguish between general office vulgarity and the conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive." *Reeves v. C.H. Robinson Worldwide, Inc.*, 594 F.3d 798, 811 (11th Cir. 2010) (quotations and citation omitted). The Court is mindful that Title VII is not a "general civility code for the American workplace," *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 74, 80 (1998); and that "simple teasing, offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment.'" *Faragher v. City of Boca Raton*, 524 U.S. 775, 778 (1998) (citation and quotations omitted).

While a close call, upon review of the amended complaint, I find the well-pleaded allegations sufficient to state a claim for sexual harassment. Drawing all inferences in plaintiff's favor, her allegations plausibly establish that she perceived Bennett's conduct to be severe and pervasive enough to alter the terms of her employment, and that belief was reasonable. *Mendoza*, 195 F.3d at 1246. The well-pleaded allegations claim that Bennett regularly harassed plaintiff over a mere six-week period. I also find the conduct was sufficiently severe under the framework outlined above. Plaintiff was not a cook at a restaurant with a spacious workspace or free to go home at the end of a shift. Rather, plaintiff was a second cook on a vessel at sea, confined to cramped cooking quarters and a galley kitchen, where much of the alleged harassment took place, with but one means for her to exit the space. Further, and also significant to the analysis here, plaintiff alleges that because of cabin

assignments on the vessel, she slept in an adjoining room to the individual allegedly harassing her and shared a bathroom with him. Indeed, plaintiff alleges she was so fearful of Bennett, a barrel bolt was installed on the inside of her room.

Next, I find Bennett's conduct could be perceived as physically threatening. Plaintiff alleges that Bennett was "much larger" than she; that on one occasion, he pinned plaintiff to the sink, placed his hand on her back, and stood close enough that she could feel his breath on her face, leading plaintiff to believe that he was attempting to kiss her; that on a different occasion while she was alone, he came into the galley and fully unzipped his pants in front of her; that he came in and out of the galley she worked in without apparent reason; hovered over and stared at her, and snorted like a pig on the other side of the restroom door while she was inside on several occasions. Though plaintiff alleges she was harmed by the conduct, she does not specify whether the harassment interfered with her job performance. Nevertheless, at this stage of proceedings, viewed as a whole, plaintiff has alleged conduct sufficiently severe and pervasive as to alter the terms and conditions of her employment and create a discriminatorily abusive working environment. I respectfully recommend defendants' motions to dismiss count I be denied.

IV. Plaintiff states a claim for retaliation under Title VII

In count II, plaintiff alleges defendants retaliated against her in violation of Title VII in part, by constructively discharging her. Doc. 8 ¶ 15. Title VII prohibits an employer from discriminating against an employee because she "has opposed any

practice made an unlawful employment practice by this subchapter . . . .” 42 U.S.C. § 2000e-3(a).

To establish a claim of retaliation, a plaintiff must prove that: “[s]he engaged in statutorily protected activity, [s]he suffered a materially adverse action, and there was some causal relation between the two events.” *Goldsmith v. Bagby Elevator Co., Inc.*, 513 F.3d 1261, 1277 (11th Cir. 2008) (citation omitted). The causation element requires “but-for causation” meaning “proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.” *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 360 (2013). The Eleventh Circuit has explained that “tangible employment actions” or “adverse employment actions” “consist of things that affect continued employment or pay—things like terminations, demotions, suspensions without pay, and pay raises or cuts—as well as other things that are similarly significant standing alone.” *Monaghan v. Worldpay US, Inc.*, 955 F.3d 855, 860 (11th Cir. 2020). “[P]etty slights, minor annoyances, and simple lack of good manners will not create,” *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006), an environment that “could well dissuade a reasonable worker from making or supporting a cause of discrimination.” *Palmer v. McDonald*, 624 F. App’x 699, 702 (11th Cir. 2015) (citation and quotations omitted). That the employee disagrees with and dislikes an employer’s action is not enough; the employment action must affect a term or condition of employment. *Schultz*, 465 F. Supp. 3d at 1273 (citations omitted).

Defendants make several arguments against plaintiff’s retaliation claim, including that she failed to plead a materially adverse action; that she has not

established a constructive discharge; and that she has failed to demonstrate a causal relationship between the protected expression and the adverse action. Docs. 17 at 5-9, 18 at 17-20. Plaintiff alleges she engaged in conduct protected under Title VII when she complained about the alleged harassment by Bennett and that she suffered the following adverse employment actions: Fugro called her "petty and unprofessional;" defendants "failed to recall her to work after she complained about the harassment;" and "they failed to offer her a position in which she would be able to work in a safe environment." AC ¶ 96, 97. She also alleges defendants caused her to be constructively discharged by "failing to respond, investigate, protect or take timely and appropriate action in response to the sexual harassment which Plaintiff was subjected to, when they knew or should have known of the conduct." AC ¶ 98.

Initially, I find plaintiff's accusations that Fugro "berated her" and "called her petty and unprofessional" for complaining about harassment, standing alone, would be insufficient to state a cause of action for retaliation. These amount to "mere 'trivial harms' and 'petty slights' that would not dissuade a reasonable worker from making or supporting a charge of discrimination." *Entrekin v. City of Panama City, Fla.*, 376 F. App'x 987, 995 (11th Cir. 2010) (citing *Burlington*, 548 U.S. at 68).

Turning to the second adverse employment action plaintiff alleges—that defendants failed to recall her to work after she complained about the harassment—I

find, given the stage of the litigation and my obligation to take all allegations in the amended complaint as true, plaintiff's allegations are sufficient.[16]

As alleged, plaintiff was offered two positions by defendants after disembarking the vessel. She turned down one of those jobs because of a preference against working in the union sector, a reason unrelated to her harassment violations, but a job, nonetheless that plaintiff contends is materially different from what she agreed to upon signing her employment agreement. AC ¶¶ 79, 108. *See also* AC ¶ 80 ("she did not view these union positions as equivalent to the jobs she was originally employed to do."); *Schultz*, 465 F. Supp. 3d at 1273 (holding plaintiff suffered an adverse employment action because after medical review, the defendant withdrew its job offer and "[a] reasonable person would perceive this withdrawal as an adverse employment action because it precludes future employment opportunities and performances onboard [d]efendant's vessels."). Plaintiff was offered work after she reported the harassment;[17] but fact issues remain as to whether such an offer amounted to "a fail[ure] to recall her" as alleged in the amended complaint. AC ¶¶ 97, 98. *See, e.g.*, *Smith v. Ala. Dept. of Corr.*, 145 F. Supp. 2d 1291, 1298 (N.D. Ala. June 27, 2001) (citations omitted) (explaining that a purely lateral transfer does not rise to a level of an adverse

[16] It is unclear if plaintiff alleges the constructive discharge is the adverse action she suffered or if she alleges adverse actions in addition to the constructive discharge. I address both here.

[17] *See* doc. 17 at 6-7 (citing AC ¶¶ 12,13).

employment action, but that a transfer could be adverse if an employee's pay, responsibility, or prestige is reduced).

The third adverse employment action identified by plaintiff is under the theory of constructive discharge. Plaintiff alleges that defendants failed to offer her a position in which she could work in a safe environment, apparently in relation to her refusal to accept the March 7, 2021 offer to work on the vessel when she did not receive assurances that Bennett would not be on board. AC ¶¶ 81, 82. Stated otherwise, plaintiff's pleading suggests that because her only employment option was an unsafe one—to work on a vessel with Bennett—she could not accept the position.

Defendants argue plaintiff fails to plead a constructive discharge. Docs. 17 at 7-9, 18 at 19-20. Plaintiff counters that given, the "totality of the circumstances," plaintiff's working conditions were so intolerable—working six weeks in close quarters, "at sea with no escape, with someone who had harassed her repeatedly and made her feel unsafe,"—a reasonable person would have been compelled to resign. Doc. 24 at 8.

A constructive discharge claim may stand alone or be alleged as the adverse action suffered. *Griner v. City of Sanibel, Fla.*, No. 2:17-cv-282-FtM-99MRM, 2017 WL 3782788, at *2 (M.D. Fla. Aug. 31, 2017). "A constructive discharge occurs when a discriminatory employer imposes working conditions that are so intolerable that a reasonable person in the employee's position would have been compelled to resign." *Standifer v. Sonic Williams Motors, LLC*, 401 F. Supp. 2d 1205, 1221 (N.D. Ala. 2005) (citing *Poole v. Country Club of Columbus, Inc.*, 129 F.3d 551, 553 (11th Cir. 1997)).

Plaintiff bears the burden of establishing this claim. "[S]he must do more than merely show she was subjected to actionable harassment. 'The standard for proving constructive discharge is higher than the standard for proving a hostile work environment.'" *Walton v. Johnson & Johnson Servs., Inc.*, 347 F.3d 1272, 1282 (11th Cir. 2003) (quoting *Hipp v. Liberty Nat'l Life Ins. Co.*, 252 F.3d 1208, 1231 (11th Cir. 2001)). And when evaluating a constructive discharge claim, a plaintiff's subjective feelings are irrelevant; instead, courts use an objective standard. *Hipp*, 252 F.3d at 1231.

Given my findings on plaintiff's harassment claim, *see* section III., plaintiff has alleged a facially plausible constructive discharge claim at this stage. Defendants' arguments disputing the severity of her working conditions, raise factual questions better addressed at a later stage of the proceedings.

Lastly, defendants argue that because there was a substantial delay between plaintiff's last allegation of harassment—December 22, 2020—and her constructive termination on or after March 7, 2021, the discharge is too far removed to plausibly establish the causation required for a retaliation claim. Docs 17 at 5, 18 at 20-21 ("the delay between plaintiff's alleged complaints and alleged constructive termination renders her retaliation claims untenable as a matter of law, as the events lack sufficient temporal proximity to establish a causal link.").[18] Plaintiff counters that she

[18] A delay of more than three months may be insufficient to establish causation. *Henderson v. FedEx Express*, 442 F. App'x 502, 506 (11th Cir. 2011) (citation omitted) ("If there is a delay of more than three months between the two events, then the temporal proximity is not close enough, and the plaintiff must offer some other evidence tending to show causation.").

complained about the harassment immediately upon disembarking from the vessel, and according to her understanding of the employment agreement, she was not to begin working until early February 2021; thus, the time between the end of December and the beginning of February should not count against her. Doc. 23 at 16; AC ¶¶ 72, 76.

Moreover, according to the amended complaint, near the end of January 2021, plaintiff spoke to Haynie, but Haynie informed her the vessel would not depart until March 1, 2021. AC ¶ 79. Plaintiff again contacted Haynie on March 1, 2021, but the vessel was still in the shipyard. *Id*. It was not until March 7, 2021, that plaintiff was contacted about a position on the vessel, and subsequently refused the offer over the possibility that Bennett could also be on board. AC ¶ 81. Given the nature of plaintiff's rotational schedule, and viewing the allegations as true, I find the well-pleaded allegations establish a causal relationship between plaintiff's reporting of harassment and her constructive discharge. *See* doc. 23 at 16. As plaintiff explains, she was constructively terminated when she was to report back to work; the gap between the alleged adverse action and reporting to work, on which Fugro relies, includes a six-week time frame that she was not obligated to work. Doc. 23 at 16. At this stage, plaintiff has sufficiently, although narrowly, pled causation. Thus, I respectfully recommend defendants' motions to dismiss count II be denied.

V. Plaintiff fails to state a claim for maintenance and cure (count VI)

Plaintiff brings a maintenance and cure claim against all defendants in count VI.

> Maintenance and cure is the obligation imposed on a shipowner, which results from the contract between the seaman and the shipowner or vessel, to pay a seaman, who is ill or injured while in the service of the ship, 'wages to the end of the voyage and subsistence, lodging and care to the point where the maximum cure attainable has been reached.'

Bloom v. Weeks Marine, Inc., 225 F. Supp. 2d 1334, 1335 (M.D. Fla. 2002) (quoting 2 Martin J. Norris, *The Law of Seamen* § 26:2 (4th ed. 1985)). Maintenance amounts to "a daily stipend for living expenses, whereas cure is the payment of medical expenses." *Jackson NCL Am., LLC,* No. 19-25115-CIV, 2020 WL 6049684, at *4 (S.D. Fla. May 14, 2020) *report and recommendation adopted*, 2020 WL 6047585 (Oct. 13, 2020) (quotation and citation omitted). For a plaintiff to recover for maintenance and cure, she must prove that: "(1) [s]he worked as a seaman; (2) [s]he became ill or injured while in the vessel's service; and (3) [s]he lost wages or incurred expenditures relating to the treatment of illness or injury." *Beeman v. F/V JUMA*, 8:21-cv-233-AAS, 2022 WL 1568337, at *1 (M.D. Fla. May 18, 2022) (citing *West v. Midland Enters., Inc.*, 227 F.3d 613, 616 (6th Cir. 2000) (additional citation omitted)). Typically, an action for maintenance and cure presents questions of fact and should not be disposed of on a motion for summary judgment, much less a motion to dismiss. *Id.* (citation omitted). Turning to the amended complaint, however, I find plaintiff's claim for maintenance and cure fails.

Plaintiff alleges she suffered "emotional and psychological distress, including physical manifestation[s] of such distress, including but not limited to anxiety, nausea, breathing difficulties, and insomnia" due to the harassment. AC ¶ 129. She fails to plead, however, that "[s]he lost wages or incurred expenditures *relating to the treatment of the illness or injury*." *Beeman*, 2022 WL 15683337, at *1 (emphasis added). Plaintiff does not allege that she lost wages as a result of the alleged harassment or that she sought medical treatment as a result of the emotional and psychological distress and related physical manifestations she alleges. And there is no allegation that plaintiff's missed employment was related to the treatment of illness or injury, the third prong of a maintenance and cure claim. *Id*. Rather, she alleges she was constructively discharged and missed out on wages because defendants could not offer her a position in a safe environment. AC ¶¶ 81, 82 ("Crowley reached out to MacMartin regarding a position on the vessel, but could not provide her with any assurances that Bennett would not be on board. As a result, MacMartin declined the position. Defendants' refusal to offer MacMartin a position where she could work in a safe environment constituted constructive termination).

While maintenance and cure claims are broadly construed, *Bloom*, 225 F. Supp. 2d at 1336, plaintiff must still "plead [] factual content that allows the court to draw the reasonable inference that the [defendants are] liable for [maintenance and cure]." *Iqbal*, 556 U.S. at 678. She has failed to meet that burden.

Plaintiff, pointing to allegations in the amended complaint that defendants failed to "provide any medical care on-board or give her access to necessary medicines,

medical equipment and facilities for diagnosis, treatment, medical information and/or expertise" or "offer the opportunity to visit a qualified doctor[,]" argues defendants' actions did not permit her to seek medical help. Doc. 24 at 15, AC ¶ 69, 70, 135. I find that argument unavailing.

It is unclear whether defendants were on notice that plaintiff had requested treatment. While plaintiff claims she reported the alleged harassment several times, she does not allege that she requested medical treatment or told defendants that she was injured. And due to the nature of her injuries, it is not apparent on the face of the pleadings that it would have been obvious to defendants that plaintiff was injured or needed medical treatment. *Cf. Butts v. ALN Grp., LLC*, 512 F. Supp. 3d 1301, 1305, 1308 (S.D. Fla. 2021) (denying motion to dismiss where plaintiff alleged that she suffered a disc herniation and nerve root entrapment, asked to be taken ashore for medical treatment, and was refused medical treatment). I recommend count VI be dismissed.[19]

VI. Plaintiff fails to state a claim under the Jones Act (count V)

In count V, plaintiff brings a negligence against all defendants under the Jones Act, alleging defendants breached their duty of care in failing to provide her with a safe working environment. Further, she alleges, after defendants became aware she was suffering continued harassment, they failed to make efforts to investigate or

[19] Because I find plaintiff has failed to sufficiently plead maintenance and cure, I need not reach defendants arguments that plaintiff failed to allege defendants were joint employers or that Fugro was not her employer for purposes of that claim.

remedy the situation, lectured her for complaining about it, did not offer her medical care she needed, and failed to offer her assignments she was entitled to under the employment agreement. AC ¶ 124-30. Plaintiff further explains that, as a result of their breach of the duty of care, she suffered and continues to suffer emotional and psychological distress, including physical manifestation of such distress, including anxiety, breathing difficulties, and insomnia, which developed while she was still on the vessel. AC ¶¶ 126-31.

Defendants argue this count should be dismissed. Fugro asserts that because plaintiff has not adequately alleged it was her employer, or that the defendants were joint employers, her Jones Act claim fails. Doc. 18 at 10. It also argues this claim fails because only one entity can be sued as an employer. *Id*. Crowley/MMS defendants argue that because sexual harassment is a statutory cause of action, it is an ineligible offense for a Jones Act claim. Doc. 17 at 13-15. Crowley/MMS then assumes the underlying tort plaintiff alleges is assault, and argues plaintiff has not properly pled a claim for assault. *Id.* Plaintiff responds first that she need not establish common-law assault to state a claim under the Jones Act; but even if she had to, she has plausibly done so. Doc. 24 at 12-13.

"The Jones Act states, in relevant part, 'that a seaman injured in the course of employment . . . may elect to bring a civil action at law, . . . against the employer.'" *Felarise v. Dann Ocean Towing, Inc.*, No. 8:20-cv-544-T-60-AAS, 2020 WL 3490177, at *3 (M.D. Fla. June 26, 2020) (quoting 46 U.S.C. § 30104). It allows a "seaman injured in the course of employment" to bring a cause of action in negligence. *Bendlis v. NCL*

(Bahamas), Ltd., No. 14-24731-CIV, 2015 WL 1124690, at *2 (S.D. Fla. Mar. 11, 2015) (quoting 46 U.S.C. § 30104). There are four elements to a Jones Act claim: "1) plaintiff is a seaman; 2) plaintiff suffered an injury in the course of employment; 3) plaintiff's employer was negligent; and 4) employer's negligence caused the employee's injury, at least in part." *Holt v. F/V Sir Martin E., Inc.*, No. 5:13-cv-100-RS-CJK, 2014 WL 4825223, at *6 (N.D. Fla. Sept. 26, 2014) (citation omitted).

a. Joint Employer

Initially, I address Fugro's argument that plaintiff has failed to plead it was her employer for purposes of her Jones Act claim. For the reasons articulated in section II(a) above, I find plaintiff, at this stage, sufficiently pled Fugro was her joint employer. Plaintiff alleged she was working on the vessel, which was owned and operated by Fugro, her employment agreement directed her to notify the vessel's captain/master or crew member in charge regarding an illness occurring during her employment, and plaintiff alleges that she notified employees associated with Fugro of Bennett's harassment. *See* doc. 17-1 at 6, AC ¶¶ 21, 28, 29, 44. And in count V, defendants alleged negligent failure to provide plaintiff a safe place to work took place on the vessel operated by Fugro. AC ¶¶ 121-131. At this stage, plaintiff has plausibly pled Fugro is a joint employer for purposes of the Jones Act.

Additionally, although Fugro is generally correct that "under the Jones Act, only one, person, firm or corporation can be sued as employer," here, there are unresolved factual issues as to who is plaintiff's employer which would be improper to decide at this stage. *Felarise*, 2020 WL 3490177, at *3 (quoting *Cosmopolitan Shipping v.*

McAllister, 337 U.S. 783, 790 (1949)). Thus, I find plaintiff should be permitted to engage in discovery to allow her to identify who the employer is for Jones Act purposes.

This result tracks other courts in the Eleventh Circuit which have held that plaintiffs may bring Jones Act claims against multiple defendants. *Eckert v. United States*, 232 F. Supp. 2d 1312, 1317 (S.D. Fla. 2002) ("Jones Act claimant should be able to proceed in the inchoate stages of litigation by alleging multiple employers, in the expectation that subsequent discovery would uncover the true facts as the plaintiff's employer."); *Petrovic v. Princess Cruise Lines, Ltd.*, No. 12-21588-CIV, 2012 WL 12905312, at *3 (S.D. Fla. Sept. 17, 2012) ("It is possible for a seaman to have more than one employer, and under the 'borrowed servant doctrine' a seaman may sue a number of 'employers,' forcing the[m] to argue their respective culpability to the jury."). *Cf. Felarise*, 2020 WL 3490177, at *3 (holding that plaintiff's Jones Act claim against one of the two defendants was due to be dismissed because he failed to allege "any facts" indicating that defendant would be considered his employer for Jones Act purposes).

b. The merits of plaintiff's Jones Act claim

I now turn Crowley/MMS defendants' argument that plaintiff has failed to state a cause of action because she has not pled a common law tort. Doc. 17 at 13-15. Liability under the Jones Act "is limited to causes of actions recognized under common law." *John v. Royal Caribbean Cruises, Ltd.*, No. 07-22766-CIV-Jordan, 2008 WL 11407153, at *1 (S.D. Fla. Jan. 24, 2008) (citing *Consol. Rail Corp. v. Gottshall*, 512

U.S. 532, 543-44 (1994)); *Wilson v. Zapata Off-Shore Co.*, 939 F.2d 260, 264-65 (5th Cir. 1991)). In *John*, the plaintiff sued a cruise line for negligence under the Jones Act and alleged she was sexually harassed *and* assaulted by a fellow crew member. *Id.* at *1. The Court noted that, "sexual harassment is a statutory cause of action, and therefore, a claim for sexual harassment is only cognizable under the Jones Act where the alleged conduct also amounts to a common law tort." *Id.* (citations omitted).

Upon review of count V, however, it is not the alleged sexual harassment or any intentional tort that serves as the basis for the Jones Act claim, as Crowley/MMS defendants allege, but the defendants' alleged negligent failure to provide a safe working environment. AC ¶¶ 124-31.[20] And, "[t]he employer of a seaman is negligent under the Jones Act . . . if the employer fails to use reasonable care to provide a seaman with a safe place to work." *Jackson*, 2016 WL 9488717, at *2 (citing *Ivy v. Sec. Barge Lines, Inc.*, 585 F.2d 732, 741 (5th Cir. 1978)).[21] *See also Dozer v. CoKa Ventures*, No. 4:19-cv-10172-KMM, 2021 WL 2580536, at *2, 5-*6 (S.D. Fla. Apr. 26, 2021) (finding a genuine dispute of material fact precluded summary judgment for the defendant where the plaintiff asserted "a Jones Act negligence claim for failure to provide prompt, proper, and adequate medical care for [p]laintiff's back injury.").

[20] *See also* doc. 24 at 13 (arguing the amended complaint established the "defendants were negligent because they breached their duties of care when they became aware of the harassment, but failed to make any effort to thoroughly investigate or remedy the situation.").

[21] In *Jackson*, the court found a genuine dispute of fact precluded summary judgment on the plaintiff's Jones Act claim alleging her employer negligently created or permitted an unreasonably unsafe condition (consisting of an onion on the floor). *Id.* at *3.

Crowley/MMS defendants have identified no authority in this circuit for the proposition that a plaintiff suffering this type of harm is ineligible for Jones Act relief as a matter of law, and the Court could find none.

I do not find, therefore, that plaintiff's failure to plead assault,[22] is grounds for dismissal. Plaintiff plausibly establishes a breach of duty of a care owed by both defendants. I respectfully recommend defendants' motions to dismiss count V be denied.

c. Fugro's Motion to Strike

Fugro has also moved to strike certain allegations from count V arguing a portion of the alleged injuries plaintiff suffered in that count did not occur in the course of her employment with Fugro and that she failed to allege that she informed defendants she needed medical care. Doc. 18 at 23-24. Federal Rule of Civil Procedure Rule 12(f) governs motions to strike; it provides: "the court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). "[D]istrict courts have broad discretion in determining whether to grant a motion to strike." *Wiand v. Wells Fargo Bank, N.A.*, 938 F. Supp. 2d 1238, 1251 (M.D. Fla. 2013) (citation omitted). These motions, however, are generally "disfavored due to their 'drastic nature.'" *Hamblen v. Davol, Inc.*, No. 8:17-cv-1613-T-33TGW, 2018 WL 1493251, at *3 (M.D. Fla. March 27, 2018) (quoting *Royal Ins. Co.*

[22] An intentional tort may also serve as the basis for a Jones Act claim. *See Sloan v. United States*, 603 F. Supp. 2d 798, 805 (E.D. Pa. 2009) (citations omitted); *John,* 2008 WL 11407153, at *1.

of Am. v. M/Y Anastasia, No. 95-cv-30498/RV, 1997 WL 608722, at *3 (N.D. Fla. Jan. 30, 1997)). Further, "a court will not exercise its discretion under the rule to strike a pleading unless the matter sought to be omitted has no possible relationship to the controversy, may confuse the issues, or otherwise prejudice a party." *Reyher v. Trans World Airlines, Inc.,* 881 F. Supp. 574, 576 (M.D. Fla. 1995). For the reasons explained in this report and recommendation, the allegations identified by Fugro have a relationship to the controversy and do not prejudice Fugro. I respectfully recommend the Court deny Fugro's motion to strike.[23]

VII. Breach of Contract (MMS only)

In count VII, plaintiff alleges MMS breached the employment agreement, doc. 17-1, by failing to: 1) pay her normal or basic renumeration until she had been repatriated should she become sick or injured on the voyage; 2) employ her on a rotating six weeks on the job, six weeks off the job schedule; 3) provide medical care on board, should it become necessary; and 4) give her leave to visit a qualified doctor to obtain treatment. AC ¶ 140.

MMS argues count VII must be dismissed for two reasons. First, the employment agreement contains a clause that a "crewmember must file any legal action that he/she might have in connection with this Contract within six (6) months after termination. Crewmember waives any claim not filed within said period." Docs.

[23] While I find plaintiff's allegations regarding medical care insufficient to support a claim for maintenance and cure, they are not the crux of her Jones Act claim, which is the failure to provide a safe working environment. The allegations do not rise to the level of having no possible relationship to the controversy.

17-1 at 6, 17 at 17. Second, MMS argues the count should be dismissed because plaintiff did not adequately allege a breach of that employment agreement. Doc. 17 at 18.

The employment agreement, by its terms, is governed by the General Maritime Law of the United States. Doc. 17-1 at 8. Both parties agree that 46 U.S.C. § 30508 governs this dispute, with MMS citing it for the proposition that a statute of limitations period can be altered by a marine contract. Docs. 17 at 18, 24 at 16. But 46 U.S.C. § 30508 provides:

> (b) Minimum time limits. The owner, master, manager, or agent of a vessel transporting passengers or property between ports in the United States, or between a port in the United States and a port in a foreign country, may not limit by regulation, contract, or otherwise the period for:
>
> . . .
>
> (2) bringing a civil action for personal injury or death to less than one year after the date of the injury or death.

46 U.S.C. § 30508(b)(2). Thus, MMS' six-month limitation in the employment agreement is contrary to applicable law and does not mandate dismissal here.

I now turn to the merits of plaintiff's breach of contract claim. "The elements of a breach of contract claim under Florida law and admiralty law are the same: 'a plaintiff must prove (1) the terms of a maritime contract; (2) that the contract was breached; and (3) the reasonable value of the purported damages.'" *Am. Marine Tech., Inc. v. M/Y Alchemist*, 526 F. Supp. 3d 1236, 1247 (S.D. Fla. 2021), *aff'd sub. nom. Am. Marine Tech, Inc. v. World Grp. Yachting, Inc.*, No. 21-11336, 2021 WL 4785888 (11th Cir. Oct. 14, 2021).

Plaintiff alleges that MMS breached the employment agreement, in part, by failing to perform its duty under the employment agreement of "rotating her six weeks on the job and six weeks off." AC ¶ 140. *See also* AC ¶ 25 ("The [employment agreement] provided that MacMartin would work a continuous rotating schedule on the [v]essel: six weeks on and six weeks off."). As recounted in the background section above, the employment agreement contains a "rotation" section, which lists plaintiff's rotation as "6 weeks/6 weeks." Doc. 17-1 at 2.

MMS argues it did not breach the employment agreement because it "is clear" that plaintiff was an at-will employee terminable at any time. Doc. 17 at 19 (citing doc. 17-1 at 2). I find at this stage, plaintiff has alleged sufficient facts to sustain her breach of contract claim. Plaintiff's allegation that MMS breached the contract by failing to abide by her six-weeks on, six-weeks off schedule, accepted as true, creates a plausible allegation that MMS breached its agreement with plaintiff. The Court is not free at this stage to decide whether the "at-will" clause in the employment agreement overrides the "six weeks on, six-weeks off" language or determine the contemplated employment agreement between the parties, as these are factual questions appropriately resolved at a later stage of the proceedings. I respectfully recommend MMS's motion to dismiss count VI be denied.

Recommendation[24]

I respectfully **recommend**:

1. Defendants' motions to dismiss, docs. 17 and 18, **be granted in part and denied in part**:
    a. **As to counts I and II**, brought under Title VII, the motions **be denied**;
    b. **As to counts III and IV**, brought under the FCRA, the motions **be granted**, and counts III and IV dismissed;
    c. As to **count V**, brought under the Jones Act, the motions **be denied**;
    d. As to **count VI** for maintenance and cure, **the motions be granted**, and count VI dismissed;
    e. As to **count VII** against MMS only, for breach of contract, MMS' motion, doc. 17, **be denied**;
2. That defendants be ordered to respond to the amended complaint within the time permitted by the Federal Rules of Civil Procedure.

[24] "Within 14 days after being served with a copy of [a report and recommendation on a dispositive issue], a party may serve and file specific written objections to the proposed findings and recommendations." Fed. R. Civ. P. 72(b)(2). "A party may respond to another party's objections within 14 days after being served with a copy." *Id*. A party's failure to serve and file specific objections to the proposed findings and recommendations alters the scope of review by the District Judge and the United States Court of Appeals for the Eleventh Circuit, including waiver of the right to challenge anything to which no specific objection was made. *See* Fed. R. Civ. P. 72(b)(3); 28 U.S.C. § 636(b)(1)(B); 11th Cir. R. 3-1; Order (Doc. No. 3), No. 8:20-mc-100-SDM, entered October 29, 2020, at 6.

3. Defendant Fugro's motion to strike, doc. 18, **be denied**.

Entered in Jacksonville, Florida on February 7, 2023.

LAURA LOTHMAN LAMBERT
United States Magistrate Judge

c:
Casey Therese Yamasaki, Esquire
Chiharu G. Sekino, Esquire
Nathan Zipperian, Esquire
Kelly DeGance, Esquire
Samantha Giudici Berdecia, Esquire
Stefanie M. Mederos, Esquire
Alan Persaud, Esquire