

Civil Procedure
Fall 2018
Professor Lonny
Hoffman

Section 2

Notice Pleading Questions for Discussion

Notice pleading used to be a nice, not overly taxing way of introducing students to the subject of federal civil procedure. However, thanks to the Court's decisions in *Bell Atlantic v. Twombly* and *Ashcroft v. Iqbal*, things have gotten a great deal more complicated. Here are some questions you may find useful to think about as you read through the materials and prepare for class.

1. How does modern pleading in the Federal Rules of Civil Procedure differ from common law pleading?
2. How does it differ from Code Pleading?
3. Broadly stated, what were the drafters' purposes in 1938 in modernizing pleading?
4. Describe some of the common types of instances in which allegations were found to be insufficient before the Court's decisions in *Twombly* and *Iqbal*?
5. What is the new pleading test from *Twombly* and *Iqbal*?
6. What does the Supreme Court mean by saying an allegation is conclusory? What about the following allegations? Do you think they are conclusory?
 - a. Defendant violated my constitutional rights.
 - b. Defendant violated my constitutional right to equal protection under the law.
 - c. On Dec 5, 2011, Defendant fired me because of my race, in violation of my constitutional right to equal protection under the law.
 - d. On Dec 5, 2011, Defendant fired me because of my race and replaced me with Mr. John Smith, a less qualified white male, in violation of my constitutional right to equal protection under the law.
7. What is a court to do when it determines that allegations are conclusory?
8. What does the Supreme Court mean by saying allegations are not plausible? What is a court to do when it determines that allegations are not plausible?
9. What is the broadest interpretation of the Court's cases? What is the narrowest?

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SUPREME COURT OF THE UNITED STATES

No. 00-1353

AKOS SWIERKIEWICZ, PETITIONER v.
SOREMA N. A.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[February 25, 2002]

JUSTICE THOMAS delivered the opinion of the Court.

This case presents the question whether a complaint in an employment discrimination lawsuit must contain specific facts establishing a *prima facie* case of discrimination under the framework set forth by this Court in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). We hold that an employment discrimination complaint need not include such facts and instead must contain only "a short and plain statement of the claim showing that the pleader is entitled to relief" Fed. Rule Civ. Proc. 8(a)(2).

I

Petitioner Akos Swierkiewicz is a native of Hungary, who at the time of his complaint was 53 years old.¹ In April 1989, petitioner began working for respondent Sorema N.A., a reinsurance company headquartered in New York and principally owned and controlled by a

¹ Because we review here a decision granting respondent's motion to dismiss, we must accept as true all of the factual allegations contained in the complaint. See, e.g., *Lentherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164 (1993).

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French parent corporation. Petitioner was initially employed in the position of senior vice president and chief underwriting officer (CUO). Nearly six years later, Francois M. Chavel, respondent's Chief Executive Officer, demoted petitioner to a marketing and services position and transferred the bulk of his underwriting responsibilities to Nicholas Papadopoulos, a 32-year-old who, like Mr. Chavel, is a French national. About a year later, Mr. Chavel stated that he wanted to "energize" the underwriting department and appointed Mr. Papadopoulos as CUO. Petitioner claims that Mr. Papadopoulos had only one year of underwriting experience at the time he was promoted, and therefore was less experienced and less qualified to be CUO than he, since at that point he had 26 years of experience in the insurance industry.

Following his demotion, petitioner contends that he "was isolated by Mr. Chavel . . . excluded from business decisions and meetings and denied the opportunity to reach his true potential at SOREMA." App. 26. Petitioner unsuccessfully attempted to meet with Mr. Chavel to discuss his discontent. Finally, in April 1997, petitioner sent a memo to Mr. Chavel outlining his grievances and requesting a severance package. Two weeks later, respondent's general counsel presented petitioner with two options: He could either resign without a severance package or be dismissed. Mr. Chavel fired petitioner after he refused to resign.

Petitioner filed a lawsuit alleging that he had been terminated on account of his national origin in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. §2000e *et seq.* (1994 ed. and Supp. V), and on account of his age in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U.S.C. §621 *et seq.* (1994 ed. and Supp. V). App. 28. The United States District Court for the Southern District of New York dismissed petitioner's

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complaint because it found that he “ha[d] not adequately alleged a prima facie case, in that he ha[d] not adequately alleged circumstances that support an inference of discrimination.” *Id.*, at 42. The United States Court of Appeals for the Second Circuit affirmed the dismissal, relying on its settled precedent, which requires a plaintiff in an employment discrimination complaint to allege facts constituting a prima facie case of discrimination under the framework set forth by this Court in *McDonnell Douglas*, *supra*, at 802. See, e.g., *Tarshis v. Riese Organization*, 211 F.3d 30, 35–36, 38 (CA2 2000); *Austin v. Ford Models, Inc.*, 149 F.3d 143, 152–153 (CA2 1998). The Court of Appeals held that petitioner had failed to meet his burden because his allegations were “insufficient as a matter of law to raise an inference of discrimination.” 5 Fed. Appx. 63, 65 (CA2 2001). We granted certiorari, 533 U.S. 976 (2001), to resolve a split among the Courts of Appeals concerning the proper pleading standard for employment discrimination cases,² and now reverse.

II

Applying Circuit precedent, the Court of Appeals required petitioner to plead a prima facie case of discrimination in order to survive respondent’s motion to dismiss. See 5 Fed. Appx., at 64–65. In the Court of Appeals’ view, petitioner was thus required to allege in his complaint: (1)

²The majority of Courts of Appeals have held that a plaintiff need not plead a prima facie case of discrimination under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), in order to survive a motion to dismiss. See, e.g., *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1114 (CA10 2000); *Bennett v. Schmidt*, 153 F.3d 516, 518 (CA7 1998); *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924 (CA8 1993). Others, however, maintain that a complaint must contain factual allegations that support each element of a prima facie case. In addition to the case below, see *Jackson v. Columbus*, 194 F.3d 737, 751 (CA6 1999).

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membership in a protected group; (2) qualification for the job in question; (3) an adverse employment action; and (4) circumstances that support an inference of discrimination. *Ibid.*; cf. *McDonnell Douglas*, 411 U. S., at 802; *Texas Dept. of Community Affairs v. Burdine*, 450 U. S. 248, 253-254, n. 6 (1981).

The prima facie case under *McDonnell Douglas*, however, is an evidentiary standard, not a pleading requirement. In *McDonnell Douglas*, this Court made clear that "[t]he critical issue before us concern[ed] the order and allocation of proof in a private, non-class action challenging employment discrimination." 411 U. S., at 800 (emphasis added). In subsequent cases, this Court has reiterated that the prima facie case relates to the employee's burden of presenting evidence that raises an inference of discrimination. See *Burdine*, *supra*, at 252-253 ("In [*McDonnell Douglas*,] we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination" (footnotes omitted)); 450 U. S., at 255, n. 8 ("This evidentiary relationship between the presumption created by a prima facie case and the consequential burden of production placed on the defendant is a traditional feature of the common law").

This Court has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss. For instance, we have rejected the argument that a Title VII complaint requires greater "particularity," because this would "too narrowly constrict the role of the pleadings." *McDonald v. Santa Fe Trail Transp. Co.*, 427 U. S. 273, 283, n. 11 (1976). Consequently, the ordinary rules for assessing the sufficiency of a complaint apply. See, e.g., *Scheuer v. Rhodes*, 416 U. S. 232, 236 (1974) ("When a

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federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims").

In addition, under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case. For instance, if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case. See *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) ("[T]he *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination"). Under the Second Circuit's heightened pleading standard, a plaintiff without direct evidence of discrimination at the time of his complaint must plead a prima facie case of discrimination, even though discovery might uncover such direct evidence. It thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered.

Moreover, the precise requirements of a prima facie case can vary depending on the context and were "never intended to be rigid, mechanized, or ritualistic." *Fumco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978); see also *McDonnell Douglas*, *supra*, at 802, n. 13 ("[T]he specification . . . of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations"); *Teamsters v. United States*, 431 U.S. 324, 358 (1977) (noting that this Court "did not purport to create an inflexible formulation" for a prima facie case); *Ring v. First Interstate Mortgage, Inc.*, 984 F.2d 924, 927 (CA8 1993)

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("[T]o measure a plaintiff's complaint against a particular formulation of the prima facie case at the pleading stage is inappropriate"). Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case. Given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases.

Furthermore, imposing the Court of Appeals' heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2), which provides that a complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief." Such a statement must simply "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957). This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. See *id.*, at 47-48; *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168-169 (1993). "The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court." 5 C. Wright & A. Miller, *Federal Practice and Procedure* §1202, p. 76 (2d ed. 1990).

Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake.³ This Court, however, has declined to

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extend such exceptions to other contexts. In *Leathermon* we stated: "[T]he Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under §1983. *Expressio unius est exclusio alterius*." 507 U.S., at 168. Just as Rule 9(b) makes no mention of municipal liability under Rev. Stat. §1979, 42 U.S.C. §1983 (1994 ed., Supp. V), neither does it refer to employment discrimination. Thus, complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a).⁴

Other provisions of the Federal Rules of Civil Procedure are inextricably linked to Rule 8(a)'s simplified notice pleading standard. Rule 8(e)(1) states that "[n]o technical forms of pleading or motions are required," and Rule 8(f) provides that "[a]ll pleadings shall be so construed as to do substantial justice." Given the Federal Rules' simplified standard for pleading, "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984). If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before respond-

ing fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."

⁴These requirements are exemplified by the Federal Rules of Civil Procedure Forms, which "are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate." Fed. Rule Civ. Proc. 84. For example, Form 9 sets forth a complaint for negligence in which plaintiff simply states in relevant part "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway."

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ing. Moreover, claims lacking merit may be dealt with through summary judgment under Rule 56. The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim. See *Conley*, *supra*, at 48 ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits").

Applying the relevant standard, petitioner's complaint easily satisfies the requirements of Rule 8(a) because it gives respondent fair notice of the basis for petitioner's claims. Petitioner alleged that he had been terminated on account of his national origin in violation of Title VII and on account of his age in violation of the ADEA. App. 28. His complaint detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination. *Id.*, at 24-28. These allegations give respondent fair notice of what petitioner's claims are and the grounds upon which they rest. See *Conley*, *supra*, at 47. In addition, they state claims upon which relief could be granted under Title VII and the ADEA.

Respondent argues that allowing lawsuits based on conclusory allegations of discrimination to go forward will burden the courts and encourage disgruntled employees to bring unsubstantiated suits. Brief for Respondent 34-40. Whatever the practical merits of this argument, the Federal Rules do not contain a heightened pleading standard for employment discrimination suits. A requirement of greater specificity for particular claims is a result that "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Leatherman*, *supra*, at 168. Furthermore, Rule 8(a) establishes a

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pleading standard without regard to whether a claim will succeed on the merits. "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Scheuer*, 416 U. S., at 286.

For the foregoing reasons, we hold that an employment discrimination plaintiff need not plead a *prima facie* case of discrimination and that petitioner's complaint is sufficient to survive respondent's motion to dismiss. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

AKOS SWIERKIEWICZ,
Plaintiff,

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CIVIL ACTION NO. 99-CV

v.

SOREMA N.A.,
Defendant.

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JURY TRIAL DEMANDED

COMPLAINT

1. This is an employment discrimination action brought by Akos Swierkiewicz to recover damages against SOREMA N.A. ("SOREMA") for the violation of his rights under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §2000e et seq. ("Title VII") and the Age Discrimination in Employment Act of 1967, 29 U.S.C. §621 et seq. ("ADEA").

JURISDICTION AND VENUE

a. Jurisdiction over Mr. Swierkiewicz's Title VII claim is conferred by 42 U.S.C. §2000e-5(f)(3). Jurisdiction over his ADEA claim is conferred by 29 U.S.C. §626(c)(1).

b. Venue is proper in this district pursuant to the general venue statute, 28 U.S.C. §1391, and under Title VII's special venue statute, 42 U.S.C. §2000e-5(f)(3)

PARTIES

2. Plaintiff, Akos Swierkiewicz, resides at 821 Hudson Drive, Yardley, Pennsylvania 19067.

3. Defendant SOREMA is a New York corporation headquartered at 199 Water Street, 20th Floor, New York, New York 10038.

4. At all times relevant hereto, SOREMA has resided and conducted business in this judicial district.

5. At all times relevant hereto, SOREMA has been an employer within the meaning of Title VII and the ADEA.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

6. On or about July 11, 1997 Mr. Swierkiewicz filed a Charge of Discrimination against SOREMA with the Philadelphia District Office of the Equal Employment Opportunity Commission ("EEOC"), Charge No. 170971447, charging it with unlawful national origin and age discrimination in connection with his dismissal from employment.

7. By notice dated May 3, 1999 and which he received on May 5, 1999, Mr. Swierkiewicz was notified by the EEOC of his right to file a civil action against SOREMA.

8. This lawsuit has been timely filed within 90 days of Mr. Swierkiewicz's receipt of the EEOC's right-to-sue notice.

FACTUAL ALLEGATIONS

9. Mr. Swierkiewicz is a native of Hungary. He became a United States citizen in 1970.

10. Mr. Swierkiewicz is 53 years old. His date of birth is July 25, 1946.

11. SOREMA was formed in 1989. It is a reinsurance company principally owned and controlled by a French parent corporation. At all times relevant hereto, SOREMA's Chief Executive Officer has been François M. Chavel, a French national:-

12. From 1970 to 1986, Mr. Swierkiewicz was employed by INA which after its merger in 1982 with Connecticut General, became CIGNA Insurance Company. His last position at CIGNA was Vice President of Special Risk Facilities.

13. From 1986 to 1989, Mr. Swierkiewicz was employed by SCOR U.S., a reinsurance company, as Senior Vice President for Research and Special Risks.

14. On April 17, 1989 Mr. Swierkiewicz began his employment with SOREMA in the position of Senior Vice President and Chief Underwriting Officer ("CUO").

15. In all respects, Mr. Swierkiewicz performed his job in a satisfactory and exemplary manner.

16. Despite plaintiff's stellar performance, in February 1995 Mr. Chavel demoted him from his CUO position to a marketing and services position and transferred the bulk of his underwriting responsibilities to another French national, Nicholas Papadopoulos, who was 32 years old at the time (and 16 years younger than plaintiff).

17. Mr. Chavel demoted Mr. Swierkiewicz on account of his national origin (Hungarian) and his age (he was 49 at the time).

18. A year later, in or about February 1996, Mr. Chavel formally appointed Mr. Papadopoulos as SOREMA's CUO.

19. Mr. Papadopoulos was far less experienced and less qualified to be SOREMA's CUO than was Mr. Swierkiewicz. Indeed, Mr. Papadopoulos had just one year of underwriting experience prior to being appointed CUO by Mr. Chavel. By contrast, plaintiff had more than 26 years of broad based experience in the insurance and reinsurance industry.

20. At the time Mr. Papadopoulos assumed plaintiff's duties as CUO, Mr. Chavel stated that he wanted to "energize" the underwriting department – clearly implying that plaintiff was too old for the job.

21. In light of Mr. Papadopoulos's inexperience, Mr. Chavel brought in Daniel Peed from SOREMA's Houston, Texas office to support him in his CUO duties. Mr. Peed, like Mr. Papadopoulos, was in his early 30s. Shortly after his transfer to SOREMA's office in New York City, Mr. Chavel promoted Mr. Peed to the position of Senior Vice President of Risk Property.

22. Prior to his transfer, Mr. Peed had been a Second Vice President reporting to plaintiff.

23. Not long after plaintiff's demotion, SOREMA hired another French national, Michel Gouze, as Vice President in charge of Marketing. Mr. Gouze, unlike plaintiff, had very little prior experience in the insurance/reinsurance business.

24. Because of his inexperience, Mr. Gouze needed to rely on Mr. Swierkiewicz to perform his marketing duties for SOREMA.

25. Mr. Gouze's marketing duties at times overlapped with those of plaintiff. Despite Mr. Swierkiewicz's requests to better coordinate their duties, Mr. Chavel refused to accommodate those requests or to have Mr. Gouze report to plaintiff.

26. Mr. Swierkiewicz was isolated by Mr. Chavel following his demotion, excluded from business decisions and meetings and denied the opportunity to reach his true potential at SOREMA.

27. Efforts by Mr. Swierkiewicz to meet with Mr. Chavel to resolve the unsatisfactory working conditions to which he was subjected following his demotion proved unsuccessful.

28. On April 14, 1997, following two years of ongoing discrimination on account of his national origin and age, Mr. Swierkiewicz sent a memo to Mr. Chavel outlining his grievances and requesting a severance package to resolve his disputes with SOREMA.

29. Mr. Chavel did not respond to Mr. Swierkiewicz's memo.

30. In the morning, on Tuesday April 29, 1997, Mr. Chavel and Daniel E. Schmidt, IV, SOREMA's General Counsel, met with Mr. Swierkiewicz and gave him two options: either resign his job (with no severance package) or be fired.

Mr. Swierkiewicz refused to resign his employment with SOREMA.

As a result, he was fired by Mr. Chavel, effective that very day (April 29, 1997).

31. SOREMA had no valid basis to fire Mr. Swierkiewicz.

32. Plaintiff's age and national origin were motivating factors in SOREMA's decision to terminate his employment.

33. Unlike plaintiff who was fired without cause and without any severance pay or benefits, SOREMA has provided generous severance packages to a number of former executives for whom it had cause to terminate their employment. These include, but are not limited to, the following individuals: Jay Kubinak, Thilo Herda, Douglas Zale, Nigel Harley and Marcus Corbally.

34. As a direct and proximate cause of his being fired by SOREMA, Mr. Swierkiewicz has suffered and will continue to suffer a substantial loss of earnings to which he otherwise would have been entitled. This includes, but is not limited to, the loss of his salary, bonus, automobile allowance and pension credits as well as the loss of his medical and dental insurance, life insurance, short and long term disability insurance and the insurance he had for accidental death and dismemberment.

35. As a further direct and proximate cause of his being fired by SOREMA, Mr. Swierkiewicz has suffered damage to his reputation and harm to his career. He has also experienced physical pain and suffering, mental anguish, and the loss of enjoyment of life's pleasures.

36. SOREMA acted willfully and in reckless disregard of Mr. Swierkiewicz's rights under Title VII and the ADEA by discharging him from employment on account of his age and national origin.

STATEMENT OF CLAIMS

COUNT I: VIOLATION OF TITLE VII

37. Mr. Swierkiewicz repeats and incorporates by reference the allegations of paragraphs 1 - 40 of the Complaint as if they were set forth in full.

38. SOREMA terminated Mr. Swierkiewicz's employment on account of his national origin and thereby violated his right to equal employment opportunity as protected by Title VII.

COUNT II: VIOLATION OF THE ADEA

39. Mr. Swierkiewicz repeats and incorporates by reference the allegations of paragraphs 1 - 42 of the Complaint as if they were set forth in full.

40. SOREMA terminated Mr. Swierkiewicz's employment on account of his age and thereby violated his right to equal employment opportunity as protected by the ADEA.

PRAYER FOR RELIEF

WHEREFORE, Mr. Swierkiewicz respectfully requests the Court to enter judgment in his favor and against SOREMA, and to accord him the following relief:

- (a) Back pay with prejudgment interest and all the fringe benefits to which he is entitled;
- (b) Front pay and benefits to the extent reinstatement is not feasible;

(c) Compensatory damages for his non-economic injuries in an amount authorized by Title VII;

(d) Punitive damages to punish and deter SOREMA from future acts of employment discrimination in an amount authorized by Title VII;

(e) Liquidated damages in an amount equal to twice Mr. Swierkiewicz's back pay losses as authorized by the ADEA;

(f) An award of reasonable counsel fees and costs to compensate Mr. Swierkiewicz for having to prosecute this action against SOREMA; and

(g) Such other legal and equitable relief or may be just and proper under the circumstances.

JURY DEMAND

Mr. Swierkiewicz demands a trial by jury on all the issues in this action that are triable by law.

Respectfully submitted,

RAYNES, MCCARTY, BINDER, ROSS & MUNDY

HAROLD I. GOODMAN, ESQUIRE
1845 Walnut Street, 20th Floor
Philadelphia, PA 19103
(215)588-6190

Counsel for Plaintiff
Akos Swierkiewicz

Dated: August 3, 1999

The Rise and Fall of Plausibility Pleading?

Adam N. Steinman*

I. *TWOMBLY*, *IQBAL*, AND THE RISE OF “PLAUSIBILITY PLEADING”

This Part describes federal pleading standards beginning with the adoption of the Federal Rules of Civil Procedure in 1938. It outlines Supreme Court case law setting forth the well-known notice-pleading approach, and then details the Court’s decisions in *Twombly* and *Iqbal*. It concludes by summarizing the initial reaction to *Twombly* and *Iqbal* and the early impact of those decisions in the lower federal courts.

A. *Pleading Standards During the Federal Rules’ First Seven Decades*

Rule 8 of the Federal Rules of Civil Procedure provides that, in order to state a claim, a complaint need only provide “a short and plain statement of the claim showing that the pleader is entitled to relief.”¹⁹ This pleading standard was a core feature of the Federal Rules when they were initially adopted in 1938.²⁰ It was meant to provide a simpler approach than had traditionally been required under either common-law pleading or code pleading, in order to facilitate determinations of cases on their merits.²¹

18. Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 563 (2007).

19. FED. R. CIV. P. 8(a)(2).

20. Charles E. Clark, *Simplified Pleading*, in 2 FED. RULES DECISIONS 456, 462 (1941) (“Simplified pleading is basic to any program of civil procedural reform That is the course of the new Federal Rules of Civil Procedure . . .”).

21. See Stephen B. Burbank & Sean Farhang, *Litigation Reform: An Institutional Approach*, 162 U. PA. L. REV. 1543, 1584 (2014) (“In rejecting common law pleading, . . . the drafters of the 1938 Federal Rules embraced the insights of legal realism. Pleadings are an inferior method to find out what actually happened”); Miller, *Deformation of Federal Procedure*, *supra* note 4, at 288–89:

[T]he distinguished proceduralists who drafted the Federal Rules believed in citizen access to the courts and in the resolution of disputes on their merits, not by tricks or traps or obfuscation Because the rulemakers were deeply steeped in the history of the debilitating technicalities and rigidity that characterized the prior English and

The Federal Rules illustrated this simpler approach with several hypothetical complaints that were included in the Rules' appendix. One of them provided that a negligence complaint would satisfy Rule 8 by alleging: "On <Date>, at <Place>, the defendant negligently drove a motor vehicle against the plaintiff."²² A hypothetical patent infringement complaint, using the example of electric motors, provided that it would be sufficient to allege: "The defendant has infringed and is still infringing the Letters Patent by making, selling, and using electric motors that embody the patented invention."²³

Judge Charles Clark, the chief drafter of the original Federal Rules, believed that these sample complaints were "the most important part of the rules" as far as illustrating Rule 8's pleading standard.²⁴ As of December 1, 2015, the forms that had long appeared in the Federal Rules' Appendix have been removed, and Rule 84—which had provided the forms "suffice under these rules and illustrate the simplicity and brevity that these rules contemplate"²⁵—has been abrogated.²⁶ The Advisory Committee Note to this 2015 amendment states explicitly, however, that the elimination of the forms "does not alter existing

American procedural systems—that is, the common law forms of action and then the codes—the Rules established an easily satisfied pleading regime for stating a grievance that abjured factual triviality, verbosity, and technicality.

Charles E. Clark—who was the chief drafter of the original rules as well as dean of the Yale Law School and, later, a federal judge on the U.S. Court of Appeals for the Second Circuit—put it this way: "[I]n the case of a real dispute, there is no substitute anywhere for a trial. To attempt to make the pleadings serve as such substitute is in very truth to make technical forms the mistress and not the handmaid of justice." Charles E. Clark, *The Handmaid of Justice*, 23 WASH. U. L.Q. 297, 319 (1938). For more on Clark's view of the proper role of pleading standards, see Charles E. Clark, *Pleading Under the Federal Rules*, 12 WYO. L.J. 177, 179–89, 191–93, 196–97 (1958) [hereinafter Clark, *Pleading Under the Federal Rules*]; Christopher M. Fairman, *The Myth of Notice Pleading*, 45 ARIZ. L. REV. 987, 990–94 (2003); and Michael E. Smith, *Judge Charles E. Clark and the Federal Rules of Civil Procedure*, 85 YALE L.J. 914, 917–19, 923–32 (1976).

22. FED. R. CIV. P. Form 11, ¶ 2 (2014), reprinted *infra* Appendix B. Until 2007, this form appeared as Form 9 and was drafted slightly differently. See *Twombly*, 550 U.S. at 575–76 (Stevens, J., dissenting) (quoting former Form 9: "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway."); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 n.4 (2002) (same). The 2007 change occurred as part of a general restyling of the Federal Rules, which was intended "to be stylistic only" and "to make no changes in substantive meaning." FED. R. CIV. P. 1 advisory committee's notes to 2007 amendment.

23. See FED. R. CIV. P. Form 18, ¶3 (2014), reprinted *infra* Appendix B. This language derived from Form 16 of the original rules, but became Form 18 in 2007.

24. Clark, *Pleading Under the Federal Rules*, *supra* note 21, at 181:

What we require [in Rule 8] is a general statement of the case We do not require detail. We require a general statement. How much? Well, the answer is made in what I think is probably the most important part of the rules so far as this particular topic is concerned, namely, the Forms.

25. FED. R. CIV. P. 84 (2014) (abrogated 2015).

26. FED. R. CIV. P. 84 advisory committee's notes to 2015 amendment.

pleading standards or otherwise change the requirements of Civil Rule 8."²⁷

For the Federal Rules' first seven decades, Supreme Court case law elaborated on the simplified approach to pleading commanded by the text of Rule 8 and these illustrative forms. In 1957, *Conley v. Gibson* made clear that "the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim."²⁸ Rather, a complaint is sufficient as long as it "give[s] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."²⁹ During the half-century that followed *Conley*, the Court repeatedly quoted and applied the "fair notice" standard³⁰—so much so that the federal approach enshrined in Rule 8 came to be known as "notice pleading."³¹

This approach, the Court would later emphasize, was compelled by the text of Rule 8 itself: "In *Conley v. Gibson*, . . . we said in effect that the Rule meant what it said."³² When presented with arguments

27. *Id.* As discussed in more detail *infra* note 163, long-standing forms such as the complaints in Form 11 and Form 18 should continue to inform federal courts' approach to pleading even though the Appendix of Forms has been deleted. Given their continued relevance—and because such abrogated content may be harder to find as electronic sources of information are updated to reflect the current Rules—several of the forms relevant to pleading standards are reproduced in Appendix B of this Article.

28. *Conley v. Gibson*, 355 U.S. 41, 47 (1957).

29. *Id.*

30. See, e.g., *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (quoting *Conley*, 355 U.S. at 47); *Leatherman v. Tarrant Cty. Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 168 (1993) (same).

31. E.g., *Swierkiewicz*, 534 U.S. at 511 (describing the federal approach as "a notice pleading system"); *Leatherman*, 507 U.S. at 168 (noting "the liberal system of 'notice pleading' set up by the Federal Rules"); *Thomas v. Independence Twp.*, 463 F.3d 285, 295 (3d Cir. 2006) ("[T]he notice pleading standard of Rule 8(a) applies in all civil actions, unless otherwise specified in the Federal Rules or statutory law."); see also *Mayle v. Felix*, 545 U.S. 644, 669 (2005) (contrasting the Court's approach to habeas corpus petitions with "the generous notice-pleading standard for the benefit of ordinary civil plaintiffs under Federal Rule of Civil Procedure 8(a)"). It is worth noting that Charles Clark himself had some reservations about framing the pleading standard in terms of notice; he wrote:

The usual modern expression, at least of text writers, is to refer to the notice function of pleadings This is a sound approach so far as it goes; but *content must still be given to the word "notice."* It cannot be defined so literally as to mean all the details of the parties' claims, or else the rule is no advance.

Clark, *supra* note 20, at 460 (emphasis added). For convenience, however, this Article will use the phrase "notice pleading" to refer to the pleading standard that prevailed before *Twombly*, if only because the Supreme Court itself has embraced that phrase. By contrast, the Court has still never used the phrase "plausibility pleading"; a Westlaw search for that phrase in the Supreme Court database returned zero cases.

32. *Leatherman*, 507 U.S. at 168:

Rule 8(a)(2) requires that a complaint include only "a short and plain statement of the claim showing that the pleader is entitled to relief." In *Conley v. Gibson*, . . . we said in effect that the Rule meant what it said: "The Federal Rules of Civil Procedure do not

that heightened pleading standards would be desirable for certain kinds of issues in certain kinds of cases, the Court invariably responded that such concerns—however justified as a practical matter—could not be squared with the Federal Rules as they were written, and therefore could only be implemented “by the process of amending the Federal Rules, and not by judicial interpretation.”³³

Indeed, the Court made one of its most robust reaffirmations of notice pleading just five years before *Twombly* came down. *Swierkiewicz v. Sorema N.A.*³⁴ was an employment-discrimination case decided in 2002. In a unanimous opinion authored by Justice Thomas, the Court concluded that it was sufficient for a plaintiff to allege that his “age and national origin were motivating factors in [the defendant’s] decision to terminate his employment.”³⁵ Emphasizing *Conley*’s “fair notice” standard,³⁶ Justice Thomas made clear that the pleading threshold did not require the plaintiff to show that he will ultimately prevail on his claim,³⁷ or that he has or will likely uncover evidence to support his allegations.³⁸ Justice Thomas explicitly recognized that the

require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a short and plain statement of the claim that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests” (citations omitted).

33. *E.g.*, *Swierkiewicz*, 534 U.S. at 515 (“A requirement of greater specificity for particular claims is a result that ‘must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.’” (quoting *Leatherman*, 507 U.S. at 168)); *see also* Subrin & Main, *supra* note 4, at 1847 (“In 1993, and then again in 2002, the Supreme Court . . . found that only Congress or other rulemakers—not the courts—could deviate from the ‘notice pleading’ standard required by Federal Rule 8(a).”).

34. 534 U.S. 506.

35. Amended Complaint at ¶ 37, *Swierkiewicz v. Sorema N.A.*, No. 99 Civ. 12272 (S.D.N.Y. Apr. 19, 2000), reprinted in Joint Appendix, 2001 WL 34093952, at 27a; *see also Swierkiewicz*, 534 U.S. at 514 (“Petitioner alleged that he had been terminated on account of his national origin in violation of Title VII and on account of his age in violation of the ADEA.”).

36. *Swierkiewicz*, 534 U.S. at 512;

[I]mposing the Court of Appeals’ heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2), which provides that a complaint must include only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Such a statement must simply “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests” (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

37. *See id.* at 515 (“[The federal] pleading standard [is] without regard to whether a claim will succeed on the merits.”); *accord Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974):

When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.

38. *See Swierkiewicz*, 534 U.S. at 511–12 (rejecting as “incongruous” with notice pleading a requirement to allege facts raising an inference of discrimination, because “direct evidence of discrimination” might be unearthed during discovery even though the plaintiff was concededly “without direct evidence of discrimination at the time of his complaint”).

federal approach to pleading would “allow[] lawsuits based on conclusory allegations of discrimination to go forward.”³⁹ But “[w]hatever the practical merits of this argument, the Federal Rules do not contain a heightened pleading standard for employment discrimination suits.”⁴⁰

Notice pleading was not a free pass, however. Even at the pleading stage, a defendant could challenge a claim’s legal sufficiency.⁴¹ If the substantive law does not provide a remedy for the conduct alleged, the complaint’s statement of the claim does not “show[] that the pleader is entitled to relief” as required by Rule 8(a)(2).⁴² And such a complaint “fail[s] to state a claim upon which relief can be granted,” which justifies dismissal under Rule 12(b)(6).⁴³ Indeed, a pleading-stage motion to dismiss was—and remains—a suitable vehicle for resolving novel questions of substantive law.⁴⁴ Notice pleading was also understood to permit dismissal at the pleading stage when the plaintiff’s own allegations reveal a fatal defect that defeats the claim on the merits. In other words, a plaintiff may “plead[] itself out of court”⁴⁵ by making

allegations that conclusively undermine its claim for relief. If so, a Rule 12(b)(6) dismissal is proper.⁴⁶

41. See, e.g., *Am. Postal Workers Union v. City of Memphis*, 361 F.3d 898, 902 (6th Cir. 2004) (reviewing a dismissal “based purely on the legal sufficiency of a plaintiff’s case”); *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002) (“A Rule 12(b)(6) motion tests the legal sufficiency of a complaint . . .”); *Int’l Mktg., Ltd. v. Archer-Daniels-Midland Co.*, 192 F.3d 724, 732 (7th Cir. 1999):

[G]iven that the written agreements were, as a matter of law, the only valid agreements between IML and the defendants, and given that IML by its own admissions apparently failed to meet the payment terms that would have triggered the defendants’ duty to perform, neither ADM nor Swift acted wrongfully . . . ;

see also Clyde Spillenger, *Teaching Twombly and Iqbal: Elements Analysis and the Ghost of Charles Clark*, 60 UCLA L. REV. 1740, 1745 (2013):

“[N]otice pleading” did not alter the requirement that the complaint’s allegations satisfy the elements of a recognized cause of action. The conceptual basis for assessing the legal sufficiency of a complaint that had prevailed prior to the [Federal Rules] adoption remained in place: The complaint’s allegations must be assessed in light of governing substantive law to ensure that they address the elements of some recognized claim.

42. FED. R. CIV. P. 8(a)(2).

43. FED. R. CIV. P. 12(b)(6).

44. See generally, e.g., *Cutter v. Wilkinson*, 544 U.S. 709 (2005) (on appeal from the district court’s denial of a Rule 12(b)(6) motion, deciding whether the federal Religious Land Use and Institutionalized Persons Act violated the Establishment Clause); *Rosenbrahn v. Daugaard*, 61 F. Supp. 3d 845 (D.S.D. 2014) (deciding in the context of defendants’ motion to dismiss that South Dakota’s ban on same-sex marriage was unconstitutional); *Wyeth, Inc. v. Weeks*, 159 So. 3d 649 (Ala. 2014) (on certification from a federal district court in connection with a Rule 12(b)(6) motion to dismiss, considering whether a name-brand drug manufacturer could be liable for failing to warn a purchaser of the generic version); see also *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 65 (1990) (on appeal from a grant of a Rule 12(b)(6) motion, deciding “whether promotion, transfer, recall, and hiring decisions involving low-level public employees may be constitutionally based on party affiliation and support”).

45. *Xechem, Inc. v. Bristol-Myers Squibb Co.*, 372 F.3d 899, 901 (7th Cir. 2004).

The Parable of the Forms

Samuel L. Bray¹

*There shall be one form of action
to be known as "civil action."²*

Imagine a university, somewhere, no particular place. The year is 1970. It has all the usual university things, including lots of departments. Because this is life, things break. Light bulbs go out. Toilets flood. Doors get stuck. Football fans get excited and steal the door mats as souvenirs.

If you are at the university—as student, staff, or faculty—you might notice something that has gone wrong. A needed repair, say. What do you do? You fill out a form. It includes blanks for you to put your name, your contact information, and what you need. And then you send the form to someone who is supposed to take care of the problem.

Now the exact form you fill out depends on your department. In the History Department, the form has a special box that you can check that says “Archival materials at risk.”

The Theatre Department has its own form that includes more detailed specs about lighting and sound systems.

The Power Plant has a very long form, with separate boxes for each of the major parts of the power plant. It also has in caps at the top: “DO NOT USE FOR MISSION-CRITICAL PROBLEMS.”

The Library has its own form, too. The options are the following checkboxes: “Books damaged,” “Books missing,” “Books misshelved,” “Book requests,” “Bookshelf damage,” and “Other.” It also asks for the call-number of the affected book.

The architecture school has its own form, which has large print and a geometric typeface. Instead of checkboxes it asks for your contact information and for a brief description of the problem.

As time goes by, each department tends to get new kinds of problems, or new kinds of equipment. The departmental forms get tweaked. The Power Plant adds a supplemental form for reporting that something is amiss with the solar panels distributed around the campus. The Library adds checkboxes about audio and video materials. And so on.

¹ Professor, UCLA School of Law. I am grateful for comments from Alexandra Lahav, Richard Re, Stephen E. Sachs, and Jay Tidmarsh.

² FED. R. CIV. P. 2 (1937).

Eventually, a new university president comes in, and what he hates most is Red Tape. “Bureaucracy,” he likes to say, “is red tape, so red it’s almost Communist.” Instead of asking, “How’s your day?” he says “Cutting through the red tape today?” Most people find it tiresome.

The new university president decides there are too many forms. His objection has some merit. One problem is that some forms are not well-designed. Another is that when a person from one department happens to be in the building of another department, and sees something that needs to be repaired or replaced, the visiting person has to adjust to a new form. For students and faculty who spend time in multiple departments, there can be confusion.

Some departments even have rules specifying that no action can be taken unless a form is correctly filled out. The Theater Department refuses to take action on requests about lighting if the same form makes a request about sound. Recently the History Department has been slow in changing lightbulbs, and enterprising students began checking the “Archival materials at risk” box. The custodian, upon discovering there were no archival materials nearby, was vexed, and threw away a pile of completed forms.

So the university president announces a new form: The Central Consolidated Help Form. It uses a new sans-serif typeface, Helvetica, and gets rid of a lot of cumbersome details. It has a large box with a bolded instruction: **Describe in complete detail everything that happened.**

Each department is encouraged to use the new form, but they are not forbidden to use the old ones. It will be silly, thinks the president, to use multiple forms—so much Red Tape—and the new form is so much better that it will quickly drive out the old, rigid, specialized, narrow forms.

Then a funny thing happens on the way to the form’s domination. Some departments do give up their old forms and adopt the Central Consolidated Help Form. But the old problems reappear, because some departments will not take action if the new form includes anything less than “complete detail.” Other departments start putting out the old forms with the new. They encourage people to use both—to write a short statement of what happened on the new form, while also filling out one of the more specific forms, with their more specific checkboxes, to make sure the problem is routed to the right person.

Then some departments that adopted the Central Consolidated Help Form change their minds. The Library had switched to it. But then it started getting patrons who would fill out a form with something obtuse like saying the problem was “Books upstairs.” Back when the form had the checkboxes—“Books damaged,” “Books missing,” “Books misshelved,” “Book requests,” “Bookshelf damage,” and “Other”—at least the librarian

had some idea what was going on. The Library ditches the new form and goes back to its old one.

All of this is very discouraging to the university president. There is so much Red Tape. He tries again. Now there is to be one form to rule them all, the Universal Form. Every department has to use it. It is basically the same as the Central Consolidated Help Form, but larger, so there is more room to write down information that might be more department-specific. And no longer is there a requirement of "complete detail."

The Universal Form is widely praised, and every department adopts it. It is written up in *University President: The Magazine*, and soon other universities have their own Universal Forms.

How well does it work? There were naysayers from the beginning, but it has worked pretty well. No longer are people baffled by all the checkboxes on the more complex forms. No longer is there confusion about which form to fill out—should I fill out the regular Power Plant form, the solar-power supplemental form, or the Central Consolidated Help Form? No longer are there cases where people checked the wrong boxes. There is less Red Tape. The university president smiles.

But over time, if you are looking closely, you might observe something else. Some departments need quite specific information. The Power Plant does want to know the model number of the machine or the part. The Library does want to know the call number. The History department still wants to know if archival materials are damaged or in danger.

So what has happened is that all these departments use the new Universal Form, but they all post signs next to the box of forms, telling the person who will complete a form about the kinds of information that are needed. There is one form, but different departments want that one form filled out different ways, because of their specialized needs. One form in appearance, but in reality the old specialization is reasserting itself. It is hard to keep it out.

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It might be good for each department to have its own form, or it might be better to have one form for the whole campus. That is an open question. It depends on how different the repair requests are in different departments, on the value of specialization. It depends on whether we want some complexity about the choice of forms or if we want radical simplicity about the number of forms with all of the complexity residing within a single form.

It might be good to have different forms of action, so everyone knows up front what the plaintiff will have to show and what the limits will be on

the suit, and so we can have special procedures adapted to that kind of case. But there were real problems with the forms of action, and also with code pleading. It might be better to have one form of civil action, so no one accidentally chooses the wrong one, and so we can be flexible in accommodating new fact patterns that might not fit so easily into the old forms.

These were important questions in the nineteenth century, when the code pleading statutes were being debated. These were important questions when the Federal Rules were being drafted. However we answer them in the present, as there is an increasing push for specialization in procedure, these are not the sort of questions that will ever go away.

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SUPREME COURT OF THE UNITED STATES

No. 07-1015

JOHN D. ASHCROFT, FORMER ATTORNEY GENERAL,
ET AL., PETITIONERS v. JAVAID IQBAL ET AL.

ON WRIT OF HABEAS CORPUS TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

[May 13, 2009]

JUSTICE KENNEDY delivered the opinion of the Court.

Respondent Javaid Iqbal is a citizen of Pakistan and a Muslim. In the wake of the September 11, 2001, terrorist attacks he was arrested in the United States on criminal charges and detained by federal officials. Respondent claims he was deprived of various constitutional protections while in federal custody. To redress the alleged deprivations, respondent filed a complaint against numerous federal officials, including John Ashcroft, the former Attorney General of the United States, and Robert Mueller, the Director of the Federal Bureau of Investigation (FBI). Ashcroft and Mueller are the petitioners in the case now before us. As to these two petitioners, the complaint alleges that they adopted an unconstitutional policy that subjected respondent to harsh conditions of confinement on account of his race, religion, or national origin.

In the District Court petitioners raised the defense of qualified immunity and moved to dismiss the suit, contending the complaint was not sufficient to state a claim against them. The District Court denied the motion to dismiss, concluding the complaint was sufficient to state a

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claim despite petitioners' official status at the times in question. Petitioners brought an interlocutory appeal in the Court of Appeals for the Second Circuit. The court, without discussion, assumed it had jurisdiction over the order denying the motion to dismiss; and it affirmed the District Court's decision.

Respondent's account of his prison ordeal could, if proved, demonstrate unconstitutional misconduct by some governmental actors. But the allegations and pleadings with respect to these actors are not before us here. This case instead turns on a narrower question: Did respondent, as the plaintiff in the District Court, plead factual matter that, if taken as true, states a claim that petitioners deprived him of his clearly established constitutional rights. We hold respondent's pleadings are insufficient.

I

Following the 2001 attacks, the FBI and other entities within the Department of Justice began an investigation of vast reach to identify the assailants and prevent them from attacking anew. The FBI dedicated more than 4,000 special agents and 3,000 support personnel to the endeavor. By September 18 "the FBI had received more than 96,000 tips or potential leads from the public." Dept. of Justice, Office of Inspector General, *The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks* 1, 11-12 (Apr. 2003) (hereinafter *OIG Report*), http://www.usdoj.gov/oig/special/0306/full.pdf?bcsi_scan_61073EC0F74759AD=0&bcsi_scan_filename=full.pdf (as visited May 14, 2009, and available in Clerk of Court's case file).

In the ensuing months the FBI questioned more than 1,000 people with suspected links to the attacks in particular or to terrorism in general. *Id.*, at 1. Of those individuals, some 762 were held on immigration charges; and

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a 184-member subset of that group was deemed to be “of high interest” to the investigation. *Id.*, at 111. The high-interest detainees were held under restrictive conditions designed to prevent them from communicating with the general prison population or the outside world. *Id.*, at 112–113.

Respondent was one of the detainees. According to his complaint, in November 2001 agents of the FBI and Immigration and Naturalization Service arrested him on charges of fraud in relation to identification documents and conspiracy to defraud the United States. *Iqbal v. Hasty*, 490 F. 3d 143, 147–148 (CA2 2007). Pending trial for those crimes, respondent was housed at the Metropolitan Detention Center (MDC) in Brooklyn, New York. Respondent was designated a person “of high interest” to the September 11 investigation and in January 2002 was placed in a section of the MDC known as the Administrative Maximum Special Housing Unit (ADMAX SHU). *Id.*, at 148. As the facility’s name indicates, the ADMAX SHU incorporates the maximum security conditions allowable under Federal Bureau of Prison regulations. *Ibid.* ADMAX SHU detainees were kept in lockdown 23 hours a day, spending the remaining hour outside their cells in handcuffs and leg irons accompanied by a four-officer escort. *Ibid.*

Respondent pleaded guilty to the criminal charges, served a term of imprisonment, and was removed to his native Pakistan. *Id.*, at 149. He then filed a *Bivens* action in the United States District Court for the Eastern District of New York against 34 current and former federal officials and 19 “John Doe” federal corrections officers. See *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U. S. 388 (1971). The defendants range from the correctional officers who had day-to-day contact with respondent during the term of his confinement, to the wardens of the MDC facility, all the way to petitioners—officials who

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were at the highest level of the federal law enforcement hierarchy. First Amended Complaint in No. 04-CV-1809 (JG)(JA), ¶¶10-11, App. to Pet. for Cert. 157a (hereinafter Complaint).

The 21-cause-of-action complaint does not challenge respondent's arrest or his confinement in the MDC's general prison population. Rather, it concentrates on his treatment while confined to the ADMAX SHU. The complaint sets forth various claims against defendants who are not before us. For instance, the complaint alleges that respondent's jailors "kicked him in the stomach, punched him in the face, and dragged him across" his cell without justification, *id.*, ¶113, App. to Pet. for Cert. 176a; subjected him to serial strip and body-cavity searches when he posed no safety risk to himself or others, *id.*, ¶¶143-145, App. to Pet. for Cert. 182a; and refused to let him and other Muslims pray because there would be "[n]o prayers for terrorists," *id.*, ¶154, App. to Pet. for Cert. 184a.

The allegations against petitioners are the only ones relevant here. The complaint contends that petitioners designated respondent a person of high interest on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments to the Constitution. The complaint alleges that "the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11." *Id.*, ¶47, at 164a. It further alleges that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001." *Id.*, ¶69, at 168a. Lastly, the complaint posits that petitioners "each knew of, condoned, and willfully and maliciously agreed to subject" respondent to harsh conditions of confinement "as a matter of policy, solely on account of [his]

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religion, race, and/or national origin and for no legitimate penological interest." *Id.*, ¶96, at 172a–173a. The pleading names Ashcroft as the "principal architect" of the policy, *id.*, ¶10, at 157a, and identifies Mueller as "instrumental in [its] adoption, promulgation, and implementation." *Id.*, ¶11, at 157a.

Petitioners moved to dismiss the complaint for failure to state sufficient allegations to show their own involvement in clearly established unconstitutional conduct. The District Court denied their motion. Accepting all of the allegations in respondent's complaint as true, the court held that "it cannot be said that there [is] no set of facts on which [respondent] would be entitled to relief as against" petitioners. *Id.*, at 136a–137a (relying on *Conley v. Gibson*, 355 U.S. 41 (1957)). Invoking the collateral-order doctrine petitioners filed an interlocutory appeal in the United States Court of Appeals for the Second Circuit. While that appeal was pending, this Court decided *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), which discussed the standard for evaluating whether a complaint is sufficient to survive a motion to dismiss.

The Court of Appeals considered *Twombly*'s applicability to this case. Acknowledging that *Twombly* retired the *Conley* no-set-of-facts test relied upon by the District Court, the Court of Appeals' opinion discussed at length how to apply this Court's "standard for assessing the adequacy of pleadings." 490 F.3d, at 155. It concluded that *Twombly* called for a "flexible 'plausibility standard,' which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim plausible." *Id.*, at 157–158. The court found that petitioners' appeal did not present one of "those contexts" requiring amplification. As a consequence, it held respondent's pleading adequate to allege petitioners' personal involvement in discriminatory decisions which, if true, violated clearly established consti-

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tutional law. *Id.*, at 174.

Judge Cabranes concurred. He agreed that the majority's "discussion of the relevant pleading standards reflect[ed] the uneasy compromise ... between a qualified immunity privilege rooted in the need to preserve the effectiveness of government as contemplated by our constitutional structure and the pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure." *Id.*, at 178 (internal quotation marks and citations omitted). Judge Cabranes nonetheless expressed concern at the prospect of subjecting high-ranking Government officials—entitled to assert the defense of qualified immunity and charged with responding to "a national and international security emergency unprecedented in the history of the American Republic"—to the burdens of discovery on the basis of a complaint as nonspecific as respondent's. *Id.*, at 179. Reluctant to vindicate that concern as a member of the Court of Appeals, *ibid.*, Judge Cabranes urged this Court to address the appropriate pleading standard "at the earliest opportunity." *Id.*, at 178. We granted certiorari, 554 U. S. ____ (2008), and now reverse.

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III

In *Twombly*, *supra*, at 553–554, the Court found it necessary first to discuss the antitrust principles implicated by the complaint. Here too we begin by taking note of the elements a plaintiff must plead to state a claim of unconstitutional discrimination against officials entitled to assert the defense of qualified immunity.

In *Bivens*—proceeding on the theory that a right suggests a remedy—this Court “recognized for the first time an implied private action for damages against federal officers alleged to have violated a citizen’s constitutional rights.” *Correctional Services Corp. v. Malesko*, 534 U.S. 61, 66 (2001). Because implied causes of action are disfavored, the Court has been reluctant to extend *Bivens* liability “to any new context or new category of defendants.” 534 U.S., at 68. See also *Wilkie*, 551 U.S., at 549–550. That reluctance might well have disposed of respondent’s First Amendment claim of religious discrimination. For while we have allowed a *Bivens* action to redress a violation of the equal protection component of the Due Process Clause of the Fifth Amendment, see *Davis v. Passman*, 442 U.S. 228 (1979), we have not found an implied damages remedy under the Free Exercise Clause. Indeed, we have declined to extend *Bivens* to a claim sounding in the First Amendment. *Bush v. Lucas*, 482 U.S. 367 (1983). Petitioners do not press this argument, however, so we assume, without deciding, that respondent’s First Amendment claim is actionable under *Bivens*.

In the limited settings where *Bivens* does apply, the implied cause of action is the “federal analog to suits brought against state officials” under Rev. Stat. §1979, 42 U.S.C. §1983.” *Hartman*, 547 U.S., at 254, n. 2. Cf. *Wilson v. Layne*, 526 U.S. 603, 609 (1999). Based on the rules our precedents establish, respondent correctly concedes that Government officials may not be held liable for

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the unconstitutional conduct of their subordinates under a theory of *respondeat superior*. Iqbal Brief 46 (“[I]t is undisputed that supervisory *Bivens* liability cannot be established solely on a theory of *respondeat superior*”). See *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 691 (1978) (finding no vicarious liability for a municipal “person” under 42 U.S.C. §1983); see also *Dunlop v. Munroe*, 7 Cranch 242, 269 (1812) (a federal official’s liability “will only result from his own neglect in not properly superintending the discharge” of his subordinates’ duties); *Robertson v. Sichel*, 127 U.S. 507, 515–516 (1888) (“A public officer or agent is not responsible for the misfeasances or position wrongs, or for the nonfeasances, or negligences, or omissions of duty, of the subagents or servants or other persons properly employed by or under him, in the discharge of his official duties”). Because vicarious liability is inapplicable to *Bivens* and §1983 suits, a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.

The factors necessary to establish a *Bivens* violation will vary with the constitutional provision at issue. Where the claim is invidious discrimination in contravention of the First and Fifth Amendments, our decisions make clear that the plaintiff must plead and prove that the defendant acted with discriminatory purpose. *Church of Lukumi Babalu Aye, Inc. v. Hialeah*, 508 U.S. 520, 540–541 (1993) (First Amendment); *Washington v. Davis*, 426 U.S. 229, 240 (1976) (Fifth Amendment). Under extant precedent purposeful discrimination requires more than “intent as volition or intent as awareness of consequences.” *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). It instead involves a decisionmaker’s undertaking a course of action “‘because of,’ not merely ‘in spite of,’ [the action’s] adverse effects upon an identifiable group.” *Ibid.* It follows that, to state a claim based on a violation of a

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clearly established right, respondent must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin.

Respondent disagrees. He argues that, under a theory of "supervisory liability," petitioners can be liable for "knowledge and acquiescence in their subordinates' use of discriminatory criteria to make classification decisions among detainees." *Iqbal* Brief 45–46. That is to say, respondent believes a supervisor's mere knowledge of his subordinate's discriminatory purpose amounts to the supervisor's violating the Constitution. We reject this argument. Respondent's conception of "supervisory liability" is inconsistent with his accurate stipulation that petitioners may not be held accountable for the misdeeds of their agents. In a §1983 suit or a *Bivens* action—where masters do not answer for the torts of their servants—the term "supervisory liability" is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. In the context of determining whether there is a violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose *Bivens* liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.

IV

A

We turn to respondent's complaint. Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." As the Court held in *Twombly*, 550 U.S. 544, the pleading standard Rule 8 announces does

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not require "detailed factual allegations," but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. *Id.*, at 555 (citing *Popson v. Allain*, 478 U.S. 265, 286 (1986)). A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." 550 U.S., at 555. Nor does a complaint suffice if it tenders "naked assertion[s]" devoid of "further factual enhancement." *Id.*, at 557.

To 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." *Id.*, at 570. 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.*, at 556. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Ibid.* Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.*, at 557 (brackets omitted).

Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. *Id.*, at 555 (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we "are not bound to accept as true a legal conclusion couched as a factual allegation" (internal quotation marks omitted)). Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a com-

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plaint that states a plausible claim for relief survives a motion to dismiss. *Id.*, at 556. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. 490 F.3d, at 157–158. But where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not “show[ed]”—“that the pleader is entitled to relief.” Fed. Rule Civ. Proc. 8(a)(2).

In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Our decision in *Twombly* illustrates the two-pronged approach. There, we considered the sufficiency of a complaint alleging that incumbent telecommunications providers had entered an agreement not to compete and to forestall competitive entry, in violation of the Sherman Act, 15 U.S.C. §1. Recognizing that §1 enjoins only anti-competitive conduct “effected by a contract, combination, or conspiracy,” *Copperweld Corp. v. Independence Tube Corp.*, 487 U.S. 752, 776 (1984), the plaintiffs in *Twombly* flatly pleaded that the defendants “ha[d] entered into a contract, combination or conspiracy to prevent competitive entry . . . and ha[d] agreed not to compete with one another.” 550 U.S., at 551 (internal quotation marks omitted). The complaint also alleged that the defendants’ “parallel course of conduct . . . to prevent competition” and inflate prices was indicative of the unlawful agreement alleged. *Ibid.* (internal quotation marks omitted).

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The Court held the plaintiffs' complaint deficient under Rule 8. In doing so it first noted that the plaintiffs' assertion of an unlawful agreement was a "legal conclusion" and, as such, was not entitled to the assumption of truth. *Id.*, at 555. Had the Court simply credited the allegation of a conspiracy, the plaintiffs would have stated a claim for relief and been entitled to proceed *perforce*. The Court next addressed the "nub" of the plaintiffs' complaint—the well-pleaded, nonconclusory factual allegation of parallel behavior—to determine whether it gave rise to a "plausible suggestion of conspiracy." *Id.*, at 555–556. Acknowledging that parallel conduct was consistent with an unlawful agreement, the Court nevertheless concluded that it did not plausibly suggest an illicit accord because it was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior. *Id.*, at 557. Because the well-pleaded fact of parallel conduct, accepted as true, did not plausibly suggest an unlawful agreement, the Court held the plaintiffs' complaint must be dismissed. *Id.*, at 570.

B

Under *Twombly*'s construction of Rule 8, we conclude that respondent's complaint has not "nudged [his] claims" of invidious discrimination "across the line from conceivable to plausible." *Ibid.*

We begin our analysis by identifying the allegations in the complaint that are not entitled to the assumption of truth. Respondent pleads that petitioners "knew of, condoned, and willfully and maliciously agreed to subject [him]" to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest." Complaint ¶96, App. to Pet. for Cert. 173a–174a. The complaint alleges that Ashcroft was the "principal architect" of this invidious policy, *id.*, ¶10, at 157a, and that

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Mueller was "instrumental" in adopting and executing it, *id.*, ¶11, at 157a. These bare assertions, much like the pleading of conspiracy in *Twombly*, amount to nothing more than a "formulaic recitation of the elements" of a constitutional discrimination claim, 550 U.S., at 555, namely, that petitioners adopted a policy "because of" not merely "in spite of" its adverse effects upon an identifiable group." *Feeney*, 442 U.S., at 279. As such, the allegations are conclusory and not entitled to be assumed true. *Twombly*, *supra*, 550 U.S., at 554–555. To be clear, we do not reject these bald allegations on the ground that they are unrealistic or nonsensical. We do not so characterize them any more than the Court in *Twombly* rejected the plaintiffs' express allegation of a "contract, combination or conspiracy to prevent competitive entry," *id.*, at 551, because it thought that claim too chimerical to be maintained. It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.

We next consider the factual allegations in respondent's complaint to determine if they plausibly suggest an entitlement to relief. The complaint alleges that "the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11." Complaint ¶47, App. to Pet. for Cert. 164a. It further claims that "[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001." *Id.*, ¶69, at 158a. Taken as true, these allegations are consistent with petitioners' purposefully designating detainees "of high interest" because of their race, religion, or national origin. But given more likely explanations, they do not plausibly establish this purpose.

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The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim—Osama bin Laden—and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that “obvious alternative explanation” for the arrests, *Twombly*, *supra*, at 537, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.

But even if the complaint’s well-pleaded facts give rise to a plausible inference that respondent’s arrest was the result of unconstitutional discrimination, that inference alone would not entitle respondent to relief. It is important to recall that respondent’s complaint challenges neither the constitutionality of his arrest nor his initial detention in the MDC. Respondent’s constitutional claims against petitioners rest solely on their ostensible “policy of holding post-September-11th detainees” in the ADMAX SHU once they were categorized as “of high interest.” Complaint ¶69, App. to Pet. for Cert. 168a. To prevail on that theory, the complaint must contain facts plausibly showing that petitioners purposefully adopted a policy of classifying post-September-11 detainees as “of high interest” because of their race, religion, or national origin.

This the complaint fails to do. Though respondent alleges that various other defendants, who are not before

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us, may have labeled him a person of "of high interest" for impermissible reasons, his only factual allegation against petitioners accuses them of adopting a policy approving "restrictive conditions of confinement" for post-September-11 detainees until they were "cleared" by the FBI." *Ibid.* Accepting the truth of that allegation, the complaint does not show, or even intimate, that petitioners purposefully housed detainees in the ADMAX SHU due to their race, religion, or national origin. All it plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity. Respondent does not argue, nor can he, that such a motive would violate petitioners' constitutional obligations. He would need to allege more by way of factual content to "nudge[s]" his claim of purposeful discrimination "across the line from conceivable to plausible." *Twombly*, 550 U. S., at 570.

To be sure, respondent can attempt to draw certain contrasts between the pleadings the Court considered in *Twombly* and the pleadings at issue here. In *Twombly*, the complaint alleged general wrongdoing that extended over a period of years, *id.*, at 551, whereas here the complaint alleges discrete wrongs—for instance, beatings—by lower level Government actors. The allegations here, if true, and if condoned by petitioners, could be the basis for some inference of wrongful intent on petitioners' part. Despite these distinctions, respondent's pleadings do not suffice to state a claim. Unlike in *Twombly*, where the doctrine of *respondent superior* could bind the corporate defendant, here, as we have noted, petitioners cannot be held liable unless they themselves acted on account of a constitutionally protected characteristic. Yet respondent's complaint does not contain any factual allegation sufficient to plausibly suggest petitioners' discriminatory state

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of mind. His pleadings thus do not meet the standard necessary to comply with Rule 8.

It is important to note, however, that we express no opinion concerning the sufficiency of respondent's complaint against the defendants who are not before us. Respondent's account of his prison ordeal alleges serious official misconduct that we need not address here. Our decision is limited to the determination that respondent's complaint does not entitle him to relief from petitioners.

C

Respondent offers three arguments that bear on our disposition of his case, but none is persuasive.

1

Respondent first says that our decision in *Twombly* should be limited to pleadings made in the context of an antitrust dispute. Iqbal Brief 37-38. This argument is not supported by *Twombly* and is incompatible with the Federal Rules of Civil Procedure. Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. 550 U. S., at 554. That Rule in turn governs the pleading standard "in all civil actions and proceedings in the United States district courts." Fed. Rule Civ. Proc. 1. Our decision in *Twombly* expounded the pleading standard for "all civil actions," *ibid.*, and it applies to antitrust and discrimination suits alike. See 550 U. S., at 555-556, and n. 3.

2

Respondent next implies that our construction of Rule 8 should be tampered where, as here, the Court of Appeals has "instructed the district court to cabin discovery in such a way as to preserve" petitioners' defense of qualified immunity "as much as possible in anticipation of a summary judgment motion." Iqbal Brief 27. We have held,

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discovery as to the other parties proceeds, it would prove necessary for petitioners and their counsel to participate in the process to ensure the case does not develop in a misleading or slanted way that causes prejudice to their position. Even if petitioners are not yet themselves subject to discovery orders, then, they would not be free from the burdens of discovery.

We decline respondent's invitation to relax the pleading requirements on the ground that the Court of Appeals promises petitioners minimally intrusive discovery. That promise provides especially cold comfort in this pleading context, where we are impelled to give real content to the concept of qualified immunity for high-level officials who must be neither deterred nor detracted from the vigorous performance of their duties. Because respondent's complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.

3

Respondent finally maintains that the Federal Rules expressly allow him to allege petitioners' discriminatory intent "generally," which he equates with a conclusory allegation. Iqbal Brief 32 (citing Fed. Rule Civ. Proc. 9). It follows, respondent says, that his complaint is sufficiently well pleaded because it claims that petitioners discriminated against him "on account of [his] religion, race, and/or national origin and for no legitimate penological interest." Complaint ¶96, App. to Pet. for Cert. 172a-173a. Were we required to accept this allegation as true, respondent's complaint would survive petitioners' motion to dismiss. But the Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context.

It is true that Rule 9(b) requires particularity when pleading "fraud or mistake," while allowing "[i]njuries, intent, knowledge, and other conditions of a person's mind

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[to] be alleged generally." But "generally" is a relative term. In the context of Rule 9, it is to be compared to the particularity requirement applicable to fraud or mistake. Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid—though still operative—strictures of Rule 8. See 5A C. Wright & A. Miller, *Federal Practice and Procedure* §1301, p. 291 (3d ed. 2004) ("[A] rigid rule requiring the detailed pleading of a condition of mind would be undesirable because, absent overriding considerations pressing for a specificity requirement, as in the case of averments of fraud or mistake, the general 'short and plain statement of the claim' mandate in Rule 8(a) . . . should control the second sentence of Rule 9(b)"). And Rule 8 does not empower respondent to plead the bare elements of his cause of action, affix the label "general allegation," and expect his complaint to survive a motion to dismiss.

V

We hold that respondent's complaint fails to plead sufficient facts to state a claim for purposeful and unlawful discrimination against petitioners. The Court of Appeals should decide in the first instance whether to remand to the District Court so that respondent can seek leave to amend his deficient complaint.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

The Lost Story of *Iqbal*

SHIRIN SINNAR*

Every first-year law student reads *Ashcroft v. Iqbal*,¹ the 2009 Supreme Court decision that transformed pleading standards across civil litigation. Now an established part of the civil procedure canon, the 5–4 decision significantly eased the standard for dismissing complaints for failure to state a claim, upending the liberal pleading regime that had marked federal litigation for half a century. The old standard judged the factual sufficiency of complaints only according to whether they gave defendants fair notice of the basis for the plaintiff's case, rather than screening cases on their merits.² *Iqbal* required instead that a plaintiff set out facts to persuade a judge that her claim was “plausible.”³ The new pleading standard attracted enormous attention from lawyers, legal scholars, and lower courts. Noting that *Iqbal* had been cited in 85,000 lower court decisions and that instituting plausibility pleading may have especially disadvantaged civil rights plaintiffs, *The New York Times* called the decision possibly “the most consequential ruling in Chief Justice John G. Roberts Jr.’s 10-year tenure.”⁴ Indeed, by 2015, the decision had already become one of the five most cited Supreme Court decisions of all time.⁵

A. THE IMMIGRANT EXPERIENCE

In 1992, Iqbal arrived at JFK Airport from Faisalabad, Pakistan, brought into the country on a false passport by immigration smugglers.⁸⁰ He settled in Long Island, and for nearly a decade, he worked long hours at multiple jobs to send money to family back home.⁸¹ For much of that time, Iqbal worked as a gas station attendant in Huntington, Long Island, sometimes seven days a week, opening at five in the morning and closing at ten at night.⁸² At other times, he rang up purchases at a 7-Eleven,⁸³ made sandwiches at Subway,⁸⁴ washed dishes at a bar,⁸⁵ and worked the graveyard shift as a security guard.⁸⁶ Finally, after a customer at the Gulf’s gas station in Huntington told him of an opening at a leading New York cable company, he landed the job he ended up loving



most.⁸⁷ For five years prior to his arrest, Iqbal worked as a cable repair technician, calling himself the “Cable Guy” after his favorite movie, Jim Carrey’s 1996 dark comedy of the same name.⁸⁸ Interviewed fifteen years later, Iqbal still relished the memories of his around-the-clock availability as a “cable guy” in Long Island:

I was the only person who had [the] radio 24 hours—me and the truck, 24 hours with me. Because whenever they got emergency, they called, “Iqbal! You gotta go to exit 47, the lady got no TV. Right away. Go ahead there.” 50 dollar for the gas, 50 dollar tip. 100 bucks. So I was greedy about that, that every dollar makes [a] difference. I send money home. And I will change my family’s life.⁸⁹

As he came to know the community through his work as a gas station attendant and cable repairman, Iqbal increasingly felt at home in America. He recalled the regular customers who brought him food at the gas station at Thanksgiving and Christmas:

Imagine, they were sitting at the home preparing dinner for their family. And in the back of their head they also remembered me[,] too. And they pack [a] plate of food and they drive all the way to the gas station and bring me the food. I was feeling that I’m part of this family. I’m part of this system. Before I was feeling that I am a foreigner. But those feelings, those moments, make me realize, make me feel that I am American—I’m family of American family.⁹⁰

Eventually, Iqbal married an American woman whom he met while working at the gas station, moved in with her and her children, and applied for a green card based on his marriage.⁹¹ After four and a half years of marriage, the two separated.⁹² Iqbal moved into a tiny studio apartment in Long Island that he shared with a roommate who worked the night shift.⁹³

Iqbal’s decade on Long Island had features common to those of many undocumented immigrants and other features that may have distinguished it. Like other immigrants, Iqbal worked for part of his time in the United States using a false identity, one that he purchased from two men in Brooklyn for

87. Interview with Javaid Iqbal, *supra* note 82; Telephone Interview with Javaid Iqbal, *supra* note 80.

88. Interview with Javaid Iqbal, *supra* note 82; Telephone Interview with Javaid Iqbal, *supra* note 80.

89. Interview with Javaid Iqbal, *supra* note 82.

90. *Id.*

91. Telephone Interview with Javaid Iqbal, *supra* note 80.

92. See Bernstein, *2 Men Charge Abuse*, *supra* note 67; Telephone Interview with Javaid Iqbal, *supra* note 80.

93. Interview with Javaid Iqbal, *supra* note 82.

\$1,500.⁹⁴ He says he obtained identification documents in the name of “Abdul Khaliq” after someone stole his identity; he suspected that it was a Pakistani salesperson at a jewelry store in Queens who asked him for his mother’s maiden name in the course of swiping his credit card.⁹⁵ The use of a false ID later figured heavily in the criminal case brought against Iqbal in the fall of 2001, as did more serious allegations that he was also engaging in financial fraud.⁹⁶

B. ARREST AND DETENTION

On the morning of September 11, Iqbal had an appointment to renew his work authorization card with the U.S. Immigration & Naturalization Service (INS) in lower Manhattan.⁹⁷ He never made it there: as he neared the office, one block away from the World Trade Center, he saw the first plane heading toward the Twin Towers.⁹⁸ When the second plane hit some twenty minutes later, and it became clear to everyone in the area that a terrorist attack was unfolding, Iqbal joined the crowds of New Yorkers fleeing the scene.⁹⁹ With train and bus transportation largely suspended, he was stranded with thousands of others at Grand Central Station until police finally allowed people to board the subway late that evening and return to their homes.¹⁰⁰ When he got out at a stop in Jamaica, Queens, a reporter from a local TV station was interviewing exiting passengers about what they had seen.¹⁰¹ Iqbal says he gave his name and told the reporter how pained he felt at the loss of innocent life.¹⁰²

Less than eight weeks later, on November 2 or 3, 2001, Iqbal was arrested.¹⁰³ As Iqbal recounted, it was a Friday night, and he was home alone.¹⁰⁴ He heard a helicopter hovering close by and, pushing back the curtains, saw police cars in the street.¹⁰⁵ Iqbal had no inkling that the police attention was directed at him until he heard a knock at his door:

Two guys in civilian dress were standing in front of the door and they didn’t show their ID or anything. They said, “Hey buddy, open the door.” I just—I just like froze there. Because of their look—they were well-built, you know. “Open your door.” I just opened the door. Bang! They just came in through the door. Dragged me to the ground. Dropped me to the ground—one guy just

94. *Id.*

95. *Id.*

96. *See infra* notes 122–38 and accompanying text.

97. Interview with Javaid Iqbal, *supra* note 82.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *See* First Amended Complaint & Jury Demand, *supra* note 22, at 15; Bernstein, *2 Men Charge Abuse*, *supra* note 67. The complaint sworn out by an INS agent puts the date as November 3, 2001. Complaint at 2, *United States v. Iqbal*, No. 1:01-cr-01318-ILG-1 (E.D.N.Y. Sept. 30, 2002).

104. Interview with Javaid Iqbal, *supra* note 82.

105. *Id.*

put his knee right here on my back and they cuffed me. And they make me sit on the couch.¹⁰⁶

Two officers started searching the room.¹⁰⁷ According to Iqbal, several things in the apartment caught their interest. First, on top of the TV, they found a letter from the INS informing Iqbal of his appointment in lower Manhattan on the morning of September 11.¹⁰⁸ Iqbal recalled one agent pointing out the letter to the other, then calling someone on the radio to ask whether Iqbal actually had an appointment that day.¹⁰⁹ The officers accused him of lying about having the appointment¹¹⁰ and of going to the World Trade Center with the intent of helping the hijackers.¹¹¹ Surprised at their incredulity, Iqbal insisted that the INS had determined the date of his appointment and that he had not been able to attend because the building was closed.¹¹²

According to Iqbal, the officers again appeared to grow suspicious when they came across an issue of *Time* magazine featuring the burning World Trade Center on the cover and a Pakistani newspaper reporting on the attacks.¹¹³ Iqbal had purchased the *Time* magazine at a newsstand and picked up the free Pakistani newspaper from Jackson Heights, the immigrant enclave in Queens he visited weekly to stock up on Pakistani food.¹¹⁴ Despite the wide availability of the publications, their coverage of the September 11 attacks appeared to pique the officers' suspicion.¹¹⁵

The officers used a classic "good cop, bad cop" routine on the night of the arrest, with one officer cursing and banging the table and threatening Iqbal if he refused to cooperate and the other seeking to build his trust.¹¹⁶ The agents asked Iqbal questions regarding travel to Afghanistan and knowledge of Osama bin Laden,¹¹⁷ in addition to asking him to recount in detail where he had lived and worked in the United States.¹¹⁸ The agents also questioned Iqbal about the second ID that he was using at the time.¹¹⁹ Iqbal says that he acknowledged working under a false identity and described the circumstances of his acquiring

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. Interview with Javaid Iqbal, *supra* note 82.

111. *Thook mila khana, kapron par pishaab, FBI nay begunaah Pakistani par zulm ki inteha kar di* [*Spit Mixed in Food, Urine on Cloths—FBI Crossed the Limit of Cruelty on an Innocent Pakistani*], ROZNA MA KHABREN (Pak.), Mar. 19, 2003, at 1–2 (Timsal Masud trans.) [hereinafter *Spit Mixed in Food*].

112. Interview with Javaid Iqbal, *supra* note 82.

113. *Id.*; see also Bernstein, 2 Men Charge Abuse, *supra* note 67 (noting that officers "found a Time magazine showing the trade towers in flames").

114. Interview with Javaid Iqbal, *supra* note 82.

115. *Id.*

116. *Id.*

117. *Spit Mixed in Food*, *supra* note 111.

118. Interview with Javaid Iqbal, *supra* note 82.

119. *Id.*

it.¹²⁰ He offered to lead the officers to the jewelry store in Queens to further investigate his claim that his identity had been stolen and misused.¹²¹

On the Monday following his arrest, Iqbal was arraigned before a magistrate judge in the U.S. District Court for the Eastern District of New York who entered an order to detain him.¹²² In support of a charge of making a false statement, an INS special agent swore out a complaint saying that Iqbal had stated that his name was Abdul Khaliq when the INS agent and an FBI special agent appeared at his residence, and that Iqbal had presented them with a New York state driver's license in that name.¹²³ According to the agent's statement, Iqbal then admitted that his real name was Javaid Iqbal, that he did not have lawful immigration status, and that he had entered the United States using another identity that smugglers had assigned him ("Muhammad Mumtaz").¹²⁴ The complaint states that, after Iqbal consented to the search, the agents found checks, a Social Security card, and several credit cards in the name of Abdul Khaliq.¹²⁵

That day, Iqbal was brought to the Metropolitan Detention Center (MDC) in Brooklyn and housed with the general inmate population.¹²⁶ Later that month, a grand jury indicted Iqbal on two counts of identity fraud for obtaining a driver's license in the name of Abdul Khaliq and for possessing a Social Security card in that name.¹²⁷ In December, Iqbal pled not guilty to both charges.¹²⁸ At the time, Iqbal was represented by Richard Shanley,¹²⁹ a court-appointed attorney who Iqbal felt treated him like a terrorist: Shanley demanded to know how often Iqbal had visited Afghanistan or received special military training, accused him of lying when he said he had done neither, and insisted that Iqbal "look[ed] like a commando."¹³⁰ After some time, Iqbal refused to see him,¹³¹ and a friend paid for a private criminal defense attorney, Frank Lopez, to represent Iqbal instead.¹³²

The government labeled Iqbal as being of interest to the terrorism investigation early on; by November 2001, it had included Iqbal on a list of over one hundred federally charged detainees connected to the September 11 investiga-

120. *Id.*

121. *Id.*

122. Docket at ECF No. 2, *United States v. Iqbal*, No. 1:01-cr-01318-ILG-1 (E.D.N.Y. Sept. 30, 2002).

123. Complaint, *supra* note 103, at 1-3.

124. *See id.* at 3-4.

125. *See id.* at 4-5.

126. First Amended Complaint & Jury Demand, *supra* note 22, at 15; Telephone Interview with Javaid Iqbal, *supra* note 80.

127. *See* Indictment at 1-2, *Iqbal*, No. 1:01-cr-01318-ILG-1; *see also* Docket, *supra* note 122, at ECF No. 7.

128. Docket, *supra* note 122, at ECF No. 8.

129. *Id.*

130. Interview with Javaid Iqbal, *supra* note 82.

131. *Id.*; *see also* Docket, *supra* note 122, at ECF No. 10 (noting that Shanley had been relieved).

132. *See* Docket, *supra* note 122, at ECF No. 10; Interview with Javaid Iqbal, *supra* note 82.

tion.¹³³ It remains unclear why the government did so. An FBI list of “Special Interest Cases” from May 2002 includes Iqbal but, in a section of the list used to provide a factual narrative of each case, notes only that Iqbal was using a fraudulent Pakistani passport and was charged with making false statements.¹³⁴

On January 8, 2002, the same day that Lopez first appeared in court on Iqbal’s behalf,¹³⁵ the government indicated that it might seek a superseding indictment against Iqbal.¹³⁶ The following month, a grand jury charged Iqbal with conspiracy to utter counterfeited securities, uttering forged securities, and identity fraud, specifically accusing Iqbal of creating checks in the names of various financial institutions and depositing them in bank accounts in his name.¹³⁷ Iqbal initially entered a not guilty plea to the new charges.¹³⁸

C. CONFINEMENT AT THE METROPOLITAN DETENTION CENTER

During his two months of confinement in the general inmate section of the MDC, Iqbal heard rumors about the “K Unit” of a new building in the MDC,¹³⁹ which ultimately housed eighty-four inmates arrested in connection with the September 11 investigation.¹⁴⁰ Inmates in the general prison population voiced concern that terrorist groups might attack the building because their members were reportedly being held there.¹⁴¹ Still, Iqbal did not imagine that he would

133. A publicly released list of 110 federally charged detainees dated December 7, 2001, lists a “Javaid Iqbal” charged with 18 U.S.C. § 1001 in the Eastern District of New York. See Defendant’s Notice of Filing of Amended & Supplemental Exhibits, Exhibit 7 at 5, *Cent. for Nat’l Sec. Studies v. U.S. Dep’t of Justice*, 217 F. Supp. 2d 58 (D.D.C. 2002) (No. Civ.A. 01-2500 GK). Iqbal is also included on an amended list of 108 federally charged detainees released in early February 2002 after the *Center for National Security Studies* suit was filed under the Freedom of Information Act. See *id.*, Exhibit 5 at 3. His name also appeared on a list released by the Justice Department in late November 2001 of ninety-three individuals charged with federal crimes. See Masood Haider, *Predicament of Detained Pakistanis*, DAWN (Dec. 9, 2001), <http://www.dawn.com/news/1062418> [<https://perma.cc/48UB-NCFE>] (noting that at least seventeen of those appeared to be Pakistani, including a “Javaid Iqbal”).

134. See JTTF Special Interest Cases at 16, *Turkmen v. Ashcroft*, 915 F. Supp. 2d 314 (E.D.N.Y. 2013) (No. 02-CV-2307). The document notes brief procedural updates for Iqbal’s case through the end of January 2002 but reports no additional factual information. See *id.* In both *Iqbal* and *Turkmen*, discovery against officials not claiming qualified immunity and against non-parties proceeded while Ashcroft, Mueller, and other officials claiming qualified immunity appealed the lower courts’ decisions not to dismiss claims against them. See Motion for Leave to File & Brief for Amici Curiae Ibrahim Turkmen et al. in Support of Respondent Javaid Iqbal at iii, 3, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (No. 07-1015) [hereinafter *Turkmen Amicus Brief*]. Although ordinarily subject to a protective order, certain documents produced in discovery by the United States, including the list of Special Interest Cases, were permitted to be disclosed by the *Turkmen* plaintiffs to the Court on the public record for purposes of filing an amicus brief in *Iqbal*. See *id.* at iv, Exhibit I; see also JTTF Special Interest Cases, *supra*, at 1 (noting that the document is “subject to protective order”).

135. See Docket, *supra* note 122, at ECF No. 12.

136. *Id.* at ECF No. 10.

137. Superseding Indictment at 1–3, *United States v. Iqbal*, No. 1:01-cr-01318-ILG-1 (E.D.N.Y. Sept. 30, 2002).

138. Docket, *supra* note 122, at ECF No. 17.

139. Telephone Interview with Javaid Iqbal, *supra* note 80.

140. OFFICE OF THE INSPECTOR GEN., *supra* note 16, at 5.

141. Telephone Interview with Javaid Iqbal, *supra* note 80.

be sent there until it actually happened.¹⁴² His transfer occurred on January 8, 2002, the same day that the government indicated in court that it might seek a superseding indictment.¹⁴³ No public information explains what prompted the transfer—whether it was new information that had emerged in the criminal investigation, the announcement in court of Iqbal's retention of private counsel, or something entirely unrelated.

That evening, correctional officers told Iqbal that he would be having a meeting with his lawyer—an announcement that struck those around him as unusual, given the time of day.¹⁴⁴ Instead, the officers brought him to a room on a separate floor where a guard announced his presence: "Captain, here's the one."¹⁴⁵ According to Iqbal, he saw nearly a dozen men waiting in the room.¹⁴⁶ Upon Iqbal's arrival, several officers kicked and beat him, called him a "terrorist," punched him in the face, and threw him against the wall.¹⁴⁷ After the physical abuse, which had left Iqbal bleeding from his mouth and nose, the officers cuffed his arms and legs and moved him through an underground tunnel to the ninth floor of the new building, where he was forced to strip and undergo an extensive search.¹⁴⁸

Around March 20, 2002, prison guards subjected Iqbal to a second particularly severe attack.¹⁴⁹ That day, officers conducted three strip and body-cavity searches of Iqbal, and he protested when the officers ordered a fourth search.¹⁵⁰ In retaliation, the guards punched Iqbal in the face and kicked him, causing him to bleed.¹⁵¹ After further physical abuse, one officer urinated in the toilet in Iqbal's cell and turned off the water so that he could not flush it until morning.¹⁵² Despite his requests for help, Iqbal stated that he did not receive medical care for two weeks after the incident.¹⁵³ In addition to these especially serious attacks, Iqbal alleged that prison guards routinely punched and kicked him during morning searches of his cell.¹⁵⁴

During his six months in the Administrative Maximum Special Housing Unit, or ADMAX SHU, Iqbal was usually confined in his cell for all but one hour

142. *Id.*

143. See Docket, *supra* note 122, at ECF No. 10; First Amended Complaint & Jury Demand, *supra* note 22, at 15.

144. First Amended Complaint & Jury Demand, *supra* note 22, at 20; Bernstein, *2 Men Charge Abuse*, *supra* note 67; Telephone Interview with Javaid Iqbal, *supra* note 80.

145. Telephone Interview with Javaid Iqbal, *supra* note 80.

146. *Id.*

147. First Amended Complaint & Jury Demand, *supra* note 22, at 20–21; Telephone Interview with Javaid Iqbal, *supra* note 80.

148. First Amended Complaint & Jury Demand, *supra* note 22, at 21; Telephone Interview with Javaid Iqbal, *supra* note 80.

149. First Amended Complaint & Jury Demand, *supra* note 22, at 21.

150. *Id.* at 21.

151. *Id.* at 21.

152. *Id.* at 21–22.

153. *Id.* at 32.

154. *Id.* at 25; Interview with Javaid Iqbal, *supra* note 82.

each day.¹⁵⁵ Prison officials kept the light on nearly all the time—a light so strong that inmates referred to it as the “brain melter.”¹⁵⁶ MDC guards regularly called him a “terrorist,” a “killer,” a “Muslim bastard,” and a “Muslim killer.”¹⁵⁷ When taken to exercise on rainy days, Iqbal was left outside until drenched and then brought back to his cell where prison officials deliberately turned on the air conditioner.¹⁵⁸ On cold winter mornings, prison guards brought detainees, undressed, outside to the tenth floor of the MDC and then watched how they reacted to the freezing temperatures.¹⁵⁹ Iqbal says that he and other detainees repeated religious incantations to withstand the cold.¹⁶⁰ In the ADMAX SHU, strip and body-cavity searches were routine: Iqbal experienced them each morning as well as multiple times before and after visits to court or to the medical clinic.¹⁶¹ Deprived of adequate food and subjected to harsh treatment, Iqbal lost over forty pounds in detention.¹⁶²

Iqbal also recalled how the prison guards spoke of his religion. When the guards granted an inmate’s request for a copy of the Quran, they threw the Quran on the ground and shouted at the detainees.¹⁶³ Iqbal described the scene, unconsciously slipping into an American accent fifteen years later as he recalled their words:

And then, you know, they shout at us: “This is what you read? This is what makes you terrorists? This is what makes you terrorists?” Then they curse. “You guys are gonna get killed here. We make sure you guys get killed here because you killed our innocent people. You killed our innocent people. You’re gonna die here. You deserve to die here. We’re gonna turn your countries to [the] ground. We’re gonna make your countries miserable for [the] rest of their lives.”¹⁶⁴

During his six months in the K unit, Iqbal was hindered from meeting or communicating with his lawyers. He stated that López, his private criminal defense attorney, tried to visit him at the facility but was incorrectly told that Iqbal was not located there.¹⁶⁵ Iqbal further alleged that a correctional officer

155. First Amended Complaint & Jury Demand, *supra* note 22, at 3, 15.

156. Interview with Javaid Iqbal, *supra* note 82.

157. First Amended Complaint & Jury Demand, *supra* note 22, at 16.

158. *Id.*

159. Interview with Javaid Iqbal, *supra* note 82.

160. *Id.*

161. First Amended Complaint & Jury Demand, *supra* note 22, at 25.

162. *Id.* at 17.

163. Interview with Javaid Iqbal, *supra* note 82.

164. *Id.*

165. *Id.*; see also First Amended Complaint & Jury Demand, *supra* note 22, at 30 (“Mr. IQBAL’s attorney was turned away from the MDC several times, being falsely informed that Mr. IQBAL had been transferred to another facility.”); Plaintiff Iqbal’s Responses to Defendant Linda Thomas’s First Set of Interrogatories at 13–14, *Elmaghraby v. Ashcroft*, No. 04 CV 01809 JG SMG (E.D.N.Y. Nov. 10, 2009) (stating that López tried to visit but was turned away on one occasion); Plaintiff Iqbal’s

would sometimes disconnect the phone if he complained to his lawyers about conditions in the prison¹⁶⁶ and that he was allowed only one brief call to family in Pakistan during his stay in the ADMAX SHU.¹⁶⁷

Many of these allegations align with findings of the Justice Department Inspector General, which conducted more than one hundred interviews and obtained videotape evidence in its investigation of conditions at the MDC.¹⁶⁸ The Inspector General found the following: MDC detainees were confined to cells for at least twenty-three hours a day; exercise was offered on the exposed top floor of the MDC on cold winter mornings;¹⁶⁹ nearly twenty-four hours each day of illumination in the cells caused lack of sleep, depression, and panic attacks among the inmates;¹⁷⁰ and access to counsel was sometimes blocked.¹⁷¹ Moreover, the Inspector General substantiated allegations that MDC staff members slammed detainees into walls, twisted and bent detainees' arms and hands, and otherwise inflicted pain on detainees, while routinely calling them terrorists and killers.¹⁷² The abuse occurred despite the "compliant and non-combative" behavior of the September 11 detainees.¹⁷³ The Bureau of Prisons eventually disciplined several officers accused by detainees of abuse, largely in response to the Inspector General investigation, although the Justice Department did not bring criminal charges against any of them.¹⁷⁴

Supplemental to Defendant Linda Thomas' First Set of Interrogatories at 23, *Elmaghraby*, No. 04 CV 01809 JG SMG (stating that Iqbal received one visit from Lopez at the MDC and spoke with him on the phone on seven or eight occasions).

166. First Amended Complaint & Jury Demand, *supra* note 22, at 29.

167. Plaintiff Iqbal's Responses to Defendant Linda Thomas's First Set of Interrogatories, *supra* note 165, at 12.

168. See OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, SUPPLEMENTAL REPORT ON SEPTEMBER 11 DETAINEES' ALLEGATIONS OF ABUSE AT THE METROPOLITAN DETENTION CENTER IN BROOKLYN, NEW YORK 6-7 (2003).

169. See OFFICE OF THE INSPECTOR GEN., *supra* note 16, at 152.

170. *Id.* at 153-54.

171. *Id.* at 135-37.

172. OFFICE OF THE INSPECTOR GEN., *supra* note 168, at 28-30. Sixteen to twenty MDC staff members, "a significant number of the officers who had regular contact with the detainees," participated in the verbal and physical abuse. *Id.* at 8.

173. *Id.* at 13.

174. Of the individual officers whom Iqbal accused of assaulting him at the MDC, none were prosecuted in connection with his allegations or those of other post-9/11 detainees. See Nina Bernstein, *Officer Named in Abuse Suit Was Accused in Earlier Scandal*, N.Y. TIMES (May 7, 2004), <http://www.nytimes.com/2004/05/07/nyregion/officer-named-in-abuse-suit-was-accused-in-earlier-scandal.html> [<https://perma.cc/QBS3-KG78>] (noting that Justice Department decided not to prosecute correctional officers accused of abuse with respect to September 11 detainees). Some of these officers, however, were ultimately convicted of abuse in later cases involving other detainees: In 2007, a jury convicted Captain Salvatore LoPresti, then "[o]ne of the highest-ranking officers at the Metropolitan Detention Center," of conspiracy in planning and then covering up the beating of an inmate in a high-security unit. Alan Feuer, *High-Ranking Jail Officer is Convicted of Conspiracy in Beating*, N.Y. TIMES (Oct. 26, 2007), <http://www.nytimes.com/2007/10/26/nyregion/26abuse.html> [<https://perma.cc/2UDK-HU3U>]. Officers Angel Perez and Elizabeth Torres were sentenced for their role in assaulting another inmate in a separate incident. Press Release, U.S. Attorney's Office, E. Dist. of N.Y., Former Bureau of Prisons Correctional Officer Sentenced on Conviction Arising from Inmate Beating and Subsequent Cover-up

E. THE LEGAL CHALLENGE

Despite opposition from his family and harassment from society, Iqbal insisted on sharing his story and, when the opportunity arose, pursuing a legal challenge. Two organizations working with post-9/11 detainees, the Islamic Circle of North America and Amnesty International, connected Iqbal with Haeyoung Yoon of the Urban Justice Center, a public interest organization.²¹² She in turn enlisted Alexander Reinert of the private prisoner rights law firm Koob & Magoolaghan.²¹³ A separate lawsuit, *Turkmen v. Ashcroft*, was already underway on behalf of a class of male noncitizens of South Asian or Middle Eastern origin who had been detained for minor immigration violations,²¹⁴ but Iqbal was not part of that class because he had been detained on criminal charges. Iqbal says that his lawyers warned him “to think a thousand times” before deciding to sue.²¹⁵ He chose to sue because he wanted people to know the darker side of America: he saw the post-9/11 detentions as a reflection of systematic racism and imperialism that had also led to deadly U.S. interventions in Iraq, Afghanistan, and other Muslim countries.²¹⁶

His lawyers filed a complaint in the Eastern District of New York in May 2004 on behalf of Iqbal and a second man, Ehab Elmaghraby, an Egyptian Muslim who also alleged discriminatory confinement and abuse.²¹⁷ As the suit moved forward, Iqbal communicated with his lawyers from the “shelter” of his mobile shop in Faisalabad because his family disapproved of his litigation activities.²¹⁸ For Iqbal, a singular moment in the litigation occurred in early 2006, when he and several *Turkmen* plaintiffs returned to the United States to give depositions and undergo discovery-related medical exams.²¹⁹ Discovery against Ashcroft and Mueller had been stayed pending appeals of their motion

to dismiss, but the court had permitted discovery to proceed against lower level defendants not claiming qualified immunity.²²⁰ The United States had initially objected to bringing back the deported detainees, but the magistrate judge threatened to schedule discovery of the defendants first if the defendants did not agree to depose the plaintiffs in the United States.²²¹ Faced with that possibility and the potential cost of deposing the plaintiffs abroad,²²² the government agreed to admit Iqbal and other ex-detainees if they cleared extensive background investigations and received the approval of multiple federal agencies.²²³ According to the Center for Constitutional Rights, which represented the *Turkmen* plaintiffs, these depositions marked the first time that the U.S. government allowed individuals who had been barred from returning to the United States to enter the country to pursue a civil case.²²⁴

Still, as a condition of entry, the government required the plaintiffs to stay at an undisclosed New York hotel, under the custody of U.S. marshals.²²⁵ They could not have visits or phone or email communication, except with legal counsel, and they had to swear in advance that they did not fear returning to their countries of origin, a condition designed to preclude asylum claims.²²⁶ Despite the onerous security restrictions and his family’s fears that he might never return,²²⁷ Iqbal experienced his two-day deposition as a release: he “felt so light” because he had told government lawyers his story, and he believed that the truth behind the detentions would “spread all over the United States.”²²⁸

Shortly after the depositions, Iqbal's co-plaintiff settled his claims because of health and financial concerns.²²⁹ Iqbal continued alone, and in 2007, the Second Circuit affirmed the district court's refusal to dismiss claims against Ashcroft and Mueller.²³⁰ The following year, the Supreme Court granted certiorari.²³¹ After the Supreme Court decided in favor of Ashcroft and Mueller, Iqbal settled the case, with the United States paying him \$265,000 in exchange for a dismissal of all claims against all defendants.²³² Iqbal agreed to settle only when his lawyers implored him to do so in light of the significant legal obstacles that lay ahead.²³³

Iqbal had mixed feelings about the resolution of the case. The compensation helped Iqbal cover debts he had incurred from his failing mobile business and from surgery for a son born with a malfunctioning kidney.²³⁴ And he felt proud of his role in preserving the history of U.S. actions and in the knowledge that law students and courts would remember his name.²³⁵ He described how he shares the story of his legal challenge with his children:

Sometimes I open [the decision] on [the] Internet, so I tell my daughter, tell my kids, I say, "Look, this is your father. If I die tomorrow, remember your father. You know, seven pages. This is history. This is not a joke. And you should never feel ashamed of this—that your father got arrested. But feel proud of your father."²³⁶

But Iqbal deplored the fact that he never received an official acknowledgment of wrongdoing or a declaration that he was innocent of terrorism connections, which he believes would have helped clear his name in Pakistan.²³⁷ Nor did the resolution of his case come with any prospect of resettlement in a third country where he and his family could feel safe—a concern that has only intensified over time.²³⁸

B. RACE AND RELIGION IN INVESTIGATIVE AND ARREST DECISIONS

The most serious problem with the Court's discussion of the detainees, however, was not that the Court thought they were Arab Muslims, but that it assumed that either (1) profiling had not occurred or (2) any profiling that had occurred was rational and justified. In contrast to the first possible assumption, abundant evidence suggests that race, ethnicity, and religion—or perceptions as to those characteristics—drove many of the initial decisions to scrutinize those who ended up being classified as September 11 detainees. These facts belie any argument that the detentions were neutral at their inception and only disparate in their effect. And in contrast to the Court's implication that the detentions focused on those with a suspected relationship to terrorism, the facts suggest that, for many of the detainees, no individualized basis for suspicion existed

315. *Id.* at 1282–85.

316. Earlier American depictions of the enemy have also compounded bias by merging racial and religious stereotypes. Claims about Japanese-Americans' disloyalty during World War II blended racial and religious stereotypes of the Japanese, see *Korematsu v. United States*, 323 U.S. 214, 237 (1944) (Murphy, J., dissenting), as did assertions about Catholic immigrants in the mid-twentieth century, see DOUG SAUNDERS, *THE MYTH OF THE MUSLIM TIDE* 115–21 (2012).

317. See *supra* note 300 and accompanying text.

apart from observations of facially innocuous conduct and the perceived race or religion of the individuals. Far from a “legitimate” effort to arrest those who had a “suspected link to the attacks,”³¹⁸ it appears instead that federal officials detained many people who were simply brown and undocumented and who happened to fall under the gaze of law enforcement officers or fearful members of the public.

It does appear that the FBI had an individualized factual basis for suspicion of *some* immigrant detainees, at least at the outset. For instance, a May 2002 FBI list of “Special Interest Cases,” released in discovery, included some individuals who had lived with, attended flight school with, or otherwise directly associated with one or more of the hijackers.³¹⁹ Although none of the detainees were ultimately implicated in the attacks,³²⁰ the initial information in such cases included facts that would likely have created an investigative interest independent of racial or religious affiliation.

In many other cases, however, no such individualized factual basis for suspicion appears to have existed. The Inspector General report did not focus on the basis for investigative decisions³²¹ but nonetheless observed that the “leads that resulted in the arrest of a September 11 detainee often were quite general in nature, such as a landlord reporting suspicious activity by an Arab tenant.”³²² The report listed several examples of detainees who attracted scrutiny based on ordinary behavior tied to a racial descriptor. For instance, “several Middle Eastern men” were arrested as September 11 detainees when law enforcement authorities found pictures of famous buildings, including the World Trade Center, during traffic stops.³²³ Another noncitizen was classified as a September 11 detainee after someone reported to the FBI that the grocery store where the individual worked was “operated by numerous Middle Eastern men, 24 hours—7 days a week” and that there were “[t]oo many people to run a small store.”³²⁴

Widespread news accounts and human rights reporting likewise suggested that vague suspicions based on the perceived ethnicity or religion of individuals undergirded many investigatory and arrest decisions. A Human Rights Watch report described how tips from “spouses, neighbors, or members of the public” or chance encounters with law enforcement ensnared many immigrants.³²⁵ It detailed, for instance, the stories of two Somali men accosted as suspicious because they had kneeled to pray in a parking lot; of an Egyptian man detained after he asked a Newark police officer for directions; and of an Iranian citizen

318. *Ashcroft v. Iqbal*, 556 U.S. 662, 682 (2009).

319. See JTTF Special Interest Cases, *supra* note 134, at 6, 11.

320. SHIEKH, *supra* note 16, at 19.

321. OFFICE OF THE INSPECTOR GEN., *supra* note 16, at 3–4, 69.

322. *Id.* at 16.

323. *Id.*

324. *Id.* at 17.

325. See HUMAN RIGHTS WATCH, PRESUMPTION OF GUILT: HUMAN RIGHTS ABUSES OF POST-SEPTEMBER 11 DETAINEES 12–15 (2002).

stopped for speeding whose Muslim-sounding name apparently attracted the officer's notice.³²⁶ One journalist reported, based on interviews with FBI officers in New York, that "[i]t seemed that anyone who had ever seen a Muslim or suspected a neighbor of being a Muslim called in," and that FBI agents receiving such tips "tried to prioritize. . . . But mostly they went after everything."³²⁷ Indeed, the *Turkmen* plaintiffs alleged that law enforcement officers sometimes treated Muslims as essentially fungible: when officers following a tip regarding one woman learned that she was breastfeeding an infant, they agreed to arrest her husband instead.³²⁸

In the *Iqbal* oral argument, Chief Justice Roberts took issue with *Iqbal*'s lawyer's statement that individuals were "swept up" in the immigration or criminal justice system.³²⁹ But widespread reports of the detentions suggest that, for a significant number of detainees, that is exactly what happened: although they may well have violated immigration or criminal laws, they fell under suspicion only because of widespread public and law enforcement attention directed toward "Muslim-looking" immigrants in New York and elsewhere.³³⁰ The actual basis for the detentions, therefore, undermines the Court's depiction of a rational process of identifying those with suspected connections to terrorism.³³¹



In addition to proliferating through federal court opinions and legal briefs, the *Iqbal* narrative circulates through law school curricula. No civil procedure course would be complete without an explanation of the change in the pleading regime. The result is that, before most first-year law students take a course in constitutional law or equality jurisprudence, they learn *Iqbal*. Were *Iqbal* taught in constitutional law courses, perhaps it would be taught as part of a discussion of racial profiling, equal protection doctrine, or the withering critiques that the evolution of that doctrine has generated in recent decades.⁴²⁸ As it is, *Iqbal* appears in courses on procedure—and there is only so much time to analyze the underlying facts or substantive law assumptions of the decision when the procedural doctrine itself demands attention and critique. In sum, federal judges, litigants, and law students read *Iqbal* for its transformation of procedural law, but without necessarily recognizing or critiquing its basic narrative.

Iqbal may provide many lawyers and law students their only, or at least primary, exposure to the post-9/11 immigrant detentions—just as *Korematsu* is the key source for many lawyers' understanding of the internment of Japanese-Americans.⁴²⁹ The historical understanding they obtain from the decision—coupled with the Court's message that the detentions were likely legitimate—may predispose readers to view less suspiciously other calls for the profiling of immigrants in response to national security concerns. Views on how the government has responded in the past to security crises affect perspectives on contemporary questions. For instance, the view of most elites that the internment of Japanese-Americans was a grievous error continues to shape contemporary debates on racial and religious profiling, and some have argued that such views have prevented the government from engaging in new mass detentions of U.S. citizens after terrorist attacks.⁴³⁰ Although *Korematsu* has been roundly con-

the race or religion of individuals, especially immigrants, at least until and unless that decision comes to be seen as flawed on substantive grounds.⁴³¹

Moreover, although the lawyers and future lawyers who encounter *Iqbal* directly represent only a slice of the American public, their views may be particularly significant to contemporary debates on national security policy. Lawyers play a prominent role in making law and policy directly and in influencing public opinion. Since September 11, lawyers throughout the executive branch have exercised tremendous influence in the shaping of national security policy.⁴³² In addition, lawyers and legal scholars influence public opinion as members of influential elites. And public opinion operates as one of the few real constraints on national security policy in an era of increasing executive power.⁴³³

As the election of President Donald Trump raises the prospect of new dragnet programs to exclude or register Muslim immigrants, the perceptions of legal elites as to the legitimacy of the post-9/11 detentions may influence policymakers today.

431. It is difficult to say how large the effect of *Iqbal* might be. Legal readers, like others, receive many sources of information, opinion, and influence within and beyond legal texts. Researchers have studied the related question of whether Supreme Court decisions affect public opinion for thirty years and continue to reach mixed conclusions. See, e.g., James W. Stoutenborough et al., *Reassessing the Impact of Supreme Court Decisions on Public Opinion: Gay Civil Rights Cases*, 59 POL. RES. Q. 419, 420 (2006) (citing research by numerous scholars with conflicting conclusions and arguing that gay civil rights cases provide evidence of such an effect); see also Katerina Linos & Kimberly Twist, *The Supreme Court, the Media, and Public Opinion: Comparing Experimental and Observational Methods* at 3, 6 (unpublished manuscript), http://www.law.uchicago.edu/files/files/linos_twist_supreme_court_and_media.pdf [https://perma.cc/PB5X-CNC5] (citing conflicting studies and arguing, based on original survey and experimental studies, that court decisions upholding policies as constitutional can increase support for those policies under certain conditions). Some theoretical literature suggests that the Court may influence public opinion because citizens look to the Court for confirmation of their own views or because citizens without set prior views may take cues from the Court. See Stoutenborough, *supra*, at 420. This literature also notes that the Supreme Court might be viewed as particularly trustworthy because it is well regarded compared to other political institutions. *Id.* But even scholarship supportive of Supreme Court influence on public opinion also points to its strongly conditional nature, noting that the influence of Court decisions may depend on whether citizens actually receive information about a decision, the strength of their pre-existing views, the extent that the issue is controversial, and the extent and bias of media coverage. *Id.* The ability of any Court decision to influence legal readers—a subset of the public that is presumably more informed as to the Court's decisions but also possibly more skeptical—is likely dependent on a range of analogous conditions. For instance, just as media coverage influences how many members of the public understand and respond to Court decisions, civil procedure professors' approaches to teaching *Iqbal* may influence how students respond to it. Thus, the effect of *Iqbal* on legal audiences' perceptions of the detentions and profiling almost certainly will be conditional and varying. I argue that there is reason to believe that there is an effect but do not purport to assess the size of that contribution.

432. See, e.g., JACK GOLDSMITH, *THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION* 129–32 (2007). There is considerable disagreement, however, as to whether lawyers have done more to constrain or facilitate executive action. For a sample of this literature, see BRUCE ACKERMAN, *THE DECLINE AND FALL OF THE AMERICAN REPUBLIC* 87–116 (2010); JACK GOLDSMITH, *POWER AND CONSTRAINT: THE ACCOUNTABLE PRESIDENCY AFTER 9/11*, at 122–60 (2012); Trevor W. Morrison, Book Review, *Constitutional Alarmism*, 124 HARV. L. REV. 1688, 1688–1742 (2011).

433. See ERIC A. POSNER & ADRIAN VERMEULE, *THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC* 3–5 (2010).

2014 WL 51290
S.D. Texas,
Houston Division.

Perry COLEMAN, Plaintiff,
v.
JOHN MOORE SERVICES, INC., Defendant.

Jan. 7, 2014.

MEMORANDUM AND OPINION

LEE H. ROSENTHAL, District Judge.

*1 The plaintiff, Perry Coleman, sued his former employer, John Moore Services LP, alleging violations of the Fair Labor Standards Act for failure to pay overtime for hours worked in excess of 40 hours in a workweek. John Moore has moved to dismiss Coleman's amended complaint for failure to state an FLSA violation or FLSA employer status under Federal Rule of Civil Procedure 12(b)(6) and Rule 8(a)'s pleading standards.

Based on the pleadings; the motion, response, and reply; and the applicable law, this court finds that the complaint's allegations are inadequate and grants the motion to dismiss, without prejudice and with leave to amend.

I. The Allegations in the Amended Complaint

Coleman's amended complaint is terse. His FLSA allegations in his amended complaint are as follows:

6. The Plaintiff worked for Defendant from on or about January 2008 to on or about May 2012 as an electrician.
7. During one or more weeks of Plaintiff's employment with Defendant, Plaintiff worked in excess of forty (40) hours (overtime hours).
8. During one or more weeks of Plaintiff's employment with Defendant wherein Plaintiff worked overtime hours, Defendant failed to pay Plaintiff one and one-half times his regular rate of pay for each overtime hour worked.
9. The acts described in the preceding paragraph violate the Fair Labor Standards Act, which prohibits the denial of overtime compensation for hours worked in excess of forty (40) per workweek. Defendant willfully violated Plaintiff's rights under the FLSA.

Coleman seeks actual and compensatory damages. He also seeks liquidated damages for a willful FLSA violation.

John Moore moves to dismiss under Rule 12(b)(6) based on recent case law applying *Bell Atlantic Corporation v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) to similar bare-bones FLSA allegations. John Moore argues that Coleman's allegations that he worked in excess of 40 hours per week without being paid overtime are insufficient because they "merely parrots" the FLSA's text without supporting the overtime allegations with sufficient facts.

*2 In response, Coleman argues that the case law before and after *Twombly* and *Iqbal* support the sufficiency of his FLSA-violation allegations. He does not address the challenge to the coverage allegations. Coleman argues that the additional details can be obtained through discovery. John Moore replies by pointing out that some of the cases Coleman relies on are from 2009 and the more recent cases denying motions to dismiss had considerably more detailed pleadings than Coleman's complaint.

II. Analysis

On a Rule 12(b)(6) motion, a court must take the facts alleged in the complaint as true and draw all reasonable inferences in the plaintiff's favor. The court will not dismiss any claims unless the plaintiff has failed to plead sufficient facts to state a claim to relief that is facially plausible, *Bell Atl. Corp.*, 550 U.S. at 570, that is, one that contains "factual content that allows the court to draw the reasonable inference that the defendant is liable for the

misconduct alleged,” *Iqbal*, 556 U.S. at 678. The plaintiff must allege facts showing “more than a sheer possibility that a defendant has acted unlawfully.” *Id.* A complaint that offers only “labels and conclusions” or “a formulaic recitation of the elements of a cause of action will not do.” *Twombly*, 550 U.S. at 555.

A. The Allegation of an FLSA Violation

The FLSA states that for “employees engaged in interstate commerce ... no employer shall employ any of his employees ... for a workweek longer than forty hours unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.” 29 U.S.C. § 207(a)(1). To show a violation of the FLSA’s overtime requirements, a plaintiff must allege (1) that he was employed by the defendant; (2) that his work involved interstate activity; and (3) that he performed work for which he was undercompensated. John Moore argues that Coleman’s complaint fails to allege his claims or coverage with sufficient factual specificity. John Moore relies on two recent circuit cases, *DeJesus v. HF Management Services, LLC*, 726 F.3d 85 (2d Cir.2013) and *Pruell v. Caritas Christi*, 678 F.3d 10, 13 (1st Cir.2012).

In *DeJesus*, the Second Circuit agreed with the district court that the plaintiff failed to allege sufficient facts supporting allegations that she worked overtime without proper compensation. *DeJesus* “alleged only that in “some or all weeks” she worked more than ‘forty hours’ a week without being paid ‘1.5’ times her rate of compensation.” *DeJesus*, 726 F.3d at 89. Those allegations were “no more than [a] rephrasing [of] the FLSA’s formulation specifically set forth in section 207(a)(1).” *Id.* Because the “complaint [merely] tracked the statutory language of the FLSA, lifting its numbers and rehashing its formulation, but alleging no particular facts” her complaint was properly dismissed. *Id.* Plaintiff merely “repeated the language of the [FLSA],” without “estimat[ing] her hours in any or all weeks or provid[ing] any other factual context or content,” *Id.*

*3 Although plaintiffs are not required to provide an approximation of uncompensated overtime hours to survive a motion to dismiss FLSA overtime claims, the Second Circuit required the plaintiff to at least “allege 40 hours of work in a given workweek as well as some uncompensated time in excess of the 40 hours,” and noting that an approximation of hours “may help draw a plaintiff’s claim closer to plausibility,” but was clear that such an approximation was not required.

Before the Second Circuit’s analysis in *DeJesus*, district courts in the Second Circuit allowed threadbare paraphrasing of the FLSA’s statutory requirements to survive a motion to dismiss. *DeJesus* approved a district court’s decision to require some factual content or context beyond the elements of the statute. Cases decided in district courts in the Second Circuit after *DeJesus* have applied this requirement.

*4 Here, by contrast, Coleman’s complaint has no allegations that provide any factual context that form the basis for his claimed FLSA violation. The complaint merely alleges that “[during] one or more weeks of Plaintiff’s employment, Plaintiff worked in excess of forty (40) hours” and that during “one or more weeks ... Defendant failed to pay Plaintiff” the overtime rate. For the same reasons as the Second Circuit in *DeJesus*, this court finds that more is required of a plaintiff than an “all purpose pleading template” with allegations providing no factual context and no way for the court to determine that the plaintiff has stated a claim as opposed to repeating the statutory elements of the cause of action. The *DeJesus* court was careful to note that it was not requiring a plaintiff to plead a specific number of hours worked; “mathematical precision” was not the standard. But the court did not find it unfair or burdensome to require some factual allegations. “[I]t is employees’ memory and experience that lead them to claim in federal court that they have been denied overtime in violation of the FLSA in the first place. Our standard requires that plaintiffs draw on those resources in providing complaints with sufficiently developed factual allegations.” *DeJesus*, 726 F.3d at 88–91. Similarly, Coleman should be able to use his memory to flesh out the complaint with a factual context, before discovery has taken place.

John Moore points out that while Coleman cites cases denying motions to dismiss FLSA claims, the complaints in those cases provided facts that fairly put the defendant on notice of the basis of the claims but in [those cases] the plaintiff’s allegations indicated that her overtime claim was based on alleged misclassification as an independent contractor. Accordingly, the motion to dismiss the FLSA violation claim is granted, without prejudice and with leave to amend the complaint to provide a factual context, consistent with this opinion.

B. The Allegation of FLSA Coverage

John Moore contends that the complaint does not allege facts but rather merely recites the statutory elements of FLSA coverage. Coleman does not respond to this argument. His amended complaint alleges the following:

At all times pertinent to this complaint, Defendant John Moore, LP was an enterprise engaged in interstate commerce. At all times pertinent to this Complaint, Defendant regularly owned and operated businesses engaged in commerce or in the production of goods for commerce as defined by § 3(r) and 3(s) of the Act, 29 U.S.C. § 203(r) and 203(s). Additionally, Plaintiff was individually engaged in commerce, and his work was essential to Defendant's business.

*5 To survive a motion to dismiss, a complaint must allege facts that show coverage under the FLSA. "The FLSA guarantees overtime pay to employees engaged in the production of goods for commerce ('individual coverage') or employed in an enterprise engaged in commerce or in the production of goods for commerce ('enterprise coverage')." *Martin v. Bedell*, 955 F.2d 1029, 1032 (5th Cir.1992). "Commerce," under the FLSA, "means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof." 29 U.S.C. § 203(b).

The court agrees that the complaint does not sufficiently allege facts demonstrating individual or enterprise coverage. Rather than pleading specific facts that establish individual or enterprise coverage, Coleman recites the statutory elements of FLSA coverage or asserts generalized facts that do not relate to the coverage issue.

Because Coleman has failed to allege facts that, if taken as true, establish coverage under the FLSA, John Moore's Rule 12(b)(6) motion to dismiss is granted, without prejudice and with leave to amend to provide a sufficient factual basis consistent with this opinion.

2014 WL 4722706
N.D. Texas,
Dallas Division.

Kurtiss KIDWELL, Plaintiff,
v.
DIGITAL INTELLIGENCE SYSTEMS, LLC, d/b/a Disys, Defendant.

Signed Sept. 22, 2014.

MEMORANDUM OPINION AND ORDER

JANE J. BOYLE, District Judge.

*1 Before the Court is the Motion to Dismiss for Failure to State a Claim or, in the Alternative, Motion for a More Definite Statement, filed by Defendant Digital Intelligence Systems, LLC, d/b/a DISYS on March 17, 2014. After considering the Motion and the related briefings, the Court GRANTS Defendant's Motion to Dismiss but permits Plaintiff leave to amend his complaint to include allegations sufficient to inform Defendant of the parties' coverage under the FLSA. Accordingly, the Court DENIES Defendant's Motion for a More Definite Statement as moot.

I.

BACKGROUND

This is an action for unpaid overtime compensation under the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 201, *et. seq.* Plaintiff Kurtiss Kidwell ("Kidwell") alleges that he was employed by Defendant Digital Intelligence Systems, LLC d/b/a DISYS ("DISYS") as a national accounts recruiter from November 2012 through April 2013. Kidwell claims that during "one or more weeks" of his employment he worked in excess of forty hours but was not paid overtime. *Id.* Accordingly, he filed suit in this Court on October 8, 2013. Several months later, on February 3, 2014, Kidwell filed his First Amended Complaint, seeking actual and compensatory damages, liquidated damages, as well as attorneys' fees and costs. On March 17, 2014, DISYS filed its present Motion to Dismiss, or in the Alternative, Motion for a More Definite Statement.

II.

LEGAL STANDARD

A. Rule 12(b)(6) Motion to Dismiss

Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, 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). Rule 12(b)(6) authorizes the court to dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." Fed.R.Civ.P. 12(b)(6). In considering a Rule 12(b)(6) motion to dismiss, "[t]he court accepts all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir.2007). To survive a motion to dismiss, a plaintiff must plead "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009). "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.* "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Id.* When well-pleaded facts fail to achieve this plausibility standard, "the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Id.* at 679 (internal quotation marks and alterations omitted).

B. Rule 12(e) Motion for a More Definite Statement

*2 Rule 12(e) allows a party to "move for a more definite statement of a pleading to which a responsive pleading is allowed" when it is "so vague or ambiguous that the party cannot reasonably prepare a response." Fed.R.Civ.P. 12(e). "When a party moves for a more definite statement, a court must determine whether the complaint is such that a party cannot reasonably be required to frame a responsive pleading." *Ash Grove Tex., L.P. v. City of Dallas*, No. 3:08-CV-2114-O, 2009 WL 3270821, at *7 (N.D.Tex. Oct.9, 2009). "[M]otions for a more definite statement are generally disfavored," and district courts have

1 3 5

"significant discretion" when considering them. *Id.* (internal citations and quotations omitted).

III. ANALYSIS

DISYS seeks dismissal, or alternatively, a more definite statement, because Kidwell "failed to plead facts ... sufficient to support his claims for individual relief" under the FLSA. Specifically, DISYS argues Kidwell does not offer sufficient facts regarding DISYS's employer status, the alleged overtime violations, and coverage under the FLSA.

A. The Allegations of Employer Status under the FLSA

The Court first considers DISYS's argument that Kidwell has failed to plead sufficient facts to demonstrate that an employer-employee relationship existed between them. DISYS contends that Kidwell's allegations fail to satisfy the "economic reality" test set out by the Fifth Circuit and do not provide facts establishing DISYS's employer status.

In order "[t]o be bound by the requirements of the Fair Labor Standards Act, one must be an 'employer.'" *Donovan v. Grim Hotel Co.*, 747 F.2d 966, 971 (5th Cir.1984) (citing 29 U.S.C. §§ 206-07). Under the FLSA, the term "employer" "includes any person acting directly or indirectly in the interest of an employer in relation to an employee." *Lee v. Coahoma Cnty.*, 937 F.2d 220, 226 (5th Cir.1991) (quoting 29 U.S.C. § 203(d)). The Supreme Court has determined that the FLSA's definition of "employer" is to be interpreted expansively. *Falk v. Brennan*, 414 U.S. 190, 195, 94 S.Ct. 427, 38 L.Ed.2d 406 (1973). Thus, "[t]he term employer includes individuals with managerial responsibilities and 'substantial control over the terms and conditions of the [employee's] work.'" *Lee*, 937 F.2d at 226 (quoting *Falk*, 414 U.S. at 195).

*3 The Fifth Circuit uses the "economic reality" test to evaluate whether an individual or entity possesses such operational control with respect to the employment relationship. *Gray v. Powers*, 673 F.3d 352, 354, 357 (5th Cir.2012). In applying this test, the court considers whether the alleged employer: "(1) possessed the power to hire and fire the employees, (2) supervised and controlled employee work schedules or conditions of employment, (3) determined the rate and method of payment, and (4) maintained employment records." *Id.* at 355 (citations omitted). "While each element need not be present in every case," the individual must have control over at least certain aspects of the employment relationship. *Id.* at 357 ("While the Fifth Circuit 'has on several occasions found employment status even though the defendant-employer had no control over certain aspects of the relationship,' it does not follow that someone who does not control any aspect of the employment relationship is an employer.>").

While Kidwell's Amended Complaint does not provide details describing how DISYS oversaw his work, the Court concludes that the allegations are sufficient to support a reasonable inference of operational control by DISYS and an employer-employee relationship between the parties. Kidwell alleges he "worked for Defendant from November 2012 through April 2013 as a national accounts recruiter"; "his work was essential to Defendant's business"; and "[d]uring ... Plaintiff's employment with Defendant ... Defendant failed to pay Plaintiff." At the very least, Kidwell has asserted that he was employed by DISYS, DISYS was in control of his method of payment, and DISYS failed to pay him. *See Hoffman v. Cemex, Inc.*, No. H-09-3144, 2009 WL 4825224, at *3 (S.D.Tex. Dec.8, 2009) (finding that similarly simple allegations in an FLSA complaint were "all factual allegation[s]—not legal conclusions—and, if proven, they give rise to a plausible claim for relief"). Kidwell's allegations, taken as true, are sufficient to qualify DISYS as an employer under the FLSA, and therefore state a claim against it.

Accordingly, the Court finds that Kidwell has alleged sufficient facts to demonstrate that an employer-employee relationship existed between him and DISYS.

B. The Allegations of FLSA Overtime Violations

*4 The Court next considers DISYS's argument that Kidwell has failed to satisfy the pleading requirements for the alleged FLSA overtime violations because he offers no factual context for his claims and "must at least allege an estimate of the number of hours worked without adequate compensation." In response, Kidwell insists that he pled sufficient facts to put DISYS on notice that it is being sued for overtime wage violations.

Allegations of a complaint must be sufficient to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (quoting *Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957)). "Moreover, it cannot be the case that a plaintiff must plead specific instances of unpaid overtime before being allowed to proceed to discovery to access the employer's records." *Solis v. Time Warner Cable San Antonio, L.P.*, No.

10-CA-0231-XR, 2010 WL 2756800, at *2 (W.D.Tex. July 13, 2010).

Taking Kidwell's factual allegations regarding the overtime violations as true, the Court finds that Kidwell has pled "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570.⁵ In his pleadings, Kidwell has specified the name of the employee asserting the statutory violation, the employee's job title while working for DISYS, and the six-month time period during which he allegedly worked over forty hours without being paid time-and-a-half. Doc. 5, Pl.'s Am. Comp. 1-2 (noting that "Plaintiff worked for Defendant from November 2012 through April 2013"). Kidwell's complaint presents similar allegations regarding overtime pay and is therefore sufficient to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555 (quoting *Conley*, 355 U.S. at 47).

C. The Allegations of FLSA Coverage

*5 The Court turns to the issue of the parties' coverage under the FLSA, examining both Kidwell's individual coverage and DISYS's enterprise coverage. "The FLSA guarantees overtime pay to employees engaged in the production of goods for commerce ('individual coverage') or employed in an enterprise engaged in commerce or in the production of goods for commerce ('enterprise coverage')." *Martin v. Bedell*, 955 F.2d 1029, 1032 (5th Cir.1992) (citing 29 U.S.C. § 207(a)(1)). "Either individual or enterprise coverage is enough to invoke FLSA protection." *Id.* (emphasis omitted). Because coverage is an element of an FLSA claim, a plaintiff must allege facts that show coverage under the FLSA in order to survive a motion to dismiss.

Kidwell alleges both individual and enterprise coverage. Doc. 5, Pl.'s Am. Comp. 1-2. In addition to stating that he worked for DISYS as a national accounts recruiter, the relevant portion of the Amended Complaint states:

[a]t all times pertinent to this complaint, DIGITAL INTELLIGENCE SYSTEMS, LLC d/b/a DISYS, LLC, was an enterprise engaged in interstate commerce. At all times pertinent to this Complaint, Defendant regularly owned and operated businesses engaged in commerce or in the production of goods for commerce as defined by § 3(r) and 3(s) of the Act, 29 U.S.C. § 203(r) and 203(s). Additionally, Plaintiff was individually engaged in commerce and his work was essential to Defendant's business.

Id. DISYS argues Kidwell's allegations supporting the overtime claim are insufficient because the Amended Complaint does not allege any specific facts regarding interstate commercial activity, but merely recites the statutory elements of FLSA coverage.

1. Individual Coverage

The Court first addresses the issue of Kidwell's individual coverage under the FLSA. To demonstrate that individual coverage exists, Kidwell must allege facts that give rise to a reasonable inference that he was engaged in commerce or in the production of goods for commerce. 29 U.S.C. §§ 206(a), 207(a); *Morrow*, 2011 WL 5599051, at *3. The test to determine whether an employee is "engaged in commerce" inquires "whether the work is so directly and vitally related to the functioning or an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it rather than an isolated activity." *Williams v. Henagan*, 595 F.3d 610, 621 (5th Cir.2010).

*6 Even though Kidwell's Amended Complaint indicates "national accounts recruiter" as his job title, Kidwell has failed to plead specific facts that establish individual coverage. Despite the presence of the term "national" in his job title, Kidwell offers neither a description of the nature of his work nor a clarification as to how such work engaged him in interstate commerce. *See Foreman v. Foodtronix, LLC*, No. 3:14-CV-0656-BF, 2014 WL 2039055, at *2 (N.D.Tex. May 16, 2014) (finding that plaintiff's allegation that he worked as a "technical support agent" and his assertion that his employer engaged in interstate commerce did not demonstrate that plaintiff's work engaged him in interstate commerce); *Morrow*, 2011 WL 5599051, at *3 (holding that plaintiff's allegation that he provided electrician services to defendants' clients sufficiently described his work but did not demonstrate "how that work engage[d] him in interstate commerce"). Kidwell recites the elements of coverage as articulated in the FLSA, but he fails to relate them to the specifics of his work responsibilities. Thus, the Court concludes that the Amended Complaint fails to allege sufficient facts to establish individual coverage.

2. Enterprise Coverage

Lastly, the Court examines the issue of enterprise coverage under the FLSA. To satisfy the pleading requirement, Kidwell must allege facts that give rise to at least a reasonable inference that DISYS is an "enterprise engaged in commerce or in the production of goods for commerce." 29 U.S.C. §§ 206(a), 207(a). An "enterprise that engages in commerce or in the production of goods for commerce" is an enterprise that:

(i) has employees engaged in commerce or in the production of goods for commerce, or that has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person; and (ii) is an enterprise whose annual gross volume of sales made or business done is not less than \$500,000 (exclusive of excise taxes at the retail level that are separately stated) [.]

*7 29 U.S.C. § 203(s)(1)(A).

To demonstrate the existence of coverage under the FLSA, Kidwell alleges that "[a]t all times pertinent to [the Complaint], [Defendant] was an enterprise engaged in interstate commerce" and "regularly owned and operated businesses engaged in commerce or in the production of goods for commerce as defined by ... 29 U.S.C. § 203(r) and § 203(s)."

Kidwell does not otherwise allege that any other of DISYS's employees engaged in interstate commerce or handled, sold, or worked on goods or materials that have been moved in or produced for commerce. 29 U.S.C. § 203(s)(1)(A)(i). Rather, Kidwell solely alleges that DISYS was "engaged in interstate commerce." Doc. 5, Pl.'s Am. Comp. 1. These allegations provide no factual context for Kidwell's claims and are merely "formulaic recitations" of the elements of an FLSA cause of action. *Twombly*, 550 U.S. at 555 (citations omitted). Therefore, the Court finds that Kidwell has not articulated grounds from which individual or enterprise coverage under the FLSA can be discerned.

In sum, because Kidwell has failed to plead sufficient facts that, if taken as true, would establish coverage under the FLSA, he has failed to state a claim upon which relief can be granted. Accordingly, DISYS's Motion to Dismiss is **GRANTED**.

IV. CONCLUSION

For the reasons stated above, DISYS's Motion to Dismiss is hereby **GRANTED**. Normally, courts will afford a plaintiff the opportunity to overcome pleading deficiencies, unless it appears that the defects are incurable. Since this Order is the Court's first review of Kidwell's allegations, the Court concludes that Kidwell should be given the opportunity to overcome the deficiencies in its pleadings.

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2013 WL 2189952
S.D. Texas,
Victoria Division.

Jose O GUZMAN, Plaintiff,
v.
HACIENDA RECORDS AND RECORDING STUDIO, INC., et al, Defendants.

May 20, 2013.

MEMORANDUM AND ORDER

GREGG COSTA, District Judge.

*1 This is a copyright infringement case involving two Tejano songs. Plaintiff José O. Guzman alleges that Defendants copied the "original lyrics and music" in his song, "Triste Aventurera," by producing, selling, and distributing records containing a substantially similar, yet differently named song, "Cartas de Amor." Docket Entry No. 1 ¶¶ 13, 16. Defendants now seek dismissal pursuant to Rule 12(b)(6), or alternatively a more definite statement pursuant to Rule 12(e), on the ground that Guzman failed to plead the infringement allegations with sufficient specificity. Having reviewed the parties' briefs and the applicable case law, the Court **DENIES** Defendants' motion.

The crux of Defendant's motion is whether Guzman's Complaint meets the pleading standard set forth by the Federal Rules of Civil Procedure. Rule 8(a)(2) requires that a claim for relief contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed.R.Civ.P. 8(a)(2). To survive a motion to dismiss under Rule 12(b)(6), a claim for relief must be "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) (citing *Twombly*, 550 U.S. at 556).

Defendants argue that Guzman's Complaint fails to meet this standard, because it does not identify the exact elements of "Triste Aventurera" that "Cartas de Amor" copied. But by identifying the two works at issue and alleging that Defendants copied the original lyrics and music in his copyrighted work, Guzman pleaded a claim that was plausible on its face. *Kelly v. L.L. Cool J.*, 145 F.R.D. 32 (S.D.N.Y.1992), is informative. In that case, the court rejected arguments nearly identical to Defendants' when evaluating a complaint alleging that L.L. Cool J. copied parts of plaintiff's song "Jingling Baby" in his 1991 hit "Mama Said Knock You Out":

Broad, sweeping allegations of infringement do not comply with Rule 8. Plaintiff's complaint however, narrows the infringing act to the publishing and distribution of two songs, "Mama Said Knock You Out" and "Jingling Baby" in 1991, which is sufficiently specific for the purpose of Rule 8. Defendant argues that it is not possible to determine from the complaint the nature of the claimed infringement. However, such a level of specificity is not required in a complaint.

Id. at 36 n. 3 (citations omitted).

Though *Kelly* was decided before the Supreme Court clarified the federal pleading standard in *Twombly* and *Iqbal*, under those decisions "the height of the pleading requirement is relative to circumstances." *Cooney v. Rossiter*, 583 F.3d 967, 971 (7th Cir.2009) (Posner, J.); *see also Kadmos v. Stevens*, 706 F.3d 843, 844 (7th Cir.2013) (noting that "some [claims] require more explanation than others to establish their plausibility" (citations omitted)); *Hamilton v. Palm*, 621 F.3d 816, 817 (8th Cir.2010) ("*Twombly* and *Iqbal* did not abrogate the notice pleading standard of Rule 8(a)(2)."). Complex claims, like those in *Twombly* and *Iqbal*, require more specificity than simple ones, such as Kelly's and Guzman's. This makes sense given that *Twombly* and *Iqbal* are "designed to spare defendants the expense of responding to bulky, burdensome discovery unless the complaint provides enough information to enable an inference that the suit has sufficient merit to warrant putting the defendant to the burden of responding to at least a limited discovery demand." *In re Text Messaging Antitrust Litig.*, 630 F.3d 622, 625 (7th Cir.2010). To the extent *Twombly* and *Iqbal* are animated by concerns that vague allegations will lead to broad, "fishing expedition" discovery, that concern is not present here because the complaint provides notice of an allegation

limited to the copying of a three-minute song. The complaint cabins discovery to discrete items, such as the sales data relating to the allegedly infringing song, the creation and production of the allegedly infringing and infringed songs, and not much else.

*2 Defendants have cited no post-*Iqbal* cases imposing a higher pleading requirement in the copyright context than the *Kelly* court did. After Guzman filed his response to Defendants' motion, the Court held a telephone conference in which defense counsel represented that, in a recent case in this District involving Beyoncé, the court required plaintiffs to identify the constituent elements copied in an allegedly infringed song in order to meet the federal pleading standards. The Court allowed Defendants to file a supplemental brief containing the Beyoncé case and any similar cases, but Defendants' brief only cited *Armour v. Knowles*, No. 4:05-cv-2407 (S.D.Tex.), in which the plaintiff voluntarily amended her complaint against Beyoncé. Docket Entry No. 25 at 5. Contrary to Defendants' position, "even post-*Twombly*, Rule 8 requires only the pleading of the basic elements of an infringement claim, albeit allegations that rise above the speculative level. There is no heightened pleading requirement for copyright-infringement claims." 6 *Patry on Copyright* § 19:3 (2013); *see also Schneider v. Pearson Educ., Inc.*, No. 12 Civ. 6392(JFO), 2013 WL 1386968, at *3 (S.D.N.Y. Apr.5, 2013) (ruling that plaintiff's infringement allegations, "though not brimming with details, are specific enough to meet the requirements of Rule 12(b)(6) and Rule 8" and citing cases).

In sum, Guzman has adequately stated a claim for copyright infringement. He has pleaded sufficient content to establish the elements of a copyright claim—namely, ownership of a valid copyright and copying of constituent elements of his original work. *See Positive Black Talk Inc. v. Cash Money Records Inc.*, 394 F.3d 357, 367 (5th Cir.2004) (stating elements of copyright infringement claim), *abrogated on other grounds by Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 130 S.Ct. 1237, 176 L.Ed.2d 18 (2010). The Complaint provides sufficient notice to allow Defendants to defend against the claim and to limit discovery. Accordingly, Defendants' Motion to Dismiss and in the Alternative, Motion for More Definite Statement (Docket Entry No. 20) is **DENIED**.



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Practice Problem for Notice Pleading – Problem #1

Essay Question #1 (from Fall 2009 exam)
(total – 33 1/3 points)

Adel Guirguis brought suit in federal district court against his former employer, Movers Specialty Services, Inc. (“Movers”), alleging violations of Title VII of the Civil Rights Act of 1964. Guirguis, who is of Arab descent and a native of Egypt, contends that Movers terminated his employment on the basis of his national origin.

Paragraphs 7 through 9 of the complaint, which read as follows, contain the entirety of Guirguis’s factual averments:

7. Plaintiff began working for the defendant in 2000 in the accounting department. Plaintiff was employed by the defendant from that day until February 14, 2006, when he was terminated by the defendant in violation of his civil rights.
8. Plaintiff is foreign born, is an Arab, having been born in Egypt on June 20, 1947.
9. On February 14, 2006, plaintiff was terminated by the defendant in violation of his rights due to his national origin, having been born in Egypt.

Movers sought dismissal, charging that his complaint failed to state a claim upon which relief could be granted. How should the trial court rule?

Practice Problem For Notice Pleading- Problem # 2

From Fall 2012 Exam

Question 2 (worth 40% of grade). Your answer should not exceed 1500 words.

Plaintiff brings a complaint in federal district court. She alleges the following:

1. On June 8 2010, Plaintiff was severely and permanently injured when she fell at Dollar General Store at 171 Ambriar Plaza in Amherst County, Virginia. The store was operated by Defendant Dollar General.
2. Plaintiff fell due to the negligence of Defendant and its employees who failed to remove the liquid from the floor and had negligently failed to place warning signs to alert and warn Plaintiff of the wet floor. Defendant, through its employees, breached its duty to warn Plaintiff of the dangerous wet floor.
3. As a direct result of Defendant's employee's negligence, acting in the scope of their employment, Plaintiff was severely and permanently injured. She has incurred medical and hospital bills and suffered great pain. Also, her ability to earn an income has been hindered.
4. Plaintiff seeks a judgment in the amount of \$300,000 against Defendant Dollar General.

Defendant moves to dismiss the complaint for failure to state a claim under Fed. R. Civ. P. 12(b)(6). In its motion, Defendant argues that the complaint lacks any allegation of how the liquid came to be on the floor and that it does not allege that Defendant knew or should have known about the liquid in advance of the plaintiff's alleged fall.

Under Virginia law, store owners owe their customers the duty to exercise ordinary care as their invitees upon their premises. Ordinary care is not met as to an owner who knew or should have known of a dangerous condition on the premises and failed to exercise due care to warn others of the dangerous condition or remove it within a reasonable time. However, a landowner is under no duty to a person reasonably expected to be on the premises to warn against an open and obvious condition on the premises.

How should the court rule?

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Domico Madrigal,

Plaintiff,

v.

Kerry Inc., a foreign corporation, d/b/a
Kerry Specialty Ingredients,

Defendant.

Court File No. 05-CV-01673 JNE/JGL

**DEFENDANT'S ANSWER TO THE
COMPLAINT**

Kerry Inc. ("Kerry"), by its attorneys, hereby answers Plaintiff's Complaint.

1. Kerry admits the allegations in paragraph 1.
2. Kerry denies that "Kerry Specialty Ingredients" has been registered as an assumed name or that Kerry has not registered with the Minnesota Secretary of State as a foreign corporation. Kerry is without knowledge or information sufficient to form belief as to truth of the allegation that it is conducting business "throughout" the State of Minnesota in that such terminology is unclear. Kerry admits it does business in Minnesota and admits the remaining allegations of paragraph 2.
3. Kerry denies that Plaintiff became employed by it at its Albert Lea facility on or about February 4, 1984. Kerry admits that Plaintiff was employed by Freeborn Foods on or about that date. Kerry is without knowledge or information sufficient to form a belief as to the position in which Freeborn Foods originally employed Plaintiff. Kerry admits that when it purchased the Albert Lea facility from Armour Foods, Inc. in October, 2000, it hired Plaintiff.
4. Kerry admits that during the time Plaintiff was employed by it he performed his job in a manner sufficient to retain his position. Kerry is without knowledge or information sufficient to form a belief as to the remaining allegations of paragraph 4.

5. Kerry is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 5 in that the "job" referenced is not identified. Kerry admits that prior to approximately November 22, 2004 Plaintiff could perform the essential functions of the jobs he held with or without reasonable accommodation.

6. Kerry admits that records in its possession apparently generated during Plaintiff's employment with Freeborn Foods indicate that on or about June 22, 1989 Plaintiff injured the L-5 disc, that he sought and received workers' compensation benefits, had back surgery, and returned to work at Freeborn Foods under medical work restrictions. Kerry is without knowledge or information sufficient to form a belief as to the truth of the remaining allegations of paragraph 6.

7. Kerry is without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 7.

8. Kerry denies that Plaintiff was terminated. Kerry admits that until Plaintiff's layoff on or about November 22, 2004, he worked in the "Intake" position referenced.

9. Kerry admits that in September 2004, in an economy measure, Kerry eliminated the job position previously held by Plaintiff, and at least one other job position held by other persons. Kerry admits that, pursuant to the requirements of the applicable collective bargaining agreement with Plaintiff's union, it posted a Notice of Job Openings for a "Janitor/Intake Operator." This new position combined the Janitor and Intake Operator jobs. The intake operator component of the position included a requirement, as an essential function of the job, that incumbents, upon occasion, perform lifting of as much as 55 lbs. Kerry admits further that, following negotiations with Plaintiff's union, on or about December 17, 2004 it modified the

41. Kerry denies the allegations of paragraph 41.

AFFIRMATIVE DEFENSES

To the extent Plaintiff's Complaint alleges injuries covered by the Minnesota Workers' Compensation Act (Minn. Stat. Section 176 et seq.), he is barred by the exclusivity provisions of that Act (Minn. Stat. Section 176.031).

2 Plaintiff's prayer for back pay and/or for monetary damages is barred in whole or in part by his failure to mitigate his damages.

3 To the extent Minnesota law does not allow trial by jury, Plaintiff's request for a jury trial should be stricken.

4 Plaintiff's claim is barred in whole or in part since, pursuant to the applicable Collective Bargaining Agreement with his union, on or about December 17, 2004, he bid on two open positions which he apparently believed were within his medical restrictions, but did not receive either position because he was not the senior bidder.

WHEREFORE, Defendant Kerry, Inc., prays that Plaintiff's Complaint be dismissed with prejudice, and that Kerry be awarded its costs, attorneys' fees, and other relief the court deems fit.

DATED: August 12, 2005

KERRY INC. d/b/a KERRY SPECIALTY
INGREDIENTS, Defendant

s/ John J. McDonald, Jr.
John J. McDonald, Jr. (#136815)
Bradley J. Lindeman (#0298116)
MEAGHER & GEER P.L.L.P.
33 South Sixth Street, Suite 4200
Minneapolis, Minnesota 55402-3788
(612) 338-0661

and

Exercise On Timing and Waiver for Answer and Pre-Answer Defenses

Assume the following facts:

Penelope brings suit against Dan Dugan in the United States District Court for the Southern District of Texas. Her case is filed on August 1, 2014. Twenty days later, on August 21, you, Dugan's lawyer, file a pre-answer motion in which you assert the defense that process was not properly served. About a week later, you realize that Dugan has a potentially viable defense of lack of personal jurisdiction he could have asserted. You also conclude that another potential party, Trudy, is arguably an indispensable party who should be in the case. You have not yet filed an answer on Dugan's behalf and the court has not yet ruled on the motion you filed. Questions:

1. Can you assert the defense of lack of personal jurisdiction in another pre answer motion?
2. Can you assert the defense of failure to join an indispensable party in another pre answer motion?
3. Could you instead assert either defense in the answer?
4. Would it matter whether, at the time you filed the pre answer motion to dismiss for insufficient service that neither you nor your client were aware of the facts on which the additional defenses would be based?

Now change the facts, above, as follows:

Penelope brings suit against Dan Dugan in the United States District Court for the Southern District of Texas. Her case is filed on August 1, 2014. Twenty days later, on August 21, on behalf of Dugan you, his lawyer, file a pre-answer motion in which you assert the defense that venue is improper. When that motion is denied, you file an answer on Dugan's behalf. Six months later, you realize that there is no subject matter jurisdiction. Questions:

1. Can you assert this defense in a motion to dismiss? If so, what specific rule would you use?
2. What if you didn't realize the problem with subject matter until after the case had gone to trial and a verdict was entered against Dugan? Could you make this argument for the first time on appeal?

Now change the facts, above, as follows:

Penelope brings suit against Dan Dugan in the United States District Court for the Southern District of Texas. Her case is filed on August 1, 2014. Twenty days later, on August 21, on behalf of Dugan you, his lawyer, file an answer. A month later, however, you realize that there is a defense of insufficiency of service of process and another defense of failure to state a claim on which relief can be granted. Are you allowed to raise either of these defenses now? If so, how would you do so?

Rule 11 Questions to Discuss

1. What is the primary function of Rule 11?
2. Are there other professional standards that govern lawyer conduct beyond Rule 11? What are they?
3. What is the scope of Rule 11? To what things does it apply?
4. What is Rule 11's certification requirement?
5. In what ways is the 1993 version of Rule 11 (current version) less restrictive of lawyer and client activity than the 1983 version? (There are at least 5 or 6)
6. In what ways is the 1993 version of Rule 11 more restrictive of lawyer and client activity than the 1983 version? (There are 2 or 3)
7. Contrast the current version of Rule 11 with the legislation that has been proposed a number of times in Congress known as the Lawsuit Abuse Reduction Act (your materials discuss the LARA of 2011). What are the differences you see between LARA and Rule 11?
8. Do you think the following example would satisfy Rule 11(b)(3)?

P brings suit against D claiming that D, his neighbor, caused P to develop cancer by spraying a chemical pesticide on his flowers. P does not allege that any medical evidence links his cancer to the pesticides that were sprayed.
9. Do you think the following example would satisfy Rule 11(b)(4)?

P brings suit against D for injuries caused by a defective product that D manufactured. Assume that an internal investigation D conducted before suit revealed that its manufacture of the product was defective. If P was not aware of that internal investigation at the time she brought suit, may D deny the allegation under Rule 11(b)(4)?

10. May P make the allegation of a defective product under Rule 11(b)(3) if P was not aware of that internal investigation, and P had no other evidentiary support for the allegation that D's product was defectively manufactured?
11. What limits does Rule 11(c) impose on the consequences of violating the certification requirements of the rule?
12. How does the safe harbor of Rule 11(c) work?

115TH CONGRESS
1ST SESSION

H. R. 720

IN THE SENATE OF THE UNITED STATES

MARCH 13, 2017

Received; read twice and referred to the Committee on the Judiciary

AN ACT

To amend Rule 11 of the Federal Rules of Civil Procedure
to improve attorney accountability, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Lawsuit Abuse Reduc-
3 tion Act of 2017”.

4 **SEC. 2. ATTORNEY ACCOUNTABILITY.**

5 (a) **SANCTIONS UNDER RULE 11.**—Rule 11(c) of the
6 Federal Rules of Civil Procedure is amended—

7 (1) in paragraph (1), by striking “may” and in-
8 serting “shall”;

9 (2) in paragraph (2), by striking “Rule 5” and
10 all that follows through “motion.” and inserting
11 “Rule 5.”; and

12 (3) in paragraph (4), by striking “situated”
13 and all that follows through the end of the para-
14 graph and inserting “situated, and to compensate
15 the parties that were injured by such conduct. Sub-
16 ject to the limitations in paragraph (5), the sanction
17 shall consist of an order to pay to the party or par-
18 ties the amount of the reasonable expenses incurred
19 as a direct result of the violation, including reason-
20 able attorneys’ fees and costs. The court may also
21 impose additional appropriate sanctions, such as
22 striking the pleadings, dismissing the suit, or other
23 directives of a non-monetary nature, or, if warranted
24 for effective deterrence, an order directing payment
25 of a penalty into the court.”.

1 (b) RULE OF CONSTRUCTION.—Nothing in this Act
2 or an amendment made by this Act shall be construed to
3 bar or impede the assertion or development of new claims,
4 defenses, or remedies under Federal, State, or local laws,
5 including civil rights laws, or under the Constitution of
6 the United States.

Passed the House of Representatives March 10,
2017.

Attest:

KAREN L. HAAS,
Clerk.

THE CASE AGAINST THE LAWSUIT ABUSE REDUCTION ACT OF 2011

*Lonny Hoffman**

I. INTRODUCTION

On March 9, 2011, Lamar Smith, Chairman of the House of Representatives Committee on the Judiciary, introduced H.R. 966, the Lawsuit Abuse Reduction Act.¹ On the same day Charles Grassley, the ranking Republican member of the Senate Judiciary Committee, sponsored an identical measure in the upper chamber.² Animated by concern over rising costs and abuses in federal civil cases, the bills stiffen penalties against lawyers who file sanctionable papers in federal court by legislatively amending Rule 11 of the Federal Rules of Civil Procedure, the general certification and sanctions standard for federal civil cases.³

This is not the first time that Congress has tried to reform the federal sanctions rule as a means of curbing litigation costs and abuse. Since 1995, bills regularly have been introduced that would toughen Rule 11, but to date, none have been successfully enacted.⁴

However, buoyed by sweeping victories last November that gave Republicans majority control of the House and a much greater voice in the Senate,⁵ the prospects for legislative reform of Rule 11 are better now than they have ever been before.

Enacted in 1938 as part of the original rules, Rule 11 remained unchanged for half a century.⁶ Then, in 1983, spurred by perceptions of a growing litigation crisis, judicial rulemakers proposed significant amendments to the rule.⁷ One of the most important changes was that the rule was made mandatory so that courts were required "to impose sanctions whenever a violation of the rule was found to have occurred."⁸ This and other amendments in 1983 signaled that the rule was now meant to hold lawyers more accountable for improper conduct in federal cases.⁹ It soon became apparent, however, that the 1983 version of Rule 11 not only failed to deter groundless litigation practices but actually led to greater litigation costs and abuses in many cases by incentivizing voluminous, wasteful satellite litigation over sanctions. Finally convinced that the 1983 experiment with Rule 11 was ill-advised,

rulemakers amended the rule again a decade later to soften its sharpest edges.¹⁰ Although most in the legal profession welcomed the 1993 amendments, some thought the revisions to the rule weakened a powerful deterrent against wrongful litigation practices.¹¹ Seizing on these concerns, the Republican Party made reform of Rule 11 one of the highlighted parts of the sweeping legislative reforms they proposed in the Contract with America leading up to the 1994 mid-term elections.¹²

With awareness of this history, and frustrated by their repeated failures over the last fifteen years to stiffen penalties against lawyers, sponsors introduced the Lawsuit Abuse Reduction Act of 2011 (LARA) with high hopes of finally succeeding in their ambitions. The first of the changes LARA makes to Rule 11 is to require the imposition of sanctions whenever the district judge finds that the rule was violated, mirroring the mandatory form of the 1983 version of the rule.¹³ This sanction provision is a significant change to existing law. Indeed, except for the decade in which the 1983 version of Rule 11 was in force, federal judges have always been vested with discretion to decide which violations of the rule warrant punishment and which do not.¹⁴ LARA's second retrogressive reform eliminates the existing safe harbor provision in the current rule.¹⁵ The safe harbor, put in place in 1993, protects against the imposition of sanctions if the filing alleged to be in violation of the rule is withdrawn in a timely manner.¹⁶ The third reform would make the sanctions rule even more potent than it was thirty years ago. The proposed legislation does so by adding an express proviso authorizing—the better word may be *encouraging*—judges to award monetary sanctions, including attorney's fees and costs incurred by the other side, when the rule is violated.¹⁷ This change departs drastically not only from current law but even from that earlier version of the rule inasmuch as compensation never has been the express purpose of the rule.¹⁸ Indeed, one of the main criticisms of the 1983 version of Rule 11 that prompted its revision was that, notwithstanding that rulemakers intended the rule to be for deterrence, litigants and courts frequently misused it for compensatory, cost-shifting purposes.¹⁹

II. EXTENSIVE EMPIRICAL RESEARCH ON RULE 11
DEMONSTRATES THAT A RETURN TO THE 1983 VERSION OF THE
RULE WOULD INCREASE COSTS AND DELAYS AND FOSTER
GREATER LITIGATION ABUSE

A vast body of empirical evidence has been collected relating to the 1983 version of Rule 11. As Georgene Vairo observes in her leading treatise on Rule 11, "Few amendments to the Federal Rules of Civil Procedure have generated the controversy and study occasioned by the 1983 amendments to Rule 11."²⁰ As a result, we are fortunate today not to have to consider amendments to the rule in the same empirical vacuum in which the rulemakers in 1983 previously operated. There have been at least nine major empirical studies and numerous reports of the 1983 version of Rule 11.²¹ Several books, a great many law review

articles, and a myriad of legal and lay newspaper stories have also examined it.²² Of course, there were also literally thousands of reported judicial opinions on the subject,²³ though more than anything else these probably serve best to underscore the difficulties wrought by the 1983 amendments. In any event, drawing on all of these sources today, there is much we can say with a great deal of certainty about the 1983 Rule 11 experience. Indeed, the available empirical evidence is so persuasive that it has produced a remarkable degree of agreement across the political spectrum that the 1983 sanctions rule was one of the most ill-advised procedural experiments ever tried. This moment is one of those occasions, regrettably rare, when we do not have to legislate blindly; history can be our guide.

A. *The 1983 Version of the Rule Produced an Avalanche of Unwelcome Satellite Litigation*

If the objective was to substantially increase the sheer volume of requests for sanctions, then by that measure the 1983 version of Rule 11 certainly did not disappoint. In less than ten years, the rule generated nearly 7,000 reported sanctions decisions.²⁴ And those were just the cases that were easily identified because they were reported. When unreported decisions are taken into account, the actual amount of Rule 11 activity dwarfed the reported figures, as the country's most respected legal practitioner on the subject, Greg Joseph, has emphasized.²⁵ Indeed, a task force organized by the Third Circuit to study Rule 11 by looking at both reported and unreported cases found that in the Third Circuit less than 40% of the Rule 11 decisions were published or available on Lexis or Westlaw.²⁶ The

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contrast with the paucity of decisions under the original version of Rule 11 could not have been sharper. Moreover, these figures also stand in contrast with the marked drop off in Rule 11 cases since the 1993 amendments to Rule 11 went into effect (more on that, in Part III, below).

Sanctions practice took on a life of its own under the 1983 rule. After passage of the 1983 amendments, a cottage industry arose with lawyers routinely battling over the minutiae of all of the new obligations imposed. All too often this produced satellite litigation within the case itself over one or the other lawyer's (or both lawyers') alleged noncompliance with the rule. One side would move to sanction his opponent who might respond, in kind, by filing a sanctions motion on the basis that the filing of the original sanctions motion was, itself, sanctionable.²⁷ And on and on it would go. All of this would take place as a side show to the trial of the case itself, with limited resources and time spent dealing with these tertiary sanctions issues. Georgene Vairo summarized the "avalanche" of satellite litigation unleashed by the 1983 amendments:

Beginning in 1984, the volume of cases decided under the rule increased dramatically. By the end of 1987, the number of reported Rule 11 cases had plateaued. Even though the number of reported cases leveled off, motions under the amended rule continued to be made routinely, especially by defense counsel, as many attorneys were unable to pass up the opportunity to force their adversaries to justify the factual and legal bases underlying motions and pleadings. Indeed, one study found that in a one-year period, almost one-third of the respondents to the survey reported being involved in a case in which Rule 11 motions or orders to show cause were made. The same study showed that almost 55% of the respondents had experienced either formal or informal threats of Rule 11 sanctions.²⁸

The reasons that explain the significant increase in sanctions motions that occurred are varied but certainly at least include that Rule 11 in its 1983 form came to be seen—contrary to the rulemakers' intent—as a fee-shifting device that could be used for compensatory purposes. In consequence, even the rule's strongest backers began to realize that the satellite litigation the rule was causing, and the compensatory fee-shifting effect that

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the frequent award of monetary damages was producing, were greatly troubling developments.²⁹

B. The 1983 Rule Was Applied Inconsistently and Inequitably

1. *Civil Rights and Employment Discrimination Plaintiffs, in Particular, Were Impacted the Most Severely Under the 1983 Version of Rule 11.* The available empirical evidence persuasively demonstrates the profound discriminatory effects of the 1983 version of Rule 11. Sanctions were sought and imposed against civil rights and employment discrimination plaintiffs, in particular, more often than other litigants in the civil courts, with the greatest disparities in treatment observed in the first five years of the amended rule's existence. In a study conducted in 1988, researchers with the Federal Judicial Center (FJC) found that civil rights and employment discrimination plaintiffs were the subject of sanctions motions more than 22% of the time, well out of proportion to the percentage of such cases filed.³⁰ Civil rights and employment discrimination plaintiffs were sanctioned more than 70% of the time sanctions were sought, a significantly higher rate than in cases against other kinds of plaintiffs.³¹

One reason why civil rights claimants and other resource-poor plaintiffs, like employment discrimination claimants, faced much tougher treatment under the 1983 rule is that, as applied by many courts, the 1983 version was used as a cost-shifting device. The Advisory Committee itself eventually realized that under the 1983 rule, the poorest victims and their lawyers faced the greatest threat from monetary sanctions. In its discussions about amending the rule to overcome the prior experience, the Advisory Committee recognized the particular problem cost-shifting could create in "cases involving litigants with greatly disparate financial resources."³² In addition, the 1993 Advisory Committee

Notes make reference to the problems posed by cost-shifting for "an impecunious adversary."³³

The 1983 experience also reflects that judges disproportionately enforced the prefiling factual investigation requirement of the rule against civil rights plaintiffs and their lawyers.³⁴ In many of these decisions, sanctions were awarded even though factual information vital to asserting a claim was in the sole possession of the defendant. There are many illustrations of this perverse problem, as Professor Carl Tobias carefully documented in a series of penetrating articles about the rule's disparate impact on civil rights claimants.³⁵ Professor Tobias recognized that lack of access to proof was a problem that bedeviled these claimants especially:

Civil rights actions, in comparison with private, two-party contract suits, implicate public issues and involve many persons. Correspondingly, civil rights litigants and practitioners, in contrast to the parties and lawyers they typically oppose, such as governmental entities or corporate counsel, have restricted access to pertinent data and meager resources with which to perform investigations, to collect and evaluate information, and to conduct legal research.³⁶

As he documented, courts often did not take the imbalance in access to proof into account in deciding whether to impose sanctions under the 1983 version of the rule.³⁷ One illustration of this is *Johnson v. United States*, a case involving the sexual assault of an infant, in which the dissent took the majority to task for imposing an unrealistic pleading burden on the plaintiff, given her obvious lack of access to proof before discovery:

The [majority] opinion notes that the complaint does not state facts indicating that Ojeda had "committed past offenses or manifested previous aberrant behavior that his employers should have detected." . . .

Nowhere does the majority suggest how plaintiff, presuit, could ever obtain such information. One authoritative source, Ojeda's personnel file, is in the government's control, but it usually would be regarded as quasi-confidential and unavailable to an outsider. As a practical matter, therefore, plaintiff's attorney would probably be unable to obtain the information required by the majority to satisfy Rule 11 without some form of compelled discovery, discovery which would be available only if the action should survive the inevitable Rule 12 motion by the government. As a result, requiring plaintiff to plead the additional information mentioned in the majority opinion erects a "Catch 22" barrier: no information until litigation, but no litigation without information.³⁸

A still further factor that contributed to the discriminatory impact of the 1983 version of Rule 11 was that a sanctions legal standard is inherently flexible, which is to say it is highly susceptible to different interpretations. Of course, indeterminacy is not unique to sanctions rules, but for reasons that are perhaps still not entirely understood, the failure of the law in this area to develop evenly and coherently fell particularly hard on civil rights and employment discrimination plaintiffs.³⁹ As discussed below in Part III, these problems would have continued to exist with the 1993 rule but for the adoption of the safe harbor provision in that rule, which ameliorates at least some of the harsh effects of the rule's inherent indeterminacy.

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Finally, it is worthwhile to say something about an additional factor involved in some civil rights cases that triggered disproportionate sanctions under the 1983 version of the rule: that is, the assertion by some of these claimants of novel theories of law. Although it is not clear how often civil rights claimants in the 1980s asserted legal theories that can be correctly characterized as "novel," the available empirical evidence demonstrates that judges were not very good at distinguishing legitimate assertions of new legal theories from failures to conduct adequate pre-filing investigations.⁴⁰ What is also clear is that judges applying the 1983 rule were less likely to give civil rights claimants the benefit of the doubt, especially in the first five years after the rule's amendment.⁴¹

Further, the empirical evidence also suggests that the 1983 version of Rule 11 deterred the filing of meritorious cases. When asked, a substantial number of lawyers who were surveyed (nearly 20% of respondents) reported that as a result of increased use of the 1983 version of Rule 11, they were warier of bringing meritorious cases because of a fear that the rule would be inappropriately applied to them.⁴² Based on similar survey results it obtained in its 1988 study, the FJC researchers were led to conclude that "whether it can be classified as a chilling effect or not, lawyers reported a cautionary effect of Rule 11."⁴³

A last, related lesson to mention from the 1983 experience with Rule 11 is that by allowing sanctions to be sought after a case had been resolved on the merits, the 1983 rule further exacerbated the rule's discriminatory impact. One of the leading researchers in the civil litigation field, Thomas Willging, was the first to recognize that application of the rule was subject to the problem of "hindsight bias," as it is often called.⁴⁴ In his 1988 study of Rule 11 for the FJC, Willging commented that when sanctions are sought contemporaneously with or after the dismissal of a case on the

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merits, "there may be a tendency to merge the sanctions issue with the merits" and that "[c]ommon sense and empirically tested data demonstrate that hindsight can have a powerful effect on legal decisions."¹⁵ Another keen observer, Professor Charles Yablon, made the same point some years later:

A judge deciding a motion for sanctions is looking at a case that has already been adjudicated and found to be without merit. Although the law requires her to evaluate the case as of the time it was initially brought, the judge, in fact, knows a lot more than the lawyer did at that time. She knows the facts and legal rules that were actually presented to the court, and which ones turned out to be dispositive.¹⁶

"Like a reader who already knows how the mystery turns out," Yablon analogized, "she may discern significance in facts that the lawyer deciding whether to file a claim had no reason to find especially compelling. This hindsight can affect a judge's view of what constitutes 'reasonable inquiry.'"¹⁷ By conflating how the case ultimately was resolved with what should have been a cabined assessment of what the party knew (or should have known) at the time of filing, the 1983 rule increased the risk that a civil rights or employment discrimination claimant would be sanctioned. Thankfully, this problem was ameliorated by the 1993 amendments and, specifically, the addition of the safe harbor provision in Rule 11(c).

2. Plaintiffs Were Targets of Sanctions Far More Often than Defendants and Were Sanctioned at Strikingly Higher Rates. The evidence also shows that under the 1983 version of Rule 11, plaintiffs were more often the target of sanctions motions than defendants. Far more troubling, the empirical evidence also shows that plaintiffs were sanctioned at strikingly higher rates. Notwithstanding possible legitimate explanations for the findings, the sheer magnitude of the disparity raises serious questions of fairness in terms of how the rule was applied that must be confronted.

A 1988 study found that plaintiffs were the target of sanctions motions in 536 of the 680 cases examined (or 78.8% of the total).¹⁸ Of the reported Rule 11 cases, a violation was found 57.8% of the

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time.⁴⁹ However, the 1988 study found that plaintiffs were ruled to be in violation of Rule 11 more frequently (46.9%) than defendants (10.9%).⁵⁰ The Third Circuit task force also found that under the 1983 version of the rule, plaintiffs overall were more likely to be sanctioned than defendants (finding a 3:1 ratio of sanctions imposed).⁵¹ The starkest disparities were revealed by a later study conducted by the FJC in 1991 which looked at both reported and unreported cases in five different judicial districts.⁵² Examining the cases in which sanctions were imposed, the FJC researchers found that plaintiffs were sanctioned at astonishingly higher rates than defendants. The table below from the 1991 FJC study⁵³ illustrates the disparities:

Table 20
Orders imposing Rule 11 sanctions: targeted "side" of litigation

	D. Ariz.	D. D.C.	N.D. Ca.	E.D. Mich.	W.D. Tex.
Number of rulings imposing sanctions against:					
Plaintiff's side	35	17	34	33	34
Defendant's side	3	5	4	8	21
Other	6	0	4	0	1
Total	44	22	42	41	56
As percentage of all rulings imposing sanctions					
Plaintiff's side	80%	77%	81%	80%	61%
Defendant's side	7%	23%	9%	20%	38%
Other	14%	0%	9%	0%	2%

Whatever may be said about these findings, it is difficult to credibly defend a rule that produces such strikingly disparate results. Unavoidably, the findings raise serious fairness concerns about how the 1983 version was applied.

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C. *The 1983 Version of Rule 11 Increased Costs and Delays by Encouraging Rambo-Like Litigation Tactics*

Yet another unfortunate result of the 1983 amendments is that they increased costs and delays by encouraging "[t]he Rambo-like use of Rule 11 by too many lawyers," as Professor Georgene Vairo explained.⁵⁴ Similarly, in their treatise, *The Law of Lawyering*, Geoffrey Hazard and William Hodes note that it was frequently said by critics of the 1983 rule that it "has been a major contributing factor in the rise of so-called 'Rambo tactics' and the breakdown of civility and professionalism."⁵⁵

Representative of a view many shared at the time, one court in 1991 bemoaned the incentive the rule provided to litigators "to bring Rule 11 motions and engage in professional discourtesy, preventing prompt resolution of disputes, the trial court's primary function."⁵⁶ Another emphasized the distraction that the volume of satellite litigation over sanctions motions produced, commenting that "[t]he amendment of Rule 11... has called forth a flood of... collateral disputes within lawsuits, unrelated to the ultimate merits of the cases themselves...."⁵⁷ The sentiment was widely felt. The FJC's 1991 study found that more than half of the federal judges and lawyers surveyed thought that the 1983 version of Rule 11 made the problems of incivility among lawyers much worse.⁵⁸ The findings of the 1992 survey by the American Judicature Society showed that even higher percentages of lawyer respondents believed the 1983 version of the rule put great strain on relations among lawyers.⁵⁹

In light of the rulemakers' professed desire in 1983 to improve the efficiency of civil litigation process, it is ironic that, by encouraging Rambo-litigation tactics by lawyers during this unfortunate decade, the 1983 version of Rule 11 had the effect of increasing costs and delays and impeding efficient merit-based resolution of cases.

D. *The 1983 Version of Rule 11 Was Not an Effective Means for Reducing Cost, Delay, and Abusive Litigation Activity*

Finally, and independently of the unintended consequences the rule's amendments produced, the empirical evidence also

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shows that there is little reason to put faith in the assertion that the 1983 version of Rule 11 was effective in addressing the perceived cost, delay, and abuse problems that prompted reformers to act. A 1991 FJC study revealed that few judges polled thought the 1983 version of the rule was "very effective" in deterring groundless pleadings.⁶¹ The FJC's 1995 study of Rule 11 similarly found that most federal judges and lawyers were opposed to returning Rule 11 to its 1983 version.⁶² As will be seen below, a more recent study (in 2005) found even higher levels of consensus among judges that the 1983 version was not an effective means for reducing costs and delays and for addressing abusive litigation conduct.⁶³ Instead, judges and others in the profession report that separate procedural tools, including active judicial management of cases and expeditious rulings on motions to dismiss at the pleading stage or for summary judgment, are much more effective for dealing with the problems of cost, delay, and groundless litigation.⁶⁴

III. THERE IS NO SUPPORT FOR THE ASSERTION THAT THE
1993 AMENDMENTS CAN BE BLAMED FOR ANY PROBLEMS THAT
DO EXIST WITH FEDERAL CIVIL LITIGATION

We have seen the serious difficulties that attended the 1983 revision of Rule 11. In the next Part, I will show that LARA can also be opposed on the ground that sponsors fail to demonstrate that the 1993 amendments to Rule 11 can be blamed for any problems that do exist today with federal civil litigation.

In the years after the 1983 amendments of Rule 11 went into effect, criticism of it grew in volume and intensity.⁶⁵ By 1989, the Advisory Committee could not ignore the criticisms any longer. The Advisory Committee commissioned a second study by the FJC to evaluate the rule.⁶⁶ Then, in the summer of 1990, the

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Committee announced a "Call for Comments" from the bench and bar, which produced more criticisms and suggestions than the Committee had ever received before in its half-century existence.⁶⁶ One of the primary criticisms lodged was that the 1983 version actually made the problem of costly litigation worse because of all of the satellite sanctions litigation unrelated to the merits of the underlying case.⁶⁷ A second, frequently voiced complaint was that the 1983 rule was applied nonuniformly and inconsistently by judges.⁶⁸ A third and fourth theme echoed over and over again was, respectively, that the rule disproportionately hurt civil rights plaintiffs and their counsel, and that the rule worsened civil relations among lawyers.⁶⁹

In February 1991, the Committee held a public hearing in which testimony from judges, lawyers, and academics was taken.⁷⁰ The criticism had a powerful effect on the Committee, which promptly issued an interim report, that concluded that "in light of the intensity of criticism—the process of possible revision should not be delayed."⁷¹ The criticisms of the 1983 version of Rule 11, the Advisory Committee concluded, "have sufficient merit to justify considering specific proposals for change."⁷² Accompanying its 1992 recommendation that the rule be amended again to remedy the prior revisions made, the Advisory Committee commented that among its many unfortunate effects, the 1983 version of Rule 11 "impacted plaintiffs more frequently and severely than defendants."⁷³ All too often, it resulted in the imposition of monetary sanctions, which had the effect of turning the rule into a *de facto* "cost-shifting" rule, a result that incentivized lawyers to abuse the sanctions rule. Occasionally, the rule proved problematic for those asserting novel legal theories or claims for which more factual discovery was necessary, and it disincentivized lawyers from backing away from positions they could no longer support. In addition, the rule sometimes caused conflicts between attorneys and clients and, more frequently, among lawyers.⁷⁴

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In light of their concerns, the rulemakers amended the rule in 1993 to ameliorate the documented effects of the prior version. What is most critical to point out here is that, in backing away from the 1983 version, the rulemakers did not regress to the pre-1983 rule, but instead sought "to strike a fair and equitable balance between competing interests, remedy the major problems with the rule, and allow courts to focus on the merits of the underlying cases rather than on Rule 11 motions."⁷⁵ Said more simply, the rulemakers improved upon the rule so that the rampant and abusive Rule 11 motion practices were curtailed while ensuring that the rule still could deter unwanted litigation practices.

One of the key changes in 1993 was to replace the mandate that sanctions must be imposed if a violation of the rule is found with a grant of discretion to federal judges to decide when to impose sanctions, and to what extent.⁷⁶ Additionally, if sanctions were to be imposed, the 1993 amendments emphasized that the purpose of sanctions is deterrence, not compensation.⁷⁷ This latter reform was significant because it was designed to discourage the incentive that the prior rule created to seek sanctions for monetary gain.

A further, key reform in 1993 was the addition of what is known as the "safe harbor" provision, which protects against the imposition of sanctions if the filing alleged to be sanctionable is withdrawn in a timely manner. The safe harbor does not protect against court-imposed sanctions or from the various other rules, statutes, and disciplinary authorities beyond Rule 11 that can be invoked to deter and punish counsel who act wrongfully in civil litigation.⁷⁸ Nevertheless, the addition of the safe harbor has been credited with successfully reducing the incidence of abusive Rule 11 sanctions practice, a salutary result felt especially by those claimants who were impacted most severely by the 1983 rule.⁷⁹ The addition of the safe harbor is also significant because it

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fundamentally alters one key problem observed with the 1983 version of Rule 11—namely, that it had the effect of disincentivizing the withdrawal of sanctionable filings because, as the Advisory Committee put it, “parties were sometimes reluctant to abandon a questionable contention lest that be viewed as evidence of a violation of Rule 11.”⁸⁰

Beyond these specific points, experience since 1993 has shown that the current rule works admirably well and has engendered little complaint. The evidence shows that the rate of filing of sanctions motions has dropped off considerably post-1993. While lawyers are still sanctioned for wrongful conduct under Rule 11, there is no longer a scourge of frivolous Rule 11 motions being filed.⁸¹ At the same time, this drop in meritless Rule 11 motion practice has not been accompanied by an increase in groundless litigation practices. To this point in particular, evidence gathered by several researchers, including Danielle Kie Hart, demonstrates that after the current version of Rule 11 went into effect in 1993, there was an increased incidence of sanctions being imposed under other laws, including 28 U.S.C. § 1927 and pursuant to the court’s inherent powers.⁸² Meanwhile, Rule 11 has continued to be used as a means of regulating wrongful lawyer conduct that contravenes the rule. Consider, for instance, the data from one of the most active federal judicial districts. In the Southern District of New York, in the same time period that there were slightly fewer than two hundred § 1927 motions for sanctions, there were nearly twice as many Rule 11 motions sought.⁸³ This one example, which typifies the patterns found in other districts, underlines that both Rule 11 and other existing sanctioning and disciplinary laws are available for addressing wrongful lawyer conduct. Finally, as I discuss further in Part IV, we must also be mindful that beyond sanctions rules and laws, other—and far more effective—tools exist for dealing with cost and delay in litigation that are regularly employed by courts in managing their dockets.

Judges and lawyers overwhelmingly report that they oppose attempts to restore Rule 11 to its 1983 form. The FJC’s 1995 study of Rule 11 showed that a majority of judges and lawyers are opposed to amending Rule 11 to bring back the 1983 version of the

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rule.⁸⁴ Then a 2005 survey conducted by the FJC even more starkly illustrated the strong support within the profession that the current version of Rule 11 enjoys.⁸⁵ More than 80% of the 278 district judges surveyed shared the view that "Rule 11 is needed and it is just right as it now stands."⁸⁶ An even higher percentage (87%) preferred the existing rule to the 1983 version.⁸⁷ Equally strong support (86%) existed for the safe harbor provision in Rule 11(c), while more than 90% opposed changing the rule to make the imposition of sanctions mandatory for every Rule 11 violation.⁸⁸

IV. LARA IS NOT NEEDED BECAUSE THERE ARE MANY AVAILABLE
ALTERNATIVES FOR MANAGING CIVIL LITIGATION COSTS AND
ABUSES

By focusing exclusively on Rule 11, LARA's sponsors overlook the fact that both the existing Rule 11, as well as many other provisions in the existing rules, serve the purpose of managing federal litigation and deterring, punishing, and otherwise addressing abusive litigation practices. Of course, problems with particular cases still exist and, unavoidably, will always exist. Rules, alone, cannot eliminate all difficulties. However, the fundamental point that LARA's sponsors miss is that existing rules can and are used effectively by courts every day to adequately monitor federal civil cases.

Since the focus of LARA is on sanctioning lawyers, we can start there. Existing Rule 11 requires that all factual contentions that are plead must contain "evidentiary support."⁸⁹ When a pleading is brought without evidentiary support, sanctions can be sought and imposed if the pleader does not withdraw the offending allegations.⁹⁰ Moreover, Rule 11 is not the only source of legal authority for regulating lawyer conduct. Rule 26(g), which was enacted in 1983 as part of the same package of amendments that stiffened Rule 11, imposes a steep certification obligation on lawyers with regard to discovery disclosures, requests, responses, and objections.⁹¹ The provision was designed as a "deterrent to both

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excessive discovery and evasion” and to require lawyers “to stop and think about the legitimacy of a discovery request, a response thereto, or an objection.”⁵² Although the 1983 version of Rule 11 was repealed, under Rule 26(g) sanctions are still mandatory for violations of this section.⁵³ In addition, after a motion to compel has been filed, sanctions for discovery abuse can be imposed under Rule 37.⁵⁴ More broadly still, lawyers are regulated through other law, including 28 U.S.C. § 1927, as well as under an array of other, even more specific provisions.⁵⁵ Of course, the court also possesses inherent power to impose sanctions when they are deemed appropriate.⁵⁶ In sum, there are a plethora of authorities by which lawyers are held accountable and may be sanctioned when their conduct warrants it, under existing law. These authorities, which LARA sponsors have failed to acknowledge, cannot be squared with the bald assertion that the existing Rule 11 is inadequate for regulating lawyer conduct in the federal courts.

But sanctions rules are far from the only means for managing litigation costs and abuses. The discovery rules themselves provide powerful means for controlling costs and abuses. For more than a decade, Rule 26 has required that parties make mandatory disclosures at various stages in the case.⁵⁷ These mandatory disclosures are expressly designed to reduce discovery costs and avoid unnecessary skirmishes over groundless objections to routine discovery.⁵⁸ Moreover, while the rules obviously contemplate liberal discovery, important restrictions exist on discovery rights. For instance, presumptive limits on the amount of discovery now exist, including limits on the number of written interrogatories and the number and length of oral depositions.⁵⁹

Even more specifically, the rules authorize judges to protect parties from unnecessarily expensive and burdensome discovery. One way this goal is accomplished is by the foundational requirement in Rule 26(b)(2) that the discovery sought must be proportional with the burden imposed. Thus, when the "discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive," the court has wide discretion to limit the discovery sought.¹⁰⁰ So too can it limit discovery when it is sought too late in the case.¹⁰¹ Perhaps most importantly, Rule 26(b)(2)(C)(iii) provides that discovery can be limited when "the burden or expense of the proposed discovery outweighs its likely benefit."¹⁰²

Another vital provision by which discovery is controlled is Rule 26(c), which allows for the entry of protective orders to protect against "annoyance, embarrassment, oppression, or undue burden or expense."¹⁰³ For instance, if documents are sought that cover a period of time longer than relevant to the claims in the case that has been brought, a protective order can be issued.¹⁰⁴ The rule also protects against production of information protected by, for example, trade secret protection. Courts effectively employ this rule to protect against discovery abuses.¹⁰⁵

Even before the discovery phase, there are many procedural tools available for managing litigation and, where appropriate, dismissing cases even before the discovery stage is reached. If a pleading is filed that is too vague to understand, Rule 12(e) is available. If a pleader files a pleading that "is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading," this rule authorizes an order directing the party to plead a more definite statement of the claim.¹⁰⁶

Separate from vagueness, Rule 12(b)(6) is another powerful procedural rule for obtaining dismissal before discovery. Indeed, it is nothing short of astonishing that in urging Rule 11's amendment, LARA's proponents do not mention that in the last few years the Supreme Court has increased the availability of dismissals before discovery under Rule 12(b)(6).¹⁰⁷ The decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* were justified by the Court—and, not coincidentally, hailed by these same reformers—precisely because the motion to dismiss for failure to state a claim was seen as the appropriate rule for filtering out groundless cases before they reach the pleading stage.¹⁰⁸

Beyond existing rules, the Judicial Conference continues to monitor the state of civil litigation practice through its Standing Committee and Advisory Committee.¹⁰⁹ The Judicial Conference remains closely engaged in the effort to ensure the federal courts are run efficiently and fairly. Consider, as one important example, the major Conference held last summer at Duke University that was organized by the Advisory Committee for the Civil Rules.¹¹⁰ That Conference exemplifies the Advisory

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Committee's serious focus on rulemaking and its commitment to solicit and receive input from the rich diversity of experience in the profession. Having heard concerns about costs, delays, and burdens of civil litigation in the federal courts, the Advisory Committee designed the Conference "as a disciplined identification of litigation problems and exploration of the most promising opportunities to improve federal civil litigation."¹¹¹ The result of these efforts was the production of a large body of empirical data, as well as much thoughtful commentary and discussions, by a diverse group of individuals and organizations.

One of the clearest messages the Committee took away from the Duke Conference was that participants (who represented a wide range of lawyers, business interests, judges, and academics) believed that better utilization of existing tools was vital for effective case management and weeding out of nonmeritorious litigation. The report of the Advisory Committee following the Conference makes this point:

Conference participants repeatedly observed that the existing rules provide many tools, clear authority, and ample flexibility for lawyers, litigants, and the courts to control cost and delay. Conference participants noted that many of the problems that exist could be substantially reduced by using the existing rules more often and more effectively.¹¹²

Of course, there was also measured support expressed for revising some of the existing rules (with the discussion primarily focused on the rules governing pleading and discovery practice), though even here most participants recognized that the existing procedural framework was fundamentally sound.¹¹³ What may be most relevant, for present purposes, is that although the two-day Conference was attended by more than two hundred observers and invited guests (a group which included many members of the business community and defense bar), not a single one of the participants expressed any support—either in oral statements made at the Conference or in their written submissions—for strengthening Rule 11 along the lines contemplated by the proposed legislation.¹¹⁴

The lack of any serious discussion at the Conference about amending Rule 11 is not the least bit surprising. Although there are certainly strong divisions within the profession over civil litigation reform, the well-known experience with the prior rule has produced remarkable agreement across the political spectrum that the rule committee's decision in 1983 was an "ill-considered, precipitous step," as Professor George Cochran once succinctly described it.¹¹⁵