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Employment Litigation: Pursuing and Defeating Pre-Trial Motions to Dismiss

Leveraging Iqbal Pleadings Requirements and Summary Judgment Standards

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1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Legal Developments Affecting Motions to Dismiss and Strategies for Employers

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Michele L. Maryott

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The Dynamic Duo: *Twombly* and *Iqbal*

***Bell Atlantic Corporation v. Twombly* set the standard:**

- ❖ Supreme Court held in context of antitrust claim that Rule 8 requires sufficient facts to “state a claim to relief that is plausible on its face”
- ❖ “Formulaic recitation of elements” is not enough
- ❖ Supreme Court: this standard “does not require heightened fact pleading”

Bell Atlantic Corporation v. Twombly, 550 U.S. 544
(2007)

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The Dynamic Duo: *Twombly* and *Iqbal*

***Ashcroft v. Iqbal* clarifies the *Twombly* standard:**

- ❖ Facial plausibility exists “when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” ~ *Iqbal* at 1949.
- ❖ Probability > Plausibility > Conceivability
- ❖ Guidance? “Judicial experience and common sense”

Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009)

The Dynamic Duo: *Twombly* and *Iqbal*

Two-pronged approach for ruling on 12(b)(6) motions:

1. Separate factual allegations from mere conclusions
2. Assume truth of factual allegations and “determine whether they plausibly give rise to an entitlement to relief”

What About Swierkiewicz?

Is *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002), Still Good Law?

- ❖ Plaintiff's complaint need not include specific facts establishing a prima facie case of discrimination and "instead must contain only 'a short and plain statement of claim showing that the pleader is entitled to relief.'" ~ *Swierkiewicz* at 508.
- ❖ Courts are split on whether *Swierkiewicz* standard still applies after *Iqbal*

Twombly/Iqbal in Action: Retaliation

Pre-*Twombly/Iqbal* Complaint:

McMahon v. New York City Board of Ed.
(E.D.N.Y. Dec. 12, 2006)

Retaliation complaint failed to:

- provide dates of protected speech
- to whom the speech was directed
- show that protected speech was the cause of defendant's actions

Held:

1. Complaint "insufficiently detailed" but, "possible to understand nature of allegations with sufficient clarity to overcome low bar" of Rule 8
2. "On a motion to dismiss, it is too soon to tell whether the facts will show a causal connection between [protected speech] and the charges."

Motion to Dismiss = Denied

Post-*Twombly/Iqbal* Complaint:

Coleman v. Tulsa City Bd. of City Commissioners (N.D. Okla. Aug. 11, 2009)

Retaliation complaint failed to:

- provide dates
- describe "unreasonable disciplinary actions"

Held:

1. Allegations closely resemble legal conclusions
2. "While it is conceivable that plaintiff can state a claim against defendant, she has not pled sufficient facts...to nudge her claims from conceivable to plausible."
3. Plaintiff's complaint "may have survived under Conley, but the Court no longer applies the 'no set of facts' standard that formerly governed motions to dismiss."

Motion to Dismiss = Granted

Twombly/Iqbal in Action: Retaliation

Motion denied:

- ❖ ***Rollins v. Verizon Maryland, Inc.***, 2010 WL 4449361 (D.Md., Nov. 5, 2010): plaintiff alleged that she was denied opportunity to work overtime and was denied access to her personnel file after making complaint of discrimination, but she did not specify causal connection; court held it was reasonable to infer plaintiff wanted access to her personnel file to pursue her discrimination claims and found allegations sufficient to state plausible claim for retaliation

Twombly/Iqbal in Action: Hostile Work Environment

Motion granted:

- ❖ ***Dorsey v. Georgia Dept. of State Road & Tollway Auth.***, 2009 WL 247756 (N.D. Ga. Aug. 10, 2009): plaintiff alleged “numerous” racially disparaging remarks, without specifying any
- ❖ ***Coleman v. Tulsa County Board***, 2009 WL 2513520 (N.D. Okla. Aug. 11, 2009): plaintiff alleged she was subjected to offensive and insulting comments, without specifying any

Twombly/Iqbal in Action: Hostile Work Environment

Motion denied:

- ❖ ***Gillman v. Inner City Broadcasting Corp.***, 2009 U.S. Dist. LEXIS 85479 (S.D.N.Y. Sept. 18, 2009): plaintiff alleged specifics regarding company director's unwanted advances and unsolicited gifts, his complaint to management and prompt termination afterwards

Twombly/Iqbal in Action: Disability Discrimination

Motion denied:

- ❖ ***Fowler v. UPMC Shadyside***, 578 F. 3d 203 (3d. Cir. 2009): plaintiff's allegation that she "believed" she was terminated because of her disability deemed sufficient to avoid motion to dismiss; court found that identification of impairment and alleged limitation to sedentary work plausibly suggested she might be substantially limited in major life activity; plaintiff had not pleaded elements of prima facie case

Motion granted:

- ❖ ***Williams v. Temple Univ. Hosp.***, 2010 WL 4540328 (3d Cir. 2010): plaintiff's allegation that she was injured at work but later sent back to work on full duty status held not sufficient to give rise to plausible claim for relief under ADA; court noted that the *Iqbal* "standard is not an extraordinarily high one"

Twombly/Iqbal in Action: Age Discrimination

Motion granted:

- ❖ ***Adams v. Lafayette College***, 2009 WL 2777312 (E.D. Penn. Aug. 31, 2009): allegations that younger employees were treated differently on several occasions and that plaintiff received harsher treatment because of his age were insufficient legal conclusions

Motion denied:

- ❖ ***Martinez v. RZB Finance LLC***, 2010 WL 4449031 (S.D.N.Y. Nov. 5, 2010): allegation that younger, higher-paid white male replaced her as Chief Accountant after her unexplained demotion sufficient to survive motion to dismiss attacking ADEA and Title VII discrimination claims

Effective Use of the *Twombly/Iqbal* Standard

Key Considerations:

- ❖ Removal
- ❖ Know your judge's post-*Iqbal* rulings
- ❖ Think ahead regarding leave to amend
- ❖ Credibility is king -- don't file 12(b)(6) motion for the sake of filing
- ❖ If you do file, consider moving to stay discovery

Challenges to *Twombly/Iqbal*

- ❖ Notice Pleading Restoration Act of 2009
 - Senate Bill 1504 introduced in July 2009
 - Would prohibit dismissal under 12(b)(6) or (e) “except under the standards set forth . . . [in] *Conley v. Gibson*”
- ❖ Open Access to Courts Act of 2009
 - House Bill 4115 introduced in November 2009
 - Affirmatively adopts “no set of facts” rule
- ❖ Both sitting in respective chambers’ judiciary committees
- ❖ Overreaction?

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Motions for Summary Judgment: Defense Strategies

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Difference Between Summary Judgment Motions & Motions to Dismiss

- Summary judgment is decision made by court without trial that may resolve all or part of legal issues in a case.
- Must establish there are no genuine issues of “material fact,” or that key facts in the case are not in dispute.
- Must show that applying the law to these facts, there can be no other outcome but one in their favor.

State and Federal Court

- Federal courts are generally more prone to reading the standard as favoring disposition of cases on summary judgment.
- Judicial approach to SJ changed drastically in 1980s with Supreme Court's decision in 3 key cases, so-called "summary judgment trilogy":
 - *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986)
 - *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), &
 - *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).
- Decisions made it much easier for defendants in federal cases to win on summary judgment and placed more significant burdens on plaintiffs who opposed summary judgment.

State and Federal Court

- State courts can and have established their own benchmarks describing when a moving party is entitled to summary judgment.
 - some states follow the federal standard,
 - other states have specifically declined to follow the federal model and have adopted a different, and usually more rigorous, standard.
- Thus, venue can drastically impact the likelihood of success on summary judgment.
 - This informs the business decision faced by many employers as to whether or not filing summary judgment is worthwhile.

Summary Judgment – often “the Trial” in Employment Cases

- In the employment context, summary judgment is particularly important, as most employers rely on this procedure to quickly dispense of their cases.
- Juries are unpredictable in the best of circumstances, but in employment cases, where every juror has been an employee at some point in their lives and therefore believes they have an industrial expertise, juries can be more problematic.
- Combined with the problem that every employee has likely had or knows of someone who has had a bad boss or bad employment experience, the prospect of bringing an employment case to a jury can be daunting.

So How Do Defendants Win?

Key documents to obtain Summary Judgment

- Documentation/ warnings leading up to performance-based discipline
- Records showing consistency with other employees.
- Policies which lay out basis for disciplinary/ termination decision
- Performance Reviews that reflect a history of the performance problem
- Accurate and timely documentation.

Depositions and written discovery

- Have summary judgment motion outlined & research done before deposition – know what admissions you need.
- Tie Witness Down on Allegation – Recap, “So these are the 5 things you are saying XYZ company did to discriminate against you?”
- Touch every document in the case before the deposition – do not be surprised.
- Credibility issues arising at depositions don’t help as much with summary judgment (but have to prepare for trial)
- Written Discovery – helps plaintiff more than Defendant, BUT before depo, try to get:
 - Medical Records
 - Past Employment Records
 - Email addresses
 - Do a Background check

Drafting the brief and statement of undisputed facts

- Focus on the law
- Sure way to lose: disputed facts.
 - Don't dispute facts that the other side has contradicted in depositions (even if minor)
 - Minimize those facts that the other side says are disputed
 - Keep your own facts to a minimum – most important
 - Statement of Undisputed Facts should be like Requests for Admission
- Write, rewrite, and rewrite again – clarity and easily readable
- Analyze venue re: whether will have hearing

Strategic considerations

- Venue– Federal Court where possible
 - Are you an LLC?
- Business Considerations
- Is it worth it to draft a motion for summary judgment even if you think you won't win?
- Should you file a partial motion for summary judgment?
- Do you raise the legal argument you aren't sure other side will raise?

Recent Caselaw

- *Hannan v. Alltel Publishing Co.*, 270 S.W.3d 1 (Tenn. 2008).
- *Gossett v. Tractor Supply Co., Inc.* 320 S.W.3d 777 (Tenn. September 20, 2010)
 - Defendant must produce evidence that (1) affirmatively negates an essential element of the nonmoving party's claim; or (2) shows that the nonmoving party cannot prove an essential element of the claim at trial.
 - “Evidence satisfying an employer's burden of production pursuant to the *McDonnell Douglas* framework does not necessarily demonstrate that there is no genuine issue of material fact.”
 - Then Plaintiff's burden to show genuine issue of material fact as to that element.
- “Our holding does not exclude the possibility of summary judgment when an employer presents undisputed evidence that a legitimate reason was the exclusive motivation for discharging the employee.”

Recent Caselaw

- *Ortiz v. Jordan*
 - November 1, 2010 -- the U.S. Supreme Court considered a challenge against a recent decision by Sixth Circuit,
 - appeals court noted courts “normally do not review the denial of a summary judgment motion after a trial”
 - but said a denial of summary judgment based on qualified immunity — a defense that can shield government officials from civil liability — is an exception to the rule.

Motions for Summary Judgment: Defense Strategies

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Plaintiffs' Reaction to *Iqbal* Pleadings Standard

By: Alan G. Crone, Esq.

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From Conley to Iqbal: A History

Conley: Your Grandfather's Pleading Standard

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

In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

Conley was the basis/embodiment of the pre-*Twombly* notice pleading standard.

Accepted by all generally after that there was not factual pleading requirement under the Federal Rules

Rule 8 (a) of the Federal Rules of Civil Procedure

Rule 8(a): Your father's pleading standard

Only requires a complaint contain 3 elements:

- A short and plain statement of jurisdictional grounds
- A short and plain statement of the claim showing that the pleader is entitled to relief
- A demand for the relief sought

Twombly

Twombly: Facts plead in Complaint must be “Plausible”

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

The *Twombly* Court did not throw out *Conley*.

At the time many observers did not know whether the holding in *Twombly* was limited to anti-trust cases.

Plaintiffs must plead facts to show that his entitlement to relief is “plausible”

Complaints must have more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.

Courts are not bound to accept as true a legal conclusion couched as a factual allegation.

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Twombly Has Something for Plaintiffs

A well-pleaded complaint may proceed even if it appears that a recovery is very remote and unlikely

When a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the factfinder.

Iqbal: Your pleading standard

Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009)

Extends *Twombly* pleading standard to “all civil actions.”

First: The tenet that a court must accept as true all of the allegations in a complaint does not apply to legal conclusions.

Second: Only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will...be a content specific task that requires the reviewing court to draw on its judicial experience and common sense. 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 ‘shown’—that the pleader is entitled to relief.



What is a hard working Plaintiff's lawyer to do?
Strategies to make *Iqbal* work for you

Steer Into the Skid: New Role for Complaints

Hire Jim Rockford

- Conduct Pre-Filing Investigation
- Develop Positive Collaborative Relationship with your friendly neighborhood EEOC Investigator
- Bifurcate Representation into Pre/Post Filing
- Engage Defendant in Dialogue about merits of the case

Tips for Drafting a Complaint Post Iqbal

- Tell a compelling story
- Make sure all of the prima facie elements are present in the complaint
- Draft for your “worst” judge/Know your judges
- Use Active rather than passive voice
- No straw men – Don’t tell the Defendant’s side of the story in your complaint.

Tips for Drafting a Complaint Post Iqbal (cont't)

- Use facts from your investigation and the EEOC Investigation
- Tell who, what, where and WHY.
- Separate Factual Sections from Legal Conclusions

Responding to an *Iqbal* Motion to Dismiss

- Reinforce the plausibility of your client's story
- Look for extra-pleading facts in the Defendant's Motion. Turn such into MSJ.
- Point out attorney created argumentative alternative theories – If she needs additional facts not found in YOUR complaint – then MSJ, but not 12b6
- Turn focus back to your clients complaint and claim, not the defense.

In a really bad spot?

- Ask for time to conduct limited discovery
- Ask for leave to amend the complaint if you can cure it with some more detail
- Ask that the claim(s) be dismissed without prejudice and use discovery of remaining claims to provide basis to renew the dismissed claims later.

Defeating Motions for Summary Judgment

- Forget the law – argue the facts
- Put on your ENTIRE case – persuade the judge and his law clerk you can win at trial
- Consider cross motion for summary judgment or MSJ on affirmative defenses
 - » Beware of shifting inferences on cross motions

Strategic Considerations

- Biggest Strategic Question is now – Do you have to play cards earlier?
- Master the facts first
- Screen, Screen, Screen
- Depositions are the trial

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