Ashcroft v. Iqbal – Is It The Straw That Broke Employment Discrimination Plaintiffs Backs?

A Look Inside New York's Federal District Courts

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I. INTRODUCTION

> The effect of the Court's actions will no doubt be to deny many plaintiffs with meritorious claims access to the Federal courts and, with it, any legal redress for their injuries. I think that is an especially unwelcome development at a time when, with the litigating resources of our executive branch and administrative agencies stretched thin, the enforcement of Federal antitrust, consumer protection, civil rights and other laws that benefit the public will fall increasingly to private litigants.[1]

Ever since the U.S. Supreme Court decided *Ashcroft v. Iqbal*[2] on May 18, 2009, commentators have jumped at every opportunity to say that it is, as the 3rd Circuit recently put it, the final nail in the coffin to the liberal pleading standards in federal civil litigation that were known prior to *Iqbal*.[3] *Iqbal* is significant for its holding regarding the sufficiency of pleadings made in a civil complaint. The standard had long been that a complaint need only make general allegations against a defendant and upon a motion to dismiss, the non-moving party's version of the facts were be taken as true. In a 5-4 opinion authored by Justice Kennedy (with dissenting opinions filed by Justices Souter and Breyer), the Court increased the burden on plaintiffs and presumably has given judges more leeway in deciding motions to dismiss made under Federal Rule of Civil Procedure 12(b)(6)[4] ("12(b)(6) motions") by making the standard one of "plausibility" and "common sense".[5] These subjective terms seem to leave plaintiffs' complaints to the individual whims of the fact finder.

Justice Ruth Bader Ginsburg, who dissented from the *Iqbal* decision, told a group of federal judges at the 2nd Circuit's judicial conference in June of 2009 that the ruling was both

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[1] S. Res. 219, 111th Cong. (2009) (introductory remarks by Sen. Arlen Specter); *see infra* Part IV.B.
[2] 556 U.S. ___, 129 S.Ct. 1937 (2009).
[3] *See Fowler v. UPMC Shadyside*, 578 F.3d 203, 210 (3d Cir. 2009) ("*Iqbal* additionally provides the final nail-in-the-coffin for the 'no set of facts' standard that applied to federal complaints before *Twombly*."); *see also* Sid Steinberg, *Escalated Pleading Standard Applied to Employment Discrimination Claim*, The Legal Intelligencer Vol. 240, No. 50 (Sept. 9, 2009), available at 2009 WLNR 21602356.
[4] FED. R. CIV. P. 12(b)(6).
[5] *See Iqbal*, 129 S.Ct. at 1951.

important and dangerous. "In my view," Justice Ginsburg said, "the Court's majority messed up the federal rules."[6] Thomas C. Goldstein, an appellate lawyer with Akin Gump and the founder of SCOTUSblog, said that *Iqbal* is "the most significant Supreme Court decision in a decade for day-to-day litigation in the federal courts."[7] "It obviously licenses highly subjective judgments," said Stephen B. Burbank, an authority on civil procedure at the University of Pennsylvania Law School. "This is a blank check for federal judges to get rid of cases they disfavor."[8] "I have spent my whole life with the federal rules, and this is one of the biggest deals I have ever seen," said New York University School of Law professor Arthur Miller, a longtime expert on civil procedure.[9] Brooklyn Law School professor Elizabeth Schneider, who has written extensively on federal civil procedure, said *Iqbal* is forcing trial judges to go line by line through pleadings, using subjective factors to decide what parts are factual and which statements are conclusory.[10] "If that's not an open door to judicial bias, I don't know what is," she said.[11]

Yet there is a sizeable, if not equal, pushback from pundits who claim that *Iqbal*'s significance has been drastically overstated.[12] Indeed, not all judges are rubber-stamping 12(b)(6) motions made post-*Iqbal*. During an Aug. 10, 2009 hearing in an employment discrimination case, Senior Judge Milton Shadur of the U.S. District Court for the Northern

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[6] *See 9/11 Case Could Bring Broad Shift on Civil Suits*, N.Y. TIMES, July 20, 2009, available at http://www.nytimes.com/2009/07/21/us/21bar.html?_r=1&scp=4&sq=ashcroft%20v.%20iqbal&st=cse (last accessed Dec. 15, 2009).
[7] *Id*.
[8] *Id*.
[9] *See Plaintiffs' Attorneys Mobilize To Soften New Pleading Standard*, New York Law Journal, Vol. 242 (Sept. 24, 2009).
[10] *Id*.
[11] *Id.*
[12] *See e.g.* Steve Brown, *Reconstructing Pleading: Twombly, Iqbal and the Limited Role of the Plausibility Inquiry*, available at http://ssrn.com/abstract=1469638 (arguing that importance of plausibility analysis has been overstated) (last accessed Dec. 15, 2009); Edward A. Hartnett, *Taming Twombly*, 158 U. PA. L. REV. __, available at http://ssrn.com/abstract=1452875 (arguing that *Iqbal* and *Twombly* need not be viewed as constituting significant change to procedure) (last accessed Dec. 15, 2009).

District of Illinois told defense lawyers that *Iqbal* and *Twombly*[13] "don't operate as a kind of universal get out of jail free card."[14]

As stated in an article in the Tennessee Bar Journal in July of 2009:

> While all of this may sound like music to the ears of defendants, they might want to hold their applause--at least for a while. The Supreme Court has left the trial courts some room to maneuver when it comes to evaluating the fact allegations in a challenged complaint. *Iqbal* recognizes that evaluation of the factual allegations for "plausibility" is not an exact science, but an art: when all is said and done, determining whether a complaint states a plausible claim for relief is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."[15]

There is empirical data available demonstrating that federal courts have treated employment discrimination cases with disdain prior to the *Iqbal* era.[16] The inherent difficulty in proving an employment discrimination case under the generally accepted framework made famous by the seminal cases *McDonnell Douglas Corp. v. Green*[17] and *Texas Department of Community Affairs v. Burdine*[18] serves as the starting point for disfavor by Article III judges. Under those frameworks, an employment discrimination plaintiff must plead and prove, as part of the *prima facie* case, that: (1) he/she is a member of the protected class/prohibited classification; (2) plaintiff applied and was qualified for a job; (3) plaintiff suffered an adverse employment action; (4) under circumstances giving rise to an inference of discrimination on the

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[13] *Bell Atlantic v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007). *See* discussion *infra*, Part II.A.
[14] *See Plaintiff Groups Mount Effort To Undo Iqbal*, Fulton County Daily Report Vol. 120, No. 188, available at 2009 WLNR 21610838 (Sept. 28, 2009).
[15] Andree Sophia Blumstein, *Twombly gets Iqbal-ed*, 45-JUL TENN. B.J. 23, 25 (2009).
[16] *See New Data Unveiled: How the Federal Courts Are Treating Employment Discrimination Plaintiffs*, available at http://www.acslaw.org/node/7384. (last accessed Dec. 15, 2009); Kevin M. Clermont & Stewart A. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL'Y REV. 103 (2009); Kevin M. Clermont & Stewart J. Schwab, *How Employment Discrimination Cases Fare in Federal Court*, 1 J. EMPIRICAL LEGAL STUD. 429 (2004).
[17] 411 U.S. 792, 93 S.Ct. 1817 (1973).
[18] 450 U.S. 248, 101 S.Ct. 1089 (1981).

basis of membership in a protected class/prohibited classification.[19] After the *prima facie* case, the defendant has the most minimal of "burdens" i.e. to simply proffer a legitimate, non-discriminatory reason for its actions.[20] After defendant has met its "burden", a plaintiff may demonstrate that defendant's reason is a pretext by offering either direct or circumstantial evidence of discrimination.[21]

The application of the *Iqbal* reasoning in employment discrimination cases is obvious. As stated in an article in Mondaq:

> For example, in a disparate treatment employment discrimination case, the *Iqbal* decision directs the district court, evaluating the sufficiency of the complaint under Rule 12(b)(6), to ignore the conclusory allegations, assume the truth of the non-conclusory factual allegations, and then, applying its experience and common sense, determine whether those facts plausibly show that the defendant acted for a discriminatory reason. If the facts allow for some alternative, nondiscriminatory reason for the defendant's action, then the district court must decide whether it is plausible that discrimination was the motivation. To demonstrate plausibility, the factual allegations must do more than just allow the inference of the "mere possibility of misconduct."[22]

Professor Suja A. Thomas has noted:

> [W]hat has been required under *Iqbal* and *Twombly* strongly suggests that plaintiffs in employment discrimination suits who are subject to a motion to dismiss will be required to plead facts to rebut the legitimate non-discriminatory reason offered by the defendant for its employment decision, in addition to pleading the prima facie case, despite the Court's decision to the contrary in *Swierkiewicz*.[23]

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[19] *McDonnell Douglas*, 411 U.S. at 802.

[20] *See Bickerstaff v. Vassar College,* 196 F.3d 435, 446 (2d Cir.1999) (stating that defendant's burden of production is "not a demanding one," as it need only offer a non-discriminatory explanation to rebut plaintiff's *prima facie case*); *see also Deravin v. Kerik*, No. 00 Civ. 7487(KMW)(KNF), 2007 WL 1029895 at *6 (S.D.N.Y. Apr. 2, 2007) (noting that defendant "need not persuade the court that it was actually motivated by the proffered reasons").

[21] *Burdine*, 450 U.S. at 256.

[22] Lawrence Marquess, *Tightened Federal Pleading Rules Take Effect: Three Months After the U.S. Supreme Court's Iqbal Decision*, available at 2009 WLNR 16158226 (Aug. 19, 2009).

[23] Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, Illinois Public Law Research Paper No. 09-16, available at http://ssrn.com/abstract=1494683 (last accessed Dec. 15, 2009).

"The Supreme Court's decision has slammed shut the courthouse door on legitimate plaintiffs," said Representative Jerrold Nadler (D-NY).[24] "Its decision, unfortunately, will reward any defendant who succeeds in concealing evidence of wrongdoing, whether it is government officials who violate people's rights, polluters who poison drinking water, or *employers who engage in discrimination*," continued Nadler **[emphasis added]**.[25]

So the question is, what exactly has been *Iqbal*'s impact on employment discrimination litigation in the federal courts? This paper will attempt to answer that question by examining decisions in employment discrimination cases venued in New York's federal district courts resolving defendants' motions to dismiss under Rule 12[26] and its subparts.[27]

II. HOW DID WE GET HERE? – A DESCRIPTION OF *TWOMBLY* & *IQBAL*

A. *Bell Atlantic v. Twombly*

Twombly was an antitrust lawsuit brought against Bell Atlantic alleging that the company had violated Section 1 of the Sherman Act by engaging in anti-competitive behavior. Specifically, the plaintiffs alleged that large telephone companies had acted in order to disadvantage smaller telephone companies and charge consumers more by, for example, refraining from entering markets where another large company was dominant.

At the district court level, the complaint was dismissed as failing to allege sufficient facts to state a claim for a violation of the Sherman Act.[28] This decision was reversed by the 2nd Circuit,[29] and, in 2006, the Supreme Court agreed to hear the case.[30]

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[24] *See Press Release of Representative Jerrold Nadler*, available at http://www.house.gov/apps/list/press/ny08_nadler/RestoreCourt111909.html (last accessed Dec. 15, 2009).
[25] *Id.*
[26] FED. R. CIV. P. 12.
[27] Research is current as of December 1, 2009.
[28] *Twombly, et al. v. Bell Atlantic Corp., et al.*, 313 F.Supp.2d 174 (S.D.N.Y. 2003).
[29] *Twombly, et al. v. Bell Atlantic Corp., et al.*, 425 F.3d 99 (2d Cir. 2005).
[30] *Bell Atlantic Corp., et al. v. Twombly, et al.*, 548 U.S. 903, 126 S.Ct. 2965 (2006).

The Court, through Justice Souter writing for the majority, changed the existing interpretation of the notice pleading requirements of Federal Rule of Civil Procedure 8(a)(2)[31] and the standards for dismissal under Rule 12(b)(6), creating a new, stricter standard of a pleading's required specificity. Previously, under the standard the Court set forth in *Conley v. Gibson*,[32] a court could only dismiss a claim if it appeared, beyond a doubt, that the plaintiff would be able to prove no set of facts in support of her claim that would entitle her to relief.[33] In *Twombly*, the Court adopted a stricter "plausibility" standard, requiring "enough fact[s] to raise a reasonable expectation that discovery will reveal evidence of illegal agreement."[34]

The *Twombly* plaintiffs argued that a heightened pleading requirement would run counter to precedent, specifically citing to *Swierkiewicz v. Sorema N. A.*,[35] which held that "a complaint in an employment discrimination lawsuit [need] not contain specific facts establishing a prima facie case of discrimination."[36] The Court responded as follows:

> They argue that just as the prima facie case is a "flexible evidentiary standard" that "should not be transposed into a rigid pleading standard for discrimination cases," *Swierkiewicz*, supra, at 512, "transpos[ing]'plus factor' summary judgment analysis woodenly into a rigid Rule 12(b)(6) pleading standard . . . would be unwise," Brief for Respondents 39. As the District Court correctly understood, however, "*Swierkiewicz* did not change the law of pleading, but simply re-emphasized . . . that the Second Circuit's use of a heightened pleading standard for Title VII cases was contrary to the Federal Rules' structure of liberal pleading requirements." 313 F. Supp. 2d, at 181 (citation and footnote omitted). Even though Swierkiewicz's pleadings "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," the Court of Appeals dismissed his complaint for failing to allege certain additional facts

[31] FED. R. CIV. P. 8(a)(2).
[32] 355 U.S. 41, 78 S.Ct. 99 (1957).
[33] *Conley*, 355 U.S. at 45-46.
[34] *Twombly*, 550 U.S. at 556.
[35] 534 U. S. 506, 122 S.Ct. 992 (2002).
[36] *Swierkiewicz*, 534 U.S. at 508.

> that Swierkiewicz would need at the trial stage to support his claim in the absence of direct evidence of discrimination. *Swierkiewicz*, 534 U. S., at 514. We reversed on the ground that the Court of Appeals had impermissibly applied what amounted to a heightened pleading requirement by insisting that Swierkiewicz allege "specific facts" beyond those necessary to state his claim and the grounds showing entitlement to relief. *Id.*, at 508.
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> Here, in contrast, we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.[37]

Justice Stevens, joined by Justice Ginsburg in his dissenting opinion, noted that "Rule 8(a)(2) of the Federal Rules requires that a complaint contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.' The rule did not come about by happenstance and its language is not inadvertent."[38]

He further stated:

> We reversed in another unanimous opinion, holding that "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." *Swierkiewicz,* 534 U.S., at 511, 122 S.Ct. 992. We also observed that Rule 8(a)(2) does not contemplate a court's passing on the merits of a litigant's claim at the pleading stage. Rather, the "simplified notice pleading standard" of the Federal Rules "relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Id*., at 512, 122 S.Ct. 992; see Brief for United States et al. as *Amici Curiae* in *Swierkiewicz v. Sorema N. A.,* O.T.2001, No. 00-1853, p. 10 (stating that a Rule 12(b)(6) motion is not "an appropriate device for testing the truth of what is asserted or for determining whether a plaintiff has any evidence to back up what is in the complaint" (internal quotation marks omitted)).[39]

[37] *Twombly*, 550 U.S. at 569-570.
[38] *Id.* at 573.
[39] *Id.* at 586.

Despite the majority's analysis, *Twombly* was seen by advocates as limited only to legal complaints alleging violations under the Sherman Antitrust Act.[40] *Iqbal* served to expand that analysis to all federal civil litigation.

B. *Ashcroft v. Iqbal*

Javaid Iqbal, a Pakistani Muslim who was arrested and held under highly restrictive conditions following the September 11, 2001 attacks, brought a lawsuit alleging that former Attorney General John Ashcroft and FBI Director Robert Mueller adopted a policy that subjected him to harsh detention conditions on account of his race, religion or national origin in violation of the First and Fifth Amendments of the U.S. Constitution. The district court ruled that his complaint contained sufficient allegations against Ashcroft and Mueller to survive a motion to dismiss[41] and the 2nd Circuit affirmed.[42] The Supreme Court held that Iqbal's pleadings were insufficient to state a claim for relief against Ashcroft and Mueller.[43]

The Court reasoned that, under the standard set forth in *Twombly*, a plaintiff must allege facts that, taken as true, state a "plausible" basis for relief.[44] As stated by the Court, the "plausibility standard" is guided by two working principles.

> Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. (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

[40] *Twombly*, 550 U.S. at 554-555 ("This case presents the antecedent question of what a plaintiff must plead in order to state a claim under §1 of the Sherman Act"); *see also Brief for Respondent Javaid Iqbal*, 2008 WL 4734962 at *37 ("*Bell Atlantic*'s holding must also be understood in light of the antitrust conspiracy claim it addressed, in which the Court confronted a particular factual dilemma in resolving a motion to dismiss antitrust conspiracy claims: the impossibility of distinguishing lawful parallel conduct from unlawful conspiratorial conduct, absent the allegation of *some* fact that indicates conspiracy").
[41] *Elmaghraby v. Ashcroft*, No. 04 CV 01809 (JG)(SMG), 2005 WL 2375202 (E.D.N.Y., Sept. 27, 2005).
[42] *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007).
[43] *Ashcroft v. Iqbal*, 556 U.S. ___, 129 S.Ct. 1937 (2009).
[44] *Iqbal*, 129 S.Ct. at 1949.

> prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than 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, 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[n]"-"that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2).
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> 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.[45]

The Court then examined the factual allegations in the complaint, including allegations that Mueller directed the FBI to arrest and detain thousands of Arab Muslim men as part of the 9/11 investigation, and that the 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. Although the Court acknowledged that these allegations are consistent with purposeful detention based upon race, religion or national origin,[46] the Court considered more likely the obvious alternative explanation that these arrests were motivated by nondiscriminatory intent to detain illegal aliens potentially connected to terrorists.[47] The Court concluded that "the complaint lacked any factual allegation to plausibly suggest petitioners' discriminatory state of mind. His

[45] *Id.* at 1949-1950.
[46] *Id.* at 1951.
[47] *Id.* at 1951.

pleadings thus do not meet the standard necessary to comply with Rule 8".[48] Accordingly, the Court concluded that "respondent's complaint has not 'nudged [his] claims' of invidious discrimination 'across the line from conceivable to plausible'".[49]

Justice Souter wrote a dissent joined by Justices Stevens, Ginsburg and Breyer, stating:

> *Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be. *See Twombly*, 550 U.S., at 555, 127 S.Ct. 1955 (a court must proceed "on the assumption that all the allegations in the complaint are true (even if doubtful in fact)"); *id.*, at 556, 127 S.Ct. 1955 ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable")…The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel. That is not what we have here.[50]

III. IQBAL'S IMPACT ON EMPLOYMENT DISCRIMINATION LITIGATION IN NEW YORK'S FEDERAL DISTRICT COURTS

The *Iqbal* decision flies squarely in the face of the heretofore liberally construed Federal Rules of Civil Procedure. Rule 8 governs pleadings and it states, in pertinent part:

> (a) Claims for Relief.
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> A pleading that states a claim for relief must contain:
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> (1) a *short and plain* statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
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> (2) a *short and plain* statement of the claim showing that the pleader is entitled to relief; and
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> (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

[48] *Id.* at 1952.
[49] *Id.* at 1950-1951.
[50] *Id.* at 1959.

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(e) Construing Pleadings.

Pleadings *must be construed so as to do justice*. **[emphases added]**[51]

As of December 1, 2009, *Iqbal* has been cited in over 175 circuit court of appeals opinions and over 3,320 district court opinions. The case has been cited in 39 opinions by the 2nd Circuit and in 400 New York district court opinions. Former U.S. Solicitor General Gregory Garre, the lawyer who won the *Iqbal* case, has said that it is too soon to judge the ruling's true impact.[52] "Only two things are clear," he said. "The decision is being cited an extraordinary number of times by defense counsel. And courts are coming out with decisions on both sides."[53] Is General Garre correct in his assertion regarding the nature of judicial decisions? For an answer, we look to the decisions in New York's federal district courts.

A. Eastern District of New York[54]

1. *Larson v. Essef Distributors, Inc.*[55]

Harold J. Larson commenced this action against defendants Essef Distributors, Inc., Abraham Elenowitz, Robert Elenowitz, and Robyn Elenowitz alleging employment discrimination in violation of the Americans with Disabilities Act ("ADA"),[56] the Age Discrimination in Employment Act ("ADEA"),[57] and intentional infliction of emotional distress. Defendants made a 12(b)(6) motion to dismiss plaintiff's ADA and ADEA claims against the

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[51] FED. R. CIV. P. 8.
[52] *See Iqbal Fails to Find Fan Base at House Judiciary Committee Hearing*, available at http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202435017807 (last accessed Dec. 15, 2009).
[53] *Id.*
[54] In conducting a Westlaw search with the following search terms: "129 S.CT. 1937" & "EMPLOYMENT DISCRIMINATION" & CO(EDNY), there were 12 reported cases with that criteria. After review of the 12 cases, only 5 are directly applicable to the discussion.
[55] *Larson v. Essef Distributors, Inc.*, No. 09 CV 2133(SJF)(MLO), 2009 WL 4067280 (E.D.N.Y. Nov. 19, 2009).
[56] 42 U.S.C. § 12101, *et seq.*
[57] 29 U.S.C. § 621, *et seq.*

individual defendants in their individual capacity and plaintiff's claim of intentional infliction of emotional distress against all defendants. The motion was granted in its entirety.

As will become prevalent, the court began its discussion section on the 12(b)(6) standard of review by citing to *Iqbal* for the purpose of reciting the general principles of law.[58] However, in this case, *Iqbal*'s impact is insignificant. First, the ADA and ADEA claims as against the individual defendants were dismissed with prejudice because as a matter of law and as the plaintiff conceded, there is no individual liability under ADA or ADEA. As to the emotional distress claims, the court simply stated: "As a matter of law, the allegations in plaintiff's complaint cannot reasonably be regarded as so extreme and outrageous in nature as to permit recovery for intentional infliction of emotional distress. Accordingly, plaintiff's intentional infliction of emotional distress claim is dismissed in its entirety".[59]

2. *Hooda v. Brookhaven Nat. Laboratory*[60]

Balwan Singh Hooda, appearing *pro se,* filed suit alleging violations of Title VII of the Civil Rights Act of 1964 ("Title VII"),[61] 42 U.S.C. §§ 1981, 1983, 1985 and 1986, the First and Fourteenth Amendments to the U.S. Constitution, and the New York State Human Rights Law ("NYSHRL").[62] Defendants' motion to dismiss was granted in part and denied in part.

The court cites to *Iqbal* on one occasion in the beginning of its Discussion section.[63] Again, *Iqbal*'s impact is insignificant as Plaintiff's claims were dismissed for reasons other than

[58] *See Larson*, 2009 WL 4067280 at *3.
[59] *Id.* at *4. Those allegations included seizures, suicidal tendencies and overdosing on seizure medication. *See Larson*, 2009 WL 4067280 at *2.
[60] *Hooda v. Brookhaven Nat. Laboratory*, No. 08-CV-3403 (JS)(WDW), 2009 WL 2984184 (E.D.N.Y. Sept. 15, 2009).
[61] 42 U.S.C. § 2000e, *et seq*.
[62] N.Y. Exec. Law § 290, *et seq.* (McKinney's 2009).
[63] *See Hooda*, 2009 WL 2984184 at *3.

sufficiency of pleadings e.g. timeliness grounds,[64] failure to exhaust administrative remedies,[65] lack of individual liability under Title VII[66] and state action doctrine.[67]

3. *Goldvekht v. Alhonote*[68]

Simon Goldvekht brought this *pro se* action under Title VII and ADEA alleging that Linda Alhonote, the principal of Public School 254 in Brooklyn, and the Board of Education of the City School District of the City of New York discriminated against him because of his age and his national origin. Defendants' motion to dismiss was granted in part and denied in part.

Here, the court again begins its discussion section by citing to *Iqbal* on two occasions for reciting the general principles of law.[69] The court dismissed the age claims stating "nothing in the complaint suggests that Alhonote harassed Goldvekht because of his age"[70] and addressed the national origin hostile work environment claim as follows:

> Goldvekht alleges only that Alhonote placed an undeserved disciplinary letter in his file, repeatedly refused to remove it, told a colleague not to hire Goldvekht, and did not invite Goldvekht to participate in a November 2007 meeting with the parents of a student with whom Goldvekht had worked. He does not allege that any other teacher of Russian-Jewish origin was mistreated during this period, or that any other manager or employee of P.S. 254 made any disparaging comments about his national origins. Defendants argue that a single act of discrimination-the letter in the file-does not transform into a hostile work environment claim simply because Goldvekht repeatedly and unsuccessfully complained about it. I agree. The mistreatment Goldvekht alleges, even if proven, would not be sufficiently severe or abusive to constitute a hostile work environment claim.[71]

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[64] *Hooda*, 2009 WL 2984184 at *3-4.
[65] *Id.* at *5.
[66] *Id.* at *6.
[67] *Id.* at *8.
[68] *Goldvekht v. Alhonote*, No. 09-0CV-794 (JG)(LB), 2009 WL 2754352 (E.D.N.Y. Sept. 1, 2009).
[69] *Id.* at *4-5.
[70] *Id.* at *6.
[71] *Id.* at *5.

4. *Spilkevitz v. Chase Inv. Services Corp.*[72]

Alaina Spilkevitz commenced this action against defendants Chase Investment Services Corp., Lawrence McGovern, Richard Eiseman and Robert V. Garrett, all in their individual and official capacities, alleging employment discrimination in violation of Title VII, ADA, NYSHRL and the New York City Human Rights Law ("NYCHRL").[73] Defendants' 12(b)(6) motion to dismiss certain claims alleged in the complaint was granted in part and denied in part.

The court cited to *Iqbal* on three occasions in the beginning of the discussion section, but again *Iqbal*'s impact is non-existent.[74] Plaintiff's disability and religious discrimination claims were withdrawn and the court dismissed the NYCHRL claims as all of the alleged actions took place outside of New York City.[75]

5. *Broich v. Incorporated Village of Southampton*[76]

A Caucasian male police officer brought an action against village police department, village board, mayor, police chief, and others, alleging discrimination in violation of Title VII, §1981, §1983, and §1985, arising from officer's failure to be promoted, and discharge. Defendants' motion pursuant to Rules 12(b)(1) and 12(c) to dismiss the complaint for lack of jurisdiction and for judgment on the pleadings was granted in part as it pertained to claims against the individual defendants and denied in part as to the Title VII claims because the court found that the plaintiff had exhausted the appropriate administrative remedies. *Iqbal* is cited to three times as the beginning of the discussion section[77] without any discussion or application.

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[72] *Spilkevitz v. Chase Inv. Services Corp.*, No. CV-08-3407 (SJF)(ETB), 2009 WL 2762451 (E.D.N.Y. Aug. 27, 2009).
[73] NYC Code § 8-101, *et seq.*
[74] *Spilkevitz*, 2009 WL 2762451 at *3.
[75] *Id.* at *5.
[76] *Broich v. Incorporated Village of Southampton*, No. CV-08-0553 (SJF)(ARL), 2009 WL 2225306 (E.D.N.Y. July 23, 2009).
[77] *Id.* at *6.

B. Southern District of New York[78]

1. *Weston v. Optima Communications Systems, Inc.*[79]

Celeste Weston brought an action against her former employer Optima Communications Systems, Inc. under Title VII and NYSHRL, alleging sex discrimination. Plaintiff claimed that she was subjected to a hostile work environment and was constructively discharged because she did not testify for her employer in a co-worker's suit against Optima. Defendant moved to dismiss the complaint for failure to state a claim, or in the alternative, for summary judgment. Defendant's motion to dismiss was granted as to the hostile work environment claim. As to the retaliation claims, the motion to dismiss and the motion for summary judgment were denied.

The *Weston* court interpreted *Iqbal* as providing a "two-pronged" approach:

> First, the court accepts plaintiff's factual allegations as true and draws all reasonable inferences in her favor. The court considers only the factual allegations in the complaint and "any documents that are either incorporated into the complaint by reference or attached to the complaint as exhibits."
>
> Second, the court determines whether the "well-pleaded factual allegations ... plausibly give rise to an entitlement to relief." *Iqbal,* 129 S.Ct. at 1950. "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.* (citing *Twombly,* 550 U.S. 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." *Id.* (citing *Twombly,* 550 U.S. at 557). Determining plausibility is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*[80]

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[78] In conducting a Westlaw search with the following search terms: "129 S.CT. 1937" & "EMPLOYMENT DISCRIMINATION" & CO(SDNY), there were 12 reported cases with that criteria. After review of the 12 cases, only 8 are directly applicable to the discussion.

[79] *Weston v. Optima Communications Systems, Inc.*, No. 09 Civ. 3732 (DC), 2009 WL 3200653 (S.D.N.Y. Oct. 7, 2009).

[80] *Id.* at *2.

As to the hostile work environment claim, the court stated that "the complaint contains no facts regarding the frequency or severity of the offensive behavior or the length of time she had to endure it. Without such factual content, Weston's complaint lacks the facial plausibility required to survive a motion to dismiss."[81] However, the court held that plaintiff did plead sufficient facts on her retaliation claim[82] and denied the summary judgment motion as premature.[83]

2. *Gillman v. Inner City Broadcasting Corp.*[84]

Wayne Gillman brought an action alleging that Inner City Broadcasting Corp. discriminated against him based on age and sex, and retaliated against him for complaining about the alleged discrimination. Plaintiff asserted claims under Title VII, ADEA, NYSHRL and NYCHRL. Defendant moved to dismiss the complaint, pursuant to Rules 12(b)(1) and 12(b)(6). Plaintiff opposed the motion and, in the alternative, sought leave to amend his complaint. The motion was granted in part and denied in part. Plaintiff's request to amend his complaint was granted.

The discussion of *Iqbal* in this case is more pointed towards its application in employment discrimination cases:

> The *Iqbal* plausibility standard applies in conjunction with employment discrimination pleading standards. According to *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 514 (2002), employment discrimination claims need not contain specific facts establishing a *prima facie* case of discrimination. Rather, "a complaint must include ... a plain statement of the claim ... [that] give[s] the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Id.* at 512 (internal quotation marks and citations omitted); *see also Patane v. Clark,* 508 F.3d

[81] *Id.* at *3.
[82] *See id.* at *5.
[83] *See id.* at *6.
[84] *Gillman v. Inner City Broadcasting Corp.*, No. 08 Civ. 8909 (LAP), 2009 WL 3003244 (S.D.N.Y. Sept. 18, 2009).

> 106, 113 (2d Cir.2007). *Iqbal* was not meant to displace *Swierkiewicz* 's teachings about pleading standards for employment discrimination claims because in *Twombly,* which heavily informed *Iqbal,* the Supreme Court explicitly affirmed the vitality of *Swierkiewicz. See Twombly,* 550 U.S. at 547 ("This analysis does not run counter to *Swierkiewicz* .... Here, the Court is not requiring heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."); *see also Iqbal,* --- U.S. ----, 129 S.Ct. at 1953 ("Our decision in *Twombly* expounded the pleading standard for all civil actions, and it applies to antitrust and discrimination suits alike." (internal quotation marks and citations omitted)). Accordingly, while a complaint need not contain specific facts establishing a *prima facie* case of employment discrimination to overcome a Rule 12(b)(6) motion to dismiss, it must nevertheless give fair notice of the basis of Plaintiff's claims, and the claims must be facially plausible.[85]

While finding that plaintiff pled enough facially plausible facts on the sexual harassment and retaliation claims, the court found that he had not met that standard for his age discrimination claim.

> Here, Plaintiff presents conclusory and irrelevant facts in support of his age discrimination claim. Plaintiff alleges that he was replaced by an *inexperienced* employee, as opposed to a *younger* employee. Allegations that the Defendant hired inexperienced employees do not advance an age discrimination claim. Plaintiff also contends that the Chief Operating Officer of the Company "adopted a policy and practice of replacing long term employees regardless of their dedication and competence with new hires." Even assuming such a policy existed, it would not tend to create an inference of age discrimination because the replacement of "long term employees" with new hires of unspecified ages is irrelevant to the question of whether Defendant took adverse employment actions against the fired employees based on *age.*[86]

3. *Perry v. State of New York Dep't of Labor*[87]

The plaintiff, who is *pro se,* asserted that the New York State Department of Labor discriminated and retaliated against him by declining to grant him an interview for a position as

[85] *Id.* at *3.
[86] *Id.* at *5.
[87] *Perry v. State of New York Dep't of Labor*, No. 08 Civ. 4610 (PKC), 2009 WL 2575713 (S.D.N.Y. Aug. 20, 2009).

Labor Standards Investigator. He brought claims pursuant to Title VII and ADEA. The defendant's 12(b)(6) motion to dismiss the amended complaint was granted.

In this case, the *Twombly*/*Iqbal* effect can be clearly seen. As the court stated:

> The Amended Complaint fails to set forth allegations of discrimination sufficient to make plaintiff's discrimination action "plausible on its face." *Patane,* 508 F.3d at 111-12 (quoting *Twombly,* 127 S.Ct. at 1974). To the limited extent that the Amended Complaint asserts discrimination, it does so only in a conclusory fashion. *See* Am. Compl. at 5 ("... I was denied an interview based upon discriminatory bias."); 7 ("As a 48 year old African-American male I allege that the [DOL] discriminated against me in violation of Title VII and the [ADEA] ...."); 9-10 (citing statistics concerning minority composition of New York state public workforce). Such assertions constitute the type of "labels and conclusions" or the "formulaic recitation of the elements of a cause of action" deemed by *Twombly* as insufficient to state a claim for relief. 127 S. Ct, at 1964-65. The complaint is otherwise silent as to any discriminatory purpose or motivation directed toward the plaintiff.
>
> I am mindful that the pleading requirements in a Title VII action are "very lenient, even de minimis," *Brown v. Coach Stores, Inc.,* 163 F.3d 706, 710 (2d Cir.1998), and that as a party representing himself *pro se,* the plaintiff's complaint is to be read liberally. *Graham,* 89 F.3d at 79. The special solicitude afforded to a *pro se* litigant does not relieve the plaintiff of his obligations under Rule 8, however.[88]

In addressing the retaliation claims, the court stated:

> Generously construing the Amended Complaint and plaintiffs opposition materials, it appears that the plaintiff's strongest claim for retaliation would be that, in retaliation for maintaining his 2002 litigation against the DOL, the DOL refused to permit plaintiff to participate in interviews for a position of labor standards investigator. An employer's decision to "blacklist" a former employee may be an adverse action for the purposes of stating a retaliation claim. *Wanamaker,* 108 F.3d at 466.
>
> Construing the Amended Complaint as making this assertion, the causal connection between the protected activity (commencement of a 2002 lawsuit) and the alleged act of retaliation (refusal to

[88] *Id.* at *3.

> interview the plaintiff for a job position of which he was notified) is remote. A plaintiff may assert causal connection through allegations of retaliatory animus, or else by circumstantial evidence, such as close temporal proximity between the protected activity and the retaliatory action. *See, e.g., Summer v. U.S. Postal Service,* 899 F.2d 203, 209 (2d Cir.2009). The Amended Complaint does neither: It contains no allegation of direct retaliatory animus, and as to circumstantial evidence, a gap of more than one year between protected activity and retaliatory action is generally insufficient.
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> ***
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> Moreover, the Amended Complaint contains no allegation that the decision makers responsible for filling the position of labor standards investigator were aware that the plaintiff had filed a lawsuit against the DOL or aware of any activities cited in the Amended Complaint that may be construed as allegedly protected. The plaintiff's retaliation claim is dismissed.[89]

4. *Peterec-Tolino v. Commercial Elec. Contractors, Inc.*[90]

Plaintiff asserted claims of discrimination based upon disability in violation of the ADA, NYSHRL, & NYCHRL, and age discrimination in violation of ADEA, NYSHRL and NYCHRL. Defendants' motion to dismiss the complaint was granted as to the individual defendants, based on the lack of individual liability in the applicable statutes and denied as to the Company.

Again, there seems to be confusion between the newly heightened standard and the supposedly lenient standards known previously. As the court attempts to explain:

> On a motion to dismiss pursuant to Fed.R.Civ.P. 12(b)(6), the court "must accept the factual allegations of the complaint as true and must draw all reasonable inferences in favor of the plaintiff." *Bernheim v. Litt,* 79 F.3d 318, 321 (2d Cir.1996). "[T]he complaint must assert 'enough facts to state a claim to relief that is plausible on its face.' " *Lee v. Sony BMG Music Entm't Inc.,* 557 F.Supp.2d 418, 424 (S.D.N.Y.2008) (quoting *Bell Atlantic v. Twombly,* 127 S.Ct. 1955, 1973-74 (2007)); *see also Ashcroft v. Iqbal,* 129 S.Ct. 1937, 1949 (2009). "An employment discrimination plaintiff ...

[89] *Id.* at 5-6.
[90] *Peterec-Tolino v. Commercial Elec. Contractors, Inc.*, No. 08 Civ. 0891 (RMB)(KNF), 2009 WL 2591527 (S.D.N.Y. Aug. 19, 2009).

> must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.' " *Kassner v. 2nd Ave. Delicatessen Inc.,* 496 F.3d 229, 237 (2d Cir.2007) (quoting *Swierkiewicz v. Sorema N.A.,* 534 U.S. 506, 515 (2002)); *see also Bovkin v. KeyCorp,* 521 F.3d 202, 212-16 (2d Cir.2008). "[T]he pleading requirements in discrimination cases are very lenient, even *de minimis." Deravin v. Kerik,* 335 F.3d 195, 200 (2d Cir.2003).
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> "Since most *pro se* plaintiffs lack familiarity with the formalities of pleading requirements, we must construe *pro se* complaints liberally, applying a more flexible standard to evaluate their sufficiency than we would when reviewing a complaint submitted by counsel." *Lerman v. Bd. of Elections,* 232 F.3d 135, 139 (2d Cir.2000). But, "[t]he duty to liberally construe a [*pro se*] plaintiff's complaint is not the equivalent of a duty to re-write it ." *Kirk v. Heppt,* 532 F.Supp.2d 586, 590 (S.D.N.Y.2008) (internal quotations omitted).[91]

5. *Popa v. PricewaterhouseCoopers LLP*.[92]

Mihaela Illiana Popa, a former employee of PricewaterhouseCoopers LLP, brought an action *pro se,* asserting claims for employment discrimination and retaliation based on her race, gender, national origin, age and disability in violation of Title VII, the ADA, NYSHRL and NYCHRL. Defendant's 12(b)(6) motion was granted in its entirety.

Although the court cites to a 2nd Circuit case entitled *Harris v. Mills*[93] for the proposition that courts remain obligated to construe a *pro se* complaint liberally,[94] the court dismissed the federal claims based on timeliness grounds and dismissed the state and local law claims as no allegations were ever asserted that plaintiff was a citizen of New York or that any discriminatory activity took place in New York.

6. *Smith v. St. Luke's Roosevelt Hosp.*[95]

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[91] *Id.* at *2.
[92] *Popa v. PricewaterhouseCoopers LLP*, No. 08 Civ. 8138 (LTS)(KNF), 2009 WL 2524625 (S.D.N.Y. Aug. 14, 2009).
[93] *Harris v. Mills*, 572 F.3d 66 (2d Cir. 2009).
[94] *Id.* at 72.
[95] *Smith v. St. Luke's Roosevelt Hosp.*, No. 08 Civ. 4710 (GBD)(AJP), 2009 WL 2447754 (S.D.N.Y. Aug. 11, 2009).

Pro se plaintiff Christopher Smith brought this action pursuant to Title VII and the ADA against St. Luke's Roosevelt Hospital seeking redress for termination, failure to promote, failure to accommodate, retaliation, unequal terms and conditions of employment and disparate treatment. Defendant's motion to dismiss the complaint pursuant to Rules 12(b)(1) and 12(b)(6) was granted as to Smith's failure to accommodate, failure to promote, termination and disparate treatment claims and denied as to Smith's retaliation and unequal terms and conditions of employment claims.

Here, the court starts its discussion section by engaging in a thorough explanation of the *Twombly*/*Iqbal* "plausibility" standard beginning with the following sentence: "In two decisions in the last few years, the Supreme Court *significantly clarified* the standard for a motion to dismiss…"**[emphasis added]**.[96] The court then dismissed the ADA claim as the disabilities alleged, arthritis and eczema, were not "disabilities" covered under the ADA.

As for the Title VII claims, the court said:

> Smith has not adequately pled…that his termination occurred under circumstances giving rise to an inference of discrimination on the basis of his race. In discussing the events leading up to his termination, Smith does not allege even one fact that connects his race to his termination. Instead, Smith asserts facts indicating that the Hospital terminated him for non-discriminatory reasons, namely that Smith (at a minimum) "raised [his] voice" in a threatening manner to his supevisor, Armand. Moreover, any inference of race discrimination is undermined by the fact that Armand, like Smith, is Black.[97]

7. *Maisonet v. Metropolitan Hosp. and Health Hosp. Corp.*[98]

Pro se plaintiff Jorge Castro Maisonet brought an action against his former employer, Metropolitan Hospital Center and the New York City Health and Hospitals Corporation, alleging

[96] *Id.* at *8.
[97] *Id.* at *17.
[98] *Maisonet v. Metropolitan Hosp. and Health Hosp. Corp.*, 640 F.Supp.2d 345 (S.D.N.Y. 2009).

that they discriminated against him on the basis of his race and disability, in violation of Title VII and ADA. Maisonet also alleged that Defendants retaliated against him for filing complaints regarding co-workers with the Office of Labor Relations at MHC, in violation of Title VII. Defendants made a 12(b)(6) motion and, in the alternative, Defendants moved for a more definite statement pursuant to Rule 12(e). Defendants' motion to dismiss was granted but Maisonet was granted leave to replead.

Iqbal is cited to once at the start of the discussion section.[99] Yet again, its impact is negligible. In dismissing the Title VII claims, the court stated:

> Maisonet fails to allege a plausible claim of racial discrimination under Title VII. First, the Complaint makes no mention of Maisonet's race. In his EEOC charge Maisonet identifies himself as Puerto Rican; however, even if Maisonet intended to claim discrimination based on his national origin, neither his EEOC charge nor the Complaint contain factual allegations that Maisonet suffered discrimination because of his Puerto Rican heritage. Instead, the Complaint alleges that Defendants discriminated against Maisonet based on his race by "[a] cussing [sic] me of bias crime that I called them the N word," (Complaint § II(D)), in retaliation for complaints he made to Labor Relations. Although the alleged accusation against Maisonet contains a racial component, the circumstances do not give rise to an inference of discriminatory intent against Maisonet based on his race. While Maisonet's letters to the EEOC, attached to his Complaint, are replete with allegations of harassment against him and his daughters by other hospital workers, there is nothing in these letters to indicate that such harassment was motivated by discriminatory animus based on Maisonet's race.[100]

As to the retaliation claims:

> Maisonet's allegation, even when construed liberally, does not substantiate a plausible retaliation claim. The filing of a complaint on behalf of his daughter, not employed by MHC, alleging sexual harassment by co-workers, does not constitute a protected activity under Title VII. Furthermore, even if Defendants' alleged actions were propelled by a retaliatory animus, the Court is not persuaded

[99] *Id.* at 348.
[100] *Id.* at 349.

> that the alleged agreement to sign a petition against Maisonet constitutes a materially adverse employment action sufficient to state a retaliation claim.[101]

Finally, as to the ADA claim:

> The Court notes that the Complaint indicates that Defendants' discriminatory conduct included "[f]ailure to accommodate my disability." (Complaint § 2(A).) The remainder of Maisonet's Complaint, however, provides no factual allegations relating to a failure on the part of either MHC or its staff to provide reasonable accommodation for Maisonet's alleged disability. Therefore, the Court must dismiss Maisonet's claim that Defendants violated the ADA by failing to make reasonable accommodations for his disability.
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> ***
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> Furthermore, Maisonet alleges no set of facts to demonstrate that he suffered an adverse employment action because of his disability. While Maisonet is no longer employed at MHC, the Complaint does not allege that his employment was terminated or that he suffered any discrimination because of his psychological condition. Therefore, the Court finds that the Complaint fails to state a claim of employment discrimination under the ADA and must dismiss the ADA claims accordingly.[102]

8. *Jenkins v. New York City Transit Authority*[103]

Tahita Jenkins brought an action against the New York City Transit Authority, Patrick Sullivan, and Phyllis Chambers pursuant to Title VII, NYSHRL and NYCHRL. Jenkins, a Pentecostal American, asserted that the defendants discriminated against her because of her religion by rejecting her request to wear a skirt as part of her Transit Authority bus operator uniform and then terminating her when she refused to wear pants. Plaintiff agreed to withdraw Title VII claims against the individual defendants and defendants agreed to withdraw its motion to dismiss as to claims under NYCHRL. Defendants' 12(b)(6) motion was denied.

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[101] *Id.* at 350.
[102] *Id.* at 350-351.
[103] *Jenkins v. New York City Transit Authority*, 646 F.Supp.2d 464 (S.D.N.Y. 2009).

The relevant discussion is as follows:

> To state a claim for disparate impact under Title VII, a plaintiff need only plead "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Iqbal,* 129 S.Ct. at 1949 (quoting *Twombly,* 550 U.S. at 570, 127 S.Ct. 1955). A plaintiff is not required to plead facts sufficient to establish a prima facie case. *Boykin v. KeyCorp, N.A.,* 521 F.3d 202, 212 (2d Cir.2008) (citing *Swierkiewicz v. Sorema,* 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002)).
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> ***
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> It is unnecessary in this case to test the dividing line that distinguishes a discrimination claim which, although not required to set forth a prima facie case under *Swierkiewicz,* has alleged sufficient facts to make it plausible under *Iqbal* and *Twombly*.
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> ***
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> "*Swierkiewicz* does not, however, relieve a plaintiff of the obligation to identify in his pleadings a specific employment practice that is the cause of the disparate impact." *Kulkarni v. City Univ. of New York,* No. 01 Civ. 10628, 2002 WL 1315596, at *2 (S.D.N.Y. Jun. 14, 2002). A "[p]laintiff must identify a specific employment practice to 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.' " *Id.* (quoting *Swierkiewicz,* 534 U.S. at 512, 122 S.Ct. 992).
>
> The plaintiff's Complaint identifies a specific employment practice-the Transit Authority's policy of requiring all bus operators to wear pants. She also alleges that she was terminated because her religion prevents her from complying with that policy. She also alleges that there was no business justification for the Transit Authority's actions. It is plain that the plaintiff is alleging that the policy has a disparate impact on Pentecostal American women because their religion prohibits them from wearing pants, and the Complaint gives the defendants fair notice of these allegations. The allegations in the Complaint are therefore sufficient to state a claim of disparate impact.[104]

C. Western District of New York[105]

[104] *Id.* at *3-4.

[105] In conducting a Westlaw search with the following search terms: "129 S.CT. 1937" & "EMPLOYMENT DISCRIMINATION" & CO(WDNY), there was only one reported case with that criteria.

1. *Lueck v. Progressive Ins., Inc.*[106]

Plaintiff John Lueck commenced this action against Progressive Insurance Company and Timothy Fritz, seeking damages against defendants for gender based discrimination in violation of Title VII and NYSHRL. Plaintiff also alleged a violation of 42 U.S.C. § 1981 and asserted claims of common law negligence and negligent infliction of emotional distress. Specifically, plaintiff claimed that he was subjected to a hostile work environment while employed by Progressive as a result of a single e-mail he received from Fritz. Defendants made a 12(b)(6) motion contending that the plaintiff had failed to allege misconduct sufficiently severe to constitute unlawful same-sex sexual harassment under Title VII and the NYSHRL. The motion, which was submitted without opposition, was granted.

The familiar pattern again arises here, as the court cites to *Iqbal* three times at the start of its discussion section, yet the case is not specifically decided on the sufficiency of the facts alleged in the complaint. The Title VII and NYSHRL hostile work environment claims were dismissed as Plaintiff failed to establish the "severe or pervasive" standard. The Section 1981 claims were dismissed as that statute protects against racial discrimination only and the negligence claims were dismissed as New York's Workers' Compensation Law is the exclusive remedy for those claims.

D. Northern District of New York

There has been only one reported case in the Northern District that mentions *Iqbal*.[107] However, that case was decided on timeliness grounds.

IV. CONCLUSION

A. What impact has *Iqbal* had, if any?

[106] *Lueck v. Progressive Ins., Inc.*, No. 09-CV-6174, 2009 WL 3429794 (W.D.N.Y. Oct. 19, 2009).
[107] *Brown v. Research Foundation of SUNY*, No. 08-CV-592, 2009 WL 1504745 (N.D.N.Y. May 28, 2009).

At this point, one would have to assess *Iqbal*'s impact as being inconclusive. The majority of the cases were decided on grounds other than the sufficiency of the factual assertions in the complaints. It should be noted that *Iqbal* has been the governing law for only eight months. Perhaps *Iqbal*'s true impact can only be measured after a number of years rather than a number of months. This conclusion is confirmed in a memorandum to the Civil Rules Committee of Judicial Conference of the United States, wherein it states: "While more time is needed to allow the lower courts to flesh out the results of *Twombly* and *Iqbal*, most of the case law to date does not indicate a drastic change in pleading standards."[108]

B. The Legislative Response

As was alluded to earlier,[109] *Iqbal* has not escaped critique from Congress. On July 22, 2009, Senator Arlen Specter (D-Pa.) introduced S. 1504, The Notice Pleading Restoration Act of 2009.[110] On that date, Sen. Specter made introductory remarks on the measure.[111] The bill was then read twice and referred to the Senate Judiciary Committee. There has been no action taken on the bill since that date.[112]

On October 27, 2009, the U.S. House Committee for the Judiciary's Subcommittee on the Constitution, Civil Rights and Civil Liberties held a hearing entitled "Access to Justice Denied – *Ashcroft v. Iqbal*."[113] On November 19, 2009, Representatives John Conyers (D-Mich.) Jerrold

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[108] *See Memorandum – Application of pleading standards post-Ashcroft v. Iqbal*, available at http://www.uscourts.gov/rules/Memo%20re%20pleading%20standards%20Nov30.pdf. (last accessed Dec. 15, 2009).
[109] *See supra* p. 5.
[110] S. 1504, 111th Congress (1st Sess. 2009). For the text of the bill, please see http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:s1504is.txt.pdf (last accessed Dec. 15, 2009).
[111] *See supra* p. 1.
[112] *See Search Results – THOMAS (Library of Congress)*, available at http://www.thomas.gov/cgi-bin/bdquery/D?d111:1:./temp/~bdmZ06:@@@X|/bss/111search.html| (last accessed Dec. 15, 2009).
[113] *See Hearing on: Access to Justice Denied – Ashcroft v. Iqbal*, available at http://judiciary.house.gov/hearings/hear_091027_1.html (last accessed Dec. 15, 2009); *see also* Alison Frankel, *Mr. Iqbal Goes to Washington*, available at http://www.law.com/jsp/tal/digestTAL.jsp?id=1202435006595&Mr_Iqbal_Goes_to_Washington (last accessed Dec. 15, 2009).

Nadler (D-NY) and Henry Johnson (D-Ga.) introduced H.R. 4115, the "Open Access to Courts Act of 2009",[114] which would override *Iqbal* by lowering the standards for a case to move to the discovery stage.[115] Rep. Johnson called *Iqbal* an "unexpected gift for the business community."[116] On December 11, 2009, the bill was referred to the House Subcommittee on Courts and Competition Policy.[117]

On December 2, 2009, the U.S. Senate Committee on the Judiciary held a hearing entitled "Has the Supreme Court Limited Americans' Access to Courts?". General Garre, one of three witnesses at the hearing, said: "We need to know more. We need to know whether meritorious cases are being dismissed. We need to know if these are cases that would have been dismissed before *Twombly* and *Iqbal*."[118] Sen. Patrick Leahy (D-Vt.), the committee's chairman, asked Gen. Garre: "If the cases are dismissed, how are we going to know whether they were meritorious?" Garre replied that researchers could at least study whether a case might have been dismissed under the previous standard.[119]

C. What Should Plaintiffs Do in the *Iqbal* Era?

1. New York Plaintiffs Should File in New York State Courts

Iqbal is limited to cases brought in federal courts under the Federal Rules of Civil Procedure. New York's Civil Practice Law and Rules and New York case law remains

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[114] H.R. 4115, 111th Congress (1st Sess. 2009).
[115] *See Press Release of Representative Jerrold Nadler*, available at http://www.house.gov/apps/list/press/ny08_nadler/RestoreCourt111909.html (last accessed Dec. 15, 2009); *see also US Dem Reps Craft Bill To Prevent Easily Dismissing Lawsuits*, available at http://online.wsj.com/article/BT-CO-20091027-719356.html (last accessed Dec. 15, 2009).
[116] *See Wednesday Round-Up*, available at http://www.scotusblog.com/wp/wednesday-round-up-6/#more-12135 (last accessed Dec. 15, 2009).
[117] *See Search Results – THOMAS (Library of Congress)*, available at http://www.thomas.gov/cgi-bin/bdquery/D?d111:1:./temp/~bdjwga:@@@X|/bss/111search.html|. (last accessed Dec. 15, 2009).
[118] *See Former Solicitor General Feels the Wrath of Senators – The BLT: The Blog of Legal Times*, available at http://legaltimes.typepad.com/blt/2009/12/former-solicitor-general-feels-the-wrath-of-senators.html. (last accessed Dec. 15, 2009).
[119] *Id.*

undaunted by the *Iqbal* decision.[120] The New York counterpart to Rule 8 is CPLR § 3013,[121] which states: "Statements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense."[122]

2. New York Plaintiffs Should File under State and Local Laws

The advantages of filing legal complaints under NYSHRL and NYCHRL are undeniable. First, both statutes are substantively broader than their federal counterparts. Under the NYSHRL, the following protected classes are protected, along with the ones protected by federal law: "sexual orientation, military status… predisposing genetic characteristics,[123] marital status, or domestic violence victim status"[124] while the NYCHRL adds "alienage or citizenship status" to the all of the aforementioned characteristics.[125] NYCHRL's private right of action allows for uncapped punitive damages and compensatory damages,[126] as compared to Title VII which has a maximum statutory cap of $300,000 for the sum of compensatory and punitive damages.[127]

Second, while federal courts have routinely and consistently analyzed NYSHRL and NYCHRL under the frameworks established by federal law, the New York City Council has rejected such equivalence through a 2005 revision to Administrative Code § 8-130, called the "Restoration Act".[128]

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[120] As of December 1, 2009, only one New York case cites to *Iqbal*. *Creative Interiors, Inc. v. Epelbaum*, 24 Misc.3d 1231(A) (N.Y. Sup. 2009). There is no substantive discussion or application of *Iqbal*.
[121] N.Y. C.P.L.R. § 3013 (McKinney's 2009).
[122] *Id.*
[123] On November 21, 2009, GINA (Genetic Information Nondiscrimination Act), which protects against discrimination in employment based on genetic information, became effective. 42 U.S.C. § 2000ff, *et seq*. *See also Historic Genetic Information Nondiscrimination Act Takes Effect*, available at http://eeoc.gov/eeoc/newsroom/release/11-20-09.cfm (last accessed Dec. 15, 2009).
[124] N.Y. Exec. Law § 296(1)(a) (McKinney's 2009).
[125] NYC Code § 8-107(1)(a).
[126] *See* NYC Code § 8-502(a).
[127] Title VII's statutory caps are also based on the number of employees an employer has. *See* 42 U.S.C. § 1981a(b)(3).
[128] N.Y.C. Local Law No. 85 of 2005 (Oct. 3, 2005).

The operative language of the Act is as follows:

> The provisions of this [chapter] *title* shall be construed liberally for the accomplishment of the *uniquely broad and remedial* purposes thereof, *regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed* **[emphasis added]**.[129]

The seminal case in New York for establishing the breadth of the NYCHRL as compared to its federal counterparts is *Williams v. New York City Housing Authority*.[130] *Williams* engages in a thorough explication of the requirements of the Restoration Act, rejecting the "carbon copy" school of jurisprudence, and abandoning the "severe or pervasive" standard in harassment cases:

> [T]he Restoration Act notified courts that (a) they had to be aware that some provisions of the City HRL were textually distinct from its State and federal counterparts, (b) all provisions of the City HRL required independent construction to accomplish the law's uniquely broad purposes and (c) cases that had failed to respect these differences were being legislatively overruled.[131]
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>
> Experience has shown that there is a wide spectrum of harassment cases falling between 'severe or pervasive' on the one hand and a 'merely' offensive utterance on the other. The City HRL is now explicitly designed to be broader and more remedial than the Supreme Court's 'middle ground,' a test that had sanctioned a significant spectrum of conduct demeaning to women. With this broad remedial purpose in mind, we conclude that questions of 'severity' and 'pervasiveness' are applicable to consideration of the scope of permissible damages, but not to the question of underlying liability.[132]

The *Williams* court also clarified the broad scope of the local law's retaliation provisions,[133] and rejects a narrow interpretation of continuing violation doctrine.[134]

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[129] *Id.*
[130] *Williams v. New York City Housing Authority*, 61 A.D.3d 62, 872 N.Y.S.2d 27 (1st Dept., Jan. 27, 2009).
[131] *Williams*, 61 A.D.3d at 67-68.
[132] *Id.* at 76.
[133] *Id.* at 70-71.

Federal courts may finally be starting to recognize the difference in analysis. As the 2nd Circuit stated in a recent decision:

> The Local Civil Rights Restoration Act of 2005, N.Y.C. Local Law No. 85 (2005) (the "Restoration Act") amended the City HRL in a variety of ways, including by confirming the legislative intent to abolish "parallelism" between the City HRL and federal and state anti-discrimination law:
>
> The provisions of this [] title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably-worded to provisions of this title, have been so construed.
>
> There is now a one-way ratchet: "Interpretations of New York state or federal statutes with similar wording may be used to aid in interpretation of New York City Human Rights Law, viewing similarly worded provisions of federal and state civil rights laws as a *floor* below which the City's Human Rights law cannot fall." Id. §1 (emphasis added).
>
> ***
>
> Because claims under the City HRL must be given "an independent liberal construction," *Williams,* 61 A.D.3d at 66, 872 N.Y.S.2d at 31, and because the City HRL permits associational discrimination claims, we vacate the dismissal of the Loefflers' City HRL claims and remand to the district court for further proceedings. We leave it to the district court to interpret any specific, applicable provisions in the first instance.[135]

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[134] *Id.* at 73-74. *See also Caselaw Developments – Anti-Discrimination Center*, available at http://www.antibiaslaw.com/nyc-human-rights-law/caselaw-developments (last accessed Dec. 15, 2009) and Craig Gurian, *A Return to Eyes on the Prize: Litigating Under the Restored New York City Human Rights Law*, 33 FORDHAM URB. L.J. 255 (2006).

[135] *Loeffler v. Staten Island University Hosp.*, 582 F.3d 268, 278 (2d Cir. 2009). *See also Sampson v. City of New York*, No. 07 Civ. 2836(BSJ)(RLE), 2009 WL 3364218 at *7 (S.D.N.Y., Oct. 19, 2009) (The NYCHRL, like Title VII, prohibits employment discrimination on the basis of race or age. However, the municipal law "explicitly requires an independent liberal construction analysis in all circumstances, even where State and federal civil rights laws have comparable language. The independent analysis must be targeted to understanding and fulfilling ... the City HRL's 'uniquely broad and remedial' purposes, which go beyond those of counterpart State or federal civil rights laws."[internal citations to *Williams* and *Loeffler* omitted]).