Twombly/Iqbal Held Not Applicable to Evidentiary Standard

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In *Keys v. Humana, Inc.,* No. 11-5472 (6th Cir. July 22, 2012) [http://www.ca6.uscourts.gov/opinions.pdf/12a0204p-06.pdf], the Sixth Circuit held that the burden shifting framework applicable to protected-class employment discrimination litigation is an evidentiary standard that might or might not ultimately apply to the plaintiff's burden of proof, and is therefore not subject to the *Twombly/Iqbal* pleading standards established in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

In general, an individual alleging a violation of Title VII of the Civil Rights Act can proceed by introducing direct evidence of discrimination or by proving circumstantial evidence which would support an inference of discrimination. *See Kline v. Tennessee Valley Auth.*, 128 F.3d 337, 348 (6th Cir. 1997). When an individual proceeds with indirect or circumstantial evidence, the individual's claims are analyzed under the burden-shifting framework set forth in *McDonnell Douglas v. Green*, 411 U.S. 792 (1973) and *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248 (1981).

Under this framework, an individual has the initial burden of proving a prima facie case of discrimination. *Burdine*, 450 U.S. at 252-53. If the individual succeeds in proving a prima facie case, the burden shifts to the employer to articulate a legitimate, nondiscriminatory reason for its decision. *Id*. at 253. If the employer makes this showing, the burden then shifts back to the individual to prove that the employer's reason for its decision was not its true reason, but was a pretext for discrimination. *Id*.

To establish a prima facie case of protected-class employment discrimination, an individual must demonstrate that she: (1) is a member of a protected group; (2) was subjected to an adverse employment decision; (3) was qualified for the position; and (4) a similarly situated non-protected employee was treated more favorably. *See Corell v. CSX Transp., Inc.*, 378 Fed.Appx. 496, 501 (6th Cir. 2010).

In this case, Keys alleged in her Amended Complaint that Humana systematically discriminated against her based upon her race, but she did not specifically plead the fourth prong of a prima facie case that a similarly situated non-protected employee was treated more favorably. The United States District Court for the Western District of Kentucky granted Humana's motion to dismiss her Amended Complaint. The district court relied upon the Sixth Circuit's decision in "*White v.*

Baxter Healthcare Corp., 533 F.3d 381, 391 (2008), which applied the burden-shifting framework of *McDonnell Douglas* to review of a district court's grant of *summary judgment* in a claim of race discrimination based on circumstantial evidence." *Keys* at *5 (emphasis the Court's).

The district court, however, analyzed the Amended Complaint at the motion to dismiss as compared to the summary judgment stage, engaged in the burden shifting analysis, and concluded that Keys had failed to sufficiently plead that a similarly situated non-protected employee had been treated more favorably.

In its opinion, the Court noted that the Supreme Court had held that the *McDonnell Douglas* burden shifting analysis represented an evidentiary standard and explained how discovery might make the burden-shifting analysis inapplicable. *Keys* at *6 (citing *Swierkiewicz v. Sorema*, 534 U.S. 506, 510 (2002)). Further citing to *Swierkiewicz*, the Court stated that "as the Court reasoned, '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.'" *Keys* at *6 (citing *Swierkiewicz,* 534 U.S. at 511).

When addressing the interplay of an evidentiary standard and the pleading standard, the Court stated:

> Recently, in *HDC, LLC v. City of Ann Arbor*, we again recognized the applicability of *Swierkiewicz*'s holding and further noted that it would be "inaccurate to read [*Twombly* and *Iqbal*] so narrowly as to be the death of notice pleading and we recognize the continuing viability of the 'short and plain' language of Federal Rule of Civil Procedure 8." 675 F.3d 608, 614 (6th Cir. 2012). Therefore, it was error for the district court to require Keys to plead a prima facie case under *McDonnell Douglas* in order to survive a motion to dismiss.

Keys, at *6-7.

Thus, where it is unknown at the outset whether an evidentiary standard will apply, it is inappropriate to require a plaintiff to plead sufficiently to satisfy that standard. The Court went on to confirm, however, that a plaintiff must nevertheless allege sufficient facts to make plausible claims as defined in *Twombly /Iqbal*. The Court ultimately found that Keys had asserted plausible claims and sent the matter back to the District Court for further proceedings.

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