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Expert Analysis

Harmonizing Iqbal Pleading Standards With McDonnell Douglas Framework

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This month, we discuss *Littlejohn v. City of New York*, where the U.S. Court of Appeals for the Second Circuit addressed the intersection of the McDonnell Douglas evidentiary framework and the "plausibility" pleadings standard announced in *Ashcroft v. Iqbal*.[1] In the decision, written by Judge Christopher Droney and joined by Judges Pierre Leval and Gerard Lynch, the court reconciled the heightened pleading standards outlined in *Iqbal* with the McDonnell Douglas evidentiary standard and held that, to the extent that the McDonnell Douglas framework relaxes the factual showing required for plaintiffs to defeat a summary judgment motion, it likewise relaxes the facts needed to be pleaded under *Iqbal* to survive a motion to dismiss.

The court also clarified the scope of Title VII protected activity under the opposition clause in §704(a) of the Civil Rights Act,[2] holding that the clause protects certain activities of all employees, even if their job duties include monitoring and investigating complaints of discrimination. The opposition clause specifies that it is unlawful for an employer to discriminate against an employee because she "opposed" a discriminatory action or policy. 42 U.S.C.A. §2000e-3(a).

In so ruling, the court held that the plaintiff had sufficiently pleaded disparate treatment under Title VII as against her employer, the City of New York, and under §§1981 and 1983 as against her direct supervisor. The court vacated the district court's judgment as to those claims, affirmed the dismissal of all other claims and remanded the case to the district court.

Background

Title VII prohibits employers from discriminating in compensation, terms, conditions, and privileges of employment on account of an employee's race, color, religion, sex or national origin.[3] Sections 1981 and 1983 create causes of action for race-based employment discrimination based on disparate treatment and/or hostile environment.[4] *McDonnell Douglas v. Green*, decided in 1973, set forth the elements of establishing a prima facie case for a Title VII claim of discriminatory treatment. As subsequently refined, these requirements have been consistently characterized as "not onerous" or "minimal," in keeping with the court's reasoning that fairness required that a plaintiff alleging discrimination be protected from early-stage dismissal before a defendant employer has put forth the reasons for the adverse employment action in question.[5] This burden-shifting framework is also used to evaluate disparate treatment claims arising under §§1981 and 1983.[6]

> 'Littlejohn' presented a matter of first impression: Does Iqbal's 'plausibility' requirement apply to employment discrimination complaints subject to the McDonnell Douglas framework?

In its 2002 decision, *Swierkiewicz v. Sorema*, the Supreme Court squarely addressed the pleading requirements for such cases.[7] The court ruled that the McDonnell Douglas framework constituted an evidentiary standard, not a pleading requirement. A Title VII plaintiff, like all other plaintiffs, was only required to provide the employer "fair notice" of the claims being made and the basis for those claims, consistent with the liberal pleading standards of the Federal Rules of Civil Procedure. Seven years later, in *Iqbal*, the Supreme Court announced a heightened standard for pleading arguably in tension with *Swierkiewicz*. The court held that a plaintiff must provide more than mere notice of claims and the grounds upon which they rest to survive a motion to dismiss—namely, the complaint must contain "*sufficient factual matter*, accepted as true, to state a claim of relief that is *plausible* on its face."[8]

Littlejohn thus marked an issue of first impression for the Second Circuit—specifically, whether Iqbal's heightened "plausibility" pleading requirements would apply to Title VII and other claims subject to the specialized McDonnell Douglas framework.

Title VII and §1981 also prohibit employers and individual supervisors from retaliating against employees who complain about workplace discrimination. Such claims are likewise analyzed under the McDonnell Douglas burden-shifting evidentiary framework. To establish a presumption of retaliation, a plaintiff must demonstrate that she was engaged

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in a protected activity, among other factors. The statute, §704(a) of the Civil Rights Act, defines protected activity as either participation in an investigation of discrimination or opposition to discrimination or discriminatory practices.[9]

While the Second Circuit recently passed upon the scope of the statute's participation clause, it had not previously addressed the scope of the opposition clause with regard to employees, like Dawn Littlejohn, whose job duties involve investigating and reporting on complaints of discrimination. Indeed, several district courts within the circuit had interpreted the clause restrictively by ruling that the scope of an employee's job duties limited what could qualify as protected activity pursuant to the opposition clause.[10]

Prior Proceedings

Plaintiff Dawn Littlejohn, an African-American woman and formerly the director of the Equal Employment Opportunity (EEO) Office for the New York City Administration of Children's Services (ACS), brought suit against the City of New York and three of her former supervisors—ACS Commissioner John Mattingly; his chief of staff and Littlejohn's direct supervisor, Amy Baker; and a later supervisor, Brandon Stradford—for hostile work environment, disparate treatment based on race, and retaliation, in violation of Title VII and 42 U.S.C. §§1981 and 1983. Littlejohn also alleged hostile work environment and sexual harassment in violation of Title VII against defendant Stradford.

In her amended complaint, filed on Sept. 23, 2013, she detailed how she was subjected to heightened reporting requirements, excluded from meetings and eventually demoted following the installment of two white supervisors, Mattingly and Baker. Likewise, she alleged that this treatment was a result of her complaints about personnel decisions accompanying the merger of ACS with the Department of Juvenile Justice (DJJ); specifically, her concerns about the lack of African-American women in management, and overall lower levels of management positions and pay for African-American employees.

Littlejohn filed a formal Charge of Discrimination with the EEOC in February 2012, claiming discrimination on the basis of race and color, as well as retaliation for complaints about discrimination. In October 2012, she wrote a separate letter to the EEOC office purporting to notify the agency of her sexual harassment claim. On Nov. 19, 2012, the EEOC sent Littlejohn a Notice of a Right to Sue letter based on her February filing. No acknowledgment was made of her later letter.

Upon a motion by defendants, Judge Robert Sweet dismissed the case in its entirety on Feb. 28, 2014, based on the pleading standards announced in *Iqbal*. The district court held that Littlejohn had failed to adequately plead her hostile work environment, disparate treatment, and retaliation claims. In deciding the disparate treatment claim, Sweet found that Littlejohn had failed to allege racial animus rising to the level of discriminatory intent, other than through unavailing conclusory statements. In addressing the retaliation claims, he observed that the plaintiff was acting in her official capacity as an EEO officer when she made her complaints and, as such, her complaints did not constitute protected activity under Title VII.

As to the §§1981 and 1983 claims, Sweet held that Littlejohn had failed to allege personal responsibility with regard to defendants who were not her direct supervisors at the time. He also held that Littlejohn had failed to exhaust her administrative remedies as to her sexual harassment claim. Plaintiff appealed these rulings.

The Second Circuit Decision

The Second Circuit reviewed de novo the district court's order granting defendants' motion to dismiss the action in its entirety.

Supreme Court Precedent. The court began its discussion by analyzing the interaction of *McDonnell Douglas*, *Swierkiewicz* and *Iqbal*. The court observed that, under *McDonnell Douglas* and its progeny, the requirements for establishing a prima facie case of employment discrimination change over the course of litigation. While a plaintiff must ultimately prove discrimination, at the earliest stages, a plaintiff may establish a prima facie case even in the absence of evidence sufficient to show discriminatory motivation on the part of the employer. Thereafter the burden shifts to the employer to posit a legitimate, non-discriminatory reason for the action, at which point the presumption is no longer relevant. The employee then bears the burden of showing that the employer's stated reason is pretextual.

Under the McDonnell Douglas framework, a plaintiff alleging employment discrimination is entitled to a presumption of "discriminatory motivation" in the initial stages of litigation when she can point to "some minimal evidence" leading to the inference that the employer acted with discriminatory impulse or intent, in addition to satisfying three other factors. Notably, Supreme Court precedent does not specify the quantum of evidence needed to shift the burden from the plaintiff alleging discriminatory motivation to the employer. However, as the Circuit observed, the Supreme Court has consistently downplayed the severity of the burden, characterizing it as "minimal" and "not onerous."[11]

Swierkiewicz, decided in 2002, marked the first time that the Supreme court addressed the pleading requirements for such cases. The Supreme Court emphasized that the McDonnell Douglas framework was "an evidentiary standard, not a pleading requirement."[12] In *Littlejohn*, the court observed that the most direct reading of *Swierkiewicz* relieved a plaintiff of the obligation "to plead facts sufficient to support even a minimal inference of discriminatory intent."[13]

The Supreme Court's 2009 Iqbal decision, the Second Circuit observed, seemed to run counter to the minimal requirements for pleading claims governed by the McDonnell Douglas framework. Applying the recent heightened pleading standards initially set forth in *Bell Atlantic v. Twombly*,[14] the Iqbal court held a complaint alleging that defendants acted with a "discriminatory state of mind" was insufficient to state a claim because of the absence of "sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face."[15]

Harmonizing the McDonnell Douglas Evidentiary Framework and Iqbal Pleading Standards. *Littlejohn* thus presented a matter of first impression: Does Iqbal's "plausibility" requirement apply to employment discrimination complaints subject to the McDonnell Douglas framework?

The court noted at the outset that applying *Iqbal* would run directly contrary to *Swierkiewicz*, which was decided just a few years prior to *Iqbal*. The court posited it would be inappropriate to apply *Iqbal*, a ruling of general applicability, to the specialized area for which the Supreme Court had devised a special set of rules via *McDonnell Douglas* and its progeny. That said, the court noted that the Iqbal decision itself contained no suggestion that its holding regarding pleading requirements was limited in any manner. The court also observed that Iqbal's "conflict" with *Swierkiewicz* depended on how one interpreted the earlier decision, noting that the Supreme Court itself had supplied a narrow reading of the Swierkiewicz holding in *Twombly*.

The Second Circuit observed that the apparent "tension" between the two precedents, *Swierkiewicz* and *Iqbal*, could be resolved if Iqbal's requirement that a complaint incorporate sufficient facts to make its claim plausible "is assessed in light of the presumption that arises in the plaintiff's favor under *McDonnell Douglas*."[16] Thus, to the extent that the McDonnell Douglas evidentiary framework lessens the burden on the plaintiff to present facts to defeat a motion for summary judgment in the initial stages of litigation, it likewise reduces the facts needed to be pleaded under *Iqbal*.

Addressing what must be plausibly supported by factual allegations when the Title VII plaintiff lacks direct evidence of discriminatory intent, the court observed that, under *McDonnell Douglas*, the plaintiff is only obligated to sustain "a minimal burden" of showing facts suggesting an inference of discriminatory motivation to survive a motion to dismiss. Applying this principle to the pleadings stage and the Iqbal requirement, the court held that the plaintiff can allege facts that "only give plausible support to a minimal inference of discriminatory motivation" to sustain her claim.[17]

Analyzed under this standard, the Second Circuit held that plaintiff's complaint, in which she alleged that she was demoted and replaced by an individual outside of her protected class, adequately stated a claim for disparate treatment. Noting that evidence of a demotion and replacement by a white colleague would be sufficient to fulfill the McDonnell Douglas requirement to make some minimal showing leading to an inference of discriminatory intent, the court found that the plaintiff's allegations were likewise "more than sufficient to make plausible her claim"—and therefore sufficient under *Iqbal*—to survive a motion to dismiss.

Retaliation Claims

The court also addressed the district court's grounds for dismissing plaintiff's Title VII and §1981 retaliation claims. Specifically, the court focused on whether Littlejohn participated in "protected activity" as defined by §704(a) of the Civil Rights Act.

The Second Circuit addressed for the first time whether §704(a)'s opposition clause encompasses an employee's complaints of discrimination when the employee's job duties involve reporting, investigating and/or preventing discrimination for her employer. In resolving the question, the Second Circuit looked to the Supreme Court's recent decision in *Crawford v. Metropolitan Government of Nashville & Davidson County*, in which the court clarified that an employee's communication to an employer that the employer has engaged in discrimination "virtually always constitutes the employee's opposition to the activity" and that any activity designed to resist, confront, or withstand discrimination prohibited by Title VII constitutes protected oppositional activity.[18]

The Second Circuit observed that *Crawford* was consistent with the Circuit's own prior decisions in which it held that the opposition clause protects not just complaints about discriminatory behavior directed at the complainant herself, but also complaints about discrimination directed at others and regarding discrimination generally.[19] The court explained that neither *Crawford* nor the Second Circuit's previous rulings were limited to employees who were not officially involved in monitoring discrimination or promoting non-discrimination policies.

Moreover, the court found that the plain language of §704(a) itself prohibited such a restrictive reading, meaning that it was applicable to all employees, including those whose job responsibilities, like Littlejohn's, involve tracking discriminatory behavior within a company or agency. The court rejected defendants' argument that such a reading would expose employers to gratuitous litigation, in that any adverse action taken against such employees could be considered related to their job duties and thus "opposition" under the court's reading. In so holding, the court relied on the plain language of the statute and the court drew a distinction between an employee's actions in "merely reporting or investigating" complaints and communicating to the employer the employee's own independent assessment that the employer engaged in discriminatory behavior.

Applying this framework to *Littlejohn*, the Second Circuit found that her repeated objections regarding the conduct of the ACS/DJJ merger and agency personnel decision-making constituted protected activities under §704(a)'s opposition clause, regardless of her title and role as EEO director. The court further found that Littlejohn's allegations regarding the timing of her complaints and her demotion would indirectly establish a causal connection between the protected activity and the adverse employment action, thus fulfilling her obligation under *McDonnell Douglas* and *Iqbal* to plead facts sufficient to plausibly support an indirect inference of causation for her retaliation claim.

Conclusion

Iqbal marked a sea-change in pleading requirements for plaintiffs, especially those alleging discrimination, scienter or improper motive without any direct evidence. While district courts have applied Iqbal's requirements with varying levels of stringency, the ruling was understood to raise the bar for plaintiffs like Littlejohn.

By harmonizing Iqbal's heightened pleading requirements with the longstanding McDonnell Douglas evidentiary framework, the Second Circuit offers a reprieve to plaintiffs, whose claims now can survive a motion to dismiss on pleadings that plausibly give rise to a minimal inference of discrimination, thereby preserving the flexibility traditionally afforded under *McDonnell Douglas*.

The Second Circuit's interpretation of the opposition clause of §704(a) likewise is plaintiff-friendly. In clarifying the broad scope of protection afforded under Title VII to employees who are responsible for monitoring and investigating complaints of discriminatory behavior, the Circuit's ruling shields those who are best situated to identify discrimination within an institution and seek to combat it.

1. *Littlejohn v. City of New York*, No. 13-1395, 2015 WL 4604250 (2d Cir. Aug. 3, 2015); *McDonnell Douglas v. Green*, 411 U.S. 792 (1973); *Ashcroft v. Iqbal*, 552 U.S. 662 (2009).
2. 42 U.S.C.A. §2000e-3(a).
3. 42 U.S.C. §2000e-2(a)(1).
4. 42 U.S.C. §1981; 42 U.S.C. §1983.
5. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981); St. *Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993); *Reeves v. Sanderson Plumbing Products*, 530 U.S. 133 (2000).
6. See *Ruiz v. County of Rockland*, 609 F.3d 486, 491 (2d Cir. 2010).
7. *Swierkiewicz v. Sorema*, 534 U.S. 506 (2002).
8. *Iqbal*, 556 U.S. at 678 (emphasis added).
9. 42 U.S.C.A. §2000e-3(a).
10. See, e.g., *Sarkis v. Ollie's Bargain Outlet*, No. 10-CV-6382 CJS, 2013 WL 1289411, at *13 (W.D.N.Y. March 26, 2013); *Ezuma v. City Univ. of N.Y.*, 665 F.Supp.2d 116, 123-24 (E.D.N.Y. 2009).
11. *St. Mary's Honor Ctr.,* 509 U.S. at 506; *Burdine*, 450 U.S. at 253.
12. *Swierkiewicz*, 534 U.S. at 510.
13. 2015 WL 4604250, at *5.
14. 550 U.S. 544 (2007).
15. *Iqbal*, 556 U.S. at 678.
16. Id. at *7.
17. Id. at *8.
18. 555 U.S. 271, 276 (2009).
19. 2015 WL 4604250, at *13 (citing *Sumner v. U.S. Postal Serv.*, 899 F.2d 203, 209 (2d Cir. 1990)).