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Client Alert

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Ashcroft v. Iqbal—the U.S. Supreme Court Articulates a New Pleading Standard for All Federal Civil Litigation Cases

One of the most important decisions of the Supreme Court's recently concluded term to impact employment litigation didn't arise from a single employment-related claim. Instead, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) arose from allegations of abuse and mistreatment by federal law enforcement officials following the September 11th terrorist attacks. Nonetheless, this case is important because it clarified the standards applicable for pleading a valid cause of action under Federal Rule of Civil Procedure 8, and in so doing, ended the two-year debate over whether the stricter fact-based pleading standard articulated in the antitrust case, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 applies to *all civil actions* - including actions sounding in employment law. Through Iqbal, the Supreme Court made unequivocally clear that it does.

Background

Iqbal was a *"Bivens case"*[1] brought by a Muslim Pakistani immigrant against thirty-four federal law enforcement officials, including former U.S. Attorney General John Ashcroft and former FBI Director Robert Mueller. Iqbal's federal complaint alleged that in the wake of the September 11, 2001 terrorist attacks, Ashcroft and Mueller purposefully and unlawfully architected and executed a policy that enabled officers to arrest, detain, and mistreat him on the basis of his race, religion, and national origin.

The district court denied Ashcroft and Mueller's motion to dismiss and the Second Circuit Court of Appeals affirmed the district denial after reasoning that, because it was not an antitrust case, the *Iqbar* complaint could not be held to the amplified and more fact-specific pleading standards set by *Twombly*.[2]

The Supreme Court Decision

On certiorari, the Supreme Court reversed the Second Circuit's decision after making clear that the plausibility pleading standard introduced in *Twombly* applied to *all civil actions* – not just antitrust cases.

The Court then clarified that complaints containing well-pleaded facts that show only the *possibility* of misconduct will not survive a motion to dismiss. Instead, under *Twombly's plausibility* standard, the facts pled must not only be compatible with the alleged unlawful behavior, but must be more plausibly explained by the alleged unlawful behavior.[3]

Against this backdrop, the Court found that *Iqbal's* allegations against Ashcroft and Mueller fell short of *Twombly's plausibility* standard because the complaint did not sufficiently allege factual details to support the *plausibility* of the claims against Ashcroft and Mueller. Put another way, the complaint's allegations failed to include factual assertions that, when accepted as true, plausibly established that Ashcroft and Mueller acted with a discriminatory purpose as opposed to a legitimate purpose.

Seizing on this foundation, the Court reasoned that, in view of the September 11th attacks, it was *more plausible than not* that "the nation's top law enforcement office, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in

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[1] *See* generally, *Bivens v. Six Unknown Named Agents of Fed Bureau of. Narcotics*, 403 U.S. 388 (1971).

[2] *Twombly* was an antitrust case in which the Court effectively retired the well-established "no set of facts" test found in *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). *Conley* had provided that district courts should not dismiss a complaint for failure to state a claim "unless it appear[ed] beyond doubt" that the plaintiff could prove no set of facts in support of the plaintiff's entitlement to relief. *Id.* at 45.

[3] *Iqbal*, 129 S. Ct. at 878-79.

the most secure conditions available until the suspects could be cleared of terrorist activity."[4] According to the Court, "[a]s between that 'obvious alternative explanation' for the arrests, and the purposeful, invidious discrimination [that Mr. Iqbal] asks [the Court] to infer [against Ashcroft and Mueller], discrimination is not a plausible conclusion."[5]

As such, the majority Court held that Iqbal's complaint was facially insufficient because it lacked the "factual content [that] allows the Court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[6]

Iqbal's Significance for Litigation

In sum, the Court, in applying Fed. R. Civ. P. 8(a)(2)'s pleading requirements, noted that courts need not accept as true allegations that are basically legal conclusions even if they are framed as factual allegations, and stated that well-pleaded facts must allow the courts to *do more than infer the possibility of misconduct*.

Through *Iqbal*, the Court outlined a two-step approach for district courts to use when considering motions to dismiss.

Step one — district courts must accept as true all factual allegations but exclude all unsupported conclusory allegations, bare assumptions, and "recitals of the elements of the cause of action."[7] The Court explained that relying on such conclusory allegations without explanation simply does not meet Rule 8's standard requirements.

Step two – district courts must consider whether the factual allegations asserted in the complaint "plausibly suggest an entitlement to relief."[8] In so doing, the factual assertions pled in the complaint must be more than *conceivable or possible* (*i.e.*, dismissable); but must instead rise to the level of *plausible* (*i.e.*, viable) such that they enable a court to infer the existence of the unlawful conduct alleged. The Court cautioned that this analysis does not require judges to consider whether the facts as alleged are *probable*, but rather requires judges to engage in a context-specific analysis and to draw on their "judicial experience and common sense"[9] to determine whether the complaint at issue states a plausible claim for relief. This "plausibility standard," the Court explained, is "not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully."[10]

Importantly, *Iqbal* also instructs that an "amplified" pleading standard applies to actions where an individual's knowledge or intent is an element to the claim. Accordingly, under Rule 8, plaintiffs bringing discrimination complaints must plead facts with sufficient particularity to demonstrate intent or knowledge of the defendant.

While the *Iqbal* decision resolves the debate about whether *Twombly* applies to all federal civil cases, what remains to be seen is how *Iqbal* will be reconciled with the Court's directives in the 2002 case of *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512 (2002) – which, to date, remains good law. *Swierkiewicz* was an employment discrimination suit wherein the Court held that a complaint alleging unlawful discrimination need not contain specific facts establishing a *prima facie* case.[11] Specifically, *Swierkiewicz* provided that absent limited exceptions, complaints in employment "cases, as in most others, must satisfy only the simple requirements of Rule 8(a)," in order to provide respondent fair notice.[12] In *Twombly*, the Court clearly stated that its decision was not inconsistent with *Swierkiewicz*. Notably, however, the *Iqbal* Court made no mention of *Swierkiewicz* thereby leaving counsel ample room to argue over whether a particular complaint is more akin to the complaint in *Swierkiewicz* or more like the complaint in *Iqbal*.

The goal of district courts is to apply the Supreme Court's directives regarding proper evaluation of pleadings in a consistent manner. Therefore, it will be interesting to watch how district court judges reconcile *Swierkiewicz* with *Iqbal*.

Recent Opposition to *Iqbal*

The Court's demonstrated shift away from generalized notice pleadings has not gone unnoticed or unchallenged by lawmakers.

In an attempt to undo the effects of the *Twombly* and *Iqbal* decisions and to reinstate a more relaxed pleading standard, last week, Senator Arlen Specter of Pennsylvania introduced Senate Bill S.1504, the Notice Pleading Restoration Act of 2009 (the "NPRA"). This bill explicitly reinstates the *Conley "no set of facts"* standard which *Iqbal* and *Twombly* expressly retired.

The bill provides, in relevant part, that absent an Act of Congress or an amendment to the Federal Rules of Civil

4 *Iqbal,* 129 S. Ct. at 887.
5 *Id.* at 886 (internal citation omitted).
6 *Id* at 884.
7 *Id.*
8 *Id.* at 886.
9 *Id.* at 884.
10 *Id.*
11 *Id.* at 509.
12 *Id.* at 513.

Procedure, federal courts responding to Rule 12(b)(6) or (e) motions are precluded from dismissing complaints unless the dismissals are conducted under the standards set forth in *Conley v. Gibson*, 355 U.S. 41 (1957). It is unclear whether the NPRA will gain the support necessary for passage. However, what is clear is that should it pass, it will effectively overrule both *Twombly* and *Iqbal* and, thereby, make it once again more difficult for employers to gain dismissals of "generally-pleaded" complaints.

To file or not to file a Motion to Dismiss?

Clearly, *Iqbal* is welcomed news to employers who under the prior *Conley* motion to dismiss standard, had few options, but to answer "generally-pleaded" complaints. However, if the plaintiff re-pleads following an *Iqbal* dismissal with more specific facts, the early dismissal will indeed prove to be a hollow defense victory. This is because, in addition to the obvious waste of bringing a motion to dismiss only to see a similar complaint brought again (*Iqbal* itself was remanded to determine whether the plaintiff should be given leave to amend), defendants who bring such motions also run the risk of buying back "new and improved" complaints filled with more amplified, salacious and, often, shocking allegations (whether or not true) that can negatively impact the employer's public image. Therefore, it is important for employers to think strategically and consider the following factors before moving to dismiss a "generally-pleaded" complaint under *Iqbal*:

- Investigate early to determine plaintiff's knowledge of the "facts" of the case. Employers should conduct internal investigations and have counsel reach out to the plaintiff's representative early following knowledge of the filing of the complaint. If the plaintiff knows more specific facts but has simply failed to add them to the initial complaint (but can easily amend or refile), bringing an *Iqbal* motion may not be the best use of time or money;

- Assess the validity of the plaintiff's case. If the plaintiff's claims are indeed valid, an early settlement is a better option than a non-prejudicial motion to dismiss. Plaintiffs with valid claims seldom "go away", thus even if dismissed for lack of specificity at the outset, it is more likely than not that the aggrieved plaintiff will replead;

- Gain insight into how eager the plaintiff is to pursue further litigation should the matter be dismissed at the outset. Clearly, if the plaintiff is unlikely to pursue action following a dismissal, filing a motion under *Iqbal* is worth it – however, if the plaintiff is litigious, conserving resources for a solid summary judgment motion would be a more cost-effective strategy.

If you have any questions about this Client Alert, please contact your Proskauer relationship attorney or any of the attorneys listed below.

NEW YORK
Joseph Baumgarten
212.969.3002 – jbaumgarten@proskauer.com
Keisha-Ann G. Gray
212.969.3855 – kgray@proskauer.com
Steven D. Hurd
212.969.3985 – shurd@proskauer.com
Kathleen M. McKenna
212.969.3130 – kmckenna@proskauer.com

BOCA RATON
Allan H. Weitzman
561.995.4760 – aweitzman@proskauer.com

BOSTON
Mark W. Batten
617.526.9850 – mbatten@proskauer.com

LOS ANGELES
Anthony J. Oncidi
310.284.5690 – aoncidi@proskauer.com

NEWARK
Lawrence R. Sandak
973.274.3256 – lsandak@proskauer.com
John P. Barry
973.274.6081 – jbarry@proskauer.com

NEW ORLEANS
Howard Shapiro
504.310.4085 – howshapiro@proskauer.com

WASHINGTON, D.C.
Lawrence Z. Lorber
202.416.6891 – llorber@proskauer.com
Leslie E. Silverman
202.416.5836 – lsilverman@proskauer.com