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NEWSLETTER ARTICLE

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Employment Law

One Year Post the United States' Twombly Decision and How the Aftermath is Affecting Title VII Claims Within the U.S. District Courts Of North Carolina.

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With little or no warning, on May 21, 2007, the Supreme Court abrogated the familiar Conley standard which, for the past 60 years, has defined the concept of "notice pleading" pursuant to Rule 8 of the Federal Rules of Civil Procedure. The words Justice Souter¹ wrote, "dismissal for failure to state a claim upon which relief may be granted *does not* require appearance, beyond a doubt, that plaintiff can prove *no set of facts* in support of a claim that would entitle him to relief..." set a new standard for the sufficiency of complaints. Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 167 L. Ed. 2d, 929 (2007) (emphasis added), abrogating Conley v. Gibson, 355 U.S. 41, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957).

In Twombly, the Court explained that a complaint must "contain enough factual matter (taken as true) to suggest that an agreement was made." 127 S. Ct. at 1965. "[A]n allegation of parallel conduct and a bare assertion of conspiracy will not suffice. Without more, parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality." Id. at 1966. In conclusion, Justice Souter noted, "[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is *plausible* on its face. Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed." Id. at 1974 (emphasis added).

TWOMBLY'S GENERAL EFFECT IN NORTH CAROLINA

Prior to the Twombly decision in 2007, the Supreme Court decided Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002) which some circuits read as eliminating the fact pleading requirement in a complaint. At the time of the Swierkiewicz decision in 2002, federal circuits splintered as they struggled to identify the level of factual assertion necessary to withstand dismissal.

The Fourth Circuit, however, remained clear during this unsettled time that Rule 8 of the Federal Rules of Civil Procedure required a "plaintiff to allege facts sufficient to state all the elements of her claim." See, Bass v. E.I. DuPont de Nemours & Co., 324 F.3d 761, 765 (4th Cir. 2003), cert. denied, 540 U.S. 940 (2003). In Bass, Judge Luttig wrote,

Our circuit has not, however, interpreted Swierkiewicz as removing the burden of a plaintiff to allege facts sufficient to state all the elements of her claim. See Dickson v. Microsoft Corp., 309 F.3d 193, 213 (4th Cir. 2002) "[T]he Supreme Court's holding in Swierkiewicz v. Sorema did not alter the basic pleading requirement that a plaintiff set forth facts

¹ Justice Souter wrote the opinion in which Justices Roberts, C.J., and Scalia, Kennedy, Thomas, Breyer, and Alito, JJ., joined (except as to part IV).

sufficient to allege each element of his claim.” (internal citations omitted). These cases reject Plaintiff’s contention. While a plaintiff is not charged with pleading facts sufficient to prove her case, as an evidentiary matter, in her complaint, a plaintiff *is* required to allege facts that support a claim for relief. The words “hostile work environment” are not talismanic, for they are but a legal conclusion; it is the alleged facts supporting those words, construed liberally, which are the proper focus at the motion to dismiss stage.

Bass v. E.I. Dupont de Nemours & Co. 324 F.3d 761, 764 -765 (4th Cir. 2003).

While Twombly does not explicitly overrule Swierkiewicz,² it has affirmed the Fourth Circuit’s previous interpretation of Swierkiewicz that a Plaintiff must state facts sufficient to support the elements of his/her claims. See generally Bass, 324 F.3d 761, 765 (noting that a plaintiff *is* required to allege facts that support a claim for relief).

Consistent with Bass, Twombly now also requires a Plaintiff to plead facts that state a claim to relief that is *plausible* on its face. See also Iqbal v. Hasty, 490 F.3d 143, 157 -158 (2nd Cir., 2007) ([W]e believe the Court is not requiring a universal standard of heightened fact pleading, but is instead requiring a flexible “plausibility standard,” which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*).

EMPLOYMENT DISCRIMINATION CLAIMS

The Twombly standard has been specifically applied to employment discrimination cases in our district courts. Recently Judge Horn III applied Twombly as the standard of review in Nixon v. Majors, 2007 WL 4592277, *4 (W.D.N.C., December 28, 2007) (Slip Copy) to a hostile work environment claim brought under Title VII and again in Rathbone v. Haywood County 2008 WL 2789770 (W.D.N.C., July 17, 2008) to a claim for retaliation under Title VII. Similarly, Judge Conrad, Jr. applied Twombly in an employment discrimination case and dismissed Plaintiff’s negligent infliction of emotional distress claim. Zampogna v. Gaston County Schools Bd. of Educ., 2007 WL 4570869, *2 (W.D.N.C., December 26, 2007) (Slip Copy). Even more recently, Judge Britt applied the Twombly standard to a claim of hostile work environment. See Mangum v. Town of Holly Springs, 551 F. Supp. 2d 439, 444 (E.D.N.C. March 17, 2008). Relying on Twombly as the articulated standard for dismissal, Judge Britt stated:

Because plaintiff has not alleged facts that, if true, would establish the third element of her claim under any plausible reading of her complaint, the court need not address the other elements. The facts plaintiff has alleged simply do not rise to the level of unlawful gender discrimination based on hostile work environment in violation of Title VII, and defendant’s motion to dismiss with respect to this claim will be granted.

Mangum at 444.

The application, therefore, of Twombly as a standard for review in Title VII cases, is being applied throughout our district courts. And the “plausibility” standard has developed the appropriate teeth necessary to render a claim which is *not* plausible, subject to dismissal.

² At least one Court has interpreted Twombly to implicitly overrule Swierkiewicz. See Aztec Energy Partners, Inc. v. Sensor Switch, Inc., 531 F. Supp. 2d 226, 228-9 (D. Conn., October 2, 2007) Swierkiewicz; See also Bell Atlantic Corp. v. Twombly, --- U.S. ---, 127 S. Ct. 1955, 1960, 1964-65 (2007).

PRO SE CAVEAT

Two weeks after the Twombly decision was released, the Supreme Court cited Twombly in a motion to dismiss a *pro se* litigant's claim, Erickson v. Pardus³, --- U.S. ---, 127 S. Ct. 2197, 2200, 167 L. Ed. 2d 1081 (2007). Although the Court reiterated that "when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint." The Court also noted that the plaintiff "ha[d] been proceeding, from the litigation's outset, without counsel. Id. A document filed *pro se* is 'to be liberally construed,' and 'a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers.' Id. In conclusion, the Court held that the case cannot "be dismissed on the ground that petitioner's allegations of harm were too conclusory..." Erickson at 2200.

A number of lower courts also recognize a "deference" provided to *pro se* litigants. See, e.g., Alvarez v. Hill, 518 F.3d 1152 (9th Cir. 2008) (noting that prisoner had made factual allegations establishing a "plausible" entitlement to relief while also noting that conclusion was "bolstered by the 'less stringent standards' used to assess whether a *pro se* inmate's complaint places the defendants on notice); accord, Dudnikov v. Chalk & Vermillion Fine Arts, Inc., 514 F.3d 1063 (10th Cir. 2008); Johnson v. Lappin, 264 Fed. Appx. 520 (7th Cir., February 14, 2008); Curto v. Bender, 231 Fed. Appx. 93 (2nd Cir. 2007) (unpublished).

In North Carolina, the results appear to be mixed. See Ervin v. Hammond 2008 WL 901185, 5 (W.D.N.C. March 31, 2008) (Slip Copy) Stating, "To the extent that the 'no set of facts' language has been pronounced outdated, the deference provided to Ervin's complaint as a *pro se* litigant and the other statements of proper standards render the objection moot and the lower court's application of the Twombly standard correct." Ervin at *5 relying upon Erickson, 127 S. Ct. at 2200 (emphasis added). In Salami v. Monroe, 2008 WL 2981553, 5 (M.D.N.C., August 1, 2008), the Middle District Court noted that since the plaintiff was proceeding *pro se* the Court is required to construe Plaintiff's pleading liberally and hold it to a less stringent standard than those drafted by attorneys to allow for the development of a potentially meritorious claim. Id. Citing Boag v. MacDougall, 454 U.S. 364, 365 (1982); Gordon v. Leeke, 574 F. 2d 1147, 1151 (4th Cir.1978). However, the Salami Court also dismissed multiple claims by Plaintiff and stated, "[n]evertheless, "[t]he requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim currently cognizable in a federal district court." Salami 2008 WL 2981553, 5 citing Oehlson v. Powers, No. 8:06-1060, 2006 WL 2077005, *2 (D.S.C. 2006) and Weller v. Dep't of Soc. Servs., 901 F.2d 387 (4th Cir. 1990)).

CONCLUSION

While North Carolina district courts have not held that Twombly explicitly overrules Swierkiewicz, they have consistently applied the Fourth Circuit's previous interpretation of Bass -- that a plaintiff must state facts sufficient to support the elements of their claims. Accordingly, pursuant to the recent Twombly opinion, our courts now also require a plaintiff to plead facts that state a claim to relief that is *plausible* on its face.

This "plausibility" standard, however, has yet to be extended entirely to cases in which a *pro se* litigant is faced with a motion to dismiss. In fact, as of the date of this publication, there have been no Title VII complaints brought by *pro se* litigants which have been challenged as not meeting the new "plausibility" standard. Consequently, the deference accorded the general *pro se* litigant continues notwithstanding the holding in Twombly and remains a delicate area to consider when encountering this particular type of litigation.

³ Erickson, a prisoner, brought a *pro se* § 1983 suit against prison medical officials, alleging deliberate indifference to his serious medical needs, in violation of his Eighth Amendment rights. The United States District Court for the District of Colorado, 2006 WL 650131, dismissed, and the prisoner appealed. The United States Court of Appeals for the Tenth Circuit, 198 Fed. Appx. 694, 2006 WL 2640394, affirmed the lower court's opinion. Prisoner filed petition for writ of certiorari. The Supreme Court reversed and, citing Twombly, held that prisoner properly alleged that he suffered substantial harm.