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### Plausibility Pleading and Employment Discrimination

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# Plausibility Pleading and Employment Discrimination

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Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 *Wm. & Mary L. Rev.* 1613 (2011), available at SSRN



Suzette M. Malveaux

In a sea of law review articles analyzing the potential impact of the more rigorous federal pleading standard of *Ashcroft v. Iqbal*, Charles Sullivan's *Plausibly Pleading Employment Discrimination* stands out for a number of reasons. As an initial matter, Sullivan grapples with an important question plaguing the civil rights community and the employment bar: does *Swierkiewicz v. Sorema*—the unanimous 2002 opinion that took a lenient approach to pleading discrimination cases—remain good law post-*Iqbal*? Sullivan argues that *Iqbal* did not overturn *Swierkiewicz*, leaving intact the ability of plaintiffs to plead employment discrimination without alleging a *prima facie* case under the *McDonnell Douglas* test.

But Sullivan then considers the alternate view: assuming *arguendo* that *Iqbal* did overrule *Swierkiewicz*, what should plaintiffs do to avoid dismissal for failure to state a claim under this more rigorous pleading regime? Sullivan offers a variety of approaches, each with strengths and weaknesses. This willingness to explore the proverbial edge of the envelope makes this article a compelling read. It combines pragmatism, creativity, and boldness at a time when many are struggling to make sense of the impact of the new federal pleadings standard in the civil rights arena. Given the importance of pleadings as an access to justice issue, this article provides an invaluable perspective.

The article first describes the evolution from notice to plausibility pleading and the potential deleterious effect of the latter on typical individual disparate treatment employment claims. Sullivan describes the various procedural and substantive criticisms of the plausibility standard, including concern that absent discovery, individual employment discrimination cases will be unfairly dismissed because of information asymmetry between the parties. Although to date empirical studies of *Twombly*'s and *Iqbal*'s impact on the viability of employment discrimination and civil rights claims are mixed, this does not change the fundamental question posed by Professor Sullivan: "whether alleging an identified action as being discriminatorily motivated suffices." (P. 1643.) In other words, is it enough today for plaintiffs to plead what *Swierkiewicz* did?

*Swierkiewicz* involved a plaintiff who alleged intentional employment discrimination under Title VII and the ADEA. In a unanimous opinion written by Justice Thomas, the Court concluded that the plaintiff was not required to plead facts establishing a *prima facie* case of discrimination under the *McDonnell Douglas* test to sufficiently put the defendant on notice of plaintiff's claim. *McDonnell Douglas* provides a method of establishing intentional disparate treatment through circumstantial evidence, but the Court made clear that the

test is “an evidentiary standard, not a pleading requirement.”

In *Bell Atlantic Corp. v. Twombly* and later in *Iqbal*, however, the Court shifted from requiring plaintiffs to plead facts demonstrating that a claim was possible to demonstrating that a claim was plausible. The plausibility standard has led many practitioners, commentators, and judges to wonder if an employment discrimination claim that fails to plead a *prima facie* case can still set forth a plausible claim. Sullivan concludes that “there is certainly good reason to believe that *Swierkiewicz* is good law,” noting *Twombly*’s favorable citation of its predecessor and lower courts’ hesitancy to assume *Swierkiewicz* has been overruled in the absence of clear direction from the Court. But *Swierkiewicz*’s viability depends on how broadly or narrowly it is interpreted—a conflict which has yet to be resolved.

So Sullivan analyzes a “plaintiff’s worst-case scenario.” (P. 1622.) Assuming *Swierkiewicz* is dead, how can a plaintiff avoid dismissal for failure to state an intentional discrimination claim? One obvious way is to plead facts establishing a *prima facie* case under *McDonnell Douglas*, consistent with Rule 11. Although the *McDonnell Douglas* burden-shifting framework is admittedly not a pleading standard, the *prima facie* showing—which creates a rebuttable presumption of discrimination—would seem to comfortably provide a floor for pleading purposes, even assuming that *Swierkiewicz* is no longer good law.

As an alternative, a plaintiff may contend that he or she was treated worse than a comparator—someone similarly situated to the plaintiff. Rather than accepting as true facts alleging discriminatory motive, a court would accept as true facts alleging that a comparator was treated more favorably and, therefore, plausibly infer discriminatory intent. Subject to Rule 11 limitations, this should suffice for plausibility pleading.

Another strategy available for plaintiffs in an overruled-*Swierkiewicz* world would be to plead facts showing direct evidence of discrimination—a less likely option given modern discrimination’s subtlety and subconscious nature. Professor Sullivan contends that “[a]s applied to the pleading context, this preference for direct evidence may satisfy plausible pleading by alleging this kind of evidence of discriminatory intent.” (P. 1657.)

Finally, Sullivan offers a “more extreme” approach for plausibly pleading intentional employment discrimination claims post-*Iqbal*, which he contends is not only permitted, but “invited” by the Court. (P. 1662.) Sullivan suggests that plaintiffs plead “that the phenomenon of discrimination is more common than the courts might otherwise believe,” as indicated by social science research. (P. 1662.) Plaintiffs must plead sufficient facts to convince a judge that their claims of intentional discrimination are plausible, and can do so in various ways. Sullivan’s way is “simply pleading this social science as fact, thereby requiring the court to take that fact as true.” (P. 1663.) As evidence of the workability of this approach, Sullivan points to the Court’s own reliance on economic research in *Twombly* as the basis for concluding that the defendants’ economic behavior was as consistent with parallel conduct as a conspiracy. Perhaps social science research could nudge an intentional discrimination claim from possible to plausible in a similar way. This could be particularly useful where a judge’s baseline assumption is that discrimination is rare and therefore implausible in comparison to alternative, more benign explanations for a defendant’s conduct.

This bold approach admittedly poses its own challenges. For example, in the event that an expert is asked to opine about the general propensity of discrimination in the workplace, this may say little about the propensity of a specific employer to discriminate in a specific case. At what level of generality should the factual allegations apply? Moreover, courts may give little credence to expert testimony or social science research in the discrimination context. The Court’s most recent treatment of sociology evidence at the class certification stage in *Wal-Mart v. Dukes* suggests an uphill battle. And the questions remain whether a court must accord the presumption of truth to such legislative facts and, if so, what limits are appropriate.

Sullivan’s final proposal raises more questions than it answers—which makes its contribution so important. This article moves the ball forward in assessing the viability of employment discrimination claims post-*Iqbal*,

challenging readers to consider what is plausible in pleading.

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