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## Pleading Civil Rights Claims in the Post-*Conley* Era

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# Pleading Civil Rights Claims in the Post-*Conley* Era

A. BENJAMIN SPENCER\*

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Much has been made of the Supreme Court's recent pronouncements on federal civil pleading standards during the latter half of the 2006–2007 Term. Specifically, what will be the fallout from the Court's decision in *Bell Atlantic Corp. v. Twombly*, a case that abrogated *Conley v. Gibson's* famous “no set of facts” formulation and supplanted it with a new plausibility pleading standard? This Article attempts to examine and distill the impact of *Twombly* on the pleading standards that lower federal courts are applying when scrutinizing civil rights claims. Two main approaches emerge: that of courts choosing to continue to apply a notice pleading standard and that of courts requiring factual substantiation of claims at the pleading stage. The aims of this Article are to clarify the pleading standards that civil rights claimants must now satisfy across the circuits, to assess what impact *Twombly* has had on shaping those standards, and to evaluate from a policy perspective whether any changes wrought by *Twombly* in this area are welcome or troubling.

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“[T]he courts are established to administer justice, and you cannot have justice if justice is constantly being thwarted and turned aside or delayed by a labyrinth of technicality.”†

### INTRODUCTION

For some time now,<sup>1</sup> members of minority or disadvantaged groups in the United States have used the federal courts as the forum in which they seek remedies for harmful discriminatory conduct and obtain protection against prospective harm of this kind.<sup>2</sup> Fortunately

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† Rules of Civil Procedure for the District Courts: Hearing on H.R. 8892 Before the House Comm. on the Judiciary, 75th Cong., 3d Sess. 2 (1938) (statement of Homer Cummings, Att’y Gen of the United States), quoted in Robert L. Carter, *The Federal Rules of Civil Procedure as a Vindicator of Civil Rights*, 137 U. PA. L. REV. 2179, 2179 (1989).

1. The federal courts have enjoyed federal question jurisdiction—and thus the authority to hear claims asserted under federal anti-discrimination laws—since the Judiciary Act of 1875, ch. 137, 18 Stat. 470.

2. See *Merrell Dow Pharm. Inc. v. Thompson*, 478 U.S. 804, 827 n.6 (1986) (Brennan, J., dissenting) (“Another reason Congress conferred original federal-question jurisdiction on the district courts was its belief that state courts are hostile to assertions of federal rights.”); *Mitchum v. Foster*, 407 U.S. 225, 238, 242 (1972) (“Section 1983 was originally § 1 of the Civil Rights Act of 1871. . . . The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people’s federal rights—to protect the people from unconstitutional action under color of state law. . . . In carrying out that purpose, Congress plainly authorized the federal courts to issue injunctions in § 1983 actions . . .”).

for these litigants, the procedural rules crafted for the federal courts in 1938 were supportive of such litigation at least in a generic sense. That is, the Federal Rules of Civil Procedure diminished the role of procedural technicality during the preliminary phases of litigation, giving way to the idea that access to the courts should be unfettered and that litigants should have every opportunity to plead and support their cases so that a judge or jury might resolve the matter on the merits. Liberal “notice” pleading and fairly wide-open discovery (perhaps coupled with an enduring embrace of the so-called “American Rule”<sup>3</sup>) combined to establish the open-access model of courts at the federal level. Although there was opposition to the open-access model initially, the Supreme Court soon made clear statements in defense of its key components by affirming the broad nature of discovery<sup>4</sup> and the very limited nature of a litigant’s pleading obligation under the Federal Rules.<sup>5</sup>

Arguably the most critical piece of the open-access puzzle was the simplified pleading standard set forth in Rule 8(a),<sup>6</sup> specifically the interpretation of that standard as enunciated by the Court in *Conley v. Gibson*.<sup>7</sup> Without equivocation, the *Conley* Court rejected an effort to require plaintiffs to “set forth specific facts to support [their] general allegations” by writing:

The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is “a short and plain statement of the claim” that will give the defendant

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3. The American Rule is the ordinary practice in our courts of requiring parties to pay their own attorney’s fees. This contrasts with the so-called English Rule, which obligates the losing party to pay the prevailing party’s litigation expenses.

4. *Hickman v. Taylor*, 329 U.S. 495, 507 (1947) (“We agree, of course, that the deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of ‘fishing expedition’ serve to preclude a party from inquiring into the facts underlying his opponent’s case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession.”).

5. *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (“[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is ‘a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”).

6. FED. R. CIV. P. 8(a) (requiring “a short and plain statement of the claim showing that the pleader is entitled to relief”). See also FED. R. CIV. P. Form 11, *Complaint for Negligence* (providing the following as sufficient to state a claim of negligence: “On <Date>, at <Place>, the defendant negligently drove a motor vehicle against the plaintiff.”). Prior to December 1, 2007 the form for a negligence claim was Form 9.

7. 355 U.S. 41 (1957).

fair notice of what the plaintiff's claim is and the grounds upon which it rests.<sup>8</sup>

Further, the *Conley* Court noted that in the face of a motion to dismiss, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."<sup>9</sup>

For several decades, *Conley* stood as a guarantor that civil rights<sup>10</sup> (and other) claimants would at least be able to get into court and on to discovery, not being forced to provide factual details underlying their claims at the pleading stage that they might not have access to prior to discovery. Although some lower courts eroded access by implementing higher pleading standards for civil rights cases,<sup>11</sup> the Supreme Court twice rejected this practice and reaffirmed that civil rights claims deserved to enjoy the liberal notice pleading standard articulated by the Court in *Conley*.<sup>12</sup> More recently, however, in *Bell Atlantic Corp. v. Twombly*<sup>13</sup> the Court appeared to do an abrupt about-face by rejecting *Conley*'s core "no set of facts" formulation and ratcheted up pleading standards by reinterpreting Rule 8(a) to require claimants to plead facts that show a plausible entitlement to relief.<sup>14</sup>

*Twombly* is a confusing opinion subject to multiple interpretations whose implications are still being worked out.<sup>15</sup> However, in the

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8. *Id.* at 47.

9. *Id.* at 45-46.

10. I use "civil rights" claims throughout this Article to refer to claims asserted under federal civil rights legislation, such as the Ku Klux Klan (Civil Rights) Act of 1871 (progenitor, inter alia, of § 1983 claims), the Civil Rights Act of 1964 (progenitor, inter alia, of Title VII claims), the Fair Housing Act, and the Americans with Disabilities Act.

11. See *infra* Part I.B for a discussion of cases imposing heightened pleading in civil rights cases.

12. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 513 (2002); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993).

13. 127 S. Ct. 1955 (2007).

14. *Id.* at 1965-68.

15. The import of the opinion is made even more confusing by the other pleading cases that the Court decided during the 2006-2007 Term. In *Jones v. Bock*, 549 U.S. 199 (2007), the Court rejected an effort by some courts to require prisoners to plead and demonstrate exhaustion in their habeas complaints by affirming what it had held in *Leatherman* and *Swierkiewicz*: "[C]ourts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns. . . . Given that the PLRA [Prison Litigation Reform Act] does not itself require plaintiffs to plead exhaustion, such a result 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" *Id.* at 919, 921. In *Erickson v. Pardus*, 127 S. Ct. 2197 (2007), a case decided shortly after *Twombly*, the Court seemed to reaffirm notice pleading when it wrote, "*Federal Rule of Civil Procedure 8(a)(2)* requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief.' Specific facts are not necessary; the statement need only 'give the defendant fair notice

context of a shifting procedural landscape that over the past few decades has evolved away from the original open-access ideal,<sup>16</sup> many observers may fear that the apparent move away from notice pleading that can be discerned in *Twombly* will serve as yet another procedural reform that will stymie civil rights claims and other seemingly disfavored actions. During the latter part of the fifty-year span between *Conley* and *Twombly*, there has been what some have referred to as a “counter-revolution” in procedure,<sup>17</sup> a reaction against the liberal ethos and the open-access movement towards a more restrictive vision that favors efficiency and the early elimination of meritless or frivolous claims.<sup>18</sup> Civil rights claimants have not fared particularly well under these reforms,<sup>19</sup> giving future civil rights claimants and their advocates some reason for suspecting that the modification (some would argue demise)<sup>20</sup> of civil notice pleading standards can only spell difficult times ahead for civil rights claims.

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of what the . . . claim is and the grounds upon which it rests,” and cited to *Twombly* for these propositions. *Id.* at 2200. Finally, in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007), the Court—under the pen of *Twombly* dissenter Justice Ginsburg—held that under the Private Securities Litigation Reform Act [“PSLRA”] “[a] plaintiff alleging fraud in a § 10(b) action . . . must plead facts rendering an inference of scienter *at least as likely as* any plausible opposing inference.” *Id.* at 2513. That the Court crafted a pleading obligation under the PSLRA that invokes the concept of plausibility without even citing *Twombly* or discussing how the *Tellabs* standard related to the *Twombly* standard is odd. Together, these cases reveal a slight dissonance or lack of coherence to the Court’s view of pleading, with each of these four decisions pulling in slightly different directions. That said, *Twombly* is the dominant case among the group, having the most to say directly about federal civil pleading standards that will affect litigants in most cases.

16. For an interesting argument that common law procedural rules are responsible for making a facially liberal open-access system more “conservative,” see Laurens Walker, *The Other Federal Rules of Civil Procedure*, 25 REV. LITIG. 79, 80-81 (2006) (“[C]ommon law procedural rules . . . interact with the 1938 Rules in such a way as to counter the apparent progressive character of the 1938 Rules and produce a functioning system which is not progressive in reality but conservative.”) (footnotes omitted).

17. See, e.g., Jeffrey W. Stempel, *Sanctions, Symmetry, and Safe Harbors: Limiting Misapplication of Rule 11 by Harmonizing it with Pre-Verdict Dismissal Devices*, 60 FORDHAM L. REV. 257, 262 (1991) (describing the procedural reforms of the 1980s as a decade of “counter-revolution”).

18. Some would argue that the trilogy of summary judgment cases decided in 1986 were a part of this counter-revolution. See *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). However, some research suggests that these cases did not have the impact on the grant of summary judgment that some suppose. See Joe S. Cecil et al., *A Quarter Century of Summary Judgment Practice in Six Federal District Courts*, 4 J. EMPIRICAL LEGAL STUD. 861 (2007).

19. See generally Eric K. Yamamoto, *Efficiency’s Threat to the Value of Accessible Courts for Minorities*, 25 HARV. C.R.-C.L. L. REV. 341 (1990) (discussing the disproportionate adverse impact that procedural innovations such as Rule 11 reform and heightened pleading were having on civil rights claims throughout the 1980s).

20. See, e.g., A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 431 (2008) (“Notice pleading is dead.”).

The purpose of this Article is to provide a preliminary assessment of how *Twombly*'s new approach to pleading is being applied to civil rights claims in federal court. Part I will briefly review the history of heightened pleading in civil rights cases through the Court's repudiation of heightened pleading standards in *Swierkiewicz v. Sorema N.A.*<sup>21</sup> Part II will then focus on the period after *Swierkiewicz* to get an idea of how lower federal courts approached pleading prior to *Twombly*. Part III will review the body of post-*Twombly* civil rights cases to develop some sense of the impact revised pleading standards may be having on civil rights claims thus far. Part IV provides some analysis of the cases, seeking to describe any discernible trends and impacts, followed by a brief conclusion.

## I. PLEADING CIVIL RIGHTS CLAIMS FROM CONLEY TO SWIERKIEWICZ

### A. Notice Pleading and Civil Rights Claims

The rules of civil procedure promulgated in 1938 were crafted to liberalize the rules of pleading in a way that made it easier for plaintiffs to get their claims into court.<sup>22</sup> Nevertheless, in the aftermath of the 1938 adoption of the Federal Rules, many courts were unwilling to embrace the radical notion that fact pleading<sup>23</sup> had been supplanted by a new, less technical, approach that would come to be known as notice pleading.<sup>24</sup> After various failed efforts to revise Rule 8 and its meaning in the direction of requiring fact pleading,<sup>25</sup> the Supreme

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21. 534 U.S. 506 (2002).

22. Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 535 (2001) ("The 1938 Rules liberalized the rules of pleading and joinder, with the practical effect of making it easier for litigants, even those of modest means and limited expertise, to have their day in court.").

23. The Field Code, a predecessor of the Federal Rules, required the pleading of "facts constituting a cause of action." Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 985 (1987).

24. See Stempel, *supra* note 22, at 536-37 ("The mere enactment of the Rules, of course, did not completely change pre-existing attitudes and practices. For some twenty years thereafter, judicial decisions enforcing the Rules required lower courts and counsel to conform their conduct more closely to the Rules.") (footnotes omitted).

25. For example, the Ninth Circuit Judicial Conference adopted a resolution proposing that Rule 8(a)(2) be amended to read, "(2) a short and plain statement of the claim showing that the pleader is entitled to relief, which statement shall contain the facts constituting a cause of action." Discussion, *Claim or Cause of Action*, 13 F.R.D. 253 (1953). Richard Marcus does a good job of describing some of this resistance. See Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 445 (1986); see also CHARLES ALAN WRIGHT & ARTHUR R. MILLER, 5 FED. PRAC. & PROC. 3d § 1216 (describing resistance to the rule).

Court weighed in with its definitive statement in favor of simplified notice pleading in *Conley v. Gibson*.<sup>26</sup> The *Conley* decision and its key attributes have been written about extensively and thus need not be rehearsed here. The heart of the opinion was its rejection of a call for the pleading of specific facts under Rule 8(a) and the enunciation of the principle that “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”<sup>27</sup>

For the most part, the federal circuits in the decade or so after *Conley* seem to have adequately policed district courts’ application of Rule 8 to complaints in the face of motions to dismiss for failure to state a claim.<sup>28</sup> This enforcement of the *Conley* notice pleading standard extended to civil rights cases, and appropriately so, given that *Conley* itself arose in the context of a racial discrimination claim.<sup>29</sup> More importantly, adherence to *Conley*’s liberal approach to pleading in the civil rights context was important at this time in the country’s history given the continuing commitment to racial segregation in the South in the wake of *Brown v. Board of Education*.<sup>30</sup> The access to federal courts that the *Conley* standard facilitated was critical to enabling aggrieved civil rights claimants to petition the federal courts for relief from the discrimination being endured during this time. Indeed, once the Supreme Court revitalized § 1983<sup>31</sup> claims in *Monroe v.*

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26. Although *Conley* represents the Court’s clearest and most prominent affirmation of a notice pleading interpretation of Rule 8(a), prior statements of the Court in favor of notice pleading did exist. See, e.g., *United States v. Employing Plasterers Ass’n*, 347 U.S. 186, 188 (1954) (“[T]he court held that there was no allegation of fact which showed that these powerful local restraints had a sufficiently adverse effect on the flow of plastering materials into Illinois. At this point we disagree. The complaint plainly charged several times that the effect of all these local restraints was to restrain interstate commerce. Whether these charges be called ‘allegations of fact’ or ‘mere conclusions of the pleader,’ we hold that they must be taken into account in deciding whether the Government is entitled to have its case tried.”).

27. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

28. See, e.g., *Guyton v. Solomon Dehydrating Co.*, 302 F.2d 283, 286 (8th Cir. 1962) (citing *Conley*, 355 U.S. at 45-48, to reaffirm the low pleading standard required by the Federal Rules); *Garcia v. Bernabe*, 289 F.2d 690, 692-93 (1st Cir. 1961) (“The Federal Rules of Civil Procedure do not require that a claimant set out in detail the facts upon which he bases his claim.”) (citing *Conley*, 355 U.S. at 41, 45-46); *Thomason v. Hosp. T.V. Rentals, Inc.*, 272 F.2d 263, 266 (8th Cir. 1959) (“[A plaintiff] is . . . entitled to make the attempt [to establish on trial the claim stated in his complaint] unless it appears beyond doubt that he can prove no set of facts in support of his claim which would entitle him to any relief.”).

29. The plaintiffs in *Conley* were seeking to enforce the obligation of their union, under the Railway Labor Act, to represent their interests in a fair, non-discriminatory manner.

30. 347 U.S. 483 (1954).

31. 42 U.S.C. § 1983 (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be

*Pape*,<sup>32</sup> a liberal pleading standard became all the more important—at least for claimants—as civil rights claims flooded into the system.

No court may have been more vigilant in combating the effort to terminate civil rights claims through pleadings decisions at odds with *Conley* than the Fifth Circuit under the leadership of Judge John R. Brown. At the time, the appellate bench that covered much of the Deep South (the Carolinas and Virginia fell within the Fourth Circuit) was the Fifth Circuit.<sup>33</sup> During the approximately ten-year period following *Conley*—which happened to coincide with the core period of the American civil rights movement—the Fifth Circuit had to beat back efforts on the part of district courts to render pleadings-based dismissals of viable civil rights claims<sup>34</sup> by affirming that heightened pleading standards were inappropriate for such claims.<sup>35</sup> The court's defense of notice pleading was perhaps to be expected given that the Fifth Circuit had articulated the pleading standard announced in *Conley* a few years before the *Conley* decision came down.<sup>36</sup> Several examples are worth highlighting.

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subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .").

32. 365 U.S. 167 (1961).

33. The United States Court of Appeals for the Eleventh Circuit was established out of a portion of the Fifth Circuit on October 1, 1981, pursuant to the Fifth Circuit Court of Appeals Reorganization Act of 1980, Pub. L. No. 96-452, 94 Stat. 1995 (1980).

34. See, e.g., *Fulton v. Emerson Elec. Co.*, 420 F.2d 527 (5th Cir. 1969) (holding, in response to conclusory allegations of joint action between private and public parties, that state action had been sufficiently alleged under *Conley* and thus dismissal was improper); *United States v. Bruce*, 353 F.2d 474, 475 (5th Cir. 1965) (reversing dismissal of voter intimidation complaint) (“The defendants have threatened, intimidated, and coerced, and have attempted to threaten, intimidate, and coerce Negro citizens of Wilcox County, Alabama, for the purpose of interfering with the right of Negroes to register and to vote.”); *United States v. Lynd*, 321 F.2d 26, 27 (5th Cir. 1963) (“[I]t is clear that there was no justification for the Court’s requiring the government to amend its complaint in this civil rights action to allege specific details of voter discrimination as if this were an action for fraud or mistake under Rule 9.”) (citing *Conley v. Gibson*, 355 U.S. 41 (1957)).

35. See *Hughes v. Noble*, 295 F.2d 495, 495 (5th Cir. 1961) (“This Court has held that test [*Conley*’s “no set of facts” standard] applicable to a complaint drawn under this same section [§ 1983].”) (citation omitted).

36. *Lewis v. Brautigam*, 227 F.2d 124, 127 (5th Cir. 1955) (“The complaint should not be dismissed on motion unless, upon any theory, it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts that could be proved in support of his claim.”) (citation omitted). Prior to *Conley* the Fifth Circuit explicitly noted the inordinate level of pleadings’ dismissals among lower courts under the Federal Rules by stating, “[a] principle, repeated with remarkable frequency in the plainest terms of direct simplicity, and carrying with it a compelling sense of emphasis, has again been misread, misunderstood, or misapplied, requiring again its republication. . . . ‘[A] motion to dismiss for failure to state a claim should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim.’” *Millet v. Godchaux Sugars, Inc.*,

In *Baldwin v. Morgan*,<sup>37</sup> African Americans denied access to whites-only waiting rooms sought declaratory and injunctive relief against the Alabama Public Service Commissioners, the City of Birmingham Commissioners, and the Birmingham Terminal Company, alleging that they were enforcing compulsory segregation pursuant to orders of the Public Service Commission, state law, and local custom.<sup>38</sup> The district court dismissed the complaint, but the Fifth Circuit reversed:

The complaint is not . . . subject to dismissal for formal deficiencies because . . . it did not set forth the terms of the Commission's order or more fully describe the custom or usage. In the Federal civil procedure if these are general, there are ample discovery weapons to fill them out or in.

As a matter of fact, one could not more categorically charge that an order has been issued than to say just that. That is no conclusion, but an everyday statement of fact. So, too, is the charge that there is a custom and usage to compel segregation. If that is the custom and usage, how better could it be stated?<sup>39</sup>

Here we see the court approving of assertions of fact at a generalized level, that is, that something was done “pursuant to an official policy” rather than requiring that factual allegations supporting the notion of an official policy be pleaded. Permitting such generality could be seen as consistent with what is suggested in the Official Forms appended to the Federal Rules, which state a claim for negligence by asserting that the defendant “negligently” drove into the plaintiff without offering factual allegations in support of that description.

Another example is *Madison v. Purdy*,<sup>40</sup> a civil rights suit for malicious prosecution and false arrest in which the Fifth Circuit panel quoted the dismissed complaint as follows:

[T]he appellants allege that “all acts of assistant state attorney Sawyer were done under the authority of, and for and on behalf of, and at the direction of . . . Richard E. Gerstein (the defendant State Attorney).” . . . [A]ppellants allege that Sawyer entered into a conspiracy with a deputy sheriff, Mrs. Gisela Surbaugh, . . . “to deprive

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241 F.2d 264, 265 (5th Cir. 1957) (citation omitted). The court then cited a dozen cases in which district courts had improperly granted motions to dismiss since the promulgation of the Federal Rules in 1938. *Id.* at 265 n.1.

37. 251 F.2d 780 (5th Cir. 1958).

38. *Id.* at 784.

39. *Id.* at 785.

40. 410 F.2d 99 (5th Cir. 1969).

the Plaintiffs of their right to be secure in their person, house and effects against unreasonable searches and seizures, of equal protection of laws, and due process of laws.”<sup>41</sup>

Even though there are no specific factual allegations backing up the generalized factual assertion that the Assistant State Attorney conspired with the Sheriff to deprive the plaintiffs of their rights and that such conduct was authorized by the State Attorney, the Fifth Circuit—applying *Conley*’s “no set of facts” standard—held that the complaint adequately stated a claim:

Since appellants allege that they were arrested maliciously and without probable cause, and for the purpose of the motion to dismiss this allegation of fact must be presumed to be true, Deputy Sheriff Surbaugh may well be responsible for her part in the investigation and arrest. And . . . this responsibility could, under at least one set of facts, possibly extend to Assistant State Attorney Sawyer and his superior, appellee State Attorney Gerstein, who allegedly authorized and directed Sawyer’s acts. Therefore, it cannot be said with certainty that the appellants cannot possibly recover under the allegations of their complaint, and the judgment of dismissal must be reversed.<sup>42</sup>

Note how the court referred to the generalized allegation of an unreasonable seizure as “this allegation of fact” even though details supporting that characterization of what happened are not provided. The court did not view these as mere legal conclusions masquerading as factual allegations; rather, they accepted them as generalized factual allegations of the kind illustrated in the Official Forms and to be further substantiated through the process of discovery.

To note one more example, in *Pred v. Board of Public Instruction of Dade County*,<sup>43</sup> the Fifth Circuit reversed a dismissal of the plaintiffs’ civil rights claims by a district court that had concluded, “[t]he complaint fails to allege facts sufficient to invoke the alleged violation of the First Amendment guaranteeing free speech to the plaintiffs.”<sup>44</sup> That complaint alleged, in pertinent part, the following:

All of the foregoing expressions on the part of the plaintiffs are anathema to the individual Defendants. It was for these expressions of views and solely for these expressions of views and not for any demonstrated incompetencies as teachers, that the Defendants have

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41. *Id.* at 101-02 (brackets in original).

42. *Id.* at 102.

43. 415 F.2d 851 (5th Cir. 1969).

44. *Id.* at 853 n.2.

refused to rehire the Plaintiffs for the forthcoming school year . . . .<sup>45</sup>

In rejecting the district court's conclusion that the complaint failed to satisfy the notice pleading standard, the Fifth Circuit panel wrote:

Under the spirit of the *Conley* reading of a complaint which diminishes, if not altogether obliterates, the restrictive approach of some of our earlier cases requiring the allegation of "facts" as distinguished from "conclusions" in civil rights cases, this complaint is a direct, positive charge that these two teachers . . . were denied the fourth year "continuing contract" solely because of their activities in supporting by word, deed, action and association ideas and lawful movements that were opposed by the State school authorities.<sup>46</sup>

Other circuits adhered to the liberal *Conley* pleading standard as well during this period. For example, in 1962 the Ninth Circuit made it clear that *Conley*'s "no set of facts" formulation was the governing standard for civil rights claims:

The allegations necessary to state such a claim [a § 1983 claim asserting an unconstitutional search], as in the case of any other civil action in the federal courts, are not to be held insufficient unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.<sup>47</sup>

As an illustration of what it meant by these words, the Ninth Circuit wrote, "[A]llegations that appellees searched appellant without

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45. *Id.* at 853 n.12.

46. *Id.* at 854. Seemingly exasperated with the continuing practice of district courts dismissing claims based on a view that Rule 8(a) required fact pleading, the court wrote at the outset of its opinion:

This is another monument to needless waste of lawyer and Judge time . . . This is but a different prelude to the common refrain on the high mortality rate to a dismissal under *F.R. Civ. P. 12(b)* for failure to state a claim. To the usual perils should be added the unsoundness . . . of trying . . . to resolve new, but serious, questions of constitutional law on barebones pleadings.

*Id.* at 851-52.

47. *Cohen v. Norris*, 300 F.2d 24, 31 (9th Cir. 1962); see also *York v. Story*, 324 F.2d 450, 453 (9th Cir. 1963) (asserting that *Conley*'s "no set of facts" rule "is applicable in civil rights actions"). The Ninth Circuit also took the view that *Conley* prevented a dismissal for failure to state a claim "except in the extraordinary case where the pleader makes allegations which show on the face of the complaint some insuperable bar to relief." *Corsican Prods. v. Pitchess*, 338 F.2d 441, 442 (9th Cir. 1964) (citation omitted). For an example of just such a case, see *Haldane v. Chagnon*, 345 F.2d 601, 603 (9th Cir. 1965) (holding that "the dismissal would have been improper had it been based solely upon the allegations of the complaint itself," but that "specifically alleged and documented facts" revealed the defense of judicial immunity). The Seventh Circuit seemed to hold a similar view. See, e.g., *Pickett v. New York Cent. R.R.*, 332 F.2d 968, 970 n.2 (7th Cir. 1964) ("[T]he admonition in *Conley v. Gibson* . . . does not apply here where the complaint by express allegation negates the basis for a claim of which the court has jurisdiction.").

arresting him and without having a search warrant sufficiently allege an unreasonable search to withstand a motion to dismiss.”<sup>48</sup> The Second Circuit seemed to hold a similar view, upholding the following as sufficiently stating a claim of discrimination under the Railway Labor Act: “In paragraph 55 of the complaint, appellants state, ‘that defendants have in a willful and malicious manner discriminated against plaintiff in favor of members of Lodge 2147 of the Brotherhood.’”<sup>49</sup> District court support for the *Conley* rule during this period was apparent as well.<sup>50</sup>

All was not sweetness and light, however, with respect to pleading and civil rights claims during the 1960s. For example, the D.C. Circuit offered a strict but defensible reading of the civil rights complaint in *Williams v. Hot Shoppes, Inc.*<sup>51</sup> In *Williams*, the court held that the complaint’s assertion that the plaintiff’s exclusion from a restaurant based on his race was “produced by the interplay of governmental and private action over a long period of time” was insufficient to plead the requisite state action for an equal protection claim under § 1983.<sup>52</sup> The majority in *Williams*—which included future Chief Justice Burger—felt that the complaint’s more explicit allegations suggested that the governmental action referred to was only a state statute thought to require racial segregation, not coercive threats by police or prosecutors possibly made against the restaurant owner.<sup>53</sup> The dissent disagreed, feeling that *Conley* mandated that the plaintiff be given the benefit of all possible inferences from the allegations in the complaint.<sup>54</sup>

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48. *Cohen*, 300 F.2d at 32; see also *Marshall v. Sawyer*, 301 F.2d 639, 646 (9th Cir. 1962) (“The only elements which need to be present in order to establish a claim for damages under the Civil Rights Act are that the conduct complained of was engaged in under color of state law, and that such conduct subjected the plaintiff to the deprivation of rights, privileges, or immunities secured by the Constitution of the United States.”).

49. *Ferro v. Ry. Express Agency, Inc.*, 296 F.2d 847, 851 (2d Cir. 1961). It is worth noting that Charles Clark, principal architect of the Federal Rules, was a judge on the panel in this case.

50. See, e.g., *Tennessee ex rel. Davis v. Hartman*, 306 F. Supp. 610 (E.D. Tenn. 1969) (using *Conley* to reject defendant’s call to dismiss a civil rights complaint because it failed to allege that civil rights violations were the proximate cause of the plaintiff’s injuries); *Sells v. Int’l Bhd. of Firemen & Oilers*, 190 F. Supp. 857, 861 (W.D. Pa. 1961) (“It may very well be that plaintiff in this case will be unable to show any discrimination. His complaint is not too precise on this point but it does not have to be under Rule 8(f) and as indicated in the *Conley* decision.”).

51. 293 F.2d 835 (D.C. Cir. 1961).

52. *Id.* at 361.

53. *Id.* at 840 (“The complaint, in our view, alleges no more than this: that the restaurant manager discriminated against plaintiff because he believed he was compelled to do so by the Virginia statute.”) (Bazelon, J., dissenting).

54. *Id.* at 844 (“I read the above described allegations as charging that appellee excluded the appellant because of appellee’s ‘understanding’ that it was required by law to do so, and that

All in all, though, in the decade or so following its announcement, the lower federal courts acknowledged the *Conley* rule and its applicability to civil rights claims, even though they might at times have interpreted that rule in a way that meant the complaint should nonetheless be dismissed. What does not appear to have occurred during most of this period was any explicit rejection of the *Conley* rule in favor of a judicially-created heightened pleading standard for civil rights claims. However, by the end of the 1960s many courts began to move in the direction of doing just that.

## B. The Rise (and Fall?) of Heightened Pleading

The seeds of heightened pleading for civil rights claims can be discerned in some precedent from the 1960s. In *Powell v. Workmen's Compensation Board*,<sup>55</sup> a Second Circuit case, the plaintiff alleged that the defendant Board, two insurance companies, and the plaintiff's employer conspired to deprive him of the equal protection of the laws and of his rights, privileges, and immunities as a United States Citizen "by means of unlawful and dilatory tactics designed to hinder the processing of [plaintiff's] . . . claim for workmen's compensation."<sup>56</sup> The court in *Powell* responded with the following admonition in favor of more particularized pleading:

A complaint in a case like this must set forth facts showing some intentional and purposeful deprivation of constitutional rights. This complaint does contain some general allegations, framed in broad language closely paralleling that used in Sections 1983 and 1985(3), that defendants successfully conspired to deprive plaintiff of his rights. But plaintiff was bound to do more than merely state vague and conclusionary allegations respecting the existence of a conspiracy. It was incumbent upon him to allege with at least some degree of particularity overt acts which defendants engaged in which were reasonably related to the promotion of the claimed conspiracy.<sup>57</sup>

It was a Connecticut district court that picked up on the phrase "in a case like this" in *Powell* to discern and apply—perhaps for the first time—a special, explicit heightened pleading rule for civil rights claims and removed them from the notice pleading regime of *Conley*.

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this understanding was 'produced by the interplay of governmental and private action over a long period of time.' To restrict proof of the basis of appellee's 'understanding' to a State statute ignores settled principles of modern pleading.").

55. 327 F.2d 131 (2d Cir. 1964).

56. *Id.* at 133.

57. *Id.* at 137 (citation omitted).

In *Valley v. Maule*,<sup>58</sup> the court rejected pleas to adhere to the *Conley* standard and made it clear that, in its view, heightened pleading standards applied to civil rights cases:

Plaintiffs argue that in federal practice a complaint need not set forth detailed facts, that the Federal Rules of Civil Procedure adopt the theory of “notice pleading.” As a general rule notice pleading is sufficient, but an exception has been created for cases brought under the Civil Rights Acts. The reason for this exception is clear. In recent years there has been an increasingly large volume of cases brought under the Civil Rights Acts. A substantial number of these cases are frivolous or should be litigated in the State courts; they all cause defendants—public officials, policemen and citizens alike—considerable expense, vexation and perhaps unfounded notoriety. It is an important public policy to weed out the frivolous and insubstantial cases at an early stage in the litigation, and still keep the doors of the federal courts open to legitimate claims.<sup>59</sup>

Here we can see that the judge in *Valley* was unafraid to voice what would become the enduring rationale of subsequent courts that embraced heightened pleading for civil rights claims: civil rights claims are more likely to be frivolous and are too expensive and vexatious.

The development of heightened pleading after *Valley* has already been well documented by several scholars.<sup>60</sup> Suffice it to say that after *Valley*, many courts—both at the circuit<sup>61</sup> and district<sup>62</sup> level—em-

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58. 297 F. Supp. 958 (D. Conn. 1968).

59. *Id.* at 960-61 (citation omitted).

60. See, e.g., Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 949 (1990); Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 577-82 (2002); Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749 (1998); Marcus, *The Revival of Fact Pleading*, *supra* note 26; C. Keith Wingate, *A Special Pleading Rule for Civil Rights Complaints: A Step Forward or a Step Back?* 49 MO. L. REV. 677 (1984).

61. See, e.g., *Caldwell v. City of Elwood*, 959 F.2d 670, 672 n.4 (7th Cir. 1992) (“Certain issues in *section 1983* complaints require ‘heightened pleading and substantiation.’” (quoting *Underwood v. Clark*, 939 F.2d 473, 476 (7th Cir. 1991))); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 954 F.2d 1054 (5th Cir. 1992) (“[U]nder *Elliott [v. Perez]*, 751 F.2d 1472 (5th Cir. 1985)] and *Palmer [v. City of San Antonio]*, 810 F.2d 514 (5th Cir. 1987)], the heightened pleading requirement governs all *section 1983* complaints brought in this circuit . . . .”); *Andrews v. Wilkins*, 934 F.2d 1267, 1269 (D.C. Cir. 1991) (“[A] constitutional tort claim against the government is subject to a heightened pleading standard.”); *Dartmouth Review v. Dartmouth Coll.*, 889 F.2d 13, 16 (1st Cir. 1989) (suggesting there is a greater need to plead specific factual allegations in a civil rights suit); *Arnold v. Bd. of Educ. of Escambia County*, 880 F.2d 305, 309 (11th Cir. 1989) (“[I]n an effort to eliminate nonmeritorious claims on the pleadings and to protect public officials from protracted litigation involving specious claims we, and other courts, have tightened the application of *Rule 8* to § 1983 cases.”); *Barr v. Abrams*, 810 F.2d 358, 363 (2d Cir. 1987) (“[C]omplaints relying on the civil rights statutes are insufficient unless they contain some specific allegations of fact indicating a deprivation of rights, instead of litany of general conclusions that shock but have no meaning.”); *Sooner Prods. Co. v. McBride*,

braced a special heightened pleading rule for civil rights claims and applied the rule to numerous cases throughout the 1970s, 1980s and into the early 1990s.<sup>63</sup> Again, the often-stated rationale for doing so was a sense that such cases were more likely to be frivolous and “brought for purposes of political harassment.”<sup>64</sup>

By the early 1990s, most circuits had embraced the rule that a heightened pleading standard—meaning a requirement to plead factual details in support of general allegations—applied to civil rights claims.<sup>65</sup> Indeed, Justice Kennedy himself embraced heightened

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708 F.2d 510, 512 (10th Cir. 1983) (“When a plaintiff in a § 1983 action attempts to assert the necessary ‘state action’ by implicating state officials or judges in a conspiracy with private defendants, mere conclusory allegations with no supporting factual averments are insufficient; the pleadings must specifically present facts tending to show agreement and concerted action.”); *Rotolo v. Borough of Charleroi*, 532 F.2d 920, 922 (3d Cir. 1976) (“In this circuit, plaintiffs in civil rights cases are required to plead facts with specificity.”); *Albany Welfare Rights Org. Day Care Ctr., Inc. v. Schreck*, 463 F.2d 620, 623 (2d Cir. 1972) (“The complaint in the instant action presents no facts to support the allegation that the refusal to refer children was in retaliation for Boddie’s organizing activities.”). It is worth noting that although the Seventh Circuit indicated support for “heightened pleading” in *Caldwell*, an earlier panel of the court, under the pen of Judge Easterbrook, suggested that reference to a “heightened pleading requirement” was inappropriate; instead the matter should be viewed through the lens of “the minimum quantum of proof required to defeat the initial motion for summary judgment.” *Elliott v. Thomas*, 937 F.2d 338, 345 (7th Cir. 1991). The Seventh Circuit’s hesitation in this regard was presaged by Judge Higginbotham’s expressed concern about the imposition of heightened pleading in his concurrence in *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985).

62. See, e.g., *Richardson v. Oldham*, 811 F. Supp. 1186, 1193 (E.D. Tex. 1992) (“A heightened pleading requirement is imposed on a civil rights plaintiff suing a state actor in his individual capacity.”); *La Plant v. Frazier*, 564 F. Supp. 1095, 1097 (E.D. Pa. 1983) (“Defendants’ motion to dismiss correctly notes the stringent pleading standard for complaints arising under Federal Civil Rights statutes. The requirement is that the complaint state facts upon which the court can weigh the substantiality of the claim.”); *Schramm v. Krischell*, 84 F.R.D. 294, 298 (D. Conn. 1979) (“[I]n order to bypass this motion to dismiss filed by the defendant governmental body, the complaint must make reference in detail to specific incidents of misconduct by government officials and must extrapolate from these incidents to indicate the particular manner in which the governmental body, by omission or commission, has placed its imprimatur upon the actions of its officers.”).

63. The Ninth Circuit bucked the trend in favor of heightened pleading for civil rights claims brought under § 1983. See *Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 624 (9th Cir. 1988) (“[A] claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss ‘even if the claim is based on nothing more than a bare allegation that the individual officers’ conduct conformed to official policy, custom, or practice.’”) (citation omitted). But see *Branch v. Tunnell*, 937 F.2d 1382, 1386 (9th Cir. 1991) (“We therefore adopt a heightened pleading standard in cases in which subjective intent is an element of a constitutional tort [*Bivens*] action.”).

64. *United States v. City of Philadelphia*, 644 F.2d 187, 206 (3d Cir. 1980) (“In a civil rights case, seeking federal relief against agencies and officers of state and local governments, we require the pleadings to provide more specific notice, for several reasons. Experience has demonstrated the great potential for frivolous and insubstantial suits, brought for purposes of political harassment, to cause defendants to suffer ‘expense, vexation and perhaps unfounded notoriety.’”) (footnote omitted).

65. See *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir. 1992) (stating that in cases where liability is based on § 1983, “some factual detail is necessary” and that a “height-

pleading when he wrote the following in his concurrence in *Siegert v. Gilley*.<sup>66</sup>

The heightened pleading standard is a necessary and appropriate accommodation between the state of mind component of malice and the objective test that prevails in qualified immunity analysis as a general matter. There is tension between the rationale of *Harlow* and the requirement of malice, and it seems to me that the heightened pleading requirement is the most workable means to resolve it. The heightened pleading standard is a departure from the usual pleading requirements of Federal Rules of Civil Procedure 8 and 9(b), and departs also from the normal standard for summary judgment under Rule 56. But avoidance of disruptive discovery is one of the very purposes for the official immunity doctrine, and it is no answer to say that the plaintiff has not yet had the opportunity to engage in discovery. The substantive defense of immunity controls.<sup>67</sup>

Although the issue of heightened pleading was presented to the Court in *Siegert*, the Court avoided the issue by holding that the wrongdoing alleged by the plaintiff—who had pursued a *Bivens*<sup>68</sup> action based on purported governmental interference with his ability to obtain employment—did not involve the violation of a clearly established constitutional right.<sup>69</sup>

It was not until the Supreme Court issued its decision in *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*<sup>70</sup> that the Court squarely addressed whether the imposition of heightened pleading requirements was an appropriate and permissible means of scrutinizing civil rights claims, at least to the extent such requirements were being imposed in cases alleging municipal liability under § 1983. The Court unanimously and unambiguously answered

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ened Rule 8 requirement—as the law of the circuit—must be applied by the district courts”); *Caldwell*, 959 F.2d at 672 n.4 (7th Cir. 1992); *Fraire v. City of Arlington*, 957 F.2d 1268, 1278, n.38 (5th Cir. 1992); *Crawford-El v. Britton*, 951 F.2d 1314, 1317 (D.C. Cir. 1991); *Branch*, 937 F.2d at 1386 (“We therefore adopt a heightened pleading standard in cases in which subjective intent is an element of a constitutional tort [*Bivens*] action.”); *Sawyer v. County of Creek*, 908 F.2d 663, 666 (10th Cir. 1990) (requiring plaintiffs to provide factual allegations that demonstrate that the right in question in a § 1983 action against an official in his individual capacity was clearly established at the time of the defendant’s conduct); *Brown v. Frey*, 889 F.2d 159, 170 (8th Cir. 1989); *Colburn v. Upper Darby Twp.*, 838 F.2d 663, 666 (3d Cir. 1988).

66. 500 U.S. 226 (1991).

67. *Id.* at 235-36 (Kennedy, J., concurring) (citation omitted).

68. *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971) (recognizing an implied cause of action against federal governmental officials who have violated the plaintiff’s constitutional rights).

69. *Siegert v. Gilley*, 500 U.S. 226, 231 (1991).

70. 507 U.S. 163 (1993).

that question in the negative.<sup>71</sup> After stating, “we think that it is impossible to square the ‘heightened pleading standard’ applied by the Fifth Circuit in this case with the liberal system of ‘notice pleading’ set up by the Federal Rules,” the Court suggested that any desire for an added specificity requirement for § 1983 claims against municipalities “is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.”<sup>72</sup>

Unfortunately and in seeming contradiction with the statement just quoted above, the *Leatherman* Court also noted the following: “We . . . have no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials.”<sup>73</sup> This caveat gave some lower courts a basis for interpreting *Leatherman* as a decision that was limited simply to municipal liability cases, not offering a general admonition against judicially-created heightened pleading standards beyond that context. Thus, in many courts the application of heightened pleading beyond the narrow municipal liability context persisted after *Leatherman*,<sup>74</sup> although this was by no means universally the case.<sup>75</sup>

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71. *Id.* at 164.

72. *Id.* at 168. The circuits were generally compliant with the holding of *Leatherman*. See, e.g., *Atchinson v. District of Columbia*, 73 F.3d 418, 419 (D.C. Cir. 1996) (rejecting district court’s use of heightened pleading requirement to dismiss civil rights claim alleging municipal liability (citing *Leatherman*, 507 U.S. at 169)); *Jordan ex rel. Jordan v. Jackson*, 15 F.3d 333, 337–39 (4th Cir. 1994) (addressing for the first time since *Leatherman* the standard required of a claim for municipal liability and concluding that a plaintiff need satisfy “only the usual requirements of notice pleading specified by the Federal Rules”); *Ferran v. Town of Nassau*, 11 F.3d 21, 23 (2d Cir. 1993) (stating that simple allegations of conspiracy in a § 1983 action are sufficient to state a claim (citing *Leatherman*, 507 U.S. at 169)). The Ninth Circuit had declined to impose heightened pleading to municipal liability claims prior to *Leatherman* and maintained that position after *Leatherman*. See, e.g., *Schlosser v. Renne*, 116 F.3d 1486, 1997 WL 345799, at \*1 (9th Cir. 1997) (“In this circuit, a claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss even if the claim is based on nothing more than a bare allegation that the individual officers’ conduct conformed to official policy, custom, or practice.”) (quoting *Karim-Panahi v. Los Angeles Police Dep’t*, 839 F.2d 621, 624 (9th Cir. 1988)).

73. *Leatherman*, 507 U.S. at 166–67.

74. See, e.g., *Breidenbach v. Bolish*, 126 F.3d 1288, 1292 n.2 (10th Cir. 1997) (“Because the Court [in *Leatherman*] declined to rule that its holding applied to individual government officers and we find no reason to do so here, we are compelled under the doctrine of stare decisis to continue to apply our heightened pleading standard in cases concerning individual government officers.”); *Simmons v. Poe*, 47 F.3d 1370, 1377 (4th Cir. 1995) (“[W]e have specifically rejected section 1985 claims whenever the purported conspiracy is alleged in a merely conclusory manner, in the absence of concrete supporting facts.”); *Danove v. Congemi*, 21 F.3d 1108, 1994 WL 171520, at \*1 (5th Cir. 1994) (“Taormina’s argument that . . . *Leatherman* overruled the heightened pleading requirement in cases such as this one . . . is frivolous.”); *Kimberlin v. Quinlan*, 6 F.3d 789, 794 n.9 (D.C. Cir. 1993) (“[B]ecause the Court did not address heightened pleading in individual capacity suits, our precedent requiring that standard in such suits remains the governing law of this circuit.”).

Five years later in *Crawford-El v. Britton*,<sup>76</sup> the Court touched on the heightened pleading issue in the qualified immunity context in a subtle fashion. The Court seemed to affirm its admonition that special pleading rules are not warranted as a judicial response to policy concerns surrounding certain types of claims or defenses: “[O]ur cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process.”<sup>77</sup> However, the Court did instruct that courts were fully empowered to require more factual detail of plaintiffs to “protect[ ] the substance of the qualified immunity defense,”<sup>78</sup> but not in the context of a plaintiff’s initial pleading. Rather, according to the Court, a district court:

may order a reply to the defendant’s or a third party’s answer under Federal Rule of Civil Procedure 7(a), or grant the defendant’s motion for a more definite statement under Rule 12(e). Thus, the court may insist that the plaintiff “put forward specific, nonconclusory factual allegations” that establish improper motive causing cognizable injury in order to survive a pre-discovery motion for dismissal or summary judgment.<sup>79</sup>

Several courts read this language from *Crawford-El* as disapproving of a heightened pleading standard for claims asserting liability

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75. See, e.g., *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1115 (D.C. Cir. 2000) (“‘Because racial discrimination in employment is ‘a claim upon which relief can be granted,’ . . . ‘I was turned down for a job because of my race’ is all a complaint has to say’ to survive a motion to dismiss under Rule 12(b)(6).” (quoting *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998))); *Nance v. Vieregge*, 147 F.3d 589, 590 (7th Cir. 1998) (“Civil rights complaints are not held to a higher standard than complaints in other civil litigation.”) (citation omitted).

76. 523 U.S. 574 (1998).

77. *Id.* at 595.

78. *Id.* at 597.

79. *Id.* at 598 (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring)). The Fifth Circuit followed the approach of requiring heightened pleading in a reply. See *Shipp v. McMahon*, 199 F.3d 256, 261 (5th Cir. 2000) (“[I]f a defendant raises the defense of qualified immunity, the district court may order the plaintiff under Rule 7 of the Federal Rules of Civil Procedure to file a reply tailored to answer the defendant’s assertion of qualified immunity. Furthermore, in cases involving an allegation of improper discriminatory motive, the district court may *sua sponte* or on the defendant’s motion order the plaintiff to ‘put forward specific, nonconclusory factual allegations that establish improper motive causing cognizable injury in order to survive a pre-discovery motion for dismissal or summary judgment.’” (quoting *Crawford-El*, 523 U.S. at 598)).

against governmental actors,<sup>80</sup> although other circuits saw things differently.<sup>81</sup>

The persistence of some lower courts<sup>82</sup> in imposing heightened pleading led the Supreme Court to revisit the issue in 2002 in *Swierkiewicz v. Sorema N.A.*<sup>83</sup> This time, however, the question arose in the context of an employment discrimination suit. As in *Leatherman*, the *Swierkiewicz* Court unanimously rejected the particularized pleading requirement that the Second and Sixth Circuits were imposing on such claims. Specifically, the Court held that it was inappropriate to require plaintiffs to allege facts constituting a prima facie case of discrimination under the framework established in *McDonnell Douglas Corp. v. Green*.<sup>84</sup> Unlike in *Leatherman*, however, the Court did not hint that its decision was limited to heightened pleading stan-

80. See *Trulock v. Freeh*, 275 F.3d 391, 405 (4th Cir. 2001) (“[T]here is no heightened pleading standard in qualified immunity cases . . . .”); *Currier v. Doran*, 242 F.3d 905, 916 (10th Cir. 2001) (“We conclude that this court’s heightened pleading requirement cannot survive *Crawford-El*.”); *Harbury v. Deutch*, 233 F.3d 596, 611 (D.C. Cir. 2000) (“The Supreme Court . . . held that plaintiffs making constitutional claims based on improper motive need not meet any special heightened pleading standard.”); *Nance*, 147 F.3d at 590 (“Civil rights complaints are not held to a higher standard than complaints in other civil litigation.” (citing *Crawford-El*, 523 U.S. at 574)).

81. See *Judge v. City of Lowell*, 160 F.3d 67, 74 (1st Cir. 1998) (“We conclude, therefore, that the five Justices writing for the Court in *Crawford-El* permitted an approach . . . calling for the pleading of specific facts from which to infer illegal motive . . . .”). The Eleventh Circuit continued to require heightened pleading as well. See *Magluta v. Samples*, 256 F.3d 1282, 1284 (11th Cir. 2001) (“[W]e must respect the rule that heightened specificity is required in civil rights actions against public officials who may be entitled to qualified immunity.”). The Ninth Circuit continued to adhere to its qualified immunity heightened pleading rule after *Crawford-El*. See, e.g., *Papa v. United States*, 281 F.3d 1004, 1010 (9th Cir. 2002) (“The district court correctly concluded that heightened pleading standards apply.”); *Lee v. City of Los Angeles*, 250 F.3d 668, 679 n.6 (9th Cir. 2001) (“A heightened pleading standard, however, does apply in this circuit in ‘§ 1983 cases where the defendant is entitled to assert the qualified immunity defense . . . .’”) (citation omitted). However, after *Swierkiewicz*, the Ninth Circuit expressly recognized that such was inconsistent both with *Crawford-El* and *Swierkiewicz*. See *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125 (9th Cir. 2002) (“In light of *Crawford-El* and *Swierkiewicz*, we must conclude that [our heightened pleading precedents] are no longer good law to the extent that they require heightened pleading of improper motive in constitutional tort cases.”). The Sixth Circuit appears to have followed a similar pattern. *Compare Sollitto v. Mitchell*, 23 F. App’x 527, 528 (6th Cir. 2001) (“‘[A] plaintiff bringing an action against individual governmental officials under 42 U.S.C. § 1983 must satisfy a heightened standard of pleading when the [qualified immunity] defense is raised pursuant to a motion to dismiss.’”) (citation omitted), with *Goad v. Mitchell*, 297 F.3d 497, 502-03 (6th Cir. 2002) (“We conclude [post-*Swierkiewicz*] that the Supreme Court’s decision in *Crawford-El* invalidates the heightened pleading requirement [for civil rights plaintiffs in cases in which the defendant raises the affirmative defense of qualified immunity].”).

82. The Third Circuit was a notable example of a court that accepted the notion that notice pleading applied to all civil rights claims. See *Weston v. Pennsylvania*, 251 F.3d 420, 429 (3d Cir. 2001) (“Discrimination and other civil rights claims are clearly subject to notice pleading.”).

83. 534 U.S. 506 (2002).

84. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Swierkiewicz*, 534 U.S. at 510.

dards imposed on employment discrimination claims. To the contrary, the Court elaborated on its holding by announcing in general terms that the simplified notice pleading standard of Rule 8—not judicially-created heightened pleading standards—applied in all cases not subject to an expressly stated exception, such as the particularized pleading standard set forth in Rule 9(b).<sup>85</sup> Additionally, the Court reaffirmed its commitment to *Conley*'s “no set of facts” standard when it wrote, “Given the Federal Rules’ simplified standard for pleading, [a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.”<sup>86</sup> Finally, the Court reiterated its earlier admonition that “[a] requirement of greater specificity for particular claims is a result that ‘must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.’”<sup>87</sup>

Needless to say, *Swierkiewicz*, coupled with the pleading decisions that preceded it, constituted a major statement by the Supreme Court in favor of notice pleading. The clear message of the opinion seemed to be that non-rule-based or non-statutory heightened pleading standards were illegitimate. Would lower courts heed this message and stick with simplified pleading standards or would they hold on to particularized pleading to some degree in civil rights cases? As we will see in the next Part, imposing heightened pleading ultimately proved to be a hard habit to break.

## II. THE INTERREGNUM: PREVAILING APPROACHES TO PLEADING CIVIL RIGHTS CLAIMS BETWEEN *SWIERKIEWICZ* AND *TWOMBLY*

In light of the Court’s pronouncements in *Conley*, *Leatherman*, and *Swierkiewicz*, one would think that the heightened pleading beast had been definitively slain in those cases not subject to expressly authorized particularized pleading rules. However, given the resilience of heightened pleading standards in the face of prior Supreme Court

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85. *Swierkiewicz*, 534 U.S. at 513 (“Rule 8(a)’s simplified pleading standard applies to all civil actions, with limited exceptions.”). In addition to Rule 9(b)’s particularity requirement, the Private Securities Litigation Reform Act (“PSLRA”) offers an example of statutorily-imposed heightened pleading. See Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, § 101(b), 109 Stat. 737, 747 (1995) (imposing heightened pleading standard for securities fraud class actions) (codified at 15 U.S.C. § 78u-4(b)(1)-(2)).

86. *Swierkiewicz*, 534 U.S. at 514 (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)).

87. *Id.* at 515 (quoting *Leatherman*, 507 U.S. at 168).

pronouncements against them, it is not surprising to discover that the post-*Swierkiewicz* (but pre-*Twombly*) period was characterized by a continued imposition of particularized fact-pleading requirements in many circuits. In this Part, we will look at the cases to figure out the extent to which heightened pleading standards endured after *Swierkiewicz*'s admonition that lower courts abandon the practice. This matters because it is only with a clear understanding of the lower courts' approach to pleading in the civil rights context after *Swierkiewicz* that we can determine *Twombly*'s impact on such pleadings. That is, to the extent heightened or particularized pleading requirements for civil rights claims can be found among lower courts today, we want to be able to tell whether that is due to *Twombly* or simply a legacy of a practice that preceded *Twombly*.

It appears that, at least initially, the Court's clear and unequivocal language in *Swierkiewicz* did chasten most federal courts into giving up their previous efforts to impose heightened pleading on civil rights claims.<sup>88</sup> During the same year that *Swierkiewicz* was decided, the Seventh Circuit was particularly expansive in its language regarding the pleading standard applicable to civil rights claims:

[A]s the Supreme Court and this court have emphasized, there are no special pleading rules for prisoner civil rights cases. A complaint that complies with the federal rules of civil procedure cannot be dismissed on the ground that it is conclusory or fails to allege facts.

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88. See, e.g., *Educadores Puertorriqueños en Acción v. Hernández*, 367 F.3d 61, 66-67 (1st Cir. 2004) ("We join several of our sister circuits in holding that there are no heightened pleading standards for civil rights cases."); *Phelps v. Kapnolas*, 308 F.3d 180, 187 n.6 (2d Cir. 2002) ("To the extent *Dawes* [*v. Walker*, 239 F.3d 489 (2d Cir. 2001)] did create a heightened pleading standard beyond FRCP 8(a)(2), that case is inconsistent with, and thus overruled by, *Swierkiewicz*."); *Ray v. Kertes*, 285 F.3d 287, 297 (3d Cir. 2002) (reading *Leatherman*, *Crawford-El*, and *Swierkiewicz* as rejecting court-created particularized pleading requirements); *Jackson v. Crosset Co.*, 33 F. App'x 761, 762 (6th Cir. 2002) ("[In *Swierkiewicz*] [t]he Supreme Court expressly rejected this court's requirement that a Title VII complaint contain factual allegations that support each element of a prima facie case.") (citation omitted); *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1125 (9th Cir. 2002) ("In light of *Crawford-El* and *Swierkiewicz*, we must conclude that [our heightened pleading precedents] are no longer good law to the extent that they require heightened pleading of improper motive in constitutional tort cases."); see also *Phillip v. Univ. of Rochester*, 316 F.3d 291, 298 (2d Cir. 2003) ("Plaintiffs allege that they are African-Americans, describe defendants' actions in detail, and allege that defendants selected them for maltreatment 'solely because of their color.' A recent Supreme Court case, *Swierkiewicz* . . . , compels us to conclude that these allegations are sufficient."). Although the Tenth Circuit appears not to have addressed the impact of *Swierkiewicz* on the pleading standards applicable to civil rights claims, post-*Swierkiewicz* it struck by its prior determination, based on *Crawford-El*, that heightened pleading for civil rights claims was inappropriate. See, e.g., *Bell v. Manspeaker*, 34 F. App'x 637, 642 n.6 (10th Cir. 2002) ("[A] heightened pleading requirement in responding to the qualified immunity defense . . . is no longer the law of this circuit." (citing *Currier v. Doran*, 242 F.3d 905, 916)).

The federal rules require (with irrelevant exceptions) only that the complaint state a claim, not that it plead the facts that if true would establish (subject to any defenses) that the claim was valid. All that need be specified is the bare minimum facts necessary to put the defendant on notice of the claim so that he can file an answer.<sup>89</sup>

The Ninth Circuit reached a similar conclusion regarding the import of *Swierkiewicz* and expressed its understanding of notice pleading in the following way: “In this circuit, a claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss even if the claim is based on nothing more than a bare allegation that the individual officers’ conduct conformed to official policy, custom, or practice.”<sup>90</sup> Reflecting a like embrace of simple notice pleading, the Eighth Circuit, in reversing the dismissal of an employment discrimination claim, wrote “[the plaintiff]’s allegation that [the defendant] violated Title VII by refusing to hire him because of his race sufficiently states a Title VII race-discrimination claim.”<sup>91</sup>

Other courts, however, seemed to brush aside any notion that *Swierkiewicz* adversely impacted strict pleading requirements or signaled the end of particularized fact pleading. The Fourth Circuit was notable in this regard. Its take on *Swierkiewicz* was as follows:

Our circuit has not . . . interpreted *Swierkiewicz* as removing the burden of a plaintiff to allege facts sufficient to state all the elements of her claim. . . . While a plaintiff is not charged with pleading facts sufficient to prove her case, as an evidentiary matter, in her

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89. *Higgs v. Carver*, 286 F.3d 437, 439 (7th Cir. 2002) (citing *Swierkiewicz*, 534 U.S. at 512-15) (reversing a dismissal of a prisoner’s retaliation claim alleging that he had been punished for filing a suit); see also *Garrett v. Tandy Corp.*, 295 F.3d 94, 105 (1st Cir. 2002) (“At the Rule 12(b)(6) stage, then, it is enough for a plaintiff to sketch a scenario which, if subsequently fleshed out by means of appropriate facts, could support an actionable claim.” (citing *Swierkiewicz*, 534 U.S. at 510-13)); *Walker v. Thompson*, 288 F.3d 1005, 1007 (7th Cir. 2002) (“[T]here is no requirement in federal suits of pleading the facts or the elements of a claim, with the exceptions . . . listed in Rule 9. Hence it is enough in pleading a conspiracy merely to indicate the parties, general purpose, and approximate date, so that the defendant has notice of what he is charged with.”).

90. *Galbraith*, 307 F.3d at 1127 (9th Cir. 2002) (citation and internal quotations omitted); see also *Maduka v. Sunrise Hosp.*, 375 F.3d 909, 914 (9th Cir. 2004) (reversing the dismissal of a complaint based on “*Swierkiewicz*’s willingness to ‘allow[ ] lawsuits based on conclusory allegations of discrimination to go forward.’” (quoting *Swierkiewicz*, 534 U.S. at 514)); *Empress LLC v. City & County of San Francisco*, 419 F.3d 1052, 1055-56 (9th Cir. 2005) (reaffirming notice pleading based on *Leatherman*, *Crawford-El*, and *Swierkiewicz*; applying “no set of facts” standard to complaint in § 1983 case).

91. *Pointer v. Mo. Dep’t of Corrs.*, 46 F. App’x 385, 386 (8th Cir. 2002) (citing *Swierkiewicz*, 534 U.S. at 510-14). The D.C. Circuit also seemed to reaffirm simple notice pleading after *Swierkiewicz*. See *Ciralsky v. CIA*, 355 F.3d 661, 671 (D.C. Cir. 2004) (“[A]ll that a Title VII complaint has to say to survive dismissal under Rule 12(b)(6) is: ‘The plaintiff was terminated from his job because of his religion.’” (citing *Swierkiewicz*, 534 U.S. at 508, 510-15)).

complaint, a plaintiff *is* required to allege facts that support a claim for relief.<sup>92</sup>

The Eleventh Circuit echoed this perspective when it wrote that even after *Swierkiewicz*, “unsupported conclusions of law or of mixed law and fact are not sufficient to withstand a dismissal under Rule 12(b)(6)” and “[t]he liberal standard of notice pleading still requires a plaintiff to provide the defendant with fair notice of the factual grounds on which the complaint rests.”<sup>93</sup>

A review of post-*Swierkiewicz* precedent in the other circuits reveals that they, too, maintained or reverted to some form of particularized fact-pleading over time.<sup>94</sup> Indeed, it appears that a modest consensus in favor of fact pleading prevailed during the period between *Swierkiewicz* and *Twombly*. By 2006, the Eighth Circuit was reciting the Rule 8(a) standard as follows: “[T]he complaint must contain sufficient facts, as opposed to mere conclusions, to satisfy the legal requirements of the claim to avoid dismissal.”<sup>95</sup> The Eleventh Circuit shared this view, writing, “To survive a motion to dismiss, plaintiffs must do more than merely state legal conclusions; they are required to allege some specific factual bases for those conclusions or face dismissal of their claims.”<sup>96</sup>

In some circuits, express invocation and application of heightened pleading standards for certain civil rights claims continued after

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92. *Bass v. E.I. Dupont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003) (citing *Dickson v. Microsoft Corp.*, 309 F.3d 193, 213 (4th Cir. 2002)).

93. *Jackson v. BellSouth Telecomms.*, 372 F.3d 1250, 1271 (11th Cir. 2004). *See also* *Wagner v. Daewoo Heavy Indus. Am. Corp.*, 289 F.3d 1268, 1272 (11th Cir. 2002) (interpreting *Swierkiewicz* to mean that “[s]ome details of the events leading to Plaintiff’s termination, which support an inference of deterrence, need to be alleged”).

94. *See, e.g.*, *Amron v. Morgan Stanley Inv. Advisors Inc.*, 464 F.3d 338 (2d Cir. 2006) (discussing how *Swierkiewicz* does not obviate the need to plead facts; “A plaintiff must allege, as the Supreme Court has held, those facts *necessary* to a finding of liability.” (citing *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 346-47 (2005))); *Browning v. Clinton*, 292 F.3d 235, 242 (D.C. Cir. 2002) (stating that notwithstanding *Swierkiewicz*, “we accept neither ‘inferences drawn by plaintiffs if such inferences are unsupported by the facts set out in the complaint,’ nor legal conclusions cast in the form of factual allegations.”) (citation and internal quotation marks omitted).

95. *Quinn v. Owen Fed. Bank FSB*, 470 F.3d 1240, 1244 (8th Cir. 2006) (quoting *DuBois v. Ford Motor Credit Co.*, 276 F.3d 1019, 1022 (8th Cir. 2002)); *see also* *United States ex rel. Garst v. Lockheed-Martin Corp.*, 328 F.3d 374, 378 (7th Cir. 2003) (“Rule 8(a) requires parties to make their pleadings straightforward, so that judges and adverse parties need not try to fish a gold coin from a bucket of mud. Federal judges have better things to do, and the substantial subsidy of litigation (court costs do not begin to cover the expense of the judiciary) should be targeted on those litigants who take the preliminary steps to assemble a comprehensible claim.”).

96. *Jackson*, 372 F.3d at 1263.

*Swierkiewicz*.<sup>97</sup> An example of this phenomenon may be found in *Gonzales v. Reno*,<sup>98</sup> an Eleventh Circuit case. In *Gonzales* the plaintiff alleged that the defendants “personally directed and caused a paramilitary raid upon [their] residence, and had actual knowledge of, and agreed to, and approved of, and acquiesced in, the raid in violation of the Fourth Amendment rights of Plaintiffs herein” and that federal agents on the scene “acted under the personal direction of Defendants . . . and with the knowledge, agreement, approval, and acquiescence of Defendants.”<sup>99</sup> In the face of these allegations, the Eleventh Circuit panel wrote: “In examining the factual allegations in the complaint, we must keep in mind the heightened pleading requirements for civil rights cases, especially those involving the defense of qualified immunity. The complaint must allege the relevant facts ‘with some specificity.’”<sup>100</sup> Applying its heightened pleading standard—which it acknowledged was a deviation from the ordinary notice pleading standard<sup>101</sup>—the court concluded, “These vague and conclusory allegations do not establish supervisory liability. Plaintiffs make bold statements and legal conclusions without alleging any facts to support them.”<sup>102</sup>

The Fourth Circuit employed a similar approach in *Jordan v. Alternative Resources Corp.*<sup>103</sup> *Jordan* involved a plaintiff who alleged that race was a motivating factor in his termination. However, the district court and majority of the Fourth Circuit panel felt that there were insufficient factual allegations to support this conclusory assertion. At the district level, the court noted that “[the Plaintiff] has al-

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97. See, e.g., *Burge v. Stalder*, No. 01-31484, 2002 WL 31845179, at \*3 (5th Cir. Dec. 4, 2002) (“In the face of the assertion by a defendant public official of the defense of qualified immunity, a § 1983 plaintiff must comply with a heightened pleading standard.”) (citation omitted).

98. 325 F.3d 1228 (11th Cir. 2003).

99. *Id.* at 1235 (internal quotations omitted).

100. *Id.* (quoting *GJR Invs., Inc. v. County of Escambia*, 132 F.3d 1359, 1367 (11th Cir. 1998)).

101. See *id.* (“More than mere conclusory notice pleading is required . . . .”) (citation omitted).

102. *Id.* See also *Swann v. S. Health Partners, Inc.*, 388 F.3d 834, 838 (11th Cir. 2004) (“[T]he heightened pleading standard is only applicable in § 1983 suits against individuals to whom qualified immunity is available.”). The Eleventh Circuit’s commitment to its heightened pleading standard never waned prior to *Twombly*. See *Dukes v. Miami-Dade County*, 232 F. App’x 907, 910 (11th Cir. 2007) (“This circuit, however, imposes a heightened pleading requirement in section 1983 claims and plaintiffs cannot rely on ‘vague or conclusory’ allegations.”) (citation omitted); *Albra v. City of Fort Lauderdale*, 232 F. App’x 885, 890 (11th Cir. 2007) (“[V]ague and conclusory allegations in a complaint without specific factual support are insufficient to support a civil rights complaint because such complaints are held to a higher pleading standard, and unsupported conclusions of law do not meet that standard.”) (citation omitted).

103. 467 F.3d 378 (4th Cir. 2006).

leged no facts suggesting that his own race played any role in his termination,” and wrote, “[T]he bald assertion of a legal conclusion, e.g., that Defendants discriminated against Plaintiff because he is African-American, is insufficient to overcome a motion to dismiss.”<sup>104</sup> In the decision denying en banc review, Judge Niemeyer agreed with the district court’s conclusion,<sup>105</sup> but Judge King took issue with it in his dissent, believing that the plaintiff’s allegation of race-based firing was indistinguishable from the allegations upheld as sufficient in *Swierkiewicz*.<sup>106</sup>

As *Swierkiewicz* became more of a distant memory, some courts that initially had appeared to abandon particularized pleading requirements began to send mixed signals about what level of pleading was indeed required. For example, in 2007 the Ninth Circuit made the following divergent statements in two separate cases: “In this circuit, a claim of municipal liability under § 1983 is sufficient to withstand a motion to dismiss even if the claim is based on nothing more than a bare allegation that the individual officers’ conduct conformed to official policy, custom, or practice,”<sup>107</sup> and “[v]ague and conclusory allegations of official participation in civil rights violations are not sufficient to withstand a motion to dismiss.”<sup>108</sup> Among Second Circuit precedent one finds some evidence of the same phenomenon.<sup>109</sup>

Ultimately, what many courts were seeking in the run up to *Twombly* were facts that supported the allegations made in the complaint. The Eighth Circuit reflected this position when it wrote, “Civil

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104. *Jordan v. Alternative Res. Corp.*, No. Civ. A. DKC 2004-1091, 2005 WL 736610, at \*7 (D. Md. Mar. 30, 2005).

105. *See Jordan*, 467 F.3d at 380.

106. *Id.* at 382 (King, J., dissenting).

107. *Whitaker v. Garcetti*, 486 F.3d 572, 581 (9th Cir. 2007) (quoting *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1127 (9th Cir. 2002)).

108. *Nguyen Tien Minh v. Giurbino*, 225 F. App’x 674, 676 (9th Cir. 2007) (quoting *Ivey v. Board of Regents of Univ. of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982)).

109. *Compare Wang v. Office of Prof’l Med. Conduct*, 228 F. App’x 17, 20 (2d Cir. 2007) (“Wang alleged that in revoking his certificate, [the defendant] ‘discriminated against [him] on the basis of his race’ . . . . Although Wang alleges no facts that would support a finding of discriminatory intent, he need not do so at the pleading stage.” (citing *Swierkiewicz*, 534 U.S. at 511-13)) and *Sierotowicz v. New York City Hous. Auth.*, 214 F. App’x 101, 103 (2d Cir. 2007) (“Responding to the argument that the allegations of discrimination were ‘conclusory,’ the Court noted that ‘the Federal Rules do not contain a heightened pleading standard for employment discrimination suits.’ We think the same applies to suits alleging prohibited discrimination in administering public housing under Section 8.”) (citation omitted), *with Rivera-Powell v. New York City Bd. of Elections*, 470 F.3d 458, 470 (2d Cir. 2006) (“[The plaintiff’s] complaint proffers only a conclusory allegation of discrimination, which, ‘without evidentiary support or allegations of particularized incidents, does not state a valid claim’ and so cannot withstand a motion to dismiss.” (quoting *Kern v. City of Rochester*, 93 F.3d 38, 44 (2d Cir. 1996))).

rights pleadings are construed liberally [, but] they must not be conclusory and must set forth facts which state a claim as a matter of law.”<sup>110</sup> The Tenth Circuit concurred when it stated, “When a plaintiff in a § 1983 action attempts to assert the necessary ‘state action’ by implicating state officials . . . in a conspiracy with private defendants, mere conclusory allegations with no supporting factual averments are insufficient; the pleadings must specifically present facts tending to show agreement and concerted action.”<sup>111</sup> In sum, although many circuits adhered to the traditional understanding of notice pleading—for example, the idea that all one need plead is “I was fired because of my race”<sup>112</sup>—some form of particularized fact pleading in civil rights cases could be found in a majority of the circuits.

### III. PLEADING CIVIL RIGHTS CLAIMS AFTER *TWOMBLY*

As mentioned before, the Court’s 2007 decision in *Bell Atlantic Corp. v. Twombly* revised civil pleading standards significantly, by abrogating *Conley*’s “no set of facts” standard and by reinterpreting Rule 8(a) to require the pleading of facts that show plausible entitle-

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110. *Parker v. Porter*, 221 F. App’x 481, 482 (8th Cir. 2007) (quoting *Davis v. Hall*, 992 F.2d 151, 152 (8th Cir. 1993)).

111. *Rowell v. King*, 234 F. App’x 821, 825 (10th Cir. 2007) (citation omitted); see also *Calvi v. Knox County*, 470 F.3d 422, 430 (1st Cir. 2006) (“[I]n a civil rights action, as in any other civil action subject to notice pleading requirements, the statement of claim must ‘at least set forth minimal facts as to who did what to whom, when, where, and why.’”) (citation omitted); *Mezibov v. Allen*, 411 F.3d 712, 716 (6th Cir. 2005) (“To survive a motion to dismiss under Rule 12(b)(6), a complaint must contain either direct or inferential allegations respecting all the material elements to sustain a recovery under some viable legal theory. Nonetheless, conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.”) (citations omitted). Although the statement in *Calvi* above could be construed as a particularized fact pleading requirement, it does not have to be read that way. For example, a complaint that reads “The defendant terminated me on January 1, 2006 in his office because of my race” offers the who, what, when, where, and why of the matter and thus could satisfy the standard articulated in *Calvi*. What such a complaint does not do is offer facts supporting the assertion that the firing was “because of my race.”

112. See, e.g., *Ciralsky v. CIA*, 355 F.3d 661, 671 (D.C. Cir. 2004) (“[A]ll that a Title VII complaint has to say to survive dismissal under Rule 12(b)(6) is: ‘The plaintiff was terminated from his job because of his religion.’”) (citations omitted); *Pointer v. Mo. Dep’t of Corrs.*, 46 F. App’x 385, 386 (8th Cir. 2002) (“[The plaintiff]’s allegation that [the defendant] violated Title VII by refusing to hire him because of his race sufficiently states a Title VII race-discrimination claim.”); *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998) (“I was turned down for a job because of my race’ is all a complaint has to say.”); see also *Thomas v. Independence Twp.*, 463 F.3d 285, 295 (3d Cir. 2006) (“The marching orders of the Supreme Court in both *Leatherman* and *Swierkiewicz* are clear: the notice pleading standard of Rule 8(a) applies in all civil actions, unless otherwise specified in the Federal Rules or statutory law. . . . Hence, we now make clear that . . . a civil rights complaint filed under § 1983 against a government official need only satisfy the notice pleading standard of Rule 8(a), regardless of the availability of a qualified immunity defense.”).

ment to relief and that “raise a right to relief above the speculative level.”<sup>113</sup> Again, the work of other commentators should be consulted for a full review of the case in detail.<sup>114</sup> Here we will focus our attention on examining how lower federal courts have applied *Twombly* to civil rights claims. At the outset, let us set aside those complaints offered by pro se litigants, most of whom are prisoners asserting claims of mistreatment or unconstitutional terms of confinement. As it turns out, many of these claims are nonmeritorious<sup>115</sup> and, in any event, the Supreme Court has affirmed that they are to be judged by a more lenient pleading standard than ordinarily applicable.<sup>116</sup> Also not of interest here are those cases featuring wholly conclusory statements of a claim<sup>117</sup> (e.g., “the defendant is liable for battery”) or statements of a claim that lack key facts (e.g., an age discrimination claim that fails to allege the ages of the involved parties)<sup>118</sup> because those rightly con-

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113. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007).

114. See, e.g., Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Pleading Practice*, 243 F.R.D. 604 (2006); Spencer, *Plausibility Pleading*, *supra* note 20.

115. See, e.g., *Smith v. Carter*, No. 1:08-CV-0040-RWS, 2008 WL 268925, at \*2 (N.D. Ga. Jan. 28, 2008) (rejecting *pro se* civil rights complaint that sought mandamus relief against state court from federal court because district courts lack power to grant such relief); *Tarpley v. Eikost*, No. 4:07CV00030, 2007 WL 243993, at \*2 (W.D. Va. Aug. 24, 2007) (dismissing *pro se* civil rights complaint against judicial officers due to judicial immunity); *Stidham v. Jackson*, No. 2:07cv00028, 2007 WL 2156155, at \*5 (W.D. Va. July 26, 2007) (civil rights complaint dismissed because it asserted liability against a municipality based on a *respondeat superior* theory, which is impermissible under *Monell*). Courts independently scrutinize the merits of prisoner complaints under authority granted to them by 28 U.S.C. § 1915A (2008); when doing so they apply the same standard used during the resolution of a motion to dismiss under Rule 12(b)(6). *Lagerstrom v. Kingston*, 463 F.3d 621, 624 (7th Cir. 2006) (stating that courts apply the same standard under § 1915A as when addressing a motion under Rule 12(b)(6)). Thus, *Twombly*'s revision to civil pleading standards has also impacted the way that judges exercise their authority under § 1915A.

116. *Erickson v. Pardus*, 127 S. Ct. 2197, 2200 (2007) (“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.’”) (citation and internal quotation marks omitted).

117. See, e.g., *Drake v. City of Detroit*, 266 F. App'x 444, 450 (6th Cir. 2008) (stating, in response to an allegation that “[t]hese Defendants have directly and proximately caused Plaintiff to suffer loss of income, humiliation, malicious prosecution, and loss of self-esteem, extreme mental and physical anguish which are ongoing and continuing,” and that “[t]his cursory reference to malicious prosecution, buried within a count arising under the Michigan Constitution, does not provide fair notice to the Defendants of a federal malicious prosecution claim, even under liberal notice pleading”); *Assadzadeh v. Mueller*, No. 07-2676, 2007 WL 3252771, at \*8 (E.D. Pa. Oct. 31, 2007) (holding that wholly conclusory allegations of disparate treatment in processing naturalization applications were insufficient under *Twombly*).

118. *Herndon v. Science Applications Int'l Corp.*, No. 05CV2269, 2007 WL 2019653, at \*4 (S.D. Cal. July 10, 2007) (age discrimination claim failed because of failure to allege certain facts such as replacement by younger employee or use of birth date to discriminate); *Reed v. City of San Diego*, No. 06cv2724 JM(WMc), 2007 WL 1877961, at \*3 (S.D. Cal. June 28, 2007) (dismissing Fourth Amendment excessive force claim resting on factual allegations that assert no

tinue to be dismissed and would have met the same fate under *Conley*. Finally, claims that set forth factual scenarios that fail to entitle one to relief under the governing interpretation of the law are also properly dismissed and, thus, not worth reviewing for our purposes.<sup>119</sup> Rather, we want to focus on pleading decisions rooted in a judicial assessment about whether sufficient factual support has been offered to substantiate a claim as non-speculative.

The cases thus far seem to reveal at least two approaches to applying *Twombly* in the civil rights context. One approach sees *Twombly* through the lens of notice pleading and *Swierkiewicz*, treating civil rights claims gingerly and with a wide degree of latitude, notwithstanding *Twombly*'s suggestion that more specificity may be demanded. The other approach takes its cues from *Twombly*'s strict language and abrogation of *Conley* as authorizing substantial threshold scrutiny, permitting insufficiently substantiated civil rights claims to be dismissed. Let us look at cases of each type in turn.<sup>120</sup>

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more than the fact that an arrest of the plaintiff occurred; "Plaintiff must allege something more than the use of ordinary force incident to an arrest"); *Beren v. Bd. of Trs. of Cal. State Univ.*, No. C-06-4706 MMC, 2007 WL 1692852, at \* 1 (N.D. Cal. June 11, 2007) (holding that the allegation that defendants deprived the plaintiff of enumerated constitutional rights was too conclusory under *Twombly*).

119. See, e.g., *Phillips v. County of Allegheny*, 515 F.3d 224, 236 (3d Cir. 2008) (finding insufficient a complaint asserting a state-created danger claim that set forth facts indicating the county's inaction rather than action as required by the law); *Clark v. Boscher*, 514 F.3d 107, 114 (1st Cir. 2008) ("A plausible equal protection violation is established when a plaintiff shows by his or her well-pleaded facts that she was treated differently from 'others similarly situated' . . . . [T]he three identified development projects are not similarly situated vis-à-vis Appellants' proposed subdivisions, and Appellants' well-pleaded facts have failed to state a plausible violation of the equal protection clause.") (citation omitted); *Boyd v. Peet*, 249 F. App'x 155, 157 (11th Cir. Sept. 25, 2007) ("Boyd's complaint does not allege that the city has failed to provide an adequate remedy to the alleged violation of his rights. In fact, Boyd's complaint acknowledges that he had a hearing before the DeKalb Personnel Board, which he appealed to Superior Court of DeKalb County. Accordingly, we cannot say that Boyd's complaint states a plausible claim for a due process violation."); *Weisbarth v. Geauga Park Dist.*, 499 F.3d 538, 543 (6th Cir. 2007) (dismissing a § 1983 claim for violation of First Amendment rights because the plaintiff government official was speaking pursuant to her official duties rather than as a citizen); *Streeter v. City of Pensacola*, No. 3:05cv286, 2007 WL 4468705, at \*6 (N.D. Fla. Dec. 18, 2007) (dismissing the plaintiffs' Title VII claims because their complaint revealed that the plaintiffs had not applied for the position in question as required under applicable Supreme Court precedent). I would also include within this category cases dismissed as untimely on statute of limitations grounds. See, e.g., *Eidson v. State of Tenn. Dep't of Children's Servs.*, 510 F.3d 631, 637 (6th Cir. 2007) (dismissing claim because facts showed that the complaint was time-barred; "it is apparent that plaintiff has failed to set forth facts facially establishing a continuing violation during the twelve-month period immediately preceding the filing of his complaint").

120. The Third Circuit has quoted *Twombly*'s statements in favor of particularity in its own formulation of the revised doctrine, see *Wilkerson v. New Media Tech. Charter Sch. Inc.*, 522 F.3d 315, 321 (3d Cir. 2008) ("[W]e read *Twombly* to mean that 'factual allegations must be enough to raise a right to relief above the speculative level.'") (citation omitted), but it does not appear to have applied *Twombly* to civil rights claims in a way that evinces a commitment to

## A. Notice Pleading Prevails

## 1. Circuit Court Cases

Given the recent vintage of *Twombly*, it is not surprising that there are only a handful of cases on the circuit level in which civil rights claims have been scrutinized under the pleading regime wrought by *Twombly*. Among those is *Kassner v. 2nd Avenue Delicatessen Inc.*,<sup>121</sup> a case decided shortly after *Twombly*, in which the Second Circuit appeared to rely more on *Swierkiewicz* than *Twombly* to resolve an appeal of a district court's dismissal of age discrimination, hostile environment, and retaliation claims brought by the plaintiffs. Still describing the federal pleading standard as "the notice system of pleading,"<sup>122</sup> the Second Circuit panel used its obligation to draw reasonable inferences in favor of the plaintiff to salvage one of the plaintiff's discrimination claims. One of the plaintiffs, a waitress named Marsha Reiffe, alleged the following to state her Age Discrimination in Employment Act ("ADEA") claim: (1) "Marsha Reiffe is sixty-one (61) years old"; (2) the defendant "changed Mrs. Reiffe's work station and assigned her to work station one (counter) for four consecutive days. This counter is known as the least profitable station and is usually reserved for new employees. Upon information and belief, no other veteran waitress was assigned to station one for four consecutive days"; and (3) "Mr. Lebewohl changed Mrs. Reiffe's work station and changed her hours on Saturdays from 12:00 p.m. until 5:00 p.m. to 11:00 a.m. until 2:45 p.m., thereby removing her from the early dinner shift."<sup>123</sup> The district court concluded that such allegations "either do not amount to an adverse employment action or are insufficient factual allegations to infer that those actions were based upon her age."<sup>124</sup> The appeals court reversed the dismissal, writing:

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strict particularized pleading. *See id.* at 322 (denying motion to dismiss employment discrimination and retaliation claims alleging "that her employment was terminated due to her 'Christian religious beliefs,' 'her refusal to engage in the libations ceremony [at a school banquet],' and her 'complaints related to the ceremony'" (internal quotations and citations omitted); *see also id.* ("[T]he court is not free to question whether there was in fact ancestor worship at a public school banquet in a school that ostensibly focuses on digital multimedia and project based learning . . . [B]ecause we have only her complaint before us[,] we are not prepared to hold at this preliminary stage that it is implausible . . .").

121. 496 F.3d 229 (2d Cir. 2007).

122. *Id.* at 237.

123. Complaint at ¶¶ 16, 21, 22, *Kassner v. 2nd Ave. Delicatessen*, 2004 WL 2313735 (Sept. 2004).

124. *Kassner v. 2nd Ave. Delicatessen*, No. 04 CV 7274, 2005 WL 1571927, at \*2 (S.D.N.Y. July 5, 2005).

The timely allegations made on behalf of Reiffe are limited in scope and therefore might be construed as insufficient to constitute a “materially adverse change” in the terms and conditions of employment, were we not required to draw all reasonable inferences on behalf of the plaintiff. . . . Reiffe’s claims of age discrimination based on certain changes in work station and work shift assignments, although limited, are sufficient to withstand a motion to dismiss under the standard articulated in *Swierkiewicz*.<sup>125</sup>

The court was similarly accepting of a co-plaintiff’s (Kassner) age-based hostile environment claim based on the allegation that the defendants “have repeatedly made degrading comments towards Ms. Kassner, including, but not limited to, ‘drop dead,’ ‘retire early,’ ‘take off all of that make-up,’ and ‘take off your wig.’”<sup>126</sup> Citing *Swierkiewicz* again, the Court indicated that this allegation sufficed to state a claim of hostile environment, with the caveat that “[t]o prevail, Kassner will have to persuade the factfinder that, *inter alia*, the comments the complaint attributes to Lebewohl and subordinates actually were age-related.”<sup>127</sup> However, the *Kassner* court had its limits, requiring more factual detail when it rejected Reiffe’s hostile environment claim. Reiffe had alleged that the defendants “‘pressur[ed] plaintiffs to retire from employment[.]’ . . . suspended Reiffe without pay for an incident without conducting a proper investigation and, when Reiffe objected to the suspension, threatened to subject Reiffe to arrest if she appeared in the restaurant.”<sup>128</sup> The court responded by writing:

This allegation . . . is so vague that it fails to provide defendants with fair notice of the factual grounds supporting an implied claim that Reiffe was subjected to a hostile work environment [and] . . . fails to allege any facts about the circumstances surrounding the suspension and the incident that gave rise to it.<sup>129</sup>

In basing its affirmance of the dismissal on vagueness and a lack of notice, it may have been more an affront to the “notice” obligation in “notice pleading” than a failure to satisfy *Twombly* that undermined Reiffe’s hostile environment claim. Thus, both in affirming and in dismissing various claims in this case, it might be said that *Conley*-

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125. *Kassner*, 496 F.3d at 240 (citations omitted).

126. *Id.*

127. *Id.* at 241.

128. *Id.* (citation omitted).

129. *Id.*

style notice pleading rather than *Twombly's* plausibility pleading featured more prominently here.

The Eighth Circuit case of *Gregory v. Dillard's, Inc.*,<sup>130</sup> offers an interesting example of an appeals court reversal of a district court dismissal post-*Twombly*. There, the plaintiffs asserted § 1981<sup>131</sup> claims by making the following allegations: (1) the defendant, Dillard's, "frequently engages in intentionally racially discriminatory surveillance pursuant to a policy and practice of racial discrimination, heightened scrutiny of African-American customers, and racial profiling"; (2) each plaintiff "sought to make and enforce a contract for services ordinarily provided by Dillard's"; and (3) the ability to make such contracts "was thwarted by the denial of services, such as the privileges of making shopping purchases," or the provision of services "in a markedly hostile manner and in a manner which a reasonable person would find objectively discriminatory," such as "intentionally racially discriminatory surveillance."<sup>132</sup>

Dillard's moved to dismiss the claims by arguing that "the amended complaint is conclusory and failed to allege facts sufficient to show discriminatory intent or denial of a contract right."<sup>133</sup>

The Eighth Circuit sided with the plaintiffs. It first noted that to state a § 1981 claim the plaintiffs "had the burden to plead and then show that Dillard's had discriminatory intent, that they were engaging in activity protected by § 1981, and that Dillard's interfered with that activity."<sup>134</sup> After noting that "[p]articularly in civil rights actions the complaint should be liberally construed,"<sup>135</sup> the court cited *Swierkiewicz* and *Conley* to instruct that "[g]reat precision is not required of the pleadings" and that notice is the relevant standard.<sup>136</sup> The plaintiffs had met the notice pleading standard, said the court, because they had

alleged facts constituting the elements of a prima facie case under § 1981: that appellants are African Americans, that they shopped for and selected particular items of merchandise, that they attempted to obtain services offered to others, that as African Ameri-

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130. 494 F.3d 694 (8th Cir. 2007).

131. Section 1981 prohibits racial discrimination in the making and enforcement of contracts. 42 U.S.C.A. § 1981.

132. *Gregory v. Dillard's, Inc.*, 494 F.3d 694, 709 (8th Cir. 2007) (internal quotations omitted), *vacated*, 2007 U.S. App. LEXIS 30544 (2007).

133. *Id.*

134. *Id.* at 703.

135. *Id.* at 709 (citation omitted).

136. *Id.* at 710.

cans they were subject to race based surveillance, and that Dillard's failed to provide them equal services and thwarted their attempts to contract.<sup>137</sup>

Addressing the impact of *Twombly* directly, the court went on to state, "The factual allegations in the complaint are 'more than labels and conclusions' or 'a formulaic recitation of the elements of a cause of action.' The complaint states how, when, and where they were discriminated against."<sup>138</sup> Then the court concluded:

A plaintiff alleging that a retailer followed and otherwise subjected him to surveillance based on his race may be able to prove facts entitling him to relief under § 1981. . . . [T]he complaint's allegation of "a policy and practice of racial discrimination" is sufficient to give Dillard's notice that plaintiffs seek to hold Dillard's directly liable under § 1981. We conclude that the pleadings, while not particularly detailed, were nevertheless sufficient as a matter of law and that the claims should not have been dismissed under Rule 12(b)(6).<sup>139</sup>

As in *Kassner*, the emphasis is notice, as highlighted more in *Swierkiewicz* than in *Twombly*.

Adherence to the idea of notice pleading plus obedience to *Swierkiewicz* also factored into the Sixth Circuit's decision in *Lindsay v. Yates*.<sup>140</sup> In this housing discrimination case the plaintiffs alleged that

the Yateses advertised their house for sale, that they (the Lindsays) executed a purchase agreement to buy the house, and that nearly two weeks after signing the purchase agreement and depositing \$ 500 in earnest money with Brent Yates—and one day after Brent learned they were Black—the Yateses terminated the contract.<sup>141</sup>

The district court dismissed the plaintiffs' claims on the ground that they failed to plead all the elements of a *McDonnell Douglas* prima facie case "because they did not allege facts establishing that the . . . property remained on the market after the Yateses rejected them."<sup>142</sup> The appeals court reversed based on *Swierkiewicz*.<sup>143</sup> In the process, the court acknowledged the intervening *Twombly* deci-

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137. *Id.*

138. *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007)).

139. *Id.*

140. 498 F.3d 434 (6th Cir. 2007).

141. *Id.* at 440.

142. *Id.* at 438.

143. *Id.* at 440 ("*McDonnell Douglas* 'is an evidentiary standard, not a pleading requirement.'") (quoting *Swierkiewicz*, 534 U.S. at 510).

sion but indicated its view that the allegations met the standard of that case, which it described as the plaintiff's pleading of "sufficient facts giving rise to a 'reasonably founded hope that the discovery process will reveal relevant evidence' to support their claims."<sup>144</sup> Under that iteration of the standard, the court held that the simple allegations quoted above sufficed, both in terms of giving the court some hope that discovery would lead to supportive evidence—the *Twombly* concern—but also in terms of classic notice—the *Conley/Swierkiewicz* idea that the statement of a claim simply needs enough information to apprise the defendant of the claim and its basis.<sup>145</sup>

Finally, in *Skaff v. Meridien North America Beverly Hills, LLC*,<sup>146</sup> a majority of a Ninth Circuit panel seemed to favor traditional notice pleading standards in its reading of the complaint. There, the court was willing to accept the following allegations as sufficiently establishing injury in fact for standing purposes in an Americans with Disabilities Act ("ADA") case: (1) "'during the course of his stay at the Hotel, Plaintiff encountered numerous other barriers to disabled access, including 'path of travel,' guestroom, bathroom, telephone, elevator, and signage barriers to access, all in violation of federal and state law and regulation'"; and (2) "'[u]ntil Defendants make the Hotel and its facilities accessible to and useable by Plaintiff, he is deterred from returning to the Hotel and its facilities.'"<sup>147</sup> The majority in *Skaff* rejected the defendant's call for more factual detail by writing,

Le Meridien's argument ignores the purpose of a complaint under Rule 8—to give the defendant fair notice of the factual basis of the claim and of the basis for the court's jurisdiction. "Specific facts are not necessary. . . ." Le Meridien would essentially impose a heightened pleading standard upon ADA plaintiffs, even though the Supreme Court has repeatedly instructed us not to impose such heightened standards in the absence of an explicit requirement in a statute or federal rule.<sup>148</sup>

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144. *Id.* at 440 n.6 (citation omitted).

145. *Id.* at 440 ("Because these allegations are sufficient to apprise the Defendants of the Lindsays' claims and the grounds upon which they rest, the Lindsays have satisfied their pleading burden.").

146. 506 F.3d 832 (9th Cir. 2007).

147. *Id.* at 836 (quoting paragraphs 14 and 17 of the plaintiff's complaint); *see also id.* at 840 n.7 ("[T]he allegations in paragraphs 14 and 17 of Skaff's complaint, which, while sparse, were adequate to establish injury in fact under the liberal parameters of notice pleading.").

148. *Id.* at 841 (citation omitted). The dissent felt that summary judgment standards were more appropriate for evaluating whether the plaintiff had standing in the case, and concluded

In *Skaff* and each of the cases discussed above, the admonition to eschew heightened pleading given in *Swierkiewicz* seemed to carry more weight than the intervening *Twombly* decision. As we will see below, many district courts have felt similarly obligated not to read *Twombly* as an invitation to disregard the strong teachings of *Swierkiewicz* regarding notice pleading.<sup>149</sup>

## 2. District Court Cases

Many more district courts have had the opportunity to evaluate civil rights claims against the *Twombly* standard. Indeed, as was the case with the circuit court decisions just discussed, several district courts have interpreted *Twombly* as not undoing *Swierkiewicz*'s admonition that notice pleading applies to civil rights claims and, thus, have allowed fairly conclusory allegations of discrimination to proceed. A few of these cases are worth discussing to illustrate this trend.

In *Hines v. City of Albany*<sup>150</sup>—a Northern District of New York case in which plaintiffs sought *Monell*<sup>151</sup> liability for purportedly unreasonable searches and seizures at the hand of city police officers—the defendants argued that the plaintiffs' allegation that the officers were acting pursuant to an official city policy was too conclusory.<sup>152</sup> The allegation offered by the plaintiffs in support of their claim that “[a]ll of defendants' actions were the result of the customs, practices, and policies of the City of Albany, the Albany Police Department, and Chief Tuffey” was that “a drug raid and early morning execution of an arrest warrant is a highly planned operation and not the result of

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that “[l]ooking at the record as a whole, it can be said with certainty that the general allegations made in the complaint could not be substantiated by *Skaff*.” *Id.* at 847 (Duffy, J., dissenting).

149. In a case not discussed above, the Tenth Circuit gave some hint that it was not reading *Twombly* as imposing a newly onerous burden when it rejected a motion to dismiss in the context of an assertion of qualified liability to a substantive due process claim. See *Briggs v. Johnson*, 274 F. App'x 730, 735 (10th Cir. 2008) (“We disagree with Defendants' assertion that Briggs's complaint does not allege affirmative conduct on their part. Admittedly, the allegation that Defendants discouraged the reporting of abuse could be construed to describe both action and inaction. Defendants may have specifically directed individuals interested in Kelsey's welfare to cease reporting abuse or their inaction in responding to repeated reports may have had the effect of discouraging those individuals from continuing to report abuse. This court, however, must not only accept Briggs's factual allegation as true, it must also construe that allegation in the light most favorable to him.”).

150. 542 F. Supp. 2d 218 (N.D.N.Y. 2008).

151. *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978) (holding that a local government may be sued under § 1983 “when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury”).

152. *Hines*, 542 F. Supp. 2d at 228.

spontaneous decisions.”<sup>153</sup> In support of their claim that the alleged violations were the result of inadequate training by the City, the plaintiffs asserted, “Upon information and belief, in the alternative plaintiffs allege that the City offers no training to their officers with respect to the seizure of innocent persons . . . during the execution of an alleged arrest warrant and/or pending the application for a search warrant.”<sup>154</sup>

Hewing closely to the line set by *Leatherman* and *Swierkiewicz* rather than *Twombly*, the court rejected the defendant’s challenge to the *Monell* claims. In the court’s view, the teaching of *Leatherman*, *Swierkiewicz*, and subsequent Second Circuit precedent was that notice is all that Rule 8 requires, not “specific allegations of fact which indicate a deprivation of constitutional rights.”<sup>155</sup> Thus, on the basis of these precedents—which in the district court’s view remain controlling notwithstanding *Twombly*—no factual detail supporting generalized claims of a formal municipal policy is required. As the court in *Hines* put it,

Regarding *Monell* claims in particular, “[t]he pleading requirement for a § 1983 claim against a municipality will be met if a plaintiff alleges that ‘a formal policy which is officially endorsed by the municipality’ caused the plaintiff’s injuries.”

. . .

Even where allegations in the complaint of the existence of an official policy are not buttressed by supporting facts, dismissal is not warranted as long as the defendant has “fair notice of what the plaintiff’s claim is and the grounds upon which it rests. It is up to the ‘liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.’”<sup>156</sup>

Because the plaintiffs’ allegations gave the defendants fair notice of the *Monell* claims, the court denied the defendants’ motion to dismiss.<sup>157</sup>

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153. Complaint at ¶¶ 56, 63, *Hines v. City of Albany*, No. 1:06-CV-01517 (on file with author).

154. *Id.* at ¶ 64. The plaintiffs also asserted, “Plaintiffs do not possess the information on how the City trains it [sic] officers in such matters nor is such information readily available to the public.” *Id.* at ¶ 66.

155. *Hines*, 542 F. Supp. 2d at 228 (quoting *Alfaro Motors, Inc. v. Ward*, 814 F.2d 883, 887 (2d Cir. 1987)).

156. *Id.* at 229-30.

157. *Id.* at 230.

Before looking at other district cases, let us pause to consider whether the approach of the court in *Hines* is strictly in keeping with *Twombly*. Now if it is the case, as the *Twombly* Court indicated, that “a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do”<sup>158</sup> and that “[f]actual allegations must be enough to raise a right to relief above the speculative level,”<sup>159</sup> then the *Hines* complaint seems to fall short. A bald allegation that the offending conduct is pursuant to an official policy of the municipal defendants or the result of inadequate training is arguably no more than a “formulaic recitation of the elements of a cause of action.” Why, then, was the complaint not dismissed with a simple citation to the above-quoted language from *Twombly*? It appears that from the district court’s perspective, Second Circuit precedent falling sharply in line behind the broadest reading of *Leatherman* and *Swierkiewicz* controlled because *Twombly* did not repudiate those cases. Thus, although permitting conclusory allegations of an official policy seems in tension with the *Twombly* prohibition against mere “labels and conclusions,” that is a tension that the district court did not feel compelled to resolve.<sup>160</sup>

Another example of a case sticking with notice pleading is *Merhige-Murphy v. Vicon Industries, Inc.*,<sup>161</sup> an Eastern District of New York case in which the district court addressed a motion to dismiss a Title VII claim based on an allegation that the plaintiff had been denied a promotion and then terminated based on her gender.<sup>162</sup> In support of her allegations, the plaintiff alleged (1) she had proposed and been promised, by the company Chief Financial Officer (“CFO”), a

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158. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1964-65 (2007).

159. *Id.* at 1965.

160. The court in *Hines* is not alone in permitting conclusory allegations of an official policy to proceed notwithstanding *Twombly*’s admonition that more than a conclusory, “formulaic recitation of the elements of a cause of action” is needed. *Twombly*, 127 S. Ct. at 1965; *see also* *Castaneda v. City of Williams*, No. CV07-00129, 2007 WL 1713328, at \*2 (D. Ariz. June 12, 2007) (upholding as sufficient conclusory allegations of an official policy based on pre-*Twombly* precedent: “In this circuit, a claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss even if the claim is based on nothing more than a bare allegation that the individual officers’ conduct conformed to official policy, custom, or practice” (quoting *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1127 (9th Cir. 2002)).

161. No. CV-07-1526, 2008 WL 111163, at \*1 (E.D.N.Y. Jan. 7, 2008).

162. Amended Complaint at ¶ 47, *Merhige-Murphy v. Vicon Indus., Inc.*, No. CV-07-1526 (E.D.N.Y. Apr. 16, 2007) (on file with author) (“Defendants have discriminated against Plaintiff with respect to terms and conditions of employment on the basis of her gender and/or have subjected her to a hostile environment all in violation of Title VII of the Civil Rights Act of 1964.”).

promotion to Marketing Director pursuant to a departmental reorganization; (2) the Vice President (“VP”) of the Marketing and Sales Department “defiantly” walked out of a meeting in which the plaintiff proposed the promotion; (3) the CFO told the plaintiff of the VP’s disapproval of the promotion; (4) a male co-worker referred to the plaintiff as a “fat ass” and commented that all the plaintiff did all day was “eat donuts”; (5) plaintiff complained to the VP about the comments and he responded by blaming the plaintiff; (6) the VP concluded that the members of the marketing department did not respect the plaintiff and thus she would not be promoted to Marketing Director; (7) after complaining about the cited reasons for not receiving the promotion, the VP terminated the plaintiff; and (8) no female had ever been promoted to the Director level or higher in the company.<sup>163</sup>

Although the court gave a nod to *Twombly*’s plausibility pleading standard at the outset of its analysis of the motion to dismiss,<sup>164</sup> the court focused more on the teachings of *Swierkiewicz* when it wrote,

A complaint will be sufficient if it “gives respondent fair notice of the basis for petitioner’s claims,” and in making that determination, courts will note whether it “detailed the events [in question], . . . provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved . . . .”<sup>165</sup>

Based on this standard, the court concluded—again citing *Swierkiewicz*—“[the plaintiff] has properly alleged facts sufficient to give Defendants fair notice of her claims that she was denied a promotion she sought and was terminated on the basis of her gender, including the dates of the events alleged and the persons allegedly involved” and thus denied the defendants’ motion to dismiss.<sup>166</sup>

It is debatable whether the complaint in *Merhige-Murphy* truly satisfied the *Twombly* standard. No facts suggest gender bias as the basis for termination nor are there facts offered that indicate the VP’s reason for failing to promote the plaintiff were pretextual. Although the facts offered support the *possibility* of gender-motivated discrimination in that they could be consistent with such discrimination, the facts do not necessarily suggest that such was indeed the case. Having failed to nudge the claim from being merely possible into the realm of the plausible, the court arguably would have been within its rights to

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163. *Id.* at ¶¶ 16-40.

164. *Merhige-Murphy*, 2008 WL 111163, at \*1.

165. *Id.* at \*2 (quoting *Swierkiewicz*, 534 U.S. at 514).

166. *Id.* at \*3.

dismiss this claim on *Twombly* grounds. What likely saved the claim is that *Swierkiewicz* was practically on all fours with this case, meaning that its strong language in favor of a pure notice pleading standard could not be ignored, particularly in light of the fact that the *Twombly* Court affirmed rather than disavowed *Swierkiewicz* as consistent with *Twombly*'s core message. Other district courts have continued to apply traditional notice pleading standards suggested by *Swierkiewicz* to Title VII claims in the wake of *Twombly*.<sup>167</sup>

A district court in the Sixth Circuit explicitly relied on *Twombly*'s *Swierkiewicz*-affirming language when it rejected a motion to dismiss a complaint alleging discriminatory lending practices in violation of the Civil Rights Act of 1991 [§§ 1981 & 1982], the Fair Housing Act, and the Equal Credit Opportunity Act. Although the complaint in *Jackson v. Novastar Mortgage, Inc.*<sup>168</sup> enumerated facts pertaining to the unfavorable mortgage terms afforded to the plaintiff, it did not offer facts to buttress its central claim that the defendant "intentionally discriminated against Plaintiff and Class Members by offering residential mortgage loans on less favorable conditions by charging higher fees, costs, interest, and yield spread premiums for residential

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167. See, e.g., *Lewis v. District of Columbia*, 535 F. Supp. 2d 1, 10-11 (D.D.C. 2008) (stating, in sustaining a Title VII hostile environment claim, "Many of the plaintiff's allegations are broadly stated, but nevertheless, the plaintiff's complaint has sufficient factual heft to survive a motion to dismiss—to wit, the five claims of non-selection coupled with the allegation of 'purposeful and unfair collusion against the plaintiff by her superiors by creating an untenable and intolerable working situation where plaintiff's authority was subverted to the extent that on a daily basis plaintiff was confronted with open recalcitrance, discourtesy and insubordination by her subordinates'"); *EEOC v. McIntyre Group, Ltd.*, No. 07 CV 5458, 2007 WL 4365367, at \*2 (N.D. Ill. Dec. 11, 2007) (stating that heightened pleading did not apply to civil rights claims and holding that the plaintiffs' employment discrimination and retaliation claims were sufficiently pleaded; the allegations in support of the claim were that the defendants discriminated against African Americans by "subjecting [the plaintiffs] to harassment because of their race," "paying them less than similarly situated non-African American employees," "failing to promote qualified African-American employees," and retaliating against the plaintiffs for complaining about such practices); *Kalka v. Nat'l Am. Ins. Co.*, No. CIV-07-708-C, 2007 WL 4287617, at \*3 (W.D. Okla. Dec. 5, 2007) (finding that claim of gender-based termination was adequately pleaded based on allegations of harassment linked to the plaintiff's medical condition [a staph infection], even though no facts suggesting gender-motivation was behind the defendant's alleged constructive termination); *Lee v. Pa. Dep't of Health*, No. 07-677, 2007 WL 2463404, at \*2 (W.D. Pa. Aug. 28, 2007) (denying, based on *Swierkiewicz*, a motion to dismiss a Title VII gender discrimination claim; supporting allegations in the complaint were that the plaintiff had received pornographic emails, that complaints about them to her superiors were ignored unlike those of a male co-worker, and that after her union representative informed her manager that she was being subjected to sexual harassment she was terminated); *Pittman v. Montgomery County Sheriff's Dep't*, No. 2:06-cv-507-WKW, 2007 U.S. Dist. LEXIS 62131, at \*1, n.5 (M.D. Ala. Aug. 22, 2007) (holding that allegation that "male officers had not been disciplined for more serious infractions" sufficed to support a Title VII gender discrimination claim and noting that "[p]re-*Bell Atlantic [v. Twombly]* precedent in this circuit suggests that this allegation is sufficient").

168. No. 06-2249, 2007 WL 4568976, at \*1 (W.D. Tenn. Dec. 20, 2007).

mortgage loans than the fees, costs, interest and premiums charged to similarly situated Caucasian borrowers.”<sup>169</sup> That is, although the complaint asserted that (1) the defendant offered less favorable terms for minorities than similarly-situated non-minority borrowers, (2) the defendant “advertise[d] on gospel radio stations whose listeners are predominantly African-American,” and (3) the defendant offered mortgage brokers incentives that encouraged them to seek the highest rate possible from borrowers,<sup>170</sup> no facts were offered to support the claim that non-minorities were treated differently or to indicate that the defendant did not advertise on radio stations that targeted non-minorities; nor were there facts discrediting the possibility that the broker incentives were driven by profit motive rather than racial discrimination.

Again, a strict reading of *Twombly* might have permitted the court to dismiss the complaint for failure to allege facts “plausibly suggesting [and] (not merely consistent with)”<sup>171</sup> discriminatory intent. Without the conclusory allegations of disparate treatment and targeting, the facts alleged only indicate the defendants’ peddling of unfavorable loan terms—including high interest rates—and marketing on a radio station with an African-American listening audience. That the defendants marketed such loans exclusively or disproportionately to black borrowers is a matter of pure speculation, which is something that *Twombly* seems to reject.<sup>172</sup> To be clear, it is my view that under *Conley*’s repudiated “no set of facts” standard the complaint would pass muster. Certainly it is possible that discovery will lead to evidence of disparate treatment of minorities by the defendant, thus enabling the plaintiffs to prove their case. But to read *Twombly* as permitting this complaint to go forward—as this court did—is a charitable reading rooted in an understandable fealty to *Swierkiewicz* and

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169. Complaint at ¶ 70, *Jackson v. Novastar Mortgage, Inc.*, No. 06-2249 (W.D. Tenn. Apr. 28, 2006) (on file with author).

170. No. 06-2249, 2007 WL 4568976, at \*8 (W.D. Tenn. Dec. 20, 2007).

171. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1966 (2007).

172. *Id.* at 1965 (“Factual allegations must be enough to raise a right to relief above the speculative level.”). Although the complaint asserts, for example, that the defendant “discriminates against [minorities] by engaging in predatory lending practices and charging them higher interest . . . than Defendant otherwise charges similarly situated non-minority borrowers purchasing the same subprime residential mortgage loans,” Complaint at ¶ 1, *Jackson v. Novastar Mortgage, Inc.*, No. 06-2249 (W.D. Tenn. Apr. 28, 2006), there are no facts offered to support that allegation. As such, a bald allegation of disparate treatment is no less conclusory than an unsupported allegation of “discrimination.” Had the complaint included an allegation that “the defendant *only* advertised in media outlets with African-American audiences,” there may have been more of a basis for finding it to be suggestive of discriminatory targeting of bad loans.

the concept of notice pleading that the *Twombly* Court claimed not to have disturbed.

In *Newman v. Apex Financial Group, Inc.*,<sup>173</sup> a northern Illinois district court gave similar treatment to Fair Housing Act and Equal Credit Opportunity Act claims that were pleaded at virtually the same level of generality as those in *Jackson*. The complaint in *Newman*, after giving extensive detail regarding the unfavorable terms of a mortgage loan made by the defendants, based its claim of discrimination on the following factual allegations:

46. [Defendants'] payment and . . . receipt of YSPs [Yield Spread Premiums—a broker incentive to secure a higher interest rate] disproportionately adversely effects [sic] minority borrowers such as plaintiff. Defendants, on average, subjected plaintiff and other minority borrowers to more frequent and/or larger YSPs due to their race. This necessarily means that, on average, defendants assign higher interest rates to minorities, including plaintiff, than to whites, regardless of qualifications.

47. . . . [P]laintiff's higher interest rate was the direct discriminatory effect of defendants' discretionary pricing policy and practice of imposing larger and/or more frequent YSPs on minority borrowers' transactions.

48. This result was known and intended by defendants . . . .

. . . .

53. . . . [Defendant] knows who its likely customers are, including where they live, their general credit profile and their race or ethnicity . . . .

. . . .

54. . . . [Defendants] intentionally and disproportionately target African-Americans and other minorities for higher cost loans, regardless of their qualifications.<sup>174</sup>

The district court's response to the defendants' motion to dismiss was essentially the same as the court in *Jackson*. After citing the above-quoted portions of the complaint, the court in *Newman* stated, "In the instant action, Newman provides sufficient facts that suggest the possibility that Defendants discriminated against minorities."<sup>175</sup> The court rejected the defendants' urged reading of *Twombly* as imposing a requirement that the plaintiff substantiate these claims in his

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173. No. 07 C 4475, 2008 WL 130924 (N.D. Ill. Jan. 11, 2008).

174. Amended Complaint at ¶¶ 46-48, 53-54, *Newman v. Apex Fin. Group, Inc.*, No. 07 C 4475 (N.D. Ill. Sept. 20, 2007) (on file with author).

175. *Newman*, 2008 WL 130924, at \*4.

complaint. Instead, the court read *Twombly* and the Seventh Circuit opinion interpreting that case, *EEOC v. Concentra Health Services, Inc.*,<sup>176</sup> as follows:

Nowhere in *Twombly* or in *Concentra*, interpreting *Twombly*, did either Court state that a plaintiff in federal court must plead facts to match up with each element of a claim in order to state a claim . . . .

. . . .

. . . The Court in *Concentra* made it clear that, although the pleading standard is more restrictive, the overall civil procedure remains the same, stating that detailed factual pleading is not required and “a plaintiff might sometimes have a right to relief without knowing every factual detail supporting its right; requiring the plaintiff to plead those unknown details before discovery would improperly deny the plaintiff the opportunity to prove its claim.”<sup>177</sup>

On this basis the court denied the motion to dismiss the Fair Housing Act and Equal Credit Opportunity Act claims.<sup>178</sup>

As in *Jackson*, Newman’s claim boils down to (1) he is an African American; (2) his loan terms were terrible; and (3) the unfavorable terms were the result of discrimination and were less favorable than those offered to white borrowers. However, the complaint alleges no facts that support the claim that discrimination led to the terms, nor are there factual allegations backing up the assertion that whites were treated any differently.<sup>179</sup> Thus, *Twombly* could have been used to dismiss the complaint on the basis that its claim of discrimination is conclusory and speculative. However, given the Seventh Circuit’s understanding of *Twombly* as not requiring substantiating facts at the pleading stage, and its willingness to concede the impossibility of pleading supporting facts that the plaintiff cannot know *ex ante*, it is

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176. 496 F.3d 773 (7th Cir. 2007).

177. *Newman*, 2008 WL 130924, at \*4 (quoting *Concentra*, 496 F.3d at 780).

178. *Id.* at \*4-5. Interestingly, the plaintiff also asserted a Consumer Fraud Act claim, which the court held was subject to Rule 9(b)’s particularity requirement. The court held that the allegations in the complaint failed to satisfy this requirement and dismissed the claim. *See id.* at \*6 (“[T]he allegations do not include the specificity required under Rule 9(b) for a fraud-based claim. Newman has not provided specific facts concerning how the fraud was perpetrated. Nor has he provided exact details when the alleged fraud occurred.”).

179. *Cf. Berkeley v. Potter*, No. CIV A 06-4490, 2008 WL 746602, at \*7 (D.N.J. Mar. 18, 2008) (“Circumstantial evidence to prove that Oswald [plaintiff’s manager] treated plaintiff differently would be evidence demonstrating how Oswald treated non-minorities. From the evidence of how Oswald treated non-minorities, it could then be compared to how Oswald treated plaintiff, and from there inferred that Oswald disparately treated different classes. Without evidence of how Oswald treated nonmembers of a protected class, no inference can be made.”).

not surprising that the district court in *Newman* ruled that the complaint was sufficient.<sup>180</sup>

The common thread among these cases is an emphasis on notice and *Swierkiewicz*'s admonition that a plaintiff need not plead a prima facie case of discrimination to proceed.<sup>181</sup> Thus, if a complaint provides notice of the plaintiff's "claim and its general basis"<sup>182</sup> and outlines the basic facts surrounding the events in question, the plaintiff has sufficiently stated a claim and is entitled to proceed with discovery.<sup>183</sup> As mentioned before, although *Twombly* requires more than mere "labels and conclusions" and insists that "[f]actual allegations must be enough to raise a right to relief above the speculative level,"<sup>184</sup> the countervailing teaching of *Swierkiewicz* in favor of a simple notice pleading standard permits these courts to view unsupported assertions of disparate treatment, discriminatory motivation, or official policy as sufficient. As will be shown below, however, a sizeable number of courts have declined to reconcile *Swierkiewicz* and

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180. Although the court did not cite this allegation in its opinion, the complaint's assertion that "Mr. Neuman [sic] will prove his claims of discrimination, in part, through a statistical analysis of defendants' loan transactions, based on quantitative data obtained from defendants' loan files" may have given the court some comfort in allowing the claims to proceed to discovery. The *Twombly* Court did indicate that one of its concerns was that complaints give courts "'a reasonably founded hope' that a plaintiff would be able to make a case," *Twombly*, 127 S. Ct. at 1969 (citation omitted), and the promised statistical analysis of defendants' files may have provided such hope.

181. Some courts adhered to simple notice pleading post-*Twombly* without reference to *Swierkiewicz*. See *Flanagan v. Benicia Unified Sch. Dist.*, No. CIV. S-07-333, 2007 WL 4170632, at \*1 (E.D. Cal. Nov. 19, 2007) (describing *Twombly*'s contribution to the analysis as follows: "The court may not dismiss the complaint if there is a reasonably founded hope that the plaintiff may show a set of facts consistent with the allegations." (citing *Twombly*, 127 S. Ct. at 1967-69)). The court then upheld the plaintiff's broadly outlined § 1983 claim:

Here, the plaintiff has adequately stated a claim under section 1983. She has alleged that the defendants acted under color of state law because they receive funding from the City of Benicia and because the school board is elected by local voters. The defendants' conduct of which plaintiff complains is defendants' terminating her employment, causing her arrest and prosecution, and causing her loss of teaching license. Finally, she alleges that this deprived her of her Constitutional rights to free speech, association, and due process. No additional facts are required to be pled.

*Id.* at \*7.

182. *Chappell v. Va. State Univ.*, No. 3:07CV389, 2008 WL 611298, at \*2 (E.D. Va. Mar. 5, 2008).

183. See, e.g., *Kimble v. Wis. Dep't of Workforce Dev.*, No. 07C0266, 2008 WL 916964, at \*1 (E.D. Wis. Apr. 2, 2008) ("[D]efendants argue that plaintiff did not allege specific dates, names, or other facts surrounding a discriminatory pay-setting decision, and failed to substantiate any of his allegations regarding other employees' raises with statistics or other evidence. However, at the pleading stage, plaintiff need only provide fair notice of his claims and the grounds upon which they rest. Plaintiff need not plead facts to make out a prima facie case of discrimination. The allegations above . . . meet this standard." (citing *Twombly* and *Swierkiewicz*)). In *Kimble* the plaintiff, an African-American male, simply alleged that he had not received discretionary raises that female and white co-workers had received. *Id.*

184. *Twombly*, 127 S. Ct. at 1965.

*Twombly* so charitably in the civil rights context; rather, the dominant trend appears to be one in favor of acquiescing to *Twombly*'s invitation to require factual substantiation of claims prior to having access to discovery.

## B. Factual Substantiation Required

### 1. Circuit Court Cases

Particularized fact-pleading of the kind prevalent prior to *Swierkiewicz* and resurgent during the period leading up to *Twombly* seems to have persisted as the standard of pleading applied by many, if not most, lower federal courts in civil rights cases. Several circuit court cases illustrate this phenomenon. In *Marrero-Gutierrez v. Molina*,<sup>185</sup> a First Circuit case, the plaintiff appeared to allege enough to satisfy the rejected *Conley* “no set of facts” standard. The plaintiff, a former government employee, claimed in her complaint that she was fired from her job because of her membership in the New Progressive Party (“NPP”): “From or about November 2000, to the present time, defendants have performed, fostered, and encouraged the continuous persecution, harassment, transfers, reprisals and demotions of Marrero and [co-plaintiff], because of plaintiffs’ affiliation with the NPP . . . .”<sup>186</sup> In support of her claim that her demotion and termination was motivated by political animus towards her party membership, the plaintiff alleged that she held a conflicting party membership from the defendants,<sup>187</sup> that the defendants “created and encouraged a hostile working environment against plaintiff . . . denying her of equal treatment with other employees [in various enumerated ways],”<sup>188</sup> that her supervisor “started a pattern of insults against [the plaintiff] . . . and ‘her group,’ . . . the New Progressive Party,”<sup>189</sup> and that the defendants conspired to humiliate her, foster insubordination toward her, reassign her duties to others in the department, and ultimately terminated her all as part of discriminatory political “persecution.”<sup>190</sup>

Although the First Circuit panel acknowledged that such allegations supported “a [causal] connection [a]s one among a myriad of

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185. 491 F.3d 1 (1st Cir. 2007).

186. Amended Complaint at ¶ 31, *Marrero-Gutierrez v. Molina*, No. 03-1256 (1st Cir. July 19, 2004) (on file with author).

187. *Id.* at ¶¶ 28-29.

188. *Id.* at ¶ 41.

189. *Id.* at ¶ 42.

190. *Id.* at ¶¶ 43-59.

possible inferences,” drawing that inference, in light of *Twombly*, would be too “speculative”: “Merely juxtaposing that she is an active member of the NPP and that the defendants are affiliated with the PDP [Popular Democratic Party] is insufficient, standing alone, to create a causal link.”<sup>191</sup> It seems that the facts alleged would have been sufficient to state a claim under the repudiated “no set of facts” standard of *Conley*, given that the facts were certainly consistent with a theory of political discrimination and the plaintiff may have been able to demonstrate anti-NPP animus as the motivation for the adverse employment actions with the aid of discovery. Indeed, the First Circuit panel agreed that a causal connection between the defendants’ apparent political animus and the adverse employment actions taken against the plaintiff was “one among a myriad of possible inferences.”<sup>192</sup> However, the court interpreted *Twombly*’s admonition to avoid speculation to mean that core allegations like discriminatory motivation must be substantiated by facts, a level of detail noticeably not required in the post-*Twombly* cases reviewed in Part III.A above.

The Fourth Circuit has tended toward requiring factual substantiation after *Twombly* as well. In *German v. Fox*,<sup>193</sup> for the plaintiff to prevail on his § 1983 claim, he needed to establish that his termination from employment with the Shenandoah Valley Travel Association (“SVTA”) was the result of state action. Because the SVTA is a private, non-profit organization, German’s theory was that he was terminated at the behest of Alisa Bailey, a state official, and that Bailey’s coercion of German’s superior at the SVTA, Steve Fox, to fire him constituted state action.<sup>194</sup> Rather than credit German’s assertion that Bailey coerced Fox to terminate the employment, the court scrutinized the facts underlying that contention. Those facts were that (1) German sent complaining emails about a certain tourist facility to various state officials that were embarrassing to Bailey; (2) German’s emails “caused Bailey to be very upset and angry with German and to blame him . . . .”; (3) Bailey “directed and/or encouraged Shaffer to take action to get German to back off and to stop bringing attention and scrutiny to these issues”; (4) Bailey “directed Fox as President of SVTA to get German to back off and to stop bringing so much attention and scrutiny to the . . . issue, and to reprimand German for his

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191. *Marrero-Gutierrez*, 491 F.3d at 10 (citing *Twombly*, 127 S. Ct. at 1966).

192. *Id.*

193. 267 F. App’x 231 (4th Cir. 2008).

194. *Id.* at 231-32.

exercise of speech as set out in the emails, even if that required Fox on behalf of SVTA, to fire German”;<sup>195</sup> (5) Fox expressed to others at the SVTA “that there were ‘issues’ regarding German’s sending of the emails” and that “certain people were upset”; and (6) after asking German about the emails, German was terminated because of complaints about the emails.<sup>196</sup>

The court found these factual allegations insufficient to support a theory of state coercion:

The facts here, even if taken as true, do not allege either that Bailey ordered specific conduct—for German to be fired—or that Shaffer and Fox had no choice in the matter because of the pressure exerted by Bailey. There is no indication that Bailey wanted or expected German to be fired. The most we can infer from German’s allegations is that Bailey was upset with German’s emails and wanted him to “back off.” Even assuming that German could prove that Shaffer directed Fox to reprimand or to fire German, German’s termination cannot be fairly attributed to the state where the state did not order such a result.<sup>197</sup>

Although the court may have been on solid ground here given that the law apparently requires that the state has ordered specific conduct to establish state coercion,<sup>198</sup> this decision is notable because it illustrates the extent to which the court is willing to scrutinize the facts underlying a claim. Further, once the *German* court had those facts in view, it did not seem to give the plaintiff the benefit of all permissible inferences but seemed to narrowly and strictly read the complaint in a way that failed to state a claim. A more charitable or liberal reading of the complaint’s allegations might have found that the possibility of state coercion existed here if what was alleged was true; the opportunity to engage in discovery may have enabled the plaintiff to explore the connection between Bailey and his termination further. However, given *Twombly*, which encourages stricter scrutiny at the pleading stage, the *German* court was able to yield to its more skeptical impulses and shut down the case before the plaintiff could have such an opportunity.

*Patane v. Clark*,<sup>199</sup> a Second Circuit case, is interesting because it demonstrates a responsible application of *Twombly* to dismiss a claim.

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195. *Id.* at 234

196. *Id.* at 232.

197. *Id.* at 234-35.

198. *Id.* at 234 (citing *Andrews v. Fed. Home Loan Bank*, 998 F.2d 214, 217 (4th Cir. 1993)).

199. 508 F.3d 106 (2d Cir. 2007).

In *Patane* the plaintiff's complaint set forth allegations regarding her supervisor's (Clark) viewing of pornographic videos in his office and on her computer and his receipt of such video tapes through the mail at the office (the plaintiff was the supervisor's secretary).<sup>200</sup> After complaining about this, she was isolated by Clark in terms of her job functions but was not dismissed.<sup>201</sup> Addressing the plaintiff's hostile environment and retaliation claims, the court reversed the district court's dismissal because the factual allegations alluded to above were deemed sufficient to support those claims, given the "totality of the circumstances" approach applicable to hostile environment claims.<sup>202</sup> With regards to her claim of gender-based discrimination in violation of Title VII, however, the Second Circuit panel concluded that the complaint lacked any factual allegations that supported an inference of gender-motivated adverse employment action that would make the claim of gender discrimination non-speculative.<sup>203</sup> This was consistent with the stricter reading of *Twombly* that does not countenance mere labels and conclusions, a characterization that could fairly describe the allegation of gender-based maltreatment in this case. As with the Title VII gender discrimination claim in *Patane*, factual substantiation has been required by circuit courts in other areas including civil rights

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200. *Id.* at 110.

201. *Id.* at 110-11.

202. *Id.* at 113 (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993)).

203. *Id.* at 112 ("Plaintiff's Complaint does not allege that she was subject to any specific gender-based adverse employment action by Clark or any of the other defendants, nor does it set forth any factual circumstances from which a gender-based motivation for such an action might be inferred. It does not, for instance, allege that Clark . . . made any remarks that could be viewed as reflecting discriminatory animus. Nor does it allege that any male employees were given preferential treatment when compared to Plaintiff.") (citations omitted). At least one other circuit court has similarly approached pleadings dismissals in Title VII cases. See *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 974 (11th Cir. 2008) ("The closest the complaint ever comes to pleading those sixteen [failure-to-hire] claims, however, is when it states plaintiffs were 'denied promotions . . . and treated differently than similarly situated white employees solely because of [ ] race.' That statement epitomizes speculation and therefore does not amount to a short and plain statement of their claim under Rule 8(a).").

conspiracy claims,<sup>204</sup> claims asserting *Monell* liability,<sup>205</sup> and “regarded as” claims under the Americans with Disabilities Act.<sup>206</sup>

## 2. District Court Cases

### Hostile Environment and Employment Discrimination Claims

As already noted, most activity involving the application of *Twombly* to civil rights claims has occurred at the district court level, with many courts treating the case as permitting the heightened scrutiny of such claims. *Mangum v. Town of Holly Springs*<sup>207</sup> provides a stark example of the level of scrutiny that many district courts believe *Twombly* permits. The plaintiff, a female firefighter, alleged gender discrimination in the form of hostile work environment, disparate treatment, and retaliation in violation of Title VII. In support of her claims she alleged the following: (1) prior to accepting her job as a firefighter, she “was told . . . that she needed ‘to make sure’ she knew what she was ‘getting into’ before accepting the job” and that the engineer for the Fire Department, Eric Wood, “had said that ‘he was not comfortable with Plaintiff as a female firefighter and that he would refuse to engage in a fire suppression service call with Plaintiff on his team’”; (2) the plaintiff told the fire chief that “she heard that the other male firefighters did not want to work with her because she was female”; (3) the plaintiff was assigned to a different station than other probationary firefighters, which caused her to “miss[ ] out on training opportunities, fellowship with colleagues, and advancement opportunities”; (4) firefighters habitually used profanity and vulgar language in her presence and told her she needed to “‘watch her back’” for

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204. *Mangan v. Brierre*, 257 F. App'x 525, 528 (3d Cir. 2007) (“Mangan merely asserts that Malinowski [a defendant] is a speculator in land who contacted the DEP [Pennsylvania Department of Environmental Protection] and Mangan’s mortgage holder before he bought the farmland and that he made a great profit from selling it. It cannot reasonably be conceived from these allegations that Mangan could, upon a trial, establish that Malinowski conspired with the DEP defendants to deprive him of his civil rights by Malinowski’s bona fide purchase of a parcel of Mangan’s farm at a tax sale.”).

205. *Powell v. Barrett*, 496 F.3d 1288, 1320 (11th Cir. 2007) (holding that “Plaintiffs’ conclusory statement that the County was the ‘moving force’ behind Plaintiffs’ injuries” could not overcome the court’s view that the facts did not support that conclusion).

206. *Ruiz Rivera v. Pfizer Pharms., LLC*, 521 F.3d 76, 84 (1st Cir. 2008) (“[T]he Complaint alleges: ‘On March 27, 1999, Pfizer intentionally discriminated against plaintiff because of her disability as described above in that Pfizer terminated plaintiff because of her perceived disability.’ While this paragraph could signal to a defendant that plaintiff is asserting a regarded as claim, with no facts alleged to explain any false perception on Pfizer’s part, and no facts alluding to any non-limiting impairment which Pfizer mistakenly believed to be substantially limiting, this allusion falls far short of the mark.”).

207. 551 F. Supp. 2d 439 (E.D.N.C. 2008).

complaining about it; (5) “defendant delayed in issuing [the plaintiff] a gas mask and fire coat for responding to emergency calls”; and (6) the “defendant[ ] fail[ed] to investigate [the plaintiff’s] complaints, discipline the male firefighters, [and] provide training programs on Title VII.”<sup>208</sup>

The district court was unimpressed. It blithely discounted the plaintiff’s allegations as failing to paint a plausible picture of Title VII liability for creating a hostile environment:

Here, plaintiff’s complaint regarding the male firefighters not wanting to work with her is based on hearsay comments of other individuals and not actual comments by the male firefighters directed to her. Additionally, the vulgar and profane language that plaintiff complains of may have been uncivilized and unprofessional, but it does not create an objectively hostile work environment under Title VII. . . . Although plaintiff subjectively feared that her life would be in danger if she were to respond to a fire emergency with her male counterparts, there is no concrete evidence to support that contention, only hearsay. . . . Finally, plaintiff’s complaints about defendant’s failure to investigate her complaints, discipline male firefighters, provide training, and provide plaintiff wi[th] proper equipment do not rise to the level of an objectively hostile work environment. Plaintiff’s work environment, while perhaps unpleasant, is simply not a situation that an objectively reasonable person would find hostile or abusive such that it altered the terms of plaintiff’s employment.<sup>209</sup>

The court’s rejection of the plaintiff’s allegations regarding the firefighters’ gender-biased comments against her as “only hearsay” with “no concrete evidence” to support her allegation was improper. Assuming the truth of the plaintiff’s allegations as the court was obligated to do, it can hardly be claimed that the plaintiff is speculating about the presence of gender-bias or that her claims of a gender-based hostile environment are not plausible. Thus, it can be argued that the court improperly applied *Twombly* to reject this claim. That said, it is more certain that had *Conley*’s “no set of facts” standard prevailed, the court might have been more hard-pressed to reject the claim, suggesting that *Twombly* may be emboldening courts to apply levels of scrutiny to pleadings that result in legitimate claims being denied the opportunity to go forward.

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208. *Id.* at 440-43 (citing to relevant paragraphs of the complaint).

209. *Id.* at 443-44.

As we have seen in some of the previously discussed circuit cases, allegations of discriminatory motive have faced tough scrutiny in courts favoring a factual substantiation interpretation of *Twombly*. An example of such scrutiny on the district court level is *Reed v. AirTran Airways*.<sup>210</sup> There the court applied *Twombly* to dismiss an age discrimination claim as too conclusory:

Reed's ADEA constructive discharge claim is insufficient, however, because it fails to plausibly allege that AirTran deliberately made Reed's working conditions intolerable based on her age. . . . When Reed alleges that her "age was a contributing factor in her termination; AirTran's actions were intentional and motivated by age," she merely recites her claim's elements, offering "labels and conclusions" and unsupported speculation, which fail to plausibly allege AirTran was influenced by Reed's age.<sup>211</sup>

Coupled with the plaintiff's allegations that she was over the age of forty, was replaced with someone less qualified under age forty, and that AirTran "wanted to replace her because she was approaching fifty and making more money than a new person it could hire who was much younger,"<sup>212</sup> it is hard to distinguish these allegations from those deemed sufficient by the Supreme Court in *Swierkiewicz*.<sup>213</sup> However, because "the Fourth Circuit 'has not . . . interpreted *Swierkiewicz* as removing the burden of a plaintiff to allege facts sufficient to state all the elements of her claim,'"<sup>214</sup> the district court in *Reed* was able to favor *Twombly*'s admonitions over those of *Swierkiewicz* and dismiss the ADEA claim as "unsupported speculation."<sup>215</sup>

When it came to the plaintiff's allegations of racial discrimination based on hostile work environment under Title VII, however, the *Reed* court accepted the claim. The distinction was that the complaint included factual allegations of racial epithets accompanying disrespectful conduct directed toward the plaintiff: "Reed's allegation of 'many overt racist statements, including calling her 'White bitch' is

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210. 531 F. Supp. 2d 660 (D. Md. 2008).

211. *Id.* at 667-68.

212. *Id.* at 666 (citation omitted).

213. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) ("His complaint detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination. These allegations give respondent fair notice of what petitioner's claims are and the grounds upon which they rest.")

214. *Reed*, 531 F. Supp. 2d at 666 (quoting *Bass v. E.I. DuPont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003)).

215. *Id.* at 668.

sufficient to plausibly allege a claim that racial harassment at AirTran created a hostile work environment.”<sup>216</sup> Thus, the court was requiring—and found—direct factual support for the second element of a Title VII racial harassment claim, that “the harassment was based on race.”<sup>217</sup> Absent factual allegations of similar comments directed at the plaintiff’s age, the court was unwilling to permit the age-based claim to proceed. But again, *Swierkiewicz* purportedly rejected any requirement that direct factual support for the elements of a prima facie case of discrimination be pleaded in a complaint, particularly when it was possible that discovery could uncover direct evidence of age-based motivation.<sup>218</sup> Thus, the court should have deemed the plaintiff’s allegations identified above as sufficient to state her ADEA claim.<sup>219</sup>

A final example of the level of factual substantiation some courts are requiring for employment discrimination claims is *Grosz v. Lassen Community College District*.<sup>220</sup> In *Grosz* the plaintiffs’ allegations in support of their § 1983 equal protection claim included the following:

[1] ‘Cissell [a defendant] has failed and refused to promote female employees while male employees are promoted under similar or lesser circumstances; [2] Plaintiff Karen Grosz has been required by Cissell to accept blame for his mistakes, accept criticism from Cissell without response before the Board’; and (3) ‘Plaintiff Benadette Chavez has been treated differently than similarly situated male employees . . . in that she has been in fear of her safety and security because of the Defendant[ ]’s refusal to discipline aggressive and vi-

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216. *Id.* at 670.

217. *Id.* at 669; see also *Tiu-Malabanan v. Univ. of Rochester*, No. 07-CV-6499, 2008 WL 788637, at \*4 (W.D.N.Y. Mar. 21, 2008) (upholding § 1981 claim based on allegation that the defendant “told [the plaintiff] on a nearly daily basis that, ‘because she was a Filipino, her thought process wasn’t there and that she would never become a nurse, further mocking Plaintiff’s language skills.’”).

218. *Swierkiewicz*, 534 U.S. at 511-12 (“It . . . seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered.”).

219. For an example of a complaint whose allegations were rightly deemed not to state an age discrimination claim, see *White v. Ocean Duchess Inc.*, No. 2:07cv300, 2007 WL 4874709, at \*4 (E.D. Va. Nov. 07, 2007) (“[The plaintiff] alleges . . . that the defendants illegally discharged him based on his age. The Complaint contains no facts in support of this claim. Nowhere is there an allegation of [the plaintiff’s] age at the time of his termination, the age of his replacement, or any facts to indicate his age played any part in ODI’s decision to terminate him. . . . [The plaintiff’s] allegations . . . fail to allege the most fundamental facts necessary to state a claim under the ADEA, and do not give defendants fair notice of his claim of age discrimination and the grounds upon which it rests as required by Rule 8.”).

220. No. CIV. S-07-697, 2007 WL 2384444, at \*1 (E.D. Cal. Aug. 17, 2007).

olent male employees who have attacked and threatened to attack female faculty members.’<sup>221</sup>

The court labeled these statements as “generalized allegations of discrimination” and described them as “broad and conclusory.”<sup>222</sup> To be fair, there were other defects that caused the pleading to fail on notice grounds, specifically the complaint’s failure to provide “information pertaining to plaintiffs’ occupations and dates of employment, if any, with the Lassen Community College District.”<sup>223</sup> However, it remains the case that the court also placed great stock in the fact that from its perspective, *Twombly* required more factual support for the claims of discrimination than the plaintiffs offered in the complaint excerpted above.

### Conspiracy Claims

Given that an insufficiently pleaded conspiracy allegation was at the heart of *Twombly*, one might not be surprised if conspiracy claims were particularly hard hit by the *Twombly* decision.<sup>224</sup> But *Twombly* is not necessarily entirely to blame for the strict pleading requirements some courts now impose on conspiracy claims.<sup>225</sup> For example, in *Kist v. Fatula*,<sup>226</sup> the district court referred to pre-*Twombly* precedent to indicate the level of factual detail required to support civil rights conspiracy claims: “The plaintiff must make specific factual allegations of combination . . . or understanding among all or any of the defendants to plot, plan, or conspire to carry out the alleged chain of events.”<sup>227</sup> In *Kist* the plaintiff’s allegations included the following: “Upon information and belief, defendant Fatula and defendant Bracken, along with others, had a meeting to discuss how defendant

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221. *Id.* at n.4 (citation omitted).

222. *Id.* at \*1 & n.4.

223. *Id.* at \*2.

224. In the Seventh Circuit, one district court has recognized that the circuit’s previously permissive pleading standard for conspiracy claims was impacted by the *Twombly* decision. *See Lyttle v. Killackey*, 528 F. Supp. 2d 818, 831 (N.D. Ill. 2007) (noting that under Seventh Circuit precedent “it is enough to merely ‘indicate the parties, the general purpose, and approximate date, so that the defendant has notice of what he is charged with’” but that the intervening *Twombly* decision now requires “a ‘showing,’ rather than a blanket assertion, of entitlement to relief”).

225. *See, e.g., Briggman v. Virginia*, 526 F. Supp. 2d 590, 605 (W.D. Va. 2007) (“A claim for conspiracy under § 1985 must be supported by concrete facts and will be rejected if it is supported only by conclusory allegations.” (citing *Simmons v. Poe*, 47 F.3d 1370, 1376 (4th Cir. 1995))).

226. No. 3:2006-67, 2007 WL 2404721 (W.D. Pa. Aug. 17, 2007).

227. *Id.* at \*8 (quoting *Hammond v. Creative Fin. Planning*, 800 F. Supp. 1244, 1250 (E.D. Pa. 1999)).

Fatula could avoid liability for his actions and to bring baseless criminal charges against the plaintiff,” and “Upon information and belief, after the plaintiff initialed the document, John Doe, acting in conspiracy with defendant Fatula, changed the docket number on the document to the docket number of the charges that had involved defendant Fatula and the incident that occurred on May 23, 2004.”<sup>228</sup> The district court found these allegations insufficient to state a conspiracy claim.<sup>229</sup>

The conspiracy allegation in *McCray v. City of New York*<sup>230</sup> fared better than in *Kist*, although it is difficult to discern major distinctions between the levels of allegations in each case. The court’s own words in *McCray* best explain what was pleaded and the court’s reaction to the complaint:

In this case, the Court finds that Plaintiffs have alleged facts which render a civil rights conspiracy claim plausible. Plaintiffs allege that Defendant police officers and prosecutors acted in concert to coerce and fabricate statements and conceal exculpatory evidence. They allege that the fabrication of Plaintiffs’ statements was an overt act in furtherance of this conspiracy, as were the subsequent acts of concealing the fabrication and withholding evidence regarding Matias Reyes. Unlike in *Bell Atlantic*, “we do not encounter here a bare allegation of conspiracy supported only by an allegation of conduct that is readily explained as individual action plausibly taken in the actors’ own economic interests.”<sup>231</sup>

However, when it came to the *McCray* plaintiffs’ claim of racial discrimination under § 1981, the court found the complaint lacking:

In this case, Plaintiffs make no allegations which can be interpreted to show racial discrimination or plausible entitlement to relief. Plaintiffs conclusorily assert that Defendants acted with racial animus in a purposefully discriminatory manner. Nowhere do Plaintiffs explicitly allege any facts which show that any Defendant was

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228. Amended Complaint at ¶¶ 25, 29, *Kist v. Fatula*, No. 3:2006-67 (Aug. 29, 2006).

229. *Kist*, 2007 WL 2404721, at \*8 (“Kist’s Amended Complaint avers that the defendants conspired together to violate his civil rights, but Kist fails to allege any specific facts to establish the existence of any such agreement. Kist has not pled or established an agreement or understanding between the defendants to carry out the alleged chain of events; his mere assertion that such a plot exists is simply not sufficient. Establishing the existence of an agreement is part of the prima facie case for civil conspiracy under 42 U.S.C. § 1983, and Kist has failed to do so.”).

230. Nos. 03 Civ. 9685, 03 Civ. 9974, 03 Civ. 10080, 2007 WL 4352748, at \*1 (S.D.N.Y. Dec. 11, 2007).

231. *Id.* at \*23 (S.D.N.Y. Dec. 11, 2007) (citing *Iqbal v. Hasty*, 490 F.3d 143, 177 (2d Cir. 2007)).

motivated by racial animus, or which show that Defendants deliberately acted discriminatorily.<sup>232</sup>

This conclusion again is in line with how other courts have treated claims asserting discriminatory motivation: there must be additional facts that give rise to the inference of discriminatory motivation rather than mere conclusory assertions of racial/gender/age-based animus.

### Retaliation Claims

In the context of retaliation claims, those courts following a more strict reading of *Twombly* have required more than mere *post hoc ergo propter hoc* reasoning. Facts that support an inference of a causal connection between the protected conduct and the complained of adverse response must be offered in the complaint. Thus, in *Reyes v. City University of New York*,<sup>233</sup> the court dismissed a complaint that simply alleged that the plaintiff “filed a discrimination charge against the Defendant in January 2003 and ‘thereafter’ was charged with misconduct ‘as a result of’ this protected activity.”<sup>234</sup> The court found this allegation to be too conclusory and insufficiently supported by facts to satisfy the *Twombly* pleading standard.<sup>235</sup> Compare *Reyes* with *Lyttle v. Killackey*,<sup>236</sup> a case in which the plaintiff successfully substantiated his retaliation claim. There, the plaintiff pleaded the following: (1) a permit application to protest the Iraq war was denied; (2) police officers indicated that protesters (including the plaintiff, Lyttle) interested in holding a press conference would be arrested if they proceeded; (3) the protesters held their press conference; and (4) the protesters were arrested without a prior order to disperse.<sup>237</sup> Based on these allegations, the court concluded, “Lyttle’s facts sufficiently plead that the

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232. *Id.* at \*24.

233. No. 06 Civ. 3639, 2007 WL 2186961, at \*1 (S.D.N.Y. July 26, 2007).

234. *Id.* at \*5.

235. *Id.* at \*5-7. The rejection of the *post hoc ergo propter hoc* reasoning in *Reyes* contrasts with another S.D.N.Y. judge’s acceptance of similar reasoning in another case. See *Kempkes v. Downey*, No. 07-CV-1298, 2008 WL 852765 (S.D.N.Y. Mar. 31, 2008) (holding that plaintiff’s allegation that his protected speech in December 2006 was followed by a retaliatory reduction in salary beginning less than two months later in February 2007 was sufficient to state a claim for First Amendment retaliation under § 1983, because evidence that protected First Amendment activity was followed closely in time by adverse employment treatment supports an inference of a causal connection between the two).

236. 528 F. Supp. 2d 818 (N.D. Ill. 2007).

237. *Id.* at 829.

protected conduct, namely Lyttle's protest of the Iraq war, was a 'substantial or motivating factor' in defendants' challenged action."<sup>238</sup>

## Title II

In *Williams v. Southern Illinois Riverboat/Casino Cruises, Inc.*,<sup>239</sup> the plaintiff, an African-American patron of the defendant's casino, had been denied access to a VIP lounge to which a complimentary card entitled him, violating Title II of the Civil Rights Act of 1964.<sup>240</sup> In addition to denying the plaintiff access to the lounge, a casino employee called casino security, which ultimately led to an agent of the Illinois Gaming Board (defendant Eberhart) and officers from the local police department getting involved and arresting the plaintiff.<sup>241</sup> Having previously used the same card to enjoy the VIP lounge benefits and having been—along with his wife—the only African-American patrons using the lounge, the plaintiff concluded that the denial of access and arrest were based on his race.<sup>242</sup> The court responded as follows:

The Court has carefully reviewed the Amended Complaint and believes that Count II might have been able to withstand a Rule 12(b)(6) motion to dismiss prior to *Bell Atlantic v. Twombly*, but that it cannot withstand such a motion now. . . . The[ ] allegations do not foreclose the possibility that Eberhart knew from the casino employees' reports that they were discriminating against Williams because of his race and approved that action, which would satisfy the *Conley v. Gibson* standard and would provide Eberhart with adequate notice of the claim against him.

However, the Amended Complaint fails on the second requirement announced in *Bell Atlantic*: that the complaint plausibly suggest that Williams is entitled to relief from Eberhart or the Illinois Gaming Board because he or it participated in excluding Williams from the casino because of his race. . . . [S]uch an inference is entirely speculative and unsupported by any allegation at all. Nothing in the complaint makes it plausible that Eberhart knew of, approved or participated in any racially discriminatory action to exclude Williams from the casino.<sup>243</sup>

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238. *Id.*

239. No. 06-cv-664, 2007 WL 3253239 (S.D. Ill. Nov. 05, 2007).

240. *Id.* at \*2.

241. *Id.*

242. *Id.*

243. *Id.* at \*3.

So here we have an explicit acknowledgment that *Twombly* made the difference; alleging a failure to accommodate based on race without any facts tending to indicate a discriminatory purpose, renders the claim too speculative under *Twombly*, even though *Conley*'s "no set of facts" standard might have been satisfied.

### ADA Claims

The court in *Heinemann v. Copperhill Apartments*<sup>244</sup> seemed particularly strict in its application of *Twombly* to dismiss the claim made there. In *Heinemann* the plaintiff alleged, in support of his ADA claim, "Defendants, and each of them, have failed and continue to fail to provide sufficient barrier free access to the aforementioned business establishments," and "[t]he new 'handicapped' parking space did and does not fit within [ADA guidelines]."<sup>245</sup> Although these allegations would strike many as factual and specific, the court dismissed these allegations as part of "a boilerplate complaint containing generalized allegations of discrimination."<sup>246</sup> The quoted allegations are hardly generalized and certainly would entitle the plaintiff to relief if true.

### Section 1983 Claims

Given the seeming desire of many courts to impose heightened pleading on § 1983 claims when qualified immunity is a possible defense, it is not surprising that some district courts continued to apply heightened pleading in that context after *Twombly*. A recent example comes from a district court within the Eleventh Circuit. In setting out the standard for a motion to dismiss in *Reyes v. City of Miami Beach*,<sup>247</sup> the court wrote,

[T]his circuit imposes a heightened pleading standard on claims under 42 U.S.C. § 1983 brought against individuals or entities capable of asserting a qualified immunity defense. Under the heightened pleading standard, the plaintiff must go beyond the notice pleading standard of Rule 8 and "allege with some specificity the facts which make out [his or her] claim." Indeed, "[s]ome factual

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244. No. CIV. 07-00018, 2007 WL 2225790, at \*1 (E.D. Cal. July 31, 2007).

245. First Amended Complaint at ¶¶ 18, 20, *Heinemann*, No. 07-CV-00018, 2007 WL 2973345 (Aug. 31, 2007).

246. *Heinemann*, No. CIV. 07-00018, 2007 WL 2225790, at \*1 (E.D. Cal. July 31, 2007).

247. No. 07-22680-CIV, 2008 WL 686958, at \*2 (S.D. Fla. Mar. 13, 2008).

detail in the pleadings is necessary to the adjudication of § 1983 claims” where the defendant may assert qualified immunity.<sup>248</sup>

Because one of the plaintiffs in *Reyes*—who was asserting a Fourth Amendment excessive force and false arrest claim via § 1983—had provided a detailed account of the defendant’s conduct during her arrest, the court found her claims met the heightened pleading standard applicable when qualified immunity is asserted.

The other plaintiff in *Reyes*—the named plaintiff’s husband—also asserted an excessive force claim, which arose out of the mistreatment he received from police when he complained about their treatment of his wife. The court described and dismissed his allegations as follows:

According to the Amended Complaint, when Aladro [the plaintiff] protested the force Rice-Jackson [the defendant] used on Reyes, Rice-Jackson “began attacking [Aladro] and used excessive force.” The Amended Complaint further states that “[a]t some point, T. Serrano, another police officer, acting within the scope of his employment, arrived at the scene. [Aladro] was pushed to the ground, punched in the face and kicked several times. At no point did [Aladro] show resistance toward the officers.”. . .

The Court finds Aladro’s allegations too vague to satisfy even the notice pleading standard of Rule 8(a), let alone the heightened pleading standard applicable to his section 1983 excessive force claim. Aladro did not allege violation of his Fourth Amendment right with “some specificity”—thus, Rice-Jackson is entitled to qualified immunity on Aladro’s excessive force claim . . . .<sup>249</sup>

Other district courts within the Eleventh Circuit similarly retained their allegiance to a heightened pleading standard when claims of qualified immunity are involved.<sup>250</sup>

As with the circuit courts, several district court opinions reveal a continuing adherence to the view that conclusory allegations of an official policy as part of a *Monell* claim will not do.<sup>251</sup> In fact, an Ari-

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248. *Id.* at \*3 (citations omitted).

249. *Id.* at \*9.

250. *See, e.g.,* Hayden v. Ala. Dep’t of Pub. Safety, 506 F. Supp. 2d 944 (M.D. Ala. 2007) (“[I]n determining whether a plaintiff has stated a § 1983 claim against a defendant in his or her individual capacity, courts must be ‘guided both by the regular 12(b)(6) standard and by the heightened pleading requirement.’” (quoting *GJR Invs., Inc. v. County of Escambia*, 132 F.3d 1359, 1367 (11th Cir. 1998))).

251. *Reyes v. City of Miami Beach*, No. 07-22680-CIV, 2008 WL 686958, at \*13 (S.D. Fla. Mar. 13, 2008) (rejecting as conclusory plaintiff’s claim of an official policy based on the allegation that the defendant municipality “failed, through knowing and/or reckless and/or deliberate and/or conscious indifference, to instruct, supervise, control and discipline, on a continuing basis, the duties of personnel and officials to refrain from unlawful actions leading to the arrest and

zona district court has held that *Twombly* commands further specificity in support of assertions of an official policy than pre-*Twombly* Ninth Circuit precedent—*Galbraith v. County of Santa Clara*<sup>252</sup>—suggests.<sup>253</sup> It will be interesting to see if the Ninth Circuit reconsiders its position from *Galbraith* that bare allegations of an official policy are sufficient at the pleading stage.

#### IV. ANALYSIS

What, if anything, can we learn from this survey of the handful of post-*Twombly* cases that have addressed the sufficiency of civil rights pleadings? I would like to pose three questions: First, are there any patterns that emerge from the cases—such as consistent approaches by circuit or by the deciding judges’ gender or political affiliation? Second, can one conclude that civil rights claims are now subject to

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excessive force used against Plaintiff and others”); *Heilman v. T.W. Ponessa & Assocs.*, No. 4:07-cv-1308, 2008 WL 275731, at \*14 (M.D. Pa. Jan. 30, 2008) (“Heilman’s amended complaint does no more than regurgitate the standard for municipal liability under § 1983, stating that ‘Clinton County engaged in a policy, custom and practice of denying proper medical care which led to the Plaintiff failing to receive proper medical care.’ This bare conclusory allegation does not meet the pleading standards of Rule 8 or survive a motion to dismiss under Rule 12(b)(6).”) (citation omitted); *McCray v. City of New York*, Nos. 03 Civ. 9685, 03 Civ. 9974, 03 Civ. 10080, 2007 WL 4352748, at \*27 (S.D.N.Y. Dec. 11, 2007) (“With respect to Plaintiffs’ first theory of *Monell* liability, the misconduct of fabricating the statements of minors, although the causal link between practices regarding fabricating statements and Plaintiffs’ alleged constitutional deprivations may be plausible, Plaintiffs must provide more than mere conclusory allegations; they must add specific factual support to show the existence of a pattern.”); *Lundy v. Town of Brighton*, 521 F. Supp. 2d 259, 262-63 (W.D.N.Y. 2007) (“A careful review of the First Amended Complaint, however, yields no allegations to support a conclusion that Chief Voelkl acted with deliberate indifference to Lundy’s complaints of discrimination in violation of her First or Fourteenth Amendment rights. . . . At most, . . . her allegations concerning his conduct describe nothing more than ‘mere lack of responsiveness’ and ‘nonfeasance’ with respect to her complaints of harassment, and thus are insufficient to state, with the specificity required by *Bell Atlantic Corp.*, a claim for violation of Lundy’s First or Fourteenth Amendment rights via an inferred municipal policy.”); *Holloway v. Ameristar Casino St. Charles, Inc.*, No. 4:07 CV 218, 2007 WL 2199566, at \*5 (E.D. Mo. July 27, 2007) (“Holloway’s complaint . . . does little more than allege the ‘labels and conclusions’ discouraged by *Bell Atlantic*. The complaint states that Ameristar was ‘at all times acting under color of State law,’ but offers no support for that conclusion.”); *Hooper v. City of Montgomery*, No. 2:06cv612, 2007 WL 2069851, at \*6 (M.D. Ala. July 17, 2007) (“Vague and conclusory allegations will not support a claim under § 1983 against a municipality.” (quoting *Hall v. Smith*, 170 F. App’x 105, 107-08 (11th Cir. 2006))).

252. 307 F.3d 1119, 1125 (9th Cir. 2002).

253. See *Yadin Co. v. City of Peoria*, No. CV-2006-1317, 2008 WL 906730, at \*4 (D. Ariz. Mar. 25, 2008) (“[T]he Ninth Circuit’s position, as set forth in *Galbraith v. County of Santa Clara*, 307 F.3d 1119 (9th Cir. 2002)], is that ‘a claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss even if it is based on nothing more than a bare allegation that the municipal employees’ conduct conformed to official policy, custom, or practice.’ The Court concludes that its earlier *Galbraith*-based decision must be reconsidered in light of the Supreme Court’s subsequent decision in *Bell Atlantic Corp. v. Twombly*, wherein the Supreme Court tightened the requirements for pleading a civil cause of action.”).

greater scrutiny and more dismissals after *Twombly* than before? Third, do the cases tell us anything about whether *Twombly*'s stricter approach to pleading is a good thing from a policy perspective? Each of these questions will be touched on briefly below.

#### A. Are There Any Emergent Patterns?

At this early point in the history of the post-*Conley* era with so few cases having been decided, it is difficult to find any strong patterns among the decisions applying *Twombly* to civil rights claims. However, it seems safe to say thus far that the First, Fourth, and Eleventh Circuits have tended toward the factual substantiation view of *Twombly*, a view in line with some of their previous attitudes toward particularized fact pleading for civil rights claims. District courts with similar leanings have come from a wide array of circuits, with no necessary correlation between each of these districts and the views of their respective circuits on this matter. The cases reviewed also seem to suggest that the Second, Sixth, Eighth, and Ninth (and perhaps the Seventh and Tenth) Circuits have been more cautious in their approach to *Twombly* in the civil rights context, giving due weight to *Swierkiewicz* and taking the Supreme Court at its word that that case has not been overruled. The district court decisions I have found leaning in the direction of notice pleading for civil rights claims after *Twombly* are also scattered across many of the various circuits, although one does see some focusing of these more lenient districts within those circuits favoring the notice pleading approach.

Partly to blame for the absence of more clearly defined patterns is lower court confusion regarding just what *Twombly* means. There is no denying that the *Twombly* Court sent mixed signals regarding how civil pleading standards were being altered.<sup>254</sup> On the one hand, *Conley*'s "no set of facts" language was discarded, suggestive facts rather than mere labels and conclusions were required, and the standard of "plausibility" versus possibility was given to us. On the other hand, the *Twombly* Court discounted suggestions that it was imposing a heightened pleading standard, that its decision was inconsistent with *Swierkiewicz*, or that notice pleading was no longer the appropriate

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254. See *Iqbal v. Hasty*, 490 F.3d 143, 155 (2d Cir. 2007) ("The nature and extent of that alteration [to the regime of notice pleading] is not clear because the Court's explanation contains several, not entirely consistent, signals . . .").

description of pleading under Rule 8(a).<sup>255</sup> Thus, as with a Rorschach test, judges may see different things when they look at the case, with their view of its meaning depending on a number of things, including pre-*Twombly* circuit precedent, the judges' attitudes toward the types of claims at issue, and perhaps even the judges' own personal attributes, such as race, gender, or political affiliation (although a quick look at this information for the judges deciding the cases discussed above do not reveal any patterns along these lines).<sup>256</sup> Perhaps with more data, future research can explore whether any more well-defined patterns emerge and, if so, what forces and factors might explain those patterns.

To the extent that a good number of courts are cautiously treating *Twombly* in a way that permits them to retain a notice pleading approach, that may be explained by viewing *Twombly* in the context of the other pleadings decisions of the 2006–2007 Term. Had *Twombly* been decided in isolation, one might more readily question the Court's ongoing commitment to liberal notice pleading. However, the same Court decided *Jones v. Bock*,<sup>257</sup> *Erickson v. Pardus*,<sup>258</sup> and *Tellabs, Inc. v. Makor Issues and Rights, Ltd.*,<sup>259</sup> cases that, respectively, rejected an attempt to impose particularized pleading, reaffirmed notice pleading and the idea that detailed factual allegations are not required, and failed to cite *Twombly* at all in the course of determining pleading obligations under the Private Securities Litigation Reform Act. These decisions, coupled with the Court's clear and unequivocal rejection of heightened pleading in *Swierkiewicz* and the *Twombly* Court's own softening language may have combined to make it difficult for lower federal courts simply to invoke *Twombly* as justification for a wholesale authorization to apply heightened pleading with zeal. That said, *Twombly* supplies enough material for courts that are so inclined to move in that direction. Indeed, as will be noted below, it may be the interaction between *Twombly* and courts' preexisting proclivities with respect to heightened pleading that offers additional insight into what accounts for courts' current post-*Twombly* civil rights pleading standards.

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255. As discussed previously, the 2007 Supreme Court cases of *Erickson v. Pardus* and *Jones v. Bock* add to the confusion by affirming the notice pleading standard. See *supra* note 15.

256. An Appendix reporting the party affiliation, gender, and ethnicity of the judges deciding the cases discussed follows the Conclusion below.

257. 549 U.S. 199 (2007).

258. 127 S. Ct. 2197 (2007).

259. 127 S. Ct. 2499 (2007).

B. Are Civil Rights Claims Now Subject to Greater Scrutiny?

A principal question that most interested observers will likely have is to what extent is the *Twombly* decision being interpreted and applied to screen out civil rights claims that would have passed muster under the now repudiated “no set of facts” standard of *Conley*? For the most part, that question is one that cannot be answered with any precision because unless the deciding court expressly indicates how it would have decided the case under *Conley* versus what it is doing under *Twombly*,<sup>260</sup> one can never be certain that any given pleadings dismissal would have come out differently in the hands of the same judge had *Twombly* never been decided. Certainly, it might be possible to say that under the most liberal interpretation of *Conley*—one focused primarily on a full embrace of the “no set of facts” language—many of the claims that have been dismissed based on a strict interpretation of *Twombly* would have passed muster. But the reality that we saw in Part II above is that prior to *Twombly* most courts were not taking the most liberal view of *Conley*, with many continuing to understand the ordinary pleading burden of civil rights claimants to consist of an obligation to plead facts that underlie more generalized allegations such as discriminatory motivation, official policy, or conspiracy. *Twombly*, then, for many courts was not so much a catalyst for particularized fact pleading as it was a legitimator of it. As such, it may be fair to say that in those previously strict jurisdictions favoring fact pleading, civil rights claims are now subject to roughly the same (heightened) level of scrutiny they faced before. The major difference after *Twombly* is that claimants subject to such scrutiny have lost one of their strongest weapons for combating heightened pleading in ordinary cases—the *Conley* “no set of facts” standard.

Although some jurisdictions that favored liberal notice pleading before *Twombly* are attempting to maintain that view after *Twombly*, it is almost certain that the strong language in favor of requiring factual substantiation will influence other courts from this group to tighten their standards and lend some degree of additional scrutiny to claims than they might have before *Twombly*, resulting in further in-

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260. Although rare, at least one court has expressly indicated what its decision would have been under the pre-*Twombly* standard. See *Alvarado v. KOB-TV, L.L.C.*, 493 F.3d 1210, 1215 n.2 (10th Cir. 2007) (“[W]e emphasize that in this case our decision would be the same regardless of whether we used the old ‘no set of facts’ standard or adopt either a plausibility standard or a requirement that the complaint include factual allegations sufficient to ‘raise a right to relief above the speculative level.’” (quoting *Twombly*, 127 S. Ct. at 1965)).

cremental erosion of the traditional notice pleading standard as previously understood and applied by the lower federal courts.<sup>261</sup> If civil rights claims happen to be disproportionately represented among the claims that lack such factual specificity in the complaint, then a greater degree of scrutiny will result in more such claims being dismissed than before. Indeed, an early research effort seeking to assess the impact of *Twombly* empirically by looking at overall dismissal rates at various times prior to and after *Twombly* to see if there was any increase has shown a disproportionate increase in the rate of dismissals in civil rights cases post-*Twombly*.<sup>262</sup> If these results accurately reflect what is taking place in the courts, then it is not surprising, given the penchant of courts to single out civil rights claims for special scrutiny in the past. It will be interesting to see the results of future research aimed at studying the impact on civil rights cases once a larger body of post-*Twombly* case law is available.

### C. Is Heightened Scrutiny a Good Thing?

Fully assessing whether the level of scrutiny given to civil rights pleadings after *Twombly* is a good thing from a policy perspective is beyond the scope of this article. One would have to have a comprehensive theory of pleading that prioritized competing values—such as access, fairness, justice, and efficiency to name a few—to evaluate whether screening out more civil rights claims at the front-end of the system is a positive development. But a few thoughts on this question are worth sketching out here.

First, it is my view that a claim should not be discarded unless it has been demonstrated to lack merit. That is a determination that one may be able to make at the summary judgment stage but not truly at the motion to dismiss stage. *Twombly* dismissals result from the de-

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261. This has already occurred explicitly in one case. See *Yadin*, 2008 WL 906730, at \*4.\*5 (D. Ariz. Mar. 25, 2008) (“[T]he Ninth Circuit’s position, as set forth in *Galbraith v. County of Santa Clara*, is that ‘a claim of municipal liability under section 1983 is sufficient to withstand a motion to dismiss even if it is based on nothing more than a bare allegation that the municipal employees’ conduct conformed to official policy, custom, or practice.’ The Court concludes that its earlier *Galbraith*-based decision must be reconsidered in light of the Supreme Court’s subsequent decision in *Bell Atlantic Corp. v. Twombly*, wherein the Supreme Court tightened the requirements for pleading a civil cause of action. . . . In light of *Twombly*, the Court concludes that the ‘custom or policy’-related allegations forming the federal constitutional claim in Count Two of the amended complaint are too bared-boned and conclusory to state a claim.”).

262. Kendall W. Hannon, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1815 (2008) (“[T]he one area in which this study does show a significant departure from previous dismissal practice is the civil rights field.”).

termination that a claim is not plausible or that facts have not been brought forward that substantiate the claim. But both of these conclusions are subject to rebuttal based on information that may be found in discovery. The same cannot be said of a dismissal based on summary judgment; discovery has already occurred and whatever information might be marshaled in favor of one's claim is there for the judge to evaluate. A *Twombly* dismissal is nothing more than a speculative assessment that the plaintiff is unlikely—in the view of the court—to be able to identify facts through discovery that will support a claim. Permitting that assessment—rather than the stronger assessment that no set of facts could be proved that would entitle the pleader to relief—means that the motion to dismiss will weed out claims that are merely suspected of lacking merit rather than reserving dismissal only for those claims that are certain to lack merit. Such a rule in my view is too harsh. Further, such a rule is too subjective, given its rooting in the amorphous concept of “plausibility.” This means that dismissed claims may be those that simply failed to persuade the judge rather than those that clearly lacked merit as a matter of law.

Second, to the extent *Twombly* permits courts to dismiss claims for failing to be supported by factual allegations that the plaintiff is not in a position to know, that seems unfair. This appears to be the case for many civil rights claims, where claimants often lack direct evidence of an official municipal policy or of discriminatory motivation and where circumstantial evidence of bias is equivocal.<sup>263</sup> It is in these types of cases that plaintiffs need access to discovery to explore whether they can find needed factual support. Thus, courts should not invoke *Twombly* to require the pleading of substantiating facts that a plaintiff needs discovery to gain, particularly given that discovery in civil rights cases is not likely to involve the level of expense, inconvenience, and potential for abuse that the Court felt characterized discovery in antitrust conspiracy cases.<sup>264</sup> If the allegations are consistent

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263. See, e.g., *Means v. City of Chicago*, 535 F. Supp. 455, 460 (N.D. Ill. 1982) (“We are at a loss as to how any plaintiff, including a civil rights plaintiff, is supposed to allege with specificity prior to discovery acts to which he or she personally was not exposed, but which provide evidence necessary to sustain the plaintiff’s claim, i.e., that there was an official policy or a de facto custom which violated the Constitution.”).

264. The *Twombly* Court appeared not concerned with this issue, given that conspiracy claims have the same need for discovery as civil rights claims because critical facts pertaining to a conspiracy are often concealed. However, it was the potentially exorbitant costs associated with such discovery that led the Court to raise the threshold antitrust conspiracy claimants had to pass to get to discovery. *Twombly*, 127 S. Ct. at 1967. Discovery in civil rights cases is likely to be

with the possibility of liability, the court should be able to rely on counsel's Rule 11 certification<sup>265</sup> as the basis for having a "reasonably founded hope that the discovery process will reveal relevant evidence."<sup>266</sup> Or, if need be, judges could limit initial discovery to a specific issue that must be substantiated before the case is allowed to proceed, although consideration of information derived from such a procedure would likely convert a motion to dismiss into a motion for summary judgment.<sup>267</sup>

Finally, anti-discrimination laws exist for a purpose: to make sure that our society is a place where people are not mistreated on the basis of irrelevant personal attributes such as race or gender. When pleading standards are tightened to a degree that makes it more difficult for people with legitimate grievances to have their claims heard, that undermines the goals of civil rights legislation and renders those laws dogs with more bark than bite. When procedural hurdles stymie legitimate civil rights claims, violators learn that wrongful discriminatory behavior will often go unredressed, making it more likely that undesirable discrimination will take place. Further, continued acceptance of heightened pleading for civil rights claims by many courts encourages defendants to challenge such pleadings at a higher rate, increasing the time and expense associated with civil rights claims. I would thus urge courts to be more solicitous of such claims initially, leaning more towards the spirit of *Swierkiewicz* than the letter of *Twombly* to permit civil rights plaintiffs the opportunity to develop and discover support for the more generalized allegations made in their respective complaints.

## CONCLUSION

During the *Conley* era, although many courts consistently imposed some type of particularity requirement with respect to civil

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much less costly and thus the *Twombly* concern of discovery cost and abuse should be less relevant in the civil rights context.

265. See FED. R. CIV. P. 11(b) ("By presenting to the court a pleading . . . an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: . . . (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery.").

266. *Twombly*, 127 S. Ct. at 1967 (quoting *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 347 (2005)).

267. FED. R. CIV. P. 12(d) ("If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56.").

rights claims, the “no set of facts” standard plus Supreme Court defenses of it from *Leatherman* to *Swierkiewicz* provided civil rights plaintiffs some measure of access to the federal courts that they would have lacked had a formal particularity rule—rather than notice pleading—been in place. Now that *Twombly* has modified notice pleading in a way that makes the formal rule a requirement of suggestive facts that substantiate a claim and render it plausible, the door is open for those courts that are so inclined to screen out civil rights claims that might have made it through before. However, as we have seen, *Twombly* does not yet appear to have converted all previous notice pleading adherents into strict heightened pleading taskmasters, although it certainly has converted some. But until the Supreme Court offers further clarification of its view of pleading, many lower courts are likely to continue to follow those aspects of *Twombly* that most closely align with their preexisting approach to scrutinizing civil rights claims.

APPENDIX: ATTRIBUTES OF THE JUDGES IN THE  
POST-TWOMBLY CASES DISCUSSED

“Notice Pleading Prevails”:

Case	Party Affiliation <sup>268</sup>	Gender	Ethnicity <sup>269</sup>
<i>Kassner v. 2nd Ave. Delicatessen Inc.</i> , 496 F.3d 229 (2d Cir. 2007)	DDR <sup>o</sup>	FMM	AA-W-n/a
<i>Gregory v. Dillard’s, Inc.</i> , 494 F.3d 694 (8th Cir. 2007)	D <sup>o</sup> RR <sup>d</sup>	FMM	W-W-W
<i>Lindsay v. Yates</i> , 498 F.3d 434 (6th Cir. 2007)	DDD <sup>o</sup>	MFM	AA-W-AA
<i>Skaff v. Meridien N. Am. Beverly Hills, LLC</i> , 506 F.3d 832 (9th Cir. 2007)	DDR <sup>d</sup>	MMM	AA-W-W
<i>Briggs v. Johnson</i> , 274 F. App’x 730 (10th Cir. 2008)	D <sup>o</sup> RR <sup>d</sup>	MMM	W-W-W
<i>Hines v. City of Albany</i> , 542 F. Supp. 2d 218 (N.D.N.Y. 2008)	D	M	W
<i>Castaneda v. City of Williams</i> , No. CV07-00129, 2007 WL 1713328 (D. Ariz. June 12, 2007)	R	M	W
<i>Merhige-Murphy v. Vicon Indus., Inc.</i> , No. CV-07-1526, 2008 WL 111163 (E.D.N.Y. Jan. 7, 2008)	R	F	W
<i>Lewis v. Dist. of Columbia</i> , 535 F. Supp. 2d 1, (D.D.C. 2008)	D	M	H
<i>EEOC v. McIntyre Group, Ltd.</i> , No. 07 CV 5458, 2007 WL 4365367 (N.D. Ill. Dec. 11, 2007)	R	M	W
<i>Kalka v. Nat’l Am. Ins. Co.</i> , No. CIV- 07-708-C, 2007 WL 4287617 (W.D. Okla. Dec. 5, 2007)	R	F	W
<i>Lee v. Pa. Dep’t of Health</i> , No. 07-677, 2007 WL 2463404 (W.D. Pa. Aug. 28, 2007)	D	F	W
<i>Pittman v. Montgomery County Sheriff’s Dep’t</i> , No. 2:06-cv-507-WKW, 2007 U.S. Dist. LEXIS 62131 (M.D. Ala. Aug. 22, 2007)	R	M	W

268. Party affiliation here refers to the party membership of the President who appointed the judge. It is acknowledged that the party of the appointing President does not necessarily reflect the political affiliation of the judge in question. Judges are listed in order of seniority. A superscript “o” in this column indicates the author of the opinion. The absence of a superscript “o” indicates a per curiam opinion. A superscript “d” in this column indicates a dissent by the associated judge.

269. In this column, “AA” means African American, “W” means White, “H” means Hispanic. The designation “n/a” means that ethnicity information for the judge was unavailable.

Case	Party Affiliation <sup>268</sup>	Gender	Ethnicity <sup>269</sup>
<i>Jackson v. Novastar Mortgage, Inc.</i> , No. 06-2249, 2007 WL 4568976 (W.D. Tenn. Dec. 20, 2007)	D	F	W
<i>Newman v. Apex Fin. Group, Inc.</i> , No. 07 C 4475, 2008 WL 130924 (N.D. Ill. Jan. 11, 2008)	R	M	W
<i>Flanagan v. Benicia Unified Sch. Dist.</i> , No. CIV. S-07-333, 2007 WL 4170632 (E.D. Cal. Nov. 19, 2007)	D	M	W
<i>Chappell v. Va. State Univ.</i> , No. 3:07CV389-HEH, 2008 WL 611298 (E.D. Va. Mar. 5, 2008)	R	M	W
<i>Kimble v. Wis. Dep't of Workforce Dev.</i> , No. 07C0266, 2008 WL 916964 (E.D. Wis. Apr. 2, 2008)	D	M	W
<i>Kempkes v. Downey</i> , No. 07-CV-1298, 2008 WL 852765 (S.D.N.Y. Mar. 31, 2008) <sup>270</sup>	R	M	W

270. This case appears in a footnote in the “Factual Substantiation Required” section, *see supra* note 235, but only as an example of a court adhering to more of a notice pleading standard. Thus, it is included in this portion of the Appendix.

“Factual Substantiation Required”:

Case	Party Affiliation	Gender	Ethnicity
<i>Marrero-Gutierrez v. Molina</i> , 491 F.3d 1 (1st Cir. 2007)	DRR°	FMM	W-W-W
<i>German v. Fox</i> , 267 F. App'x 231 (4th Cir. 2008)	DRD	FFF	W-AA-W
<i>Patane v. Clark</i> , 508 F.3d 106 (2d Cir. 2007)	DRR	MMM	W-W-W
<i>Davis v. Coca-Cola Bottling Co. Consol.</i> , 516 F.3d 955 (11th Cir. 2008)	R°RR	MMM	W-W-W
<i>Mangan v. Brierre</i> , 257 F. App'x 525 (3d Cir. Dec. 7, 2007)	DRR	MMM	AA-W-W
<i>Powell v. Barrett</i> , 496 F.3d 1288 (11th Cir. 2007)	R°DR	FFM	W-W-W
<i>Ruiz Rivera v. Pfizer Pharms., LLC</i> , 521 F.3d 76 (1st Cir. 2008)	DRR°	MMM	W-W-W
<i>Mangum v. Town of Holly Springs</i> , 551 F. Supp. 2d 439 (E.D.N.C. 2008)	D	M	W
<i>Reed v. AirTran Airways</i> , 531 F. Supp. 2d 660 (D. Md. 2008)	R	M	W
<i>Tiu-Malabanan v. Univ. of Rochester</i> , No. 07-CV-6499-CJS, 2008 WL 788637 (W.D.N.Y. Mar. 21, 2008)	D	M	W
<i>White v. Ocean Duchess Inc.</i> , No. 2:07cv300, 2007 WL 4874709 (E.D. Va. Nov. 7, 2007)	Magistrate	M	W
<i>Grosz v. Lassen Cmty Coll. Dist.</i> , No. CIV. S-07-697, 2007 WL 2384444 (E.D. Cal. Aug. 17, 2007)	D	M	W
<i>Lyttle v. Killackey</i> , 528 F. Supp. 2d 818 (N.D. Ill. 2007)	R	F	W
<i>Briggman v. Commonwealth</i> , 526 F. Supp. 2d 590 (W.D. Va. 2007)	R	M	W
<i>Kist v. Fatula</i> , No. 3:2006-67, 2007 WL 2404721 (W.D. Pa. Aug. 17, 2007)	R	M	W
<i>McCray v. City of New York</i> , Nos. 03 Civ. 9685, 03 Civ. 9974, 03 Civ. 10080, 2007 WL 4352748 (S.D.N.Y. Dec. 11, 2007)	D	F	AA
<i>Reyes v. City Univ. of N.Y.</i> , No. 06 Civ. 3639, 2007 WL 2186961 (S.D.N.Y. July 26, 2007)	D	F	W
<i>Williams v. S. Ill. Riverboat/Casino Cruises, Inc.</i> , No. 06-cv-664, 2007 WL 3253239 (S.D. Ill. Nov. 5, 2007)	R	M	W
<i>Heinemann v. Copperhill Apartments</i> , No. CIV. 07-00018, 2007 WL 2225790 (E.D. Cal. July 31, 2007)	D	M	W
<i>Reyes v. City of Miami Beach</i> , No. 07-22680-CIV, 2008 WL 686958 (S.D. Fla. Mar. 13, 2008)	D	M	W

Case	Party Affiliation	Gender	Ethnicity
<i>Hayden v. Ala. Dep't of Pub. Safety</i> , 506 F. Supp. 2d 944 (M.D. Ala. 2007)	R	M	W
<i>Heilman v. T.W. Ponessa &amp; Assocs.</i> No. 4:07-cv-1308, 2008 WL 275731 (M.D. Pa. Jan. 30, 2008)	R	M	W
<i>Lundy v. Town of Brighton</i> , 521 F. Supp. 2d 259 (W.D.N.Y. 2007)	R	M	W
<i>Holloway v. Ameristar Casino St. Charles, Inc.</i> , No. 4:07 CV 218, 2007 WL 2199566 (E.D. Mo. July 27, 2007)	Magistrate	M	W
<i>Hooper v. City of Montgomery</i> , No. 2:06cv612, 2007 WL 2069851 (M.D. Ala. July 17, 2007)	R	M	W
<i>Yadin Co. v. City of Peoria</i> , No. CV-06-1317, 2008 WL 906730 (D. Ariz. Mar. 25, 2008)	R	M	W
<i>Berkeley v. Potter</i> , No. CIV A 06-4490, 2008 WL 746602 (D.N.J. Mar. 18, 2008)	R	M	W