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02-CV-E

June 17, 2002

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Administrative Office of the Courts
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E.
Washington, DC 20544

RE: Proposed Change to Fed.R.Civ.P. 8(a)(2)

Dear Mr. McCabe:

This letter is submitted in accordance with the process for requesting changes in the Federal Rules of Civil Procedure outlined in the Courts' website. The change that we propose is amendment of Rule 8(a)(2) to require that the "short and plain statement of the claim" allege facts sufficient to establish a *prima facie* case.

This change is necessitated by the recent U.S. Supreme Court decision in *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 122 S.Ct. 992, 152 L.Ed.2d 1 (2002) (copy attached as Exhibit 1). The Supreme Court noted the practical merits of the argument that allowing lawsuits based on conclusory allegations of discrimination to go forward will burden the courts and encourage disgruntled employees to bring unsubstantiated claims, but stated 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.'"

The *Swierkiewicz* decision was very recently followed by the First Circuit in a case in which we were involved, *Gorski v. New Hampshire Department of Corrections*, Docket No. 01-1995 (May 25, 2002) (copy attached as Exhibit 2). The district court had determined that the allegations in the complaint, assuming them to be true were insufficient to rise to the level required by law to create an actionable claim of hostile work environment. *See* Order on Motion to Dismiss, J. DiClerico, July 19, 2000, Civil No. 99-562-JD, 2000DNH156 (copy attached as Exhibit 3). The

result of *Swierkiewicz*, as applied by the First Circuit in *Gorski*, is to render Fed. R. Civ. P. 12 (b)(6) meaningless. This result is undesirable from a practical standpoint and inconsistent with common statutory interpretation that presumes every part of a statute to have effect. Where statutes and case law establish standards for a *prima facie* case, failure to allege facts meeting that standard should mean that a claim for which relief can be granted has not been stated under Rule 12(b)(6).

The cost to employers of the *Swierkiewicz* and *Gorski* decisions are heavy. The practical result is that not only disgruntled employees, but any employee faced with less than satisfactory performance reviews will be able to force the employer through the long and costly defense of conclusory allegations of a "hostile environment," even when they are unable to articulate any plausible discriminatory actions. For a governmental entity such as the State, retaining unproductive or even incompetent employees because of the threat of hostile environment claims is not in the best interests of the citizens.

Conversely, the burden on plaintiffs is minimal and will promote the general purpose of notice pleadings by identifying the conduct at issue. The requirements of a prima facie case are "not onerous." *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). Requiring that the essential factual basis of the claim be stated is consistent with the stated goal of notice pleadings, to provide the defendant with notice of the reason for the claim. Additionally, a heightened pleading requirement will promote compliance with the early mandatory disclosure requirements of Fed. R. Civ. P. Rule 26.

We respectfully request that amendment to Fed.R.Civ.P. Rule 8(a)(2) be considered incorporating the prima facie requirement.

Sincerely,

Nancy J. Smith
Senior Assistant Attorney General
Civil Bureau

NJS:jmw/188702
Enclosures
cc: United States Senate, Committee on the Judiciary (w/enclosures)

cc: U.S. House of Representatives, Committee on the Judiciary (w/enclosures)

cc: Senator Bob Smith (w/enclosures)

cc: Senator Judd Gregg (w/enclosures)

cc: Congressman Charles Bass (w/enclosures)

cc: Congressman John Sununu (w/enclosures)

EXHIBIT 1

PENGAD-Bayonne, N. J.

Swierkiewicz v. Sorema N.A., 534 U.S. 506

Pages

*534 U.S. 506; 122 S. Ct. 992, *;*
*152 L. Ed. 2d 1, **; 2002 U.S. LEXIS 1374, ****

*AKOS **SWIERKIEWICZ** v. SOREMA N. A.*

No. 00-1853

SUPREME COURT OF THE UNITED STATES

534 U.S. 506; 122 S. Ct. 992; 152 L. Ed. 2d 1; 2002 U.S. LEXIS 1374; 70 U.S.L.W. 4152; 88 Fair Empl. Prac. Cas. (BNA) 1; 82 Empl. Prac. Dec. (CCH) P40,899; 51 Fed. R. Serv. 3d (Callaghan) 781; 2002 Daily Journal DAR 2152; 15 Fla. L. Weekly Fed. S 124

January 15, 2002, Argued
February 26, 2002, Decided

NOTICE:* [1]**

The LEXIS pagination of this document is subject to change pending release of the final published version.

***PRIOR HISTORY:** ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.*

***DISPOSITION:** 5 Fed. Appx. 63, reversed and remanded.*

CASE SUMMARY

PROCEDURAL POSTURE: Certiorari was granted to the United States Court of Appeals for the Second Circuit to review the judgement affirming the dismissal of plaintiff employee's employment discrimination action against the defendant employer because the employee's complaint did not allege facts constituting a prima facie case of discrimination under the burden shifting framework of McDonnell Douglas.

OVERVIEW: The United States Supreme Court found that it was incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he might ultimately need to prove to succeed on the merits if direct evidence of discrimination was discovered. The prima facie case under McDonnell Douglas was an evidentiary standard, not a pleading requirement. The complaint satisfied the requirements of Fed. R. Civ. P. 8(a) because it gave the employer fair notice of the basis for the claims. The employee alleged that he was terminated on account of his national origin in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., and on account of his age in violation of the Age Discrimination in Employment Act of 1967, 29 U.S.C.S. § 621 et seq. 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. The allegations stated claims upon which relief could be granted.

OUTCOME: The judgment of the United States Court of Appeals for the Second Circuit was reversed.

CORE TERMS: prima facie case, employment discrimination, direct evidence, motion to dismiss, plead, survive, discovery, fair notice, simplified, heightened, Federal Rules, particularity, notice, rigid, underwriting, evidentiary standard, entitled to relief, facts establishing, summary judgment, national origin, lawsuit, pleader, succeed, Civil Rights Act, Employment Act, pleading requirement, facts constituting, particular case, failed to meet, matter of law

CORE CONCEPTS - ◆ Hide Concepts

Civil Procedure : Pleading & Practice : Pleadings : Construction
Labor & Employment Law : Discrimination : Actionable Discrimination
An employment discrimination complaint need not include specific facts establishing a prima facie case of discrimination and instead must contain only a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2).

Civil Procedure : Appeals : Standards of Review : Standards Generally
Where a court of appeals reviews a decision granting a motion to dismiss, the court must accept as true all of the factual allegations contained in the complaint.

Labor & Employment Law : Discrimination : Disparate Treatment : Burden Shifting Analysis
The prima facie case of employment discrimination under McDonnell Douglas is an evidentiary standard, not a pleading requirement. The prima facie case relates to the employee's burden of presenting evidence that raises an inference of discrimination.

Civil Procedure : Pleading & Practice : Pleadings : Construction
Labor & Employment Law : Discrimination : Actionable Discrimination
In the context of an employment discrimination complaint, the ordinary rules for assessing the sufficiency of a complaint apply.

Civil Procedure : Pleading & Practice : Pleadings : Construction
Civil Procedure : Pleading & Practice : Defenses, Objections & Demurrers : Failure to State a Cause of Action
When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims.

Labor & Employment Law : Discrimination : Actionable Discrimination
Labor & Employment Law : Discrimination : Disparate Treatment : Burden Shifting Analysis
Under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case of employment discrimination because the McDonnell Douglas framework does not apply in every employment discrimination case. If a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case.

Labor & Employment Law : Discrimination : Actionable Discrimination
Labor & Employment Law : Discrimination : Disparate Treatment : Burden Shifting Analysis
The precise requirements of a prima facie case of employment discrimination can vary depending on the context and are not intended to be rigid, mechanized, or ritualistic. Given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases.

Civil Procedure : Pleading & Practice : Pleadings : Construction
Fed. R. Civ. P. 8(a)(2) provides that a complaint must include only a short and plain statement of the claim showing that the pleader is entitled to relief. Such a statement must simply give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.

Civil Procedure : Pleading & Practice : Pleadings : Construction
Fed. R. Civ. P. 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions.

Civil Procedure : Pleading & Practice : Pleadings : Construction
Labor & Employment Law : Discrimination : Actionable Discrimination
Complaints in employment discrimination cases, as in most others, must satisfy only the simple requirements of Fed. R. Civ. P. 8(a).

Civil Procedure : Pleading & Practice : Pleadings : Construction
See Fed. R. Civ. P. 8(e)(1).

Civil Procedure : Pleading & Practice : Pleadings : Construction
See Fed. R. Civ. P. 8(f).

Civil Procedure : Pleading & Practice : Pleadings : Construction
Civil Procedure : Pleading & Practice : Defenses, Objections & Demurrers : Failure to State a Cause of Action
Given the Federal Rules of Civil Procedure's 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.

Civil Procedure : Pleading & Practice : Pleadings : Construction
Labor & Employment Law : Discrimination : Actionable Discrimination
The Federal Rules of Civil Procedure do not contain a heightened pleading standard for employment discrimination suits.A requirement of greater specificity for particular claims is a result that must be obtained by the process of amending the Federal Rules of Civil Procedure, and not by judicial interpretation. Furthermore, Fed. R. Civ. P. 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely, but that is not the test.

◆ Hide Lawyers' Edition Display

DECISION: Individual's employment discrimination complaint, in asserting claims pursuant to Title VII and Age Discrimination in Employment Act, held not required to contain specific facts establishing prima facie case of discrimination.

SUMMARY: In McDonnell Douglas Corp. v Green (1973) 411 US 792, 36 L Ed 2d 668, 93 S Ct 1817, which involved a claim of race discrimination in asserted violation of Title VII of the Civil Rights Act of 1964, as amended (42 USCS 2000e et seq.), the United States Supreme Court provided a general standard or framework for establishing a prima facie case in a private nonclass action alleging employment discrimination. This framework has been described as requiring a plaintiff to show (1) membership in a protected group, (2) qualification for the job in question, (3) an adverse employment action, and (4) circumstances supporting an inference of discrimination.

An individual, who was allegedly a native of Hungary and 53 years of age, filed, in the United States District Court for the Southern District of New York, a lawsuit against a company. The individual's complaint claimed that he had been fired by the company (1) on account of his national origin, in asserted violation of Title VII, and (2) on account of his age, in asserted violation of the Age Discrimination in Employment Act of 1967, as amended (ADEA) (29 USCS 621 et seq.). In addition, the complaint (1) detailed the events allegedly leading to the individual's firing, (2) provided relevant dates, and (3) included the ages and nationalities of at least some of the relevant persons allegedly involved with his firing. However, the District Court granted a motion by the company to dismiss the complaint, as the court found that the individual had not adequately alleged circumstances that supported an inference of discrimination (2000 US Dist LEXIS 21547).

On appeal, the United States Court of Appeals for the Second Circuit, in affirming, (1) relied on settled Court of Appeals precedent which required an employment discrimination complaint to allege facts constituting a prima facie case of discrimination under the McDonnell Douglas framework; and (2) expressed the view that the individual failed to meet this burden, as his allegations were insufficient as a matter of law to raise an inference of discrimination (2001 US App.LEXIS 3837, 5 Fed Appx 63).

On certiorari, the United States Supreme Court reversed and remanded. In an opinion by Thomas, J., expressing the unanimous opinion of the court, it was held that:

(1) In a private nonclass action filed in a District Court and asserting employment discrimination claims pursuant to Title VII or the ADEA, a complaint does not need to contain specific facts establishing a prima facie case of discrimination under the McDonnell Douglas framework--which, among other matters, provided a flexible evidentiary standard, not a pleading requirement--and, instead, pursuant to Rule 8(a)(2) of the Federal Rules of Civil Procedure, such a complaint must contain only a short and plain statement of the claims showing that the pleader is entitled to relief.

(2) Under this "notice pleading" standard, the individual's complaint in the case at hand satisfied the requirements of Rule 8(a)(2) and was sufficient to survive the company's motion to dismiss, because the complaint gave the company fair notice of the basis for the individual's claims.

LEXIS HEADNOTES - Classified to U.S. Digest Lawyers' Edition:

[HN1]**
EVIDENCE §383

PLEADING §179
-- employment discrimination -- complaint -- prima facie case

Headnote: [1A] [1B] [1C] [1D] [1E] [1F] [1G]
In a private nonclass action filed in a Federal District Court and asserting employment discrimination claims pursuant to Title VII of the Civil Rights Act of 1964, as amended (42 USCS 2000e et seq.), or the Age Discrimination in Employment Act of 1967, as amended (ADEA) (29 USCS 621 et seq.), a complaint does not need to contain specific facts establishing a prima facie case of discrimination under the framework set forth by the United States Supreme Court in McDonnell Douglas Corp. v Green (1973) 411 US 792, 36 L Ed 2d 668, 93 S Ct 1817, which framework has been described as requiring a plaintiff to show (1) membership in a protected group, (2) qualification for the job in question, (3) an adverse employment action, and (4) circumstances supporting an inference of discrimination. Instead, pursuant to Rule 8(a)(2) of the Federal Rules of Civil Procedure, such a complaint must contain only a short and plain statement of the claims showing that the pleader is entitled to relief, for:
(1) The prima facie case under the McDonnell Douglas decision is an evidentiary standard--concerning the order and allocation of proof in a private nonclass action challenging employment discrimination--not a pleading requirement, and, consequently, the ordinary rules for assessing the sufficiency of a complaint apply.
(2) Under the "notice pleading" system of the Federal Rules of Civil Procedure, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case, because the McDonnell Douglas framework does not apply in every employment discrimination case, where, for instance, if a plaintiff is able to produce direct evidence of discrimination, then the plaintiff may prevail without proving all the elements of a prima facie case.
(3) Given that the McDonnell Douglas prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases.
(4) Other provisions of the Federal Rules of Civil Procedure are inextricably linked to Rule 8(a)'s simplified notice-pleading standard.
(5) Whatever the practical merits of an argument that allowing lawsuits based on conclusory allegations of discrimination to go forward would burden the courts and encourage disgruntled employees to bring unsubstantiated suits, the Federal Rules of Civil Procedure do not contain a heightened pleading standard for employment discrimination suits.
(6) A requirement of greater specificity for particular claims is a result that must be obtained by the process of amending the Federal Rules of Civil Procedure, not by judicial interpretation.

[HN2]**
PLEADING §103
-- employment discrimination -- complaint -- dismissal

Headnote: [2A] [2B] [2C] [2D] [2E]
Under the relevant "notice pleading" standard, an employment discrimination complaint filed in a Federal District Court by an individual, who was allegedly a native of Hungary and 53 years of age, against a company satisfied the requirements of Rule 8(a)(2) of the Federal Rules of Civil Procedure and was sufficient to survive a subsequent motion by the company to dismiss the complaint, because the complaint gave the company fair notice of the basis for the individual's claims, as:
(1) The individual alleged that he had been fired by the company (a) on account of his national origin, in asserted violation of Title VII of the Civil Rights Act of 1964, as amended (42 USCS 2000e et seq.), and (b) on account of his age, in asserted violation of the Age Discrimination in Employment Act of 1967, as amended (ADEA) (29 USCS 621 et seq.).
(2) In addition, the individual's complaint (a) detailed the events allegedly leading to his firing, (b) provided relevant dates, and (c) included the ages and nationalities of at least some of the relevant persons allegedly involved with his firing.
(3) These allegations (a) gave the company fair notice of what the individual's claims were and the grounds upon which they rested, and (b) stated claims upon which relief could be granted under Title VII and the ADEA

[HN3]**
APPEAL §1293
-- presumption -- complaint

Headnote: [3A] [3B]
Because the United States Supreme Court, on certiorari in a civil case, was reviewing a decision granting the respondent's motion to dismiss, the Supreme Court had to accept as true all of the factual allegations contained in the petitioner's complaint.

[HN4]**

DEPOSITIONS AND DISCOVERY §22

PLEADING §130

SUMMARY JUDGMENT AND JUDGMENT ON PLEADINGS §1
-- notice of claim

Headnote: [4A] [4B]
Under Rule 8(a)(2) of the Federal Rules of Civil Procedure, a complaint's statement of a claim must simply give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests. This liberal and simplified "notice pleading" standard--which was adopted to focus litigation on the merits of a claim and which applies to all civil actions, with limited exceptions--relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. In addition, if a pleading fails to specify the allegations in a manner that provides sufficient notice, then a defendant can move for a more definite statement, under Rule 12(e) of the Federal Rules of Civil Procedure, before responding.

[HN5]**
PLEADING §179
-- civil rights

Headnote: [5]
While Rule 9(b) of the Federal Rules of Civil Procedure provides for greater particularity than the simplified pleading standard of Rule 8(a) of the Federal Rules of Civil Procedure in all averments of fraud or mistake, complaints in cases of municipal liability under 42 USCS 1983 or employment discrimination, as in most other cases, must satisfy only the simple requirements of Rule 8(a), as Rule 9(b) does not refer to 1983 municipal liability or to employment discrimination.

[HN6]**
PLEADING §103
-- dismissal

Headnote: [6]
Given the simplified standard for pleading under the Federal Rules of Civil Procedure, a Federal District 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.

[HN7]**
PLEADING §1
-- standard

Headnote: [7]
Rule 8(a) of the Federal Rules of Civil Procedure establishes a pleading standard without regard to whether a claim will succeed on the merits. This is so even though it may appear on the face of the pleadings that a recovery is very remote and unlikely, but that is not the test.

SYLLABUS: Petitioner, a 53-year-old native of Hungary, filed this suit against respondent, his former employer, alleging that he had been fired on account of his national origin in violation of Title VII of the Civil Rights Act of 1964, and on account of his age in violation of the Age Discrimination in Employment Act of 1967 (ADEA). In affirming the District Court's dismissal of the complaint, the Second Circuit relied on its settled precedent requiring an employment discrimination complaint to allege facts constituting a prima facie case of discrimination under the framework set forth in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 802, 36 L. Ed. 2d 668, 93 S. Ct. 1817. **[***2]** The court held that petitioner had failed to meet his burden because his allegations were insufficient as a matter of law to raise an inference of discrimination.

Held: An employment discrimination complaint need not contain specific facts establishing a prima facie case under the *McDonnell Douglas* framework, but instead must contain only "a short and plain statement of the claim showing that the pleader is entitled to relief," Fed. Rule Civ. Proc. 8(a)(2). The *McDonnell Douglas* framework -- which requires the plaintiff to show (1) membership in a protected group, (2) qualification for the job in question, (3) an adverse employment action, and (4) circumstances supporting an inference of discrimination -- is an evidentiary standard, not a pleading requirement. See, *e.g.*, 411 U.S. at 800. The Court has never indicated that the requirements for establishing a prima facie case apply to pleading. Moreover, the *McDonnell Douglas* framework does not apply where, for example, a plaintiff is able to produce direct evidence of discrimination. See *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 121, 83 L. Ed. 2d 523, 105 S. Ct. 613. Under the Second Circuit's heightened **[***3]** pleading standard, however, a plaintiff without direct evidence at the time of his complaint must plead a prima facie case of discrimination even though discovery might uncover such direct evidence. 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. Moreover, the precise requirements of the prima facie case can vary with the context and were "never intended to

be rigid, mechanized, or ritualistic." *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 577, 57 L. Ed. 2d 957, 98 S. Ct. 2943. It may be difficult to define the precise formulation of the required prima facie case in a particular case before discovery has unearthed relevant facts and evidence. Consequently, the prima facie case should not be transposed into a rigid pleading standard for discrimination cases. Imposing the Second Circuit's heightened standard conflicts with Rule 8(a)'s express language, which requires simply that the complaint "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley* v. *Gibson*, 355 U.S. 41, 47, 2 L. Ed. 2d 80, 78 S. Ct. 99. **[***4]** 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. *Hishon* v. *King & Spalding*, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229. Petitioner's complaint easily satisfies Rule 8(a)'s requirements because it gives respondent fair notice of the basis for his claims and the grounds upon which they rest. In addition, it states claims upon which relief could be granted under Title VII and the ADEA. Thus, the complaint is sufficient to survive respondent's motion to dismiss. Pp. 3-9.

5 Fed. Appx. 63, reversed and remanded.

COUNSEL: Harold I. Goodman argued the cause for petitioner.

Jeffrey P. Minear argued the cause for the United States, as amicus curiae, by special leave of court.

Lauren R. Brody argued the cause for respondent.

JUDGES: THOMAS, J., delivered the opinion for a unanimous Court.

OPINIONBY: THOMAS

OPINION: [*995] [6]**

JUSTICE THOMAS delivered the opinion of the Court.

This case presents the question whether a complaint in an employment discrimination lawsuit must contain specific facts establishing a prima facie case of discrimination under the framework set forth by this Court in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973). We hold that an employment discrimination complaint need not include such facts and instead must contain only "a short and plain statement of **[***5]** the claim showing that the pleader is entitled to relief." Fed. Rule Civ. Proc. 8(a)(2). **[**7]**

I

Petitioner Akos **Swierkiewicz** is a native of Hungary, who at the time of his complaint was 53 years old. n1 In April 1989, petitioner began working for respondent Sorema N. A., a reinsurance company headquartered in New York and principally owned and controlled by a French parent corporation. Petitioner was initially employed in the position of senior vice president and chief underwriting officer (CUO). Nearly six years later, Francois M. Chavel, respondent's Chief Executive Officer, demoted petitioner to a marketing and services position and transferred the bulk of his underwriting responsibilities to Nicholas Papadopoulo, a 32-year-old who, **[*996]** like Mr. Chavel, is a French national. About a year later, Mr. Chavel stated that he wanted to "energize" the underwriting department and appointed Mr. Papadopoulo as CUO. Petitioner claims that Mr. Papadopoulo had only one year of underwriting experience at the time he was promoted, and therefore was less experienced and less qualified to be CUO than he, since at that point he had 26 years of experience in the insurance industry.

----------Footnotes----------

n1 Because we review here a decision granting respondent's motion to dismiss, we must accept as true all of the factual allegations contained in the complaint. See, *e.g.*, *Leatherman* v. *Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163, 164, 122 L. Ed. 2d 517, 113 S. Ct. 1160 (1993).

----------End Footnotes---------- **[***6]**

Following his demotion, petitioner contends that he "was isolated by Mr. Chavel . . . excluded from business decisions and meetings and denied the opportunity to reach his true potential at SOREMA." App. 26. Petitioner unsuccessfully attempted to meet with Mr. Chavel to discuss his discontent. Finally, in April 1997, petitioner sent a memo to Mr. Chavel outlining his grievances and requesting a severance package. Two weeks later, respondent's general counsel presented petitioner with two options: He could either resign without a severance package or be dismissed. Mr. Chavel fired petitioner after he refused to resign.

Petitioner filed a lawsuit alleging that he had been terminated on account of his national origin in violation of Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. § 2000e *et seq.* (1994 ed. and Supp. V), and on account of his age in violation of the Age Discrimination in Employment Act of 1967 (ADEA), 81 Stat. 602, as amended, 29 U.S.C. § 621 *et seq.* (1994 ed. and Supp. V). App. 28. The United States District Court for the

Southern District of New York dismissed petitioner's complaint **[***7]** because it found that he "had not adequately alleged a prima facie case, in that he had not adequately alleged circumstances that support an inference of discrimination." Id. at 42. The United States Court of Appeals for the Second Circuit affirmed the dismissal, relying on its settled precedent, which requires a plaintiff in an employment discrimination complaint to allege facts constituting a prima facie case of discrimination under the framework set forth by this Court in *McDonnell Douglas, supra,* at 802. See, *e.g.*, *Tarshis* v. *Riese Organization,* 211 F.3d 30, 35-36, 38 (CA2 2000); *Austin* v. *Ford Models, Inc.,* 149 F.3d 148, 152-153 (CA2 1998). The Court of Appeals held that petitioner had failed to **[**8]** meet his burden because his allegations were "insufficient as a matter of law to raise an inference of discrimination." 2001 U.S. App. LEXIS 3837, 5 Fed. Appx. 63, 65 (CA2 2001). We granted certiorari, 533 U.S. 976 (2001), to resolve a split among the Courts of Appeals concerning the proper pleading standard for employment discrimination cases, n2 and now reverse.

----------Footnotes----------

n2 The majority of Courts of Appeals have held that a plaintiff need not plead a prima facie case of discrimination under *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 36 L. Ed. 2d 668, 93 S. Ct. 1817 (1973), in order to survive a motion to dismiss. See, *e.g.*, *Sparrow* v. *United Air Lines, Inc.,* 342 U.S. App. D.C. 268, 216 F.3d 1111, 1114 (CADC 2000); *Bennett* v. *Schmidt,* 153 F.3d 516, 518 (CA7 1998); *Ring* v. *First Interstate Mortgage, Inc.,* 984 F.2d 924 (CA8 1993). Others, however, maintain that a complaint must contain factual allegations that support each element of a prima facie case. In addition to the case below, see *Jackson* v. *Columbus,* 194 F.3d 737, 751 (CA6 1999).

----------End Footnotes---------- **[***8]**

II

Applying Circuit precedent, the Court of Appeals required petitioner to plead a prima facie case of discrimination in order to survive respondent's motion to dismiss. See 5 Fed. Appx. at 64-65. In the Court of Appeals' view, petitioner was thus required to allege in his complaint: (1) membership in a protected group; (2) qualification for the job in question; (3) an adverse employment action; and (4) circumstances that support an inference of discrimination. *Ibid.*; cf. *McDonnell Douglas,* 411 U.S. at 802; *Texas Dept. of Community Affairs* v. *Burdine,* 450 U.S. 248, 253-254, n. 6, 67 L. Ed. 2d 207, 101 S. Ct. 1089 (1981).

[*997] The prima facie case under *McDonnell Douglas*, however, is an evidentiary standard, not a pleading requirement. In *McDonnell Douglas*, this Court made clear that "the critical issue before us concerned the order and allocation *of proof* in a private, non-class action challenging employment discrimination." 411 U.S. at 800 (emphasis added). In subsequent cases, this Court has reiterated that the prima facie case relates to the employee's burden of presenting evidence that raises an inference of discrimination. See *Burdine,* 450 U.S. at 252-253 **[***9]** ("In [*McDonnell Douglas,*] we set forth the basic allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination" (footnotes omitted)); 450 U.S. at 255, n. 8 ("This evidentiary relationship between the presumption created by a prima facie case and the consequential burden of production placed on the defendant is a traditional feature of the common law").

This Court has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss. For instance, we have rejected the argument that a Title VII complaint requires greater "particularity," because this would "too narrowly constrict the role of the pleadings." *McDonald* v. *Santa Fe Trail Transp. Co.,* 427 U.S. 273, 283, n. 11, 49 L. Ed. 2d 493, 96 S. Ct. 2574 (1976). Consequently, the ordinary rules for assessing the sufficiency of a complaint apply. See, *e.g.*, *Scheuer* v. *Rhodes,* 416 U.S. 232, 236, 40 L. Ed. 2d 90, 94 S. Ct. 1683 (1974) **[***10]** ("When a **[**9]** federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims").

In addition, under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case because the *McDonnell Douglas* framework does not apply in every employment discrimination case. For instance, if a plaintiff is able to produce direct evidence of discrimination, he may prevail without proving all the elements of a prima facie case. See *Trans World Airlines, Inc.* v. *Thurston,* 469 U.S. 111, 121, 83 L. Ed. 2d 523, 105 S. Ct. 613 (1985) ("The *McDonnell Douglas* test is inapplicable where the plaintiff presents direct evidence of discrimination"). Under the Second Circuit's heightened pleading standard, a plaintiff without direct evidence of discrimination at the time of his complaint must plead a prima facie case of discrimination, even though discovery might uncover such direct evidence. It thus seems incongruous to require a plaintiff, **[***11]** 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.

Moreover, the precise requirements of a prima facie case can vary depending on the context and were "never intended to be rigid, mechanized, or ritualistic." *Furnco Constr. Corp.* v. *Waters,* 438 U.S. 567, 577, 57 L. Ed. 2d

957, 98 S. Ct. 2943 (1978); see also *McDonnell Douglas, supra,* at 802, n. 13 ("The specification . . . of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations"); *Teamsters* v. *United States,* 431 U.S. 324, 358, 52 L. Ed. 2d 396, 97 S. Ct. 1843 (1977) (noting that this Court "did not purport to create an inflexible formulation" for a prima facie case); *Ring* v. *First Interstate Mortgage, Inc.,* 984 F.2d 924, 927 (CA8 1993) ("To measure a plaintiff's complaint against a particular formulation of the prima facie case at the pleading stage is inappropriate"). Before **[*998]** discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case. **[***12]** Given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases.

Furthermore, imposing the Court of Appeals' heightened pleading standard in employment discrimination cases conflicts with Federal Rule of Civil Procedure 8(a)(2), which provides that a complaint must include only "a short and plain statement of the claim showing that the pleader is entitled to relief." Such a statement must simply "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley* v. *Gibson,* 355 U.S. 41, 47, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. See id. at 47-48; *Leatherman* v. *Tarrant County Narcotics Intelligence* **[**10]** ***and Coordination Unit,* 507 U.S. 163, 168-169, 122 L. Ed. 2d 517, 113 S. Ct. 1160 (1993).** "The provisions for discovery are so flexible and the provisions for pretrial procedure and summary judgment so effective, that attempted surprise in federal practice is aborted very easily, synthetic **[***13]** issues detected, and the gravamen of the dispute brought frankly into the open for the inspection of the court." 5 C. Wright & A. Miller, Federal Practice and Procedure § 1202, p. 76 (2d ed. 1990).

Rule 8(a)'s simplified pleading standard applies to all civil actions, with limited exceptions. Rule 9(b), for example, provides for greater particularity in all averments of fraud or mistake. n3 This Court, however, has declined to extend such exceptions to other contexts. In *Leatherman* we stated: "The Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983. *Expressio unius est exclusio alterius.*" 507 U.S. at 168. Just as Rule 9(b) makes no mention of municipal liability under Rev. Stat. § 1979, 42 U.S.C. § 1983 (1994 ed., Supp. V), neither does it refer to employment discrimination. Thus, complaints in these cases, as in most others, must satisfy only the simple requirements of Rule 8(a). n4

----------Footnotes----------

n3 "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally." **[***14]**

n4 These requirements are exemplified by the Federal Rules of Civil Procedure Forms, which "are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate." Fed. Rule Civ. Proc. 84. For example, Form 9 sets forth a complaint for negligence in which plaintiff simply states in relevant part: "On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway."

----------End Footnotes----------

Other provisions of the Federal Rules of Civil Procedure are inextricably linked to Rule 8(a)'s simplified notice pleading standard. Rule 8(e)(1) states that "no technical forms of pleading or motions are required," and Rule 8(f) provides that "all pleadings shall be so construed as to do substantial justice." 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." *Hishon* v. *King & Spalding,* 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984). **[***15]** If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding. Moreover, claims lacking merit may be dealt with through summary **[*999]** judgment under Rule 56. The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim. See *Conley, supra,* at 48 ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits").

[11]** Applying the relevant standard, petitioner's complaint easily satisfies the requirements of Rule 8(a) because it gives respondent fair notice of the basis for petitioner's claims. Petitioner alleged that he had been terminated on account of his national origin in violation of Title VII and on account of his age in violation of the ADEA. App. 28. His complaint detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least **[***16]** some of the relevant persons involved with his termination. Id. at 24-28. These allegations give respondent fair notice of what petitioner's claims are and the grounds upon which they rest. See *Conley, supra,* at 47. In addition, they state claims upon which relief could be granted under Title VII and the ADEA.

Respondent argues that allowing lawsuits based on conclusory allegations of discrimination to go forward will burden the courts and encourage disgruntled employees to bring unsubstantiated suits. Brief for Respondent 34-40. Whatever the practical merits of this argument, the Federal Rules do not contain a heightened pleading standard for employment discrimination suits. 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." *Leatherman, supra*, at 168. Furthermore, Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits. "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Scheuer*, 416 U.S. at 236. **[***17]**

For the foregoing reasons, we hold that an employment discrimination plaintiff need not plead a prima facie case of discrimination and that petitioner's complaint is sufficient to survive respondent's motion to dismiss. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

United States Court of Appeals

For the First Circuit

No. 01-1995

TARA GORSKI,

Plaintiff, Appellant,

v.

NEW HAMPSHIRE DEPARTMENT OF CORRECTIONS,

Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Joseph A. DiClerico, Jr., U.S. District Judge]

Before

Torruella, Circuit Judge,

Stahl, Senior Circuit Judge,

and O'Toole,*District Judge.

Michael J. Sheehan for appellant.

Nancy J. Smith, Senior Assistant Attorney General, with whom Philip T. McLaughlin, Attorney General, was on brief, for appellee.

May 24, 2002

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* Of the District of Massachusetts, sitting by designation.

O'TOOLE, District Judge. At the time of the events at issue, appellant Tara Gorski was employed by the New Hampshire Department of Corrections (the "Department") as a sergeant assigned to duty in a secure psychiatric unit in the men's state prison in Concord. In her one-count amended complaint, Gorski alleged that the Department had constructively discharged her in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII"). Gorski claimed that she had been "the victim of direct sexual harassment and of a hostile work environment." More particularly, Gorski alleged that she had become pregnant in June 1998, and shortly afterward had told her supervisors of that fact. Thereafter, she alleged, both her direct supervisor, identified as "Lt. Kench," and her ultimate supervisor, unit director Joseph Panarello, "made derogatory comments about her pregnancy so as to give rise to a sexually hostile working environment." The amended complaint set forth a series of specific facts in support of the claim of discrimination.[1] The complaint then alleged: "The conduct described above was sufficiently severe or pervasive to constitute a sexually hostile work environment. As a result of this hostile environment, plaintiff was forced to resign in August 1998, a constructive discharge."[2]

The Department moved to dismiss the complaint for failure to comply with Title VII's administrative filing requirements and for failure

"to state facts which if true would meet the requirements for a claim of harassment based on gender under Title VII." The district court rejected the first ground, concluding that Gorski had complied timely with the prerequisites to a Title VII suit. What the district court did with respect to the second ground--failure to state a viable claim under Title VII--gives rise to this appeal.

Recognizing that a claim of discrimination supported by a theory of sexual harassment or hostile work environment could be made out if a plaintiff were to show "severe or pervasive conduct such that it constitutes a change in the terms and conditions of employment," the district court concluded:

The comments allegedly made by Gorski's superiors regarding her pregnancy do not rise to the level required to be actionable under Title VII. Sporadic use of abusive language does not create a hostile work environment because such conduct is not "extreme" enough to alter the terms and conditions of employment. Moreover, the remarks directed at Gorski were not physically threatening or humiliating. While the remarks Panarello and Kench made were insensitive, inappropriate and arguably offensive, these circumstances alone do not describe a workplace that a reasonable person would find hostile or abusive.

Having found that the complaint failed to state a viable claim for discrimination by reason of sexual harassment or a hostile work environment, the district court went on to conclude that the complaint did state "a claim of pregnancy discrimination," namely, that her supervisors had refused to grant her a transfer to another unit because she was pregnant. In effect, the district court parsed what had been pled as a single count into two distinct claims: one for discrimination by reason of sexual harassment/hostile work environment and one for "pregnancy discrimination." The court understood the complaint's allegation that Gorski was told her request for a transfer would not be granted because she was pregnant as asserting a claim of disparate treatment because of pregnancy. Satisfied that the latter claim was adequately asserted within the amended complaint, the district court entered an order denying the Department's motion to dismiss.

We think it is clear, not only from the amended complaint itself but also from the tenor of the arguments advanced by Gorski in opposition to the motion to dismiss, that Gorski conceived of her complaint as presenting a hostile environment claim, not a claim that a discrete employment decision--denial of a transfer--was itself a distinct act of disparate treatment discrimination. That latter theory is not explicitly--nor, we think, implicitly--asserted either in the complaint or in Gorski's legal argument opposing the motion to dismiss. In context, the allegations about Kench's comments concerning her prospects for a transfer were intended as examples of harassing conduct to support the broader allegation that there was a hostile work environment.

Nonetheless, no doubt trying to make the best of the situation, Gorski accepted the court's invitation to pursue the newly suggested theory. The parties proceeded to conduct discovery on the theory that Gorski

had been subjected to disparate treatment--i.e., the denial of a transfer--because of her pregnancy. There is nothing in the record or otherwise called to our attention that suggests that discovery was pursued by either side on the hostile work environment theory. Rather, it is clear that both the parties and the district court considered the court's dismissive treatment of that theory to be the equivalent of a formal dismissal of a claim resting on the theory, even though, as a formal matter, the court had *denied* the motion to dismiss without distinguishing between the different claims the court had found to lie within the allegations of the complaint.[3]

Following discovery, the Department moved for summary judgment as to a claim based on a denial of a transfer. On the summary judgment record, it was undisputed that "neither Kench nor Panarello had authority to transfer Gorski to another unit" and that "Gorski did not apply for a transfer to another unit." Under these circumstances, the district court concluded that "Gorski's unsupported speculation about what might have happened if she had applied for a transfer is insufficient to raise a material factual dispute," and it granted the motion. Judgment in favor of the Department was entered accordingly.

Gorski has appealed both the order limiting her claim to one for "pregnancy discrimination" and the order granting summary judgment on that claim. We review both rulings de novo. See Aldridge v. A. T Cross Corp., 284 F.3d 72, 78 (1st Cir. 2002) (reviewing motion to dismiss); Rochester Ford Sales, Inc. v. Ford Motor Co., 287 F.3d 32, 38 (1st Cir. 2002) (reviewing motion for summary judgment). We hold that the district court erred in concluding that Gorski had failed adequately to plead a claim under Title VII for sex discrimination based on a theory of hostile work environment. We affirm the district court's conclusion that a claim of disparate treatment by Gorski premised on a denial of a transfer request cannot be sustained on a factual record which shows that she had never requested a transfer and that the representative of the Department who purportedly discouraged her from requesting one lacked the authority to grant or deny such requests.

Discrimination by Reason of a Hostile Work Environment

Before considering whether Gorski's complaint adequately stated a claim upon which relief could be granted, it is useful to recall some general principles pertaining to a substantive claim of sex discrimination by reason of the existence of a hostile work environment.

Title VII prohibits employment discrimination "because of" an employee's sex. 42 U.S.C. § 2000e-2(a).[4] Discrimination "because of" a woman's pregnancy is discrimination "because of" her sex. See 42 U.S.C. § 2000e(k) ("The terms 'because of sex' or 'on the basis of sex' include, but are not limited to, because of or on the basis of pregnancy . . . ."). See also Smith v. F.W. Morse & Co., 76 F.3d 413, 420 (1st Cir. 1996).

The scope of Title VII's prohibition of discrimination "because of . . . sex" "is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions, or privileges of employment' evinces a congressional intent to strike at the entire spectrum of disparate

treatment of men and women in employment." Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 64 (1986) (citations and some internal quotation marks omitted). Thus, discrimination "because of . . . sex" includes "requiring people to work in a discriminatorily hostile or abusive environment." Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993). "When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated." Id. (citations and internal quotation marks omitted).

Sometimes, a workplace becomes a hostile working environment for a female employee because of other employees' sexual innuendos, see id. at 19, or unwelcome sexual advances or demands for sexual favors, see Meritor, 477 U.S. at 60. Sexual harassment, whether by means of a co-worker's demands for sexual favors as a "*quid pro quo*" or by the employer's creation or tolerance of a hostile and abusive work environment, constitutes discrimination prohibited by Title VII. See id. at 65; see also Faragher v. City of Boca Raton, 524 U.S. 775, 790-91 (1998).

We have previously observed that while evidence of sexually-charged or salacious behavior is often sufficient, it is not necessary to the proof that a work environment was sufficiently hostile or abusive to a female employee to amount to discrimination on the basis of sex. See O'Rourke v. City of Providence, 235 F.3d 713, 729 (1st Cir. 2001) (noting that "sex-based harassment that is not overtly sexual is nonetheless actionable under Title VII");

Lipsett v. Univ. of Puerto Rico, 864 F.2d 881, 905 (1st Cir. 1988) (stating that male employees' verbal attacks directed at female employees that were not sexual in nature but were "anti-female" could be found to contribute to hostile work environment); see also Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) ("[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex."). As we noted in O'Rourke, "incidents of nonsexual conduct--such as work sabotage, exclusion, denial of support, and humiliation--can in context contribute to a hostile work environment." 235 F.3d at 730. Indeed, the theory that a hostile work environment was a species of employment discrimination prohibited by Title VII was originally recognized in cases decided by various courts of appeals involving discrimination on bases other than sex, such as national origin, race, and religion. See Meritor, 477 U.S. at 65-66 (citing, among other cases, Rogers v. EEOC, 454 F.2d 234, 239 (5th Cir. 1971) (holding that an Hispanic claimant had sufficiently alleged a Title VII claim where her employer's discriminatory service to its Hispanic clientele created an offensive work environment) and Firefighters Inst. for Racial Equality v. City of St. Louis, 549 F.2d 506, 514-15 (8th Cir. 1977) (holding that black firefighters sufficiently alleged a hostile work environment where the city allowed on-duty white firefighters to use the firehouse's kitchen facilities in a discriminatory and segregated manner)).

What *is* essential is proof that the work environment was so hostile or abusive, because of conduct based on one of the prohibited factors identified in Title VII, that the terms or conditions of the

plaintiff's employment were caused to be altered. For this there is no "mathematically precise test." Harris, 510 U.S. at 22. Rather, "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances," which may include "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Id. at 23.

The issue presently before us, however, is not what the plaintiff is required ultimately to *prove* in order to prevail on her claim, but rather what she is required to *plead* in order to be permitted to develop her case for eventual adjudication on the merits. In determining that Gorski had not sufficiently stated a claim for sex discrimination by reason of a hostile work environment, the district court focused on the specific instances of harassing comments alleged in the complaint and concluded that, assuming the allegations to be true, the comments did not add up to "conduct [that was] 'extreme' enough to alter the terms and conditions of employment." This was error because the district court's resolution implicitly measured the complaint against a stricter standard of pleading than is required. In undertaking to assess how "extreme" the complained of conduct was, the district court was not determining whether the complaint adequately had alleged the elements of a hostile work environment claim, but rather was performing an evaluative judgment, usually left to the trier of fact, as to whether the hostility or harassment that was alleged was sufficiently severe or pervasive enough to warrant relief...

It is a familiar principle that a complaint should be dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). The factual allegations of the complaint are to be accepted as true; and all reasonable inferences that might be drawn from them are indulged in favor of the pleader. See Kiely v. Raytheon Co., 105 F.3d 734, 735 (1st Cir. 1997)(per curiam); Garita Hotel L.P. v. Ponce Fed. Bank, F.S.B., 958 F.2d 15, 17 (1st Cir. 1992).

Like most federal civil actions, all that is required to plead adequately a cause of action under Title VII is "(1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . . , (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks." Fed. R. Civ. P. 8(a).[5]

The Supreme Court has recently confirmed that complaints alleging employment discrimination need only satisfy "the simple requirements of Rule 8(a)." Swierkiewicz v. Sorema N.A., - U.S. -, 122 S. Ct. 992, 998 (2002). In assessing whether a complaint satisfies Rule 8's requirements, the issue is not "whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Id. at 997 (quoting Scheuer v. Rhodes, 416 U.S. 232, 236 (1974)). Although some cases have suggested that a heightened pleading standard may exist in certain civil rights cases, see, e.g., 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),[6] Swierkiewicz makes clear that "the Federal Rules do not contain a heightened pleading standard for employment discrimination suits." 122 S. Ct. at 999.

Gorski's complaint adequately pled a cause of action for employment discrimination by reason of an abusive or hostile work environment. First, she alleged that her supervisors "discriminated against [her] on the basis of her gender (female) and of her pregnancy" by making "derogatory comments about her pregnancy so as to give rise to a sexually hostile working environment." She went on to allege "specific facts" in support of her claims, consisting of seven separate examples of what she asserted were hostile or abusive comments. She then alleged that the conduct previously described "was sufficiently severe or pervasive to constitute a sexually hostile work environment."

The district court apparently assumed that the seven specific instances of harassing comments pled in the complaint constituted the sum total of the plaintiff's evidence of the hostility or abusiveness of the work environment and then proceeded to evaluate those allegations in light of the applicable legal standard. But the complaint did not allege that the specific instances of harassment set out were the *only* evidence available to support the discrimination claim. Nor was there any obligation on the pleader to identify in the complaint all the evidence that would later be offered in support of the claim pleaded. See 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."). The district court's error lay not in its application of the appropriate legal standard to a fixed set of facts, but rather in its belief that there was a fixed set of facts to which the standard could be applied.

It is not necessary at this point to decide whether the plaintiff could sustain a hostile work environment claim if the factual evidence she could marshal at trial were limited to the facts alleged in the amended complaint. We do observe, however, that proof of such a claim is highly fact specific. See Harris, 510 U.S. at 23 ("[W]hether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances"); see also Conto v. Concord Hosp., Inc., 265 F.3d 79, 81 (1st Cir. 2001) (whether there was a hostile work environment "necessarily entailed a fact-specific assessment of all the attendant circumstances."). In addition to the plaintiff's subjective perception of it, the tenor of the environment must be such that an objectively reasonable person would find it hostile or abusive. See Harris, 510 U.S. at 21. Subject to some policing at the outer bounds, that question is commonly one of degree--both as to severity and pervasiveness--to be resolved by the trier of fact on the basis of inferences drawn "from a broad array of circumstantial and often conflicting evidence." Lipsett, 864 F.2d at 895 (quoting Stepanischen v. Merchants Despatch Transp. Corp., 772 F.2d 922, 929 (1st Cir. 1983)).

When the allegations of the complaint are read favorably to Gorski, with the understanding that notice pleading does not require recitation of detailed evidence in support of the claim, it is clear that Gorski satisfactorily alleged the elements of a cause of action for discrimination under Title VII in conformity with the pleading requirements of the Federal Rules of Civil Procedure. Her hostile work

environment claim should not have been dismissed.

Summary Judgment as to a Denial of Transfer Claim

The second ruling appealed from--the grant of summary judgment against Gorski as to a claim that the Department had discriminated against her by effectively denying her a transfer to a different unit--is easily affirmed.

To prove that a particular adverse employment action taken with respect to her amounted to discrimination because of her pregnancy, Gorski would have to show that (1) she was pregnant at the relevant time, (2) her job performance was satisfactory, but (3) her employer took some adverse employment action against her while (4) treating non-pregnant employees differently. See F.W. Morse & Co., 76 F.3d at 421. See also Johnson v. Allyn & Bacon, Inc., 731 F.2d 64, 70 (1st Cir. 1984); Loeb v. Textron, Inc., 600 F.2d 1003, 1014 (1st Cir. 1979).

Gorski plainly satisfied the first two elements: she was pregnant, and her job performance was satisfactory. For present purposes we will also assume that she satisfied the fourth element by offering evidence that some employee requests for transfers were honored, although the evidence on this point was somewhat general. However, Gorksi failed to point to admissible evidence sufficient to permit a rational trier of fact to conclude that she had satisfied the third element--that the Department took an adverse employment action against her.

While there is no doubt that in an appropriate case the denial of a request for a transfer may be sufficiently harmful to amount to an adverse employment action, see Randlett v. Shalala, 118 F.3d 857, 862 (1st Cir. 1997), there was no actual denial by the Department of such a request by Gorksi. It is undisputed that Gorski never actually applied for a transfer, so there was not even an occasion for a denial. She attempts to make up for the absence of an actual denial of a request by proposing that there was a constructive denial. She asserts that her submission of a formal request for a transfer would have been a "futile gesture" in light of what Panarello and Kench had said to her. See Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 366 (1977).

The summary judgment record includes the Department's policies and procedures pertaining to lateral transfers. Generally, the Department retained the management prerogative to assign corrections officers to particular duties as it deemed appropriate. If a position became vacant, an employee could request either a lateral transfer or promotion to that vacancy. The manager in the unit where the vacancy occurred would decide which employee among multiple applicants would be selected to fill the vacancy, and consistent with provisions of an applicable collective bargaining agreement, the decision would ordinarily be made on the basis of seniority. The applicant's current supervisor did not have the authority to grant transfers to other assignments.

Gorski's assertion that her request for a lateral transfer would have been futile lacks support in the record. Her theory is that the opposition of Panarello and Kench to the transfer doomed any request

she might make. The record, however, shows that Panarello and Kench had at best a tangential involvement in the process.(7) While it is possible to imagine a set of events in which an employee's current supervisor might, outside the prescribed process, poison the mind of the actual decision maker against an employee so as to procure the denial of a transfer request, imagined events cannot be the basis for a favorable verdict. In opposing a motion for summary judgment, a plaintiff must proffer admissible evidence that could be accepted by a rational trier of fact as sufficient to establish the necessary proposition. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). On this issue, Gorski failed to do so, and the district court properly ruled that she could not prevail on a "disparate treatment" claim.(8)

Conclusion

For the foregoing reasons, the judgment of the district court is vacated. The order dismissing the claim of sex discrimination by reason of a hostile work environment is reversed. The order granting summary judgment in favor of the Department on a claim of sex discrimination by reason of denial of a transfer is affirmed. The case is remanded for further proceedings consistent with this opinion.

1. Paragraph 9 of the amended complaint reads:

> Following are specific facts that support plaintiff's claims:
>
> a. upon first learning of plaintiff's pregnancy, Mr. Panarello said "oh Tara, why did you have to do that? Why did you get pregnant, with everything going on, why do you want another child?"
>
> b. Lt. Kench said, "oh great, we're going to have to deal with that now;"
>
> c. after learning of plaintiff's pregnancy, when plaintiff complained about her workload (a significant complaint that pre-dated plaintiff's pregnancy by months), Lt. Kench and others responded with comments like "she's just pregnant," "you're only complaining now because you're pregnant," and "it's your hormones;"
>
> d. during this same time frame, plaintiff requested a transfer out of the unit. As a reason to deny that request, Lt. Kench said "maybe you won't come back," referring to the time away from work after plaintiff's child was born;
>
> e. Lt. Kench also said, in response to plaintiff's request for a transfer, "no one is going to want you because you are pregnant and

you are going to have to wait until after you are back;"

f. while on stress leave in September 1998 (which leave DOC approved), Mr. Panarello called plaintiff and asked if she could come in for one day to show a co-worker what to do with a project that plaintiff knew well, knowing it went against plaintiff's doctor's advice to remain out of work; and

g. while on leave on October 27, 1998, Mr. Panarello went to plaintiff's house and pressured her to return to work, asking "why aren't you at work, what's your problem?" contrary to the instructions of plaintiff's doctor. Plaintiff told Mr. Panarello that she had experienced problems with Lt. Kench, that she raised these problems with Mr. Panarello, and that Mr. Panarello did nothing.

2. The allegation that Gorski "was forced to resign in August" appears to be at odds with a preceding allegation that she was on "stress leave" during September and October. However this apparent inconsistency might ultimately be resolved, its resolution is not material to the disposition of the issues presented by this appeal.

3. For example, in its later order granting summary judgment on the transfer issue, the district court noted that "Gorski's claim of sexual harassment was dismissed on July 19, 2000," apparently pursuant to Fed. R. Civ. P. 12(b)(6).

4. It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to [her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect [her] status as an employee, because of such individual's race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-2(a).

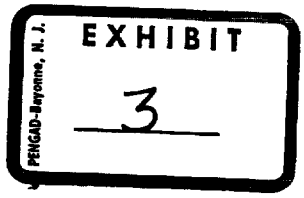
5. There are two other provisions of Rule 8 that are pertinent: "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." Fed. R. Civ. P. 8(e)(1); and "All pleadings shall be so construed as to do substantial justice." Fed. R. Civ. P. 8(f).

6. But see Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993) (holding that there is no heightened pleading requirement in § 1983 suits against municipalities).

7. So far as appears from the record, the only involvement for a current supervisor in an employee's application for a transfer to a

vacant position was the requirement that the supervisor sign the form used by an employee to request a lateral transfer. There does not appear to be any provision making the current supervisor's approval a necessary prerequisite to the granting of a transfer.

8. In fairness to Gorski, as noted above, the denial of transfer theory was not her original theory of her claim, and it seems she pursued it only after the district court had closed the door to her pursuit of her hostile environment claim. While the comments of her supervisors regarding her wish to be transferred do not by themselves support a claim of discrimination, those comments may be relevant to the question whether and to what degree the work environment was hostile and/or abusive.



UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW HAMPSHIRE

Tara Gorski

v.

New Hampshire Department of Corrections

Civil No. 99-562-JD
Opinion No. 2000DNH156

O R D E R

Tara Gorski filed suit against her former employer, the New Hampshire Department of Corrections ("NHDOC"), claiming that she suffered sexual harassment during her employment. After NHDOC filed a motion to dismiss, Gorski filed an amended complaint. The parties agreed that NHDOC's motion to dismiss would apply to the amended complaint, and NHDOC filed a supplemental memorandum in support of its motion. Gorski objects to the motion.

Standard of Review

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) is one of limited inquiry, focusing not on "whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). In reviewing the sufficiency of a complaint, the court accepts "the factual averments contained in the complaint as true, indulging every reasonable

inference helpful to the plaintiff's cause." Garita Hotel Ltd. Partnership v. Ponce Fed. Bank, 958 F.2d 15, 17 (1st Cir. 1992). In cases involving an alleged violation of a civil right, the court requires "plaintiffs to outline facts sufficient to convey specific instances of unlawful discrimination." Dartmouth Review v. Dartmouth College, 889 F.2d 13, 16 (1st Cir. 1989). Applying this standard, the court will grant a motion to dismiss "'only if it clearly appears, according to the facts alleged, that the plaintiff cannot recover on any viable theory.'" Garita Hotel Ltd. Partnership, 958 F.2d at 17 (quoting Correa-Martinez v. Arrillaga-Belendez, 903 F.2d 49, 52 (1st Cir. 1990)).

Background[1]

Gorski was employed at NHDOC from 1992 until August of 1998. In mid June of 1998, Gorski became pregnant. She informed her supervisors of the pregnancy at some point before July 1, 1998. Gorski complains of certain comments related to her pregnancy that were made by her direct supervisor, Lt. Kench, and her ultimate supervisor, Director Joseph Panarello.

Upon learning of her pregnancy, Panarello said, "Oh Tara, why did you have to do that? Why did you get pregnant, with

[1]Unless otherwise indicated, the facts are taken from Gorski's amended complaint.

everything going on, why do you want another child?" and Kench said, "Oh great, we're going to have to deal with that now." When Gorski subsequently complained about her workload, Kench responded with comments like, "she's just pregnant," "you're only complaining now because you're pregnant," and "it's your hormones." When Gorski requested an internal transfer, Kench denied her request, at least in part because he thought no other unit would accept her, knowing she was pregnant, for fear that she would not return to work after the birth of her child.

Gorski also complains that after going on leave from work, Panarello called her in September of 1998 to ask her if she could come to work, knowing that Gorski was on leave for stress-related reasons. Then, in October of 1998, Panarello went to Gorski's home and pressured her to return to work. Gorski told Panarello that she had problems with Kench, but Panarello took no action. She also complained to the human resources office about both Kench and Panarello, but she claims that NHDOC took no responsive action.

Gorski resigned in August of 1998.[2] She filed a charge with the New Hampshire Commission for Human Rights ("NHCHR") on April

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[2]In her complaint, Gorski alleges both that she was on leave from her job in September and October of 1998 and that she resigned in August of 1998. She does not explain this apparent discrepancy.

14, 1999. The Equal Employment Opportunity Commission ("EEOC") issued her a right-to-sue notice on November 10, 1999. Gorski filed her original complaint with this court on December 6, 1999.

Discussion

NHDOC moves to dismiss Gorski's amended complaint on the grounds that her lawsuit is untimely and that her allegations fail to state a claim under Title VII.

I. Timeliness of Filing

Before a plaintiff may bring suit under Title VII in federal court, she must file a charge with the EEOC or the appropriate state agency. See 42 U.S.C.A. § 2000e-5 (1994); Bonilla v. Muebles J.J. Alvarez, Inc., 194 F.3d 275, 278 (1st Cir. 1999); Lawton v. State Mut. Life Assurance Co. of Am., 101 F.3d 218, 221 (1st Cir. 1996). This exhaustion requirement is not jurisdictional; rather, it functions like a statute of limitations, and may be excused for equitable reasons. See Bonilla, 194 F.3d at 278 (citing Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393 (1982)). However, such cases are exceptional, and in general, a plaintiff's failure to adhere to the exhaustion requirement bars her claim from federal court. See id.

In states where a plaintiff can file a charge with an authorized state agency, the plaintiff must do so within 300 days of the alleged discrimination. See 42 U.S.C.A. § 2000e-5(e)(1) (1994); EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 110 (1988); Provencher v. CVS Pharmacy, 145 F.3d 5, 13 (1st Cir. 1998). The NHCHR is New Hampshire's authorized state agency for this purpose. See Bergstrom v. University of New Hampshire, 959 F. Supp. 56, 59 (D.N.H. 1996). Therefore, the question in this case is whether Gorski filed her charge with the NHCHR within 300 days of the discriminatory acts she alleged in that charge.[3]

Gorski filed her charge with the NHCHR on April 14, 1999, and the 300th day before that falls on or about June 18, 1998. The comments about which Gorski complains all occurred after she informed her supervisors at NHDOC about her pregnancy. Taking the facts alleged in the amended complaint as true, and indulging all reasonable inferences in Gorski's favor, NHDOC has not shown that the comments were made before June 18, 1998. In fact, it appears that in all likelihood, at least some of the comments were made after that date. Therefore, NHDOC is not entitled to dismissal on this ground.

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[3]The plaintiff did not attach a copy of the NHCHR charge to her complaint. The court assumes that the conduct alleged in her complaint is the same conduct she included in her charge to the NHCHR.

II. Sufficiency of Title VII Claim

Under Title VII, it is unlawful for an employer "to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C.A. § 2000e-2(a) (1994). Discrimination on the basis of sex includes discrimination based on pregnancy. See 42 U.S.C.A. § 2000e(k) (1994). Sexual harassment constitutes unlawful discrimination on the basis of sex under Title VII. See Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986); Provencher, 145 F.3d at 13. Gorski alleges that she was sexually harassed because she was subjected to a hostile work environment as a result of her pregnancy.

A claim of sexual harassment due to a hostile work environment requires a showing of severe or pervasive conduct such that it constitutes a change in the terms and conditions of employment. See Faragher v. City of Boca Raton, 524 U.S. 775, 786 (1998) (citing Meritor, 477 U.S. at 67). Sexual harassment is not measured only in economic terms, and may occur where an abusive working environment exists. See id. The work environment must be "both objectively and subjectively offensive,

one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so." Faragher, 524 U.S. at 775 (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993)). In deciding whether harassment is actionable under Title VII, the court must consider the totality of the circumstances, including the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." Id. at 787-88 (quoting Harris, 510 U.S. at 23); see also Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 540 (1st Cir. 1995) (applying Title VII analysis to Title IX case).

The comments allegedly made by Gorski's superiors regarding her pregnancy do not rise to the level required to be actionable under Title VII. "Sporadic use of abusive language" does not create a hostile work environment because such conduct is not "extreme" enough to alter the terms and conditions of employment. Faragher, 524 U.S. at 788. Moreover, the remarks directed at Gorski were not physically threatening or humiliating. While the remarks Panarello and Kench allegedly made were insensitive, inappropriate and arguably offensive, these circumstances alone do not describe a workplace that a "'reasonable person would find hostile or abusive.'" Oncale v. Sundowner Offshore Servs., Inc.,

523 U.S. 75, 81 (1998) (quoting Harris, 510 U.S. at 21). As for interference with her work performance, Gorski states in her complaint that she was absent from work on stress-related leave in September and October of 1998, but she does not allege that her stress was caused by her supervisors' conduct.[4]

Furthermore, Panarello's attempts to get Gorski to return to work are not sufficiently linked to her gender or her pregnancy to constitute sexual harassment. See Morrison v. Carleton Woolen Mills, Inc., 108 F.3d 429, 441 (1st Cir. 1997). Gorski alleges that Panarello pressured her to return to work, knowing she was under doctor's orders not to do so. However, she does not explain the underlying reasons for her absence from work or her stress, and does not connect these conditions to her pregnancy or to her supervisors' behavior. Even if she had left work because of sexual harassment she experienced there, the complaint does not allege facts sufficient to show that Panarello's subsequent behavior was motivated by Gorski's gender or her pregnancy.[5]

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[4]As noted above, Gorski's claim that she was out on leave in September and October conflicts with her statement that she resigned in August. Her complaint does not allege that her work performance suffered before August.

[5]Gorski claims that she suffered tangible employment actions, making NHDOC strictly liable for sexual harassment. However, as discussed above, Gorski has not alleged sufficient facts to state a claim for sexual harassment. Therefore, the court need not address arguments relevant to vicarious liability.

See id.; Geier v. Medtronic, Inc., 99 F.3d 238, 242 (7th Cir. 1996).

The only event Gorski alleges that goes beyond verbal remarks is Kench's refusal to grant her transfer request on the basis that no other unit would accept her while she was pregnant. This allegation would be more accurately classified as a claim of pregnancy discrimination rather than sexual harassment, both of which are subsets of discrimination based on sex. It is not clear from the complaint whether Gorski intended to bring a claim based on pregnancy discrimination. However, because Gorski brought suit under Title VII, and because the court considers whether the facts in her complaint would permit recovery under any viable theory, see Garita Hotel Ltd. Partnership, 958 F.2d at 17, the court examines whether Gorski has alleged sufficient facts to state a claim for pregnancy discrimination under Title VII.

To state a claim of discrimination based on disparate treatment, Gorski must establish a prima facie case of discrimination by showing (1) she was pregnant; (2) her job performance was satisfactory; (3) her employer took an adverse employment action against her; and (4) other employees who were

not pregnant were treated differently.[6] See Smith v. F.W. Morse & Co., 76 F.3d 413, 421 (1st Cir. 1996); Geier, 99 F.3d at 243. Gorski alleges in her complaint that she was pregnant and was otherwise qualified to hold her job. She also alleges that Kench denied her request for an internal transfer because she was pregnant. A refusal to transfer can, in some circumstances, constitute an adverse employment action. See Randlett v. Shalala, 118 F.3d 857, 862 (1st Cir. 1997) (holding refusal to transfer can be adverse employment action in Title VII retaliation case). While Gorski does not describe the nature of the transfer she requested, or explain how the transfer would have altered the terms and conditions of her employment, her allegations suffice to meet the minimal pleading requirements at this stage of litigation. Likewise, her allegation that Kench explicitly gave her pregnancy as a reason for denying the transfer suffices as an allegation that she was treated differently from other employees who were not pregnant. Therefore, Gorski's allegations as to the denial of her requested transfer state a claim under Title VII.

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[6]The elements of a Title VII prima facie case depend on the facts of each particular case. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 n.13 (1973).

Conclusion

For the foregoing reasons, the defendant's motion to dismiss (document no. 8) is denied.

SO ORDERED.

Joseph A. DiClerico, Jr.
District Judge

July 19, 2000

cc: Michael J. Sheehan, Esquire
Nancy J. Smith, Esquire