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The U.S. Supreme Court decision in *Ashcroft v. Iqbal* did not garner much attention when it was first decided but is implications on the ability to have cases dismissed in the early stages in district court are just now being felt. The court's decision along with other precedent, radically changes the rules of pleading in all civil cases and make it much easier for a federal judge to dismiss a complaint in the initial stage of the lawsuit.

Tightened Federal Pleading Rules Take Effect: Three Months After the U.S. Supreme Court's *Iqbal* Decision

By Lawrence W. Marquess and Jeff Timmerman

In *Ashcroft v. Iqbal*, 129 S.Ct. 1937 (2009), a case that initially garnered little attention when it was decided, the United States Supreme Court, emphasized and elaborated on the "plausibility" standard first injected into Rule 8 of the Federal Rules of Civil Procedure two years earlier in *Bell Atlantic Corp. v. Twombly*[1] an antitrust case. The importance of understanding the resulting enhanced requirements for pleading a claim under Rule 8 cannot be overstated. Together, the *Twombly* and *Iqbal* decisions radically change the rules of pleading in all civil cases and make it much easier for a federal judge to dismiss a complaint in the initial stage of the lawsuit. The preparation of an adequate complaint for relief in a federal court - one that will withstand a Rule 12(b)(6) motion to dismiss - is now a far more demanding task than has previously been the case.

Developments in the three months since the *Iqbal* decision was announced have confirmed that conclusory complaints, missing specific factual allegations on each of the elements of each claim, are likely to be dismissed. Over this short period, federal judges cited the *Iqbal* decision over 500 times.[2] *Iqbal's* impact on employment-related claims has been both immediate and far-reaching. Complaints that previously would not even have warranted a motion to dismiss because of the lenient pleading standard are now being dismissed under *Iqbal*. Already, the impact on federal litigation has led to the introduction of a bill in the U.S. Senate to overturn the Twombly and Iqbal decisions on this issue and restore the previous, more lenient pleading standard. While the extent to which Iqbal will ultimately alter the landscape of notice pleading in employment cases and for how long remains to be seen, the decision is for the time being a powerful tool for challenging baseless or thinly pled claims prior to commencing discovery - a tool that should at least be considered at the outset of every civil case.

The Facts and Procedural History of *Iqbal*

The plaintiff in *Iqbal*, a Muslim Pakistani, was detained under restrictive conditions by the United States government on criminal charges in the aftermath of the September 11 terrorist attacks. Iqbal filed a *Bivens* action (a private cause of action against

federal officials seeking monetary damages for alleged violation of Constitutional rights) against numerous federal officials, including, among others, former Attorney General John Ashcroft (Ashcroft) and Robert Mueller (Mueller), the Director of the Federal Bureau of Investigation (FBI).

In his 21-cause-of-action complaint, Iqbal alleged that Ashcroft and Mueller were involved in the decisions by which he was designated as a person "of high interest" to the September 11 investigation on account of his race, religion, and/or national origin, in violation of the First and Fifth Amendments to the United States Constitution. Iqbal's complaint further alleged that: (1) the FBI, under the direction of Mueller, arrested and detained thousands of Arab Muslim men as part of its investigation of the September 11 terrorist attacks; (2) in the weeks after the September 11 terrorist attacks, Ashcroft and Mueller approved a policy of holding certain "high interest" detainees in highly restrictive conditions of confinement until they were cleared by the FBI; and (3) Ashcroft and Mueller each knew of, condoned, and willfully and maliciously agreed to subject Iqbal to harsh conditions of confinement as a matter of policy, solely on account of his religion, race, and/or national origin and for no legitimate purpose.

Ashcroft and Mueller moved to dismiss Iqbal's claims under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which relief can be granted. The district court denied their motion, applying the "no set of facts" standard originally set forth in *Conley v. Gibson* that had for fifty years been the standard for measuring the adequacy of pleadings under Federal Rule of Civil Procedure 12(b)(6).[3] Ashcroft and Mueller filed an interlocutory appeal, and while that appeal was pending the United States Supreme Court decided *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), which "retired" the *Conley* "no set of facts" standard in favor of a new "plausibility" standard. In affirming the district court's denial of Ashcroft's and Mueller's motion to dismiss, the Second Circuit Court of Appeals concluded that *Twombly* "call[s] for a flexible plausibility standard, which obliges a pleader to amplify a claim with some factual allegations in those contexts where such amplification is needed to render the claim *plausible*."[4] Iqbal's claim did not require amplification, the Second Circuit concluded, and thus he sufficiently alleged cognizable constitutional claims.

The Supreme Court's Decision: Plausibility Defined

The United States Supreme Court granted certiorari, and in a five-to-four decision, reversed the Second Circuit, dismissed Iqbal's claims, and remanded the case to the Second Circuit to "decide in the first instance whether to remand to the District Court so that [Iqbal] can seek leave to amend his deficient complaint." Writing for the majority, Justice Kennedy defined what it means for a complaint to "state a claim to relief that is plausible on its face[]"[5]:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." [*Twombly* at 570]. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct. *Id*. at 556. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant acted unlawfully. *Ibid*. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"[6]

Justice Kennedy further elaborated on how the plausibility standard is to be applied:

> Two working principles underlie our decision in *Twombly*. *First*, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. *Second*, only a complaint that states a plausible claim for relief survives a motion to dismiss. Determining whether a complaint states a plausible claim for relief will, as the Court of Appeals observed, be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense. But *where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged - but it has not "show[n]" - "that the pleader is entitled to relief*."[7]

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In keeping with these principles, the Supreme Court instructed that, in considering motions to dismiss, district courts should first identify those pleadings which, because they are merely legal conclusions couched as factual allegations, are not entitled to the assumption of truth. Because many of Iqbal's allegations were, in reality, legal conclusions, the Supreme Court refused to accept those allegations as true or to consider them in evaluating the plausibility of the allegations of misconduct.

After dispensing with Iqbal's conclusory allegations, the Supreme Court reviewed his factual allegations to determine whether they plausibly suggested entitlement to relief. In further elaborating on *Twombly*, the Supreme Court in *Iqbal* reiterated that, although Iqbal's factual allegations were consistent with constitutional violations, they did not plausibly suggest entitlement to relief "given more likely explanations,...." Specifically, while Iqbal alleged that Ashcroft and Mueller purposefully designated Arab Muslim detainees as persons "of high interest" because of their race, religion, and/or national origin, an "obvious [non-discriminatory] alternative explanation" - that Arab Muslim detainees were arrested because they were illegally present in the United States and had potential connections to the September 11 terrorist attacks conducted by *Arab Muslims* - was more compelling. Although Iqbal's factual allegations were consistent with his claim that Ashcroft and Mueller had acted unlawfully, they did not create a plausible claim because the Court, exercising its "judicial experience and common sense," could see "more likely explanations" for the defendants' actions.[8]

The application of this reasoning in employment cases is obvious. For example, in a disparate treatment employment discrimination case, the *Iqbal* decision directs the district court, evaluating the sufficiency of the complaint under Rule 12(b)(6), to ignore the conclusory allegations, assume the truth of the non-conclusory factual allegations, and then, *applying its experience and common sense*, determine whether those facts *plausibly* show that the defendant acted for a discriminatory reason. If the facts allow for some alternative, nondiscriminatory reason for the defendant's action, then the district court must decide whether it is plausible that discrimination was the motivation. To demonstrate plausibility, the factual allegations must do *more* than just allow the inference of the "mere possibility of misconduct."

The Supreme Court's Decision: Addressing *Iqbal's* Arguments

After determining that Iqbal's complaint failed to state a facially plausible claim for relief, the Supreme Court addressed three arguments raised by Iqbal. First, the Supreme Court expressly noted that *Twombly* is not limited to antitrust suits. On the contrary, citing to Federal Rule of Civil Procedure 1, the court noted that *Twombly* applies to "all civil actions and proceedings in the United States district courts."

Second, the Supreme Court reiterated its rejection in *Twombly* of the availability of limited, or "cabined," discovery as a reason to save an otherwise deficient complaint. Stated otherwise, a "careful-case-management approach" does not serve to relax the federal pleadings requirements.[9]

Finally, Iqbal argued he did not need to plead intent with factual specificity because under Rule 9 only fraud or mistake need to be pled with particularity, while malice, intent, knowledge and other mental conditions only need to be pled "generally." The Court replied: "Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard. It does not give him license to evade the less rigid - though still operative - strictures of Rule 8. ... Rule 8 does not empower [Iqbal] to plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss."[10]

Iqbal's Immediate Impact on Title VII Claims

It did not take federal district courts long to apply *Iqbal* in the Title VII context. On June 4, 2009, the United States District Court for the District of Delaware dismissed a plaintiff's Title VII race, national origin, and sex discrimination claims because the plaintiff failed to state a facially plausible claim.[11] The *Golod* court described the complaint's deficiencies as follows:

> In this case, plaintiff claims she is part of a protected class, and was discriminated against and retaliated against because of

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> it. The problem with this allegation is that she has failed to allege a key element - namely, that nonmembers of the protected class were treated more favorably. Plaintiff has alleged that she was passed over for promotions in favor of other people with the same or less experience. She does not claim that these "other people" were not female, not Jewish, or not "Russian Jews."
>
> Furthermore, plaintiff does not plead which promotions she was denied because of the alleged discrimination and retaliation. She also does not explain what protected conduct she engaged in that resulted in those unidentified promotions. Instead, plaintiff makes a sweeping claim that for ten years she was discriminated against, and that this discrimination resulted in her termination because she was never afforded the educational and professional opportunities to remain a viable, up-to-date employee. Her conclusory allegations that her failure to be promoted was a result of discrimination and retaliation cannot be credited, and they are insufficient to demonstrate that she is entitled to discovery to prove her claims.[12]

Four days later, the United States District Court for the Northern District of Indiana dismissed a *pro se* plaintiff's Americans with Disabilities Act (ADA) complaint, because the plaintiff failed to "articulate some factual allegations that make his claim for relief plausible."[13] Specifically, the *Brenston* court noted that, although the plaintiff "is not required to plead detailed facts or evidence to support his claim, he must allege that he is disabled within the meaning of the ADA and that Wal-Mart discriminated against him because of that disability with enough facts to raise his claim beyond the speculative level as described in *Twombly, Erickson,* and *Iqbal*."[14]

Other district courts applying *Iqbal* in the Title VII context have reached similar conclusions.[15] As these decisions make clear, *Iqbal's* impact on Title VII claims is palpable. Indeed, many allegations that might have survived a motion to dismiss prior to *Twombly* and *Iqbal* no longer do so.[16]

Iqbal and Joint Employer Theories of Recovery

In *Leber v. Berkley Vacation Resorts, Inc.*,[17] the United States District Court for the District of Nevada dismissed the plaintiffs' Fair Labor Standards Act (FLSA) claim, where the plaintiffs failed to allege "which Defendant is their employer or any facts supporting joint employment by any of the other Defendants." Notably, the Court concluded, "[t]he fact that all Defendants conduct business in the same industry and utilize similar compensation schemes is insufficient to establish joint employer status."[18] Stated otherwise, it is no longer sufficient to nakedly allege joint employment. On the contrary, to state a facially plausible claim for relief, a plaintiff must plead sufficient facts to show the existence of a joint employment relationship.

Other Implications Of *Iqbal*

Iqbal has other implications to be considered:

- Because ruling on a challenge to the sufficiency of a multi-claim complaint must address the sufficiency of the pleading as to each claim separately, it is possible that some claims in a complaint will survive while others are dismissed.
- Because the sufficiency of a pleading is a procedural matter, the *Iqbal* standard should apply to state law claims brought in a federal court, just as it does to federal claims.
- A question that may be posed in state courts - and particularly those in states that have adopted rules of procedure based on the federal rules - is to what extent Iqbal applies or should be applied to claims pled in state court?

The Notice Pleading Restoration Act

On June 22, 2009, Senator Arlen Specter introduced Senate Bill 1504, entitled the Notice Pleading Restoration Act of 2009 (Act). If passed, the Act would overturn *Twombly* and *Iqbal*, and restore the standard for dismissing complaints under Federal Rules of Civil Procedure 12(b)(6) and 12(e) to the "no set of facts" standard first announced in *Conley v. Gibson*. The Act has been read twice and referred to the Senate Committee on the Judiciary.

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Conclusion

Regardless of its ultimate limits, *Iqbal* is one of the Supreme Court's most significant decisions in recent memory in its impact on employment litigation. In the view of at least one Supreme Court Justice, *Iqbal* "messed up the federal rules" of civil procedure.[19] For defense attorneys, Iqbal should become a part of the everyday vernacular, and Rule 12(b)(6) motions will be used more frequently to challenge claims before the expense of discovery begins to mount.

In many cases, the district court will afford the plaintiff the opportunity to file an amended complaint to cure the deficiencies in the complaint dismissed under *Twombly* and *Iqbal*, but in many of those cases, the plaintiff is likely to have difficulty pleading specific facts to overcome the deficiencies. Moreover, even if the plaintiff is successful in filing a valid amended complaint, the defendant will benefit from having more specific allegations to defend and with which to define the limits of discovery.

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[1] 550 U.S. 544 (2007).

[2] Liptak, Adam, *From Case About 9/11, Broad Shift On Civil Suits*, New York Times, July 21, 2009. ("Liptak")

[3] *See Conley*, 355 U.S. 41, 45-46 ("In appraising the sufficiency of the complaint we follow, of course, the accepted rule 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.").

[4] *Ashcroft v. Iqbal*, 490 F.3d 143, 157-58 (2d Cir. 2007) (emphasis in original).

[5] The meaning of the term "plausible" in the context of Rule 8 -the crux of the Supreme Court's holding in *Twombly* - had since the *Twombly* decision been the subject of debate amongst the circuit courts of appeal and district courts. Although the Supreme Court first introduced this term in Twombly, it did not in *Twombly* expressly elaborate on what it means.

[6] *Iqbal*, 129 S. Ct. at 1949.

[7] *Iqbal*, 129 S. Ct. at 1949-50 (internal citations omitted)(emphasis added). The importance in employment cases of the first principle - that the court considering the adequacy of the complaint need not accept as true allegations that are nothing more than legal conclusions ("[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements") - is highlighted in the Court's discussion of the deficiencies in Iqbal's pleading of intent on the part of the defendants in that case. "[T]o state a claim based on a violation of a clearly established right, [plaintiff] must plead sufficient factual matter to show that [defendants] [acted] not for a neutral ... reason but for the purpose of discriminating on account of race, religion, or national origin." *Iqbal* at 1948-49. In other words, where intent to discriminate is an element of the claim, it is not enough to simply allege that a defendant acted with "intent" to discriminate; the conclusory allegation of intent must be supported with allegations of facts that support the conclusion that the defendant acted with intent to discriminate for the prohibited reason.

[8] *Id*. at 1951-52. Although not explicitly discussed in Iqbal, this type of merits-based more-compelling-than-not plausibility assessment is the type of analysis that would ostensibly require district courts to exercise their judicial experience and common sense.

[9] *Id*. at 1954 ("Because [Iqbal's] complaint is deficient under Rule 8, he is not entitled to discovery, cabined or otherwise.").

[10] *Id*. at 1954. Justice Souter, who authored the majority opinion in *Twombly*, authored the dissenting opinion in Iqbal. Specifically, Justice Souter rejected the *Iqbal* majority's endorsement of a merits-based more-compelling-then-not plausibility standard at the motion-to-dismiss stage. *See Iqbal,*

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129 S. Ct. at 1958-1961. Rule 8, Justice Souter noted, requires that a court must accept the allegations contained in a complaint as true "no matter how skeptical the court may be." *Id*. at 1959 (citations omitted). "The sole exception to this rule lies with allegations that are sufficiently fantastic to defy reality as we know it: claims about little green men, or the plaintiff's recent trip to Pluto, or experiences in time travel. That is not what we have here." *Id*. (Souter, J., dissenting).

[11] *Golod v. Bank of Am. Corp*., Civil No. 08-746, 2009 WL 1605309, at *3-4 (D. Del. June 4, 2009).

[12] *Id*. at 3.

[13] *Brenston v. Wal-Mart*, No. 2:09 cv 026 PS, 2009 WL 1606935, *4 (N.D. Ind. June 8, 2009).

[14] In the interim between *Twombly* and *Iqbal*, the Supreme Court decided *Erickson v. Pardus*, 127 S. Ct. 2197 (2007). *Erickson* addresses the implications of *Twombly* to *pro se* litigants, reiterating that "a *pro se* complaint, however inartfully pleaded, must be held to less stringent standards than formal pleadings drafted by lawyers." *Id*. at 2200. As *Breston* makes clear, *Iqbal's* teachings should apply equally, if perhaps slightly less stringently, to *pro se* complaints.

[15] See *Olszewski v. Symyx Techs., Inc*., No. C08-03657 HRL, 2009 WL 1814320, *3 (N.D. Cal. June 24, 2009) (invoking *Iqbal* in dismissing plaintiff's Age Discrimination in Employment Act (ADEA) claim, where the plaintiff "failed to plead facts that raise more than the mere possibility that her age was the 'but-for' reason for her termination.") (citations omitted); *Logan v. Sectek, Inc*., Civil Action No. 3:08-cv-00209 (VLB), 2009 WL 1955441, *3 (D. Conn. July 8, 2009) (invoking *Iqbal* in dismissing plaintiff's claims of disability discrimination under the ADA and the Connecticut Fair Employment Practices Act, and his claim of ADA retaliation); *Argeropoulos v. Exide Techs*., No. 08-CV-3760 (JS), 2009 WL 2132443, *4-6 (E.D.N.Y. July 8, 2009) (invoking *Iqbal* in dismissing plaintiff's same-sex harassment, national origin discrimination, and hostile work environment claims); *Ansley v. State of Florida, Dep't of Revenue*, No. 4:09cv161-RH/WCS, 2009 WL 1973548, *2 (N.D. Fla. July 8, 2009) (invoking *Iqbal* in dismissing plaintiff's Title VII, Florida Civil Rights Act, and Family and Medical Leave Act claims); *Hanks v. Shinseki*, Civil Action No. 3:08-CV-1594-G, 2009 WL 2002917, *2-6 (N.D. Tex. July 9, 2009) (invoking *Iqbal* in dismissing plaintiff's Title VII, ADA, 42 U.S.C. § 1981, ADEA, and constructive discharge claims); *Fletcher v. Philip Morris USA Inc*., Civil Action No. 3:09CV284-HEH, 2009 WL 2067807, *4-10 (E.D. Va. July 14, 2009) (invoking *Iqbal* in dismissing plaintiff's Title VII, 42 U.S.C. § 1981, and Title VII retaliation claims); *Baptista v. Hartford Bd. of Ed*., No: 08CV1890 (MRK), 2009 WL 2163133, *6 (D. Conn. July 21, 2009) (invoking *Iqbal* in dismissing pro se plaintiff's ADA claim, where the plaintiff failed to alleged facts that would show his alcoholism limited one or more of his major life activities). In addressing the plaintiff's Title VII retaliation claim, the Fletcher Court credited the defendant's articulated reason for the plaintiff's termination - his low performance ratings, the first of which occurred before the plaintiff complained and before he filed an EEOC charge. 2009 WL 2067807 at *10. This alternative explanation, in part, rendered the plaintiff's Title VII retaliation claim facially implausible. If a plaintiff's factual pleadings allow, one might cite a defendant's legitimate, non-discriminatory reason for taking an adverse employment action in a motion to dismiss as an alternative to alleged unlawful discrimination as the motivation for the adverse action, thereby providing the court with a basis for finding a plaintiff's discrimination claim facially implausible.

[16] *See Ansley*, 2009 WL 1973548, *2.

[17] No. 2:08-CV-01752-PMP-PAL, 2009 WL 2252517, *5 (D. Nev. July 27, 2009).

[18] *Id. Iqbal's* implications for FLSA collective actions remains to be seen, but will likely be particularly substantial. For instance, it may no longer be permissible for a plaintiff to allege, without any factual predicate for doing so, that she is "similarly situated" to a group of individuals who she purports to represent. *Iqbal* may potentially be used in this manner to attempt to dismiss conclusory class allegations.

[19] Justice Ruth Bader Ginsburg, who joined Justice Souter's dissenting opinion in *Iqbal*, shared this view with a group of federal judges in July 2009. Liptak, *supra*.

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