NO. 19-_____

In the Supreme Court of the United States

ERIC BAGGETT,

Petitioner,

v.

ONCOR ELECTRIC DELIVERY COMPANY, L.L.C.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Age Discrimination in Employment Act (ADEA) is a federal law that prohibits age discrimination when making decisions about pay, hiring, firing, promotions, or any other condition of employment. A prima facie case of age discrimination requires that the plaintiff prove he (1) belongs to the protected group of persons over the age of forty, (2) was qualified for his position, (3) was discharged or suffered an adverse employment action, and (4) was replaced with someone younger or outside the protected group. *Cervantez v. KMGP Servs. Co., Inc.*, 349 F.3d 4 (5th Cir. 2009). Petitioner, Eric Baggett ("Mr. Baggett"), filed a lawsuit against his employer Oncor Electric Delivery Company, LLC, ("Oncor") for age discrimination. Mr. Baggett's petition was dismissed, partly *sua sponte*, for failure to state a claim.

THE QUESTION PRESENTED IS:

Whether the sufficiency of a pleading should be held to a heightened pleading standard requiring facts of each element of the claim when the claim is brought under the ADEA.

LIST OF PROCEEDINGS

Eric Baggett v. Oncor Electric Delivery Company, L.L.C.
United States District Court, Northern District of Texas, Dallas Division
Case No. 3:17-CV-03136-S
Decision Date: June 19, 2018

Eric Baggett v. Oncor Electric Delivery Company, L.L.C.
United States Court of Appeals, Fifth Circuit
Case No. 18-10918
Decision Date: May 3, 2019

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Eric Baggett, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit, dated May 3, 2019, has not and will not be designated for publication, except for the limited circumstances set forth in 5th Cir. R. 47.5.4, and is reproduced at App.1a. The Order of the United States District Court, Northern District of Texas, Dallas Division, dismissing the First Amended Complaint is also unreported and included below at App.3a.

JURISDICTION

The Fifth Circuit Court of Appeals affirmed the district court's decision and filed its opinion on May 3, 2019. (App.1a). This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

- **Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621**

(a) Employer practices It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

STATEMENT OF THE CASE

This case presents the question of whether Mr. Baggett's claims were properly dismissed when the judge *sua sponte* ruled that he failed to sufficiently plead facts to support the elements of his ADEA claim without giving him the opportunity to cure.

Mr. Baggett was an employee of Oncor Electric Delivery Company, L.L.C. from August 26, 1996 until March 29, 2017. He was 51 years old at the time of filing his Original Complaint. During his time as an Oncor employee, Mr. Baggett sought promotions on several occasions. Mr. Baggett and other older employees of Oncor, although qualified, were denied promotions because of their age, and the promotions were frequently given to younger, less qualified applicants. Mr. Baggett often raised these age discrimination complaints with his employer, and it is his belief that Oncor's management retaliated against him when he was suspended and ultimately terminated because of it.

Prior to filing suit, Mr. Baggett filed a charge of discrimination on August 14, 2017. (App.28a). His charge of discrimination asserts that the discrimination took place between 2015 and March 29, 2017. On the same day as the charge was filed, the EEOC generated a notice closing its file, noting that Mr. Baggett did not timely file the charge. The generated notice did not give any supporting details for its findings and it remains unclear why Mr. Baggett's charge was declared untimely as it was filed within 300 days from the last

act of discrimination as required by the rule. 29 U.S.C. § 626(d)(1)(B). (App.15a).

Mr. Baggett filed his Original Complaint against Oncor asserting claims of age discrimination under both the ADEA and Title VII. Oncor filed a Motion to Dismiss Pursuant to Rule 12(b)(6), asserting that (1) Petitioner failed to plead facts supporting his claim of retaliation with specificity, (2) he has no actionable claims under Title VII, (3) he failed to exhaust his administrative remedies for his Title VII claim, and (4) he failed to exhaust his administrative remedies for his ADEA claim.

In response to the motion to dismiss, Mr. Baggett filed his First Amended Complaint curing the stated deficiencies. His First Amended Complaint contained two material changes. (App.22a). First, in paragraphs 12-13, he explained details regarding the retaliation by his manager at Oncor. He clarified that his complaints to management involved the treatment of employees over the age of 50, and he explained that his supervisor had retaliated against him by treating him extremely negatively and requiring that he complete tasks in an unreasonable amount of time. Next, he modified the dates of discrimination in his complaint to limit the dates of discrimination at issue to October 18, 2016—300 days before his charge of discrimination was filed.

Oncor then filed its Second Motion to Dismiss. In this motion, Oncor reiterated the same arguments as its original motion, but it removed its argument that Mr. Baggett had failed to plead facts detailing Oncor's retaliation with specificity. Believing that the sufficiency of pleadings defect was resolved, Mr. Baggett did not file a response to Oncor's Second Motion to Dismiss.

On June 19, 2018, the District Court signed an order granting Oncor's Second Motion to Dismiss, dismissing Mr. Baggett's claims with prejudice. (App.3a). In its order granting Oncor's motion, the District Court expressed agreement with the arguments made by Oncor. *Id.* The District Court also added a ground for dismissing Mr. Baggett's ADEA claim that was not raised by Oncor—that Mr. Baggett failed to state two elements of his ADEA cause of action: (1) that he was qualified for the position he sought, and (2) he was (i) replaced by someone outside the protected class, (ii) replaced by someone younger, or (iii) otherwise discharged because of his age. *Id.* Mr. Baggett filed a timely notice of appeal seeking to move forward with his ADEA claim and abandoning his Title VII claim.

On May 3, 2019 the Fifth Circuit Court of Appeals issued a three-paragraph opinion affirming the District Court's dismissal of Mr. Baggett's claims. (App.1a). The Circuit Court made it clear that their decision was based strictly on the allegations set forth in Mr. Baggett's First Amended Complaint. *Id.* The Circuit Court quoted the district court in holding that Mr. Baggett has not sufficiently alleged "two elements of his ADEA cause of action: (1) that he was qualified for the position he sought, and (2) he was (i) replaced by someone outside the protected class, (ii) replaced by someone younger, or (iii) otherwise discharged because of his age." *Id.* The Circuit Court also noted that because Mr. Baggett had already amended his pleadings once, allowing him another opportunity would be "futile." *Id.*

REASONS FOR GRANTING THE PETITION

I. THE CIRCUITS ARE IN CONFLICT OVER THE SUFFICIENCY PLEADING STANDARD

Since *Bell Atl. Corp. v. Twombly*, one of the most notable decisions concerning the issue of pleading sufficiency, circuit courts have been divided as to the effect Twombly had on pleading standards. This historic opinion did its best to find the middle ground between requiring heightened fact pleading and allowing simple recitations of labels and conclusions to suffice. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 580, 127 S.Ct. 1955, 1979 (2007). Some circuits have correctly held that while the new *Twombly* standard does require a minimal change to the way we analyze pleading sufficiency, it does not alter the general principle of the fair notice requirement mandated by Federal Rule of Civil Procedure 8(a)(2). However, several other circuits, including the below court, have applied a heightened pleading standard to analyze the sufficiency of pleadings. This heightened standard requires far more than a short and plain statement of the facts, as is all that is required under the Rules.

Countless complaints have been subjected to this heightened standard and dismissed because of a failure to reach the substantially high bar. The split amongst the circuits threatens to impose different pleading standards on otherwise similar claims. The Fifth Circuit's flawed interpretation of pleading standards contributes to the conflict within the circuits, and until this issue is corrected, it will continue to exacerbate

the problem. Because of this conflict, it is paramount for this Court to clarify the standard for assessing the sufficiency of pleadings.

A. Several Circuit Courts Analyze Pleading Sufficiency Using the Fair Notice Standard of Federal Rule of Civil Procedure 8

The liberal notice pleading standard of Rule 8 is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim. The Federal Rules of Civil Procedure only requires a short and plain statement to state a claim for which relief is due. Fed. R. Civ. P. 8. To be entitled to relief, that statement must be sufficient to provide the defendant fair notice of what the claim is. What qualifies as sufficient has been the source of misguided interpretation amongst the circuits for the last 12 years. Some courts have interpreted "sufficient" to mean just enough facts to cross the line from conceivable to plausible, while other courts have required petitioners to allege facts relating to each and every element of their claim. This great divide in legal interpretation is partly because of this Court's addition to what is required under Rule 8.

In *Twombly*, this Court asserted that Rule 8 requires a "showing, rather than a blanket assertion, of entitlement to relief." *Twombly*, 127 S.Ct. at 1979. Additionally, this Court introduced the principle that the facts contained in a petition must show a claimant's plausibility for relief. *Id.* at 1964-65. However, despite this foreign language as it relates to Rule 8, the *Twombly* decision made it clear that it was not adopting or applying a heightened pleading standard. Instead,

Twombly only introduced a minimal change to the sufficiency analysis.

Prior to *Twombly*, pleading standards had been well-established for decades. A decision frequently cited to and found to be most helpful in determining the pleading standard for employment discrimination cases, was decided in *Swierkiewicz v. Sorema*. In *Swierkiewicz*, this Court held that an employment discrimination plaintiff does not need to plead a *prima facie* case of discrimination at the motion to dismiss stage, explaining:

> 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.
>
> . . . 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.

Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514, 122 S.Ct. 992, 999 (2002).

Following *Twombly*, the circuits were left with the question of whether *Twombly* overruled *Swier-*

kiewicz. The Second Circuit contends that *Swierkiewicz*'s rejection of a heightened pleading standard in discrimination cases remained valid and was not overruled by *Twombly. EEOC v. Port Authority of New York & New Jersey*, 768 F.3d 247 (2d Cir. 2014). As such, a discrimination complaint does not need to allege facts establishing each element of a *prima facie* case of discrimination to survive a motion to dismiss as that is a heightened pleading requirement not supported by precedent or the Federal Rules.

Holding true to that standard, courts in the Second, Third, Seventh, Tenth, and Ninth circuits all acknowledge that *Twombly* does not require a heightened pleading standard. It has been repeatedly held that, post *Twombly*, notice-pleading is still all that is required to state a claim and that specific facts need not be plead.

Another important takeaway from the pleading sufficiency line of cases is the necessity to consider the context of the case when determining whether the petition sufficiently states a claim. As it relates to employment discrimination claims, the Seventh Circuit has held on numerous occasions that employment discrimination claims may be alleged generally. *Kolupa v. Roselle Park Dist.*, 438 F.3d 713, 714 (7th Cir. 2006). Complaints need not narrate events that correspond to each aspect or element of the applicable legal rule. In *Kolupa v. Roselle Park Dist.*, the court stated:

> Federal complaints plead claims rather than facts. The appendix to the Rules of Civil Procedure contains models that illustrate the short and simple allegations that Fed. R. Civ. P. 8(a) calls for. It is enough to name the plaintiff

> and the defendant, state the nature of the grievance, and give a few tidbits . . . that will let the defendant investigate. A full narrative is unnecessary. Details come later, usually after discovery—though occasionally sooner if, as the rules allow, either side seeks summary judgment in advance of discovery, or the district court orders the plaintiff to supply a more definite statement. Any decision declaring "this complaint is deficient because it does not allege X" is a candidate for summary reversal.

Id. at 714.

The Fifth Circuit's holding issued below conflicts with the holdings of our sister circuits.

B. Several Circuit Courts Analyze Pleading Sufficiency Using a Heightened Pleading Standard in Conflict with Other Circuits

While it may seem clear what is required to survive a 12(b)(6) motion to dismiss under Rule 8 and what this Court's expansion of Rule 8 does and does not do, not all of our sister circuits analyze pleadings with the same understanding. Several Circuit Courts including the Fourth, Fifth, and Sixth Circuits, require a heightened pleading standard and have dismissed petitions that do not rise to the level. The standard imposed by these circuits requires petitioners to allege facts that relate to each element of their claim. This requirement unduly harms the right of access to courts for those plaintiffs having claims that require the pleading of information they simply do not have at this stage of litigation. Pleading standards are not

the same as standards of proof and should not be treated as such.

In upholding these types of dismissals, the Fifth Circuit has repeatedly held that dismissal is proper where the complaint lacks an allegation regarding a required element necessary to obtain relief. One court even referenced a petition's lack of allegations on "every material point" as a basis for dismissal. *Cevallos v. Silva*, 541 F. App'x 390, 393 (5th Cir. 2013). Similarly, the Sixth Circuit has held "to survive a motion to dismiss, the complaint must contain either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory." *Eidson v. State of Tenn. Dep't of Children's Servs.*, 510 F.3d 631, 634 (6th Cir. 2007).

This incorrectly applied standard originates from *Campbell v. City of San Antonio*, a case decided in the Fifth Circuit in 1995. *Campbell* held that a complaint must contain either direct allegations on every material point necessary to sustain a recovery or contain enough allegations to indicate the existence of evidence on each of these material points. *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995). This heightened standard clearly calls for more than a short plain statement of plausibility and has since been overruled. Specifically, to the extent that *Campbell* applies to employment discrimination pleadings, *Campbell* has been overruled by *Swierkiewicz*'s rejection of the heightened pleading standard. Although the Fifth Circuit has not yet taken this issue under appeal, the courts that have considered *Swierkiewicz*'s impact on pleading sufficiency have concluded that the principles set forth in *Campbell* did not survive *Swierkiewicz*.

Furstenfeld v. Rogers, No. 3-02-CV-0357-L, 2002 U.S. Dist. LEXIS 11823, at *9, n.3 (N.D. Tex. 2002). Even so, hundreds of district court cases have been dismissed based on the *Campbell* opinion. Once taken on appeal, what standard will the circuit apply? This Court's review of this issue will avoid the possibility of additional conflicting holdings. The split among the circuits requires resolution, and this Court's guidance is urgently warranted.

II. THE FIFTH CIRCUIT COURT OF APPEALS APPLIED THE WRONG STANDARD AND DECIDED INCORRECTLY

While the divisional line has been drawn between circuits imposing a Rule 8 short and plain statement pleading standard, and those imposing a heightened pleading standard requiring facts to support each element of the claim, the below court has fallen on the wrong side of the equation. The Fifth Circuit, on a *sua sponte* finding, dismissed Mr. Baggett's claim because he did not allege facts to support two of the elements required to state an age discrimination claim under the ADEA. This decision was incorrect for 3 reasons: (1) the court applied the wrong standard, (2) Petitioner's complaint was dismissed without notice or a chance to amend, and (3) the court incorrectly surmised that allowing Mr. Baggett the opportunity to replead would be futile because he had already amended his pleading once before.

A. The Fifth Circuit Applied the Wrong Standard

As explained in great detail above, evaluating the sufficiency of a petition by applying a heightened pleading standard to determine whether to dismiss the claim is a direct violation of the Rules and established

precedent. This Court expressly disclaimed using a heightened pleading standard and declared that all that is necessary to survive a Rule 12(b)(6) motion is a short and plain statement of the facts sufficient to show plausibility of relief sought. In addition, under a notice pleading system, it is not appropriate to require a plaintiff to plead facts establishing a prima facie case.

The lower court stated that Mr. Baggett's petition failed to allege that he was qualified for the position and that he was either replaced by someone outside the protected class, replaced by someone younger, or otherwise discharged because of his age. However, Mr. Baggett's amended petition did in fact make these allegations.

In Mr. Baggett's First Amended Petition he states, "Each time Plaintiff applied for these positions . . . the positions were given to a younger, less qualified employee and/or contractor." (App.22a). While Mr. Baggett did not directly state that he was qualified, he implied it by stating that the positions were being given to less qualified persons. The only way to interpret "less qualified" is to mean that one person is not as qualified as the other. If the lower court were applying the correct pleading standard, this statement would have undeniably been sufficient to satisfy the short and plain statement standard.

However, even if this statement did not contain enough facts to support the element that Mr. Baggett was qualified or the element that he was replaced by a younger person, requiring facts to support each element is an overruled and unsupported heightened pleading standard that should not have been applied. In fact, just three years prior, the Fifth Circuit held in

a similar case that it was not necessary to plead detailed facts to support each element of an ADEA discrimination claim. In analyzing the sufficiency of an ADEA petition, the Fifth Circuit pointed to the illustrative forms published with the Federal Rules noting:

> . . . the illustrative civil rules forms published with the Federal Rules of Civil Procedure provide even less factual detail than the complaint at issue here: Form 11, a sample complaint for negligence, alleges only that "[o]n date, at place, the defendant negligently drove a motor vehicle against the plaintiff" and "[a]s a result, the plaintiff was physically injured, lost wages or income, suffered physical and mental pain, and incurred medical expenses of $_____." Fed. R. Civ. P. app. Form 11. The content of this form also undermines the premise that the complaint must explicitly include every element of the plaintiff's *prima facie* case to satisfy Rule 8; the form contains no reference to a legal duty or proximate cause, two elements of a prima facie case for negligence. Rather, all elements of the cause of action are present by implication.

Wooten v. McDonald Transit Associates, Inc., 788 F.3d 490 (5th Cir. 2015).

The court went on to explain that while the plaintiff's allegations were less detailed than the defendant would prefer, the allegations were sufficient to satisfy the low threshold of Rule 8. For reasons unknown, when presented with the present ADEA claim contain-

ing very similar allegations, the below court dismissed Mr. Baggett's petition for the same reason it upheld the petition in *Wooten.*

B. The Fifth Circuit Failed to Give Petitioner an Opportunity to Amend

Mr. Baggett's First Amended Complaint was dismissed without any prior notice or opportunity to amend. In Oncor's brief supporting its Second Motion to Dismiss, Oncor argued that Mr. Baggett failed to state a plausible claim under Title VII. As explained above, Mr. Baggett abandoned his Title VII claim and only sought to proceed under the ADEA. Oncor did not allege anywhere in its brief that Mr. Baggett failed to sufficiently plead elements of his ADEA cause of action. Because Oncor's motion does not allege that Mr. Baggett failed to state a claim under the ADEA, the District Court's order dismissing his claims on that basis was a *sua sponte* order. A district court may only dismiss an action on its own *sua sponte* order when the procedure employed is fair. *Bazrowx v. Scott*, 136 F.3d 1053, 1054 (5th Cir. 1998). To be fair, dismissal requires both notice of the court's intention to dismiss and an opportunity to respond. *Id.* Mr. Baggett was afforded neither. The first time this issue was brought to Mr. Baggett's attention was in the order dismissing his claims with prejudice. This unfair treatment of Mr. Baggett's claim was reversible error.

C. The Fifth Circuit Incorrectly Concluded That an Opportunity to Amend Would Be Futile

The District Court stated that allowing Mr. Baggett an opportunity to replead would be futile, because he had already been afforded one opportunity to amend

his pleadings, failed to respond to the Second Motion to Dismiss, and did not request leave to amend. (App.12a). However, none of these justifications support denying Mr. Baggett an opportunity to replead the two allegedly deficient elements of his ADEA cause of action. Contrarily, the record indicates that allowing Mr. Baggett an opportunity to replead would not be futile. When Mr. Baggett was given notice of the factual insufficiency of his pleadings in Oncor's First Motion to Dismiss regarding his retaliation claim, Mr. Baggett amended his complaint to cure the deficiency by stating additional facts. Accordingly, in Oncor's Second Motion to Dismiss, Oncor specifically removed its factual insufficiency complaint regarding the retaliation claim. The record therefore suggests that when Mr. Baggett is provided notice that elements of his claims are alleged to be lacking, he will amend his complaint accordingly. As a result, allowing Mr. Baggett an opportunity to replead would not have been futile and would have allowed him an opportunity to have his case decided on the merits.

III. THE STANDARD FOR PLEADING SUFFICIENCY IS AN EXTREMELY IMPORTANT QUESTION

One of the most important issues in federal litigation is determining whether a claim has been sufficiently pled to survive a motion to dismiss for failure to state a claim. Our justice system should be accessible to all litigants, from the initial filing of a complaint until the rendering of a verdict. A correctly pleaded petition is the key that opens the door to that justice system. Without a clear understanding of what is required to sufficiently state a claim, courts

will continue to misguidedly dismiss claims that otherwise have merit.

Failure to correct this ongoing problem has important practical consequences. With the widespread conflicting decisions amongst the circuits, petitioners have little to no guidance as to what is required to show that the pleader is entitled to relief. The decisions rendered over the course of the past decade have are not helpful for courts or litigants in providing a clear and precise understanding of what it takes to state a claim that can survive a motion to dismiss. Further, while it may be true that certain types of claims require more factual pleading than others, the standard needs to be cohesive to better serve the interests of justice more evenly across different types of cases. As such, this Court's guidance is imperative and urgently warranted.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully request that the Supreme Court review of this matter and grant this petition for writ of certiorari.

Respectfully submitted,

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