No.

IN THE
Supreme Court of the United States

AMY HARRISON,

Petitioner,

v.

KEVIN LILLY, *Individually and in His Official Capacity*; ROBERT SAENZ, *Individually and in His Official Capacity*,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

It is well settled law that a motion to dismiss under FRCP 12(b)(6) is appropriate only if the plaintiff has not provided fair notice of its claim and factual allegations that–when accepted as true–are plausible and rise above mere speculation. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). *See generally* 5B Wright & Miller, *Federal Practice & Procedure 3d* §§1356-1357 (2004 & Supp.2015) (discussing purpose of and practice under FRCP 12(b)(6)). Generally, motions to dismiss for failure to state a claim are viewed with disfavor.

Therefore the question presented is whether the District Court and the Court of Appeals failed to follow this well settled standard and dismissed this case in the pleadings stage when it should have been allowed to proceed.

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was unpublished was entered on March 25, 2021 and is included in Appendix A. The order granting the motion to dismiss by the United States District Court for the Western District of Texas is included in Appendix B.

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on March 25, 2021. App. A. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) and 29 U.S.C § 2601, et seq.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Appellant brought this action for violations of 42 U.S.C. §1983 when Defendants terminated her employment for exercising her First Amendment rights under the United States Constitution.

STATEMENT OF THE CASE

A. Course Of Proceedings And Disposition Below

This case arises out of Appellant filing a lawsuit alleging wrongful termination by Defendants in violation of her rights under 28 U.S.C § 1983 and the First Amendment to the United States Constitution.

On July 1, 2019 Appellant filed suit alleging that her termination was a result of retaliation for exercising her First Amendment rights. On September 13, 2019 Appellees filed a Motion to Dismiss pursuant to FRCP 12(b)(6). On October 4, 2019 Appellant filed an Amended Complaint removing the Texas Alcoholic Beverage Commission ("TABC") as Defendant as well as a response to the Motion to Dismiss. On October 18, 2019 Appellees filed an Amended Motion to Dismiss. On November 1, 2019 Appellant filed a response to the Amended Motion to Dismiss and Appellees filed their reply on November 8, 2019. The District Court issued an order on July 23, 2020 granting Appellee's Motion to Dismiss and issued a Final Judgment. Appellant then timely appealed to the Fifth Circuit Court of Appeals. The Fifth Circuit affirmed the lower court's judgment in an opinion issued on March 25, 2021.

B. Factual Background

Appellant Amy Harrison was employed by TABC from 1990 until her termination on July 12, 2017. At the time of her termination Appellant held the position of Director of Licensing.

In May of 2017 Defendant Kevin Lilly was appointed by Texas Governor Greg Abbott and took his oath of office to serve as Commissioner and Chairman of the TABC. In June of 2017, through conversations with Chairman Lilly and his employees, it came to Appellant's attention that Chairman Lilly owned stock holdings in one or more alcoholic beverage businesses, and benefits from the ownership of stock holdings of the clients of his firm, Avalon Advisors LLC, in one or more alcoholic beverage businesses, which, pursuant to Section 5.05, Texas Alcoholic Beverage Code ("Relationship with Alcoholic Beverage Business Prohibited"), would make him ineligible to serve on the TABC and would render his appointment and service illegal. Appellant reported her concerns regarding this violation of Texas Law to the General Counsel and Acting Executive Director of the TABC. Id. Appellant also had several conversations with Chairman Lilly personally regarding her concerns about his eligibility to serve. While Appellant assumed that an investigation into the matter would be undertaken, she instead was approached by the executive director of the TABC on July 5, 2017 with a request that she retire. When Appellant declined to retire, on July 12, 2017 she was notified that she was being terminated.

V. ARGUMENT

A. The district court erred in granting Defendants' Motion to Dismiss for Failure to State a Claim under Rule 12(b)(6).

1. Standard of Review

A motion to dismiss for failure to state a claim upon which relief can be granted tests the formal sufficiency of plaintiff's statement of its claim for relief in its complaint. *See Republican Party v. Martin* 980 F.2d 943, 952 (4th Cir. 1992). The motion cannot be used to resolve factual issues or the merits of the case. *Id.* A motion to dismiss under FRCP 12(b)(6) is appropriate only if the plaintiff has not provided fair notice of its claim and factual allegations that–when accepted as true–are plausible and rise above mere speculation. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). *See generally* 5B Wright & Miller, *Federal Practice & Procedure 3d* §§1356-1357 (2004 & Supp.2015) (discussing purpose of and practice under FRCP 12(b)(6)). Generally, motions to dismiss for failure to state a claim are viewed with disfavor. *See Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498 (5th Cir.2000).

The defendant should not attach affidavits, evidence, or other extrinsic materials to the motion. Generally, the motion must be decided solely on the allegations in the plaintiff's complaint. *Speaker v. U.S. Dept. Of H&HS Ctrs. For Disease Control & Prevention*, 623, F.3d 1371, 1379 (11th Cir.2010). Generally, in deciding a motion to dismiss for failure to state a claim, the court limits its inquiry to facts stated in the complaint. *See Gee v. Pacheco*, 627 F.3d 1178, 1186 (10th Cir. 2010).

2. The District Court misapplied the applicable law and the facts stated in Appellant's complaint plausibly state a claim for First Amendment retaliation that rises above mere speculation

To establish a § 1983 claim for employment retaliation related to speech, a plaintiff employee must show: (1) he suffered an adverse employment action; (2) he spoke as a citizen on a matter of public concern; (3) his interest in the speech outweighs the government's interest in the efficient provision of public services; and (4) the speech precipitated the adverse employment action. *Anderson v. Valdez*, 845 F.3d 580, 590 (5th Cir. 2016). The District Court's Order of Dismissal analyzed only whether Appellant could establish element 2, focusing on whether Appellant was speaking as a citizen rather than as a public employee at the time of her speech at issue. The District Court and Fifth Circuit erred in ruling that Appellant was not speaking as a citizen rather than as a public employee at the time of her speech at issue.

In its analysis the District Court first made a determination whether Appellant's speech was made pursuant to her job duties. The Court's decision was based on an argument that as the Director of Licensing Appellant informing others regarding who held licenses was part of her job duties. Appellant does not argue that they are not. However, that argument misses the key fact in this case. Appellant does not argue that she was retaliated against for informing others regarding who was licensed. Appellant argues that she was retaliated against for publicizing the fact that Chairman Lilly was possibly ineligible to serve and possibly committing a crime. Simply because Appellant's role as Director of Licensing involved knowing who had licenses it does not mean that informing people of violations of law is a part of her job

duties. And Appellee has pleaded that it was not. Appellant could have remained silent on the issue and it would have had been no failure to perform her assigned duties.

The Court also incorrectly states that, "(Appellant's) allegations establish that she sent the conflict-of-interest email to Helm and Swedberg "in the course of performing [her] job as [Licensing Director]." Appellant never pleaded that she sent the email regarding Chairman Lilly's conflicts in her role as licensing director and has, in fact, pleaded the opposite. As discussed above, the act of informing others regarding Chairman Lilly's conflicts was not part of Appellant's job duties.

The Court bases a significant amount of its analysis applying *Williams v. Dallas Indep. Sch. Dist.*, 480 F.3d 689 (5th Cir.2007) to Appellant's claims. However, *Williams* is distinguishable from the case at bar for a number of reasons and should not be applied at all.

In *Williams* the speech at issue (an athletic director writing a memo to the principal regarding misappropriation of athletic funds) was admitted by all to not be part of the plaintiff athletic director's assigned duties, as it is conceded in the case at bar that informing others regarding a possible conflict of interest was not part of Appellant's official job duties. The *Williams* court ruled however, that the memo at issue included information regarding the athletic budget which Plaintiff was in charge of, and that information regarding an impact on his budget was therefore necessary for him to perform his duties. Thus, the speech in his memo was closely enough related to his duties to be considered a part of his duties.

The fact pattern of *Williams* simply does not exist in this case. Whether or not Chairman Lilly was potentially violating a conflict of interest statute had nothing to do with Appellant's job duties in running the licensing department. Plaintiff was terminated for informing people that Lilly was quite possibly violating Texas law and might be ineligible to serve as chairman, which, unlike in *Williams*, had absolutely nothing to do with her job duties and had no impact on her job duties.

In addition, the District Court noted that the statements by the Plaintiff in *Williams*, "focus[ed] on his daily operations," were "part-and-parcel of his concerns about the program he ran," and "concerned matters immediately within [an] athletic director's purview—the use of funds for the school athletic teams and the related accounting procedures." The same things can not be said of Appellant's speech in this case. Appellant's statements were not focused on her daily operations, were not part-and-parcel of her concerns running the Licensing Department and did not concern matters immediately within her purview. They also did not concern matters that were essential for her to do her job.

The Court further miscompares Appellant with the *Williams* Plaintiff by stating that she had "special knowledge" that led to her speech. Appellant may have had knowledge regarding licensees, however that is not how the "special knowledge" was applied in *Williams*. In *Williams* the Plaintiff had knowledge that there was a problem with his budget, which affected his ability to do his job and was, therefore, related to his job duties. Appellant's job duties or her ability to do her job duties could in no way be impacted by Chairman Lilly's conflicts.

In addition, "to hold that any employee's speech is not protected merely because it concerns facts that he happened to learn while at work would severely undercut First Amendment rights." *Charles v. Grief*, 522 F.3d 508, 513 (5th Cir.2008).

The District Court rejected Appellant's argument that her speech was not part of her job duties because it was made outside her chain of command. The Court acknowledged that she had made her report to someone not in her chain of command, the General Counsel, but that since her supervisor was also notified it became part of her job duties, citing *Davis v. McKinney*, 518 F.3d 304, 313 (5th Cir. 2008). ROA 117. However, *Davis* does not state such a proposition. *Davis* states, "Cases from other circuits are consistent in holding that when a public employee raises complaints or concerns up the chain of command at his workplace about his job duties, that speech is undertaken in the course of performing his job."

Appellant denies that notifying others of conflicts was a part of her job. The District Court's application of *Davis* seems to state that anytime speech goes up the chain of command it is made as an employee. But that application leaves out the key part that it must *also* be about the employee's job duties. In this case, Appellant's speech was not.

Further, the court ignores the fact that even if some of the speech was made "internally" and made in the "chain of command" it is not alone dispositive. See *Gibson v. Kilpatrick*, 773 F.3d 661, 70 (5th Cir.2014). The *Garcetti* case, relied on by Defendants, itself states that the fact that speech is made at work to supervisors does

not necessarily mean it was made pursuant to one's official duties and therefore not protected by the First Amendment. See *Garcetti v. Ceballos*, 547 U.S. 410, 420-421 (2006). "While such speech might very well relate to the employee's official duties, it is not necessarily made pursuant to those duties." *Id.*

Still further, *Garcetti* noted that a public employee does not speak pursuant to his official duties when his speech is analogous to that of a citizen's speech. In particular, *Garcetti* stated that "[w]hen a public employee speaks pursuant to employment responsibilities ... there [will be] no relevant analogue to speech by citizens who are not [public] employees." Accordingly, when there is an analogue to speech by citizens who are not public employees, the employee does not speak pursuant to his official duties, but as a citizen. Speech made "outside the course of performing [the public employee's] official duties ... is the kind of activity engaged in by citizens" and, therefore, not subject to the threshold inquiry in Garcetti. Therefore, "[w]hen an employee speaks as a citizen, ... the First Amendment requires a delicate balancing of the competing interests surrounding the speech and its consequences" under *Pickering*. See *Anderson v. Valdez*, 845 F.3d 580, 594 (2016).

As required Appellant has provided fair notice of its claim and factual allegations that–when accepted as true, as is required, are plausible and rise above mere speculation Plaintiff. The only reason for the issuing of an order to the contrary was due to the District Court's misapplication of the law to the facts pleaded by Appellant in this case and the erroneous affirmation of this decision by the Fifth Circuit Court of Appeals.

REASONS FOR GRANTING THE PETITION

As the constitution makes clear, jury trials matter. This is perhaps even more important today than it has ever been. Motions to dismiss should be disfavored but are nowadays far too often granted. Of course this Court has other significant issues to decide. But on occasion this Court should take the time to make the pronouncement that motions to dismiss should be rarely granted so that lower courts will take note and not just pay scant attention to that clear fact. This case is a perfect example of that.

When a defendant files a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, the trial court must assess whether a complaint states a plausible claim for relief. *See Raj v. Louisiana State Univ.,* 714 F.3d 322, 329-30 (5th Cir. 2013) (citing *Bass v. Stryker Corp.*, 699 F.3d 501, 506 (5th Cir. 2012)). Rule 12(b)(6) allows dismissal if a plaintiff fails "to state a claim upon which relief may be granted." Fed.R.Civ.P. 12(B)(6). This Court has clarified the standards that apply in a motion to dismiss for failure to state claim in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). Rule 12(b)(6) must be read in conjunction with Rule 8(a), which requires "a short plain statement of the claim showing that the pleader is entitled to relief." *Id.* At 555. The Court does "not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." *Id.* At 570.

This case was never even at the summary judgment stage, and that all that was required of the plaintiff is to plead "enough facts to state a claim to relief that is plausible on its face." *Twombly*, 550 U.S. at 570. The Court's focus in a 12(b)(6)

determination is not whether the plaintiff should prevail on the merits but rather whether the plaintiff has failed to state a claim. *Id.* At 563 n.8 ("[W]hen a complaint adequately states a claim, it may not be dismissed based on a district court's assessment that the plaintiff will fail to find evidentiary support for his allegations or prove his claim to the satisfaction of the fact finder.").

The standard established in Fed. R. Civ. P. 8(a)(2) eighty-two years ago remains in full force and effect today. This Court made this point abundantly clear when it reviewed a case out of the Fifth Circuit styled *Johnson v. City of Shelby*, 743 F.3d 59 (5th Cir. 2013). The Fifth Circuit affirmed a trial court's dismissal of that case based, said the Supreme Court, on plaintiffs' failure to invoke the statute at issue in their pleading. *Johnson*, 135 S. Ct. at 346. The Supreme Court reacted negatively. In a per curium decision, the Supreme Court stated, "We summarily reverse. Federal pleading rules call for 'a short and plain statement of the claim showing that the pleader is entitled to relief,' Fed. Rule Civ. Proc. 8(a)(2); they do not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted." *Id.* (Emphasis added).

A plaintiff's relatively light burden at this threshold stage is no accident. To the contrary, Plaintiff's relatively light burden is consistent with "a basic objective" of the Federal Rules of Civil Procedure, which is "to avoid civil cases turning on technicalities." *Johnson*, 135 S. Ct. At 347.[1] As one commentator has stated, "The

[1]This Court decided *Johnson* in Year 2014. Thus, *Johnson* follows in time **both** *Bell Atlantic Corp. V. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

premise underlying the federal rules is that pleading can be general because discovery supplies the details." DAVE CRUMP ET AL., CASES AND MATERIALS ON CIVIL PROCEDURE §5303, at 307 (1987).

Courts must "accept all well-pleaded facts as true[,"] and the must also "view all facts in light most favorable to the plaintiff[.]" *Thompson v City of Waco*, 764 F.3d 500, 502 (5th Cir. 2014); *Bowlby v City of Aberdeen*, 681 F.3d 215, 219 (5th Cir. 2012); *Turner*, 663 F.3d at 775 (citing case). Courts are not allowed to dismiss a claim under Fed. R. Civ. P. 12(b)(6) unless they first conclude "beyond doubt that the plaintiff can prove no set of facts that would entitle hm to relief." *Century Sur. Co. v. Blevins,* 799 F.3d 366, 371 (5th Cir. 2015) (citing cases); *see also, Equal Access for El Paso Inv. v. Hawkins*, 562 F.3d 724, 726-27 (5th Cir. 2009) ("In evaluating the propriety of the district court's 12(b)(6) dismissal, we must construe the complaint in the light most favorable to the plaintiff and affirm only 'if we determine that the plaintiff would not be entitled to relief under any set of facts or any possible theory that he could prove consistent with the allegations in the complaint.'")(citing case).

This facial plausibility standard "is not akin to a 'probability requirement[.]'" *Iqbal*, 556 U.S. at 678 (underline added). Indeed, the Fifth Circuit, sitting *en banc*, has expressly stated that when considering a Rule 12(b)(6) motion a court must not "evaluate the plaintiff's likelihood of success." *Doe v Covington Cnty. Sch. Dist.*, 675 F. 3d 847, 854 (5th Cir. 2012)(citing cases).

"[A] motion to dismiss under Fed. R. Civ. P. 12(b)(6) is viewed with disfavor and is rarely granted." *Turner v. Pleasant*, 663 F.3d 770, 775 (5th Cir. 2011) (citing case)

(reversing district court's dismissal).

As a result of this judicial reluctance, even hostility, the question courts decide at this early stage is "not" whether Plaintiff will ultimately prevail," but whether his Complaint is "sufficient to cross the federal court's threshold." *Skinner*, 562 U.S. 521, 530 (U.S.2011)[2] (citing *Swierkiewicz*, 534 U.S. at 514 (underline and bold font added)).[3] *See also and compare, Twombly*, 550 U.S. at 556 ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable, and 'that a recovery is very remote and unlikely.'" (citation omitted)); and *Iqbal,* 556 U.S. at 681 (To be clear, we do not reject [the] bald allegations on the ground that they are unrealistic or nonsensical. We do not so characterize them any more than the Court in Twombly rejected the plaintiffs' . . . allegation . . . because it thought that claim too chimerical to be maintained." (citation omitted)).

To cross the required legal threshold, the Supreme Court says, "[A] complaint need not pin plaintiff's claim to a precise legal theory. [Instead,] Rule 8(a)(2) of the Federal Rules of Civil Procedure generally requires only a plausible 'short and plain' statement of plaintiff's claim, no an exposition of his legal argument." *Skinner* 562 U.S. at 530. *See also Johnson*, 135 S. Ct. At 346 (reversing the U.S. Court of Appeals

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[2] This Court decided *Skinner in Year 2011.* Thus, *Skinner* follows in time both *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) and *Ashcroft v Iqbal*, 556 U.S. 662 (2009).

[3] *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002) is an employment discrimination case. Plaintiff a native of Hungary, alleged, in aprt, discrimination based on national origin in violation of Title VII. Delivering the opinion for a unanimous court, Justice Thomas wrote the following: "This case presents the question of 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*, 411 U.S. 792, 36 L, 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 the claim showing that the pleader is entitled to relief.' Fed. Rule Civ. Proc. 8(a)(2)." 534 U.S. at 508 (Emphasis added).

for the Fifth Circuit due to that appellate court's failure to following Fed. R. Civ. P. 8(a)(2)). According to the Supreme Court, Fed. R. Civ. P. 8(a)(2) does "not countenance dismissal of a complaint for imperfect statement of the legal theory supporting the claim asserted"). *Id. See Also Hill v. McDonough*, 547 U.S. 573, 582 (2006) ("Specific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determination of the federal courts") (citing *Swierkiewicz*, 534 U.S. at 512-14).

Rather, and this is critical, the facial plausibility standard requires only something "more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. *See also Twombly*, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level"). A plaintiff satisfies this facial plausibility standard when he "pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678 (Emphasis added). Again, in making this "reasonable inference," the court must act in a manner that is consistent with the principles previously discussed – namely, to accept all well-pleaded facts as true, and to view all facts in the light most favorable to the plaintiff. *See Thompson, Bowlby, and Turner*, cited *supra.*

Here both the district court and the Fifth Circuit Court of Appeals dismissed a case merely based on the pleadings without any discovery, and obviously without a trial. Plaintiff was fired for exercising her First Amendment rights and should have been allowed to present her case to a jury because that is what the Constitution

required. Petition respectfully requests that the Supreme Court overturn this injustice and allow this case to proceed.

For these reasons Petitioner respectfully requests that the Court grant its petition.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

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