NO. 21-7833

IN THE

SUPREME COURT OF THE UNITED STATES

Rhonda Nanette Polite (Petitioner)

v.

KILOLO KIJAZAZI, Acting Commissioner

Of Social Security

Respondent

"John"

Respondent

On Petition for Writ of Certiorari

TO THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PETITION FOR REHEARING

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PREAMBLE

Having a conviction (whether disclosed or not) is not an accurate proxy for determining whether an applicant would be able to perform the duties of the job. There are no reliable studies or empirical data to suggest that applicants with criminal records are more likely to engage in terminable offenses. See e.g., Ian B. Petersen, Toward True Fair-Chance /hiring: balancing Stakeholder Interest and Reality in Regulating Criminal background Checks, 94 Tex. L. Rev. 175, 187-88 (2015).

PETITION FOR REHEARING

Supreme Ct. Rule 44.2

Appellant presents its petition for a rehearing of the above entitled cause, and, in support of it, respectfully shows:

Grounds for Rehearing

A rehearing of the decision in the matter is in the interests of justice because:

1. On October 3, 2022 this Court denied the petition for writ of certiorari.
2. The principal ground cited in the Court's ruling was not evident in the order.
3. The grounds for the ruling in Rhonda Polite vs. Kilolo Kijazazi and "John", at the Ninth Circuit Court of Appeals, came as a surprise to petitioner. Petitioner presented her Opening Brief and Second Amended Complaint to the COA. And to no avail, the COA dismissed my SAC without leave to amend. See Appendix A.

4. In doing so Petitioner doesn't feel the case law presented in COA's ruling was applicable to her SAC. *Colony Cove Props., LLC v. City of Carson, 640F.3d 948, 955 (9th Circuit)*. COA abused its discretion, in that it didn't review de novo a dismissal under Federal Rule of Civil Procedure 12 (b) (6), as to Petitioner's SAC. Petitioner feels she survived Federal Rule 12 (b) (6), in that she presented a preponderance of evidence to her racial discrimination claim. After all Petitioner submitted an 80 page SAC, exhibits included. On the contrary, Colony Cove Props, didn't present sufficient evidence to its claim.

   As for *Enlow* v. *Salem-Keizer Yellow Cab Co., 389 F.3d 802, 811 (9th ir. 2004)*. Mr. Enlow didn't fail to present prima facie evidence as to Yellow Cab Co's discriminatory motives. COA presented this case as to affirming its decision on any basis supported by the record. COA didn't base its decision "on the

record". Petitioner's record of pleadings were never reviewed by the 9th Circuit court of Appeals.

McDonnell Douglas Corp. v Green, 411 U.S. 792 (1973) as to petitioner's SAC.

After careful research, Petitioner found the following within the McDonnell Douglas case: "The complainant in a trial under Title VII of the Civil Rights Act of 1964 carries the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. The burden then shifts to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." 'evidence of conduct or statements by persons involved in the decision-making process that may be viewed

as directly reflecting the alleged discriminatory attitude . sufficient to permit the fact finder to infer that attitude was more likely than not a motivating factor in the employer's decision.'" Walton v. McDonnell Douglas Corp., 167 F.3d 423, 426 (8th Cir.1999) (alteration in original, emphasis added) (quoting Radabaugh v. Zip Feed Mills, Inc., 997 F.2d 444, 449 (8th Cir.1993)).

Petitioner brings to this Court's attention "John's" attitude as to criminal background check and hiring process. The 1.5 hour follow-up call received by Petitioner was sheer harassment and demeaning.

Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248

There are basic allocation of burdens and order of presentation of proof in a Title VII of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq., case alleging discriminatory treatment. First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff

succeeds in proving the prima facie case, the burden shifts to the defendant to articulate some legitimate, nondiscriminatory reason for the employee's rejection. Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

As said in her writ; "An affidavit doesn't suffice-as to employer's legitimate nondiscriminatory reason for employee's rejection".

At the same time, this court needs to be advised that Plaintiff asked both interviewers; were there others to be interviewed after her interview. Petitioner was told "Yes." So the affidavit presented in respondents' Motion To Dismiss is null and void. At the same time, Petioner filled out W-2 form, immediately following interview. Petitioner disagrees with McDonnell Douglas vs. Green case being relative to her SAC. Petitioner presented her

prima facie case, with exhibits to support her claim. Petitioner provided a preponderance of evidence as to her being rejected due to race. See *TWA v. Thurston, 469 U.S. 111.* As a result of presenting evidence, the McDonnell Douglas test is inapplicable. The United States Court of Appeals for the Second Circuit reversed the District Court's judgment. 713 F.2d 940 (1983). It found the *McDonnell Douglas* formula inapposite because the plaintiffs had adduced *direct* proof of age discrimination.

In her SAC, Petitioner Polite adduced direct proof of race discrimination.

Presented as Exhibit 2 in her SAC; Plaintiff presents as Appendix B to this Court. South Coast College of Court Reporting transcript. Transcript is evidence that Plaintiff qualified for the Legal Assistant position. The position required background in both Legal Terminology and Medical Terminology.

Presented as Exhibit 1 in her SAC; Plaintiff presents as Appendix C to this Court. Position description for Legal

Assistant position. After review of these two exhibits, it is clear that Plaintiff qualified for the position. See

COA also mentions the Ashcroft v. Iqbal, 556 U.S. 662, 679 (2009) case. Polite didn't fail to allege facts sufficient to state a plausible claim. It was on the COA's behalf to draw on its experience and common sense in determining whether Petitioner's complaint stated a plausible claim. A plausible claim is an explanation or statement that seems to be true or valid. In considering a motion to dismiss, all material allegations in the complaint are accepted as true. *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868, 884 (2009)*. However, a complaint must contain sufficient facts to state a "plausible" claim for relief. A claim is facially plausible when the facts to support it allow the court to reasonably infer that the defendant is liable for the misconduct alleged. *Iqbal, 556 U.S. 662, 129 S. Ct. at 1949*. This requires more than a possibility that the defendant has acted unlawfully. *Iqbal, 556 U.S. 662, 129 S. Ct. at 1949*. 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.

Establishing the plausibility of a complaint's allegations is a two-step process that is "context-specific" and "requires [*996] the reviewing court to draw on its judicial experience and common sense." *Iqbal, 556 U.S. at 679 129 Supreme Court 1937*. First, a court should "identif[y] pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." Id. Then, a court should "assume the[] veracity" of "well pleaded factual allegations" and "determine whether they plausibly give rise to an entitlement to relief." Id. [**10] "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." Id. at 678 (citation omitted). When considering plausibility, courts must also consider an "obvious alternative

explanation" for defendant's behavior. Id. at 682 (quoting *Twombly, 550 U.S. at 567*).

There was no obvious alternative explanation for "John's" behavior.

To be exact, Petitioner provides to this Court Appendix D, the Declaration for Federal Employment. Originally provided in her SAC as Exhibit #5—evidence that "John" went back 22 years vs. 7 years on background check. See *Times. vs. Target 1:18 –cv-02993* . Case in which unauthorized background checks were permitted and, as a result African Americans and Latinos were weeded out of gainful employment at Target.

Questions 9 & 10 clearly state, "During the last 7 years, have you been convicted, been imprisoned, been on probation, or on parole?" Question 10 reads: "Have you been convicted by a military court-martial?" Petitioner answered "no" to each question. "John" took it upon himself

to go beyond his call of duty to go beyond the lawful 7-year background check.

Originally provided in her SAC as Exhibit #6, -- attached as Appendix E, is a letter addressed to Rocio Trinidad—includes court dockets of Petitioner's 1995/1996 misdemeanors and 1996 recalled bench warrant.

Lastly, provided in her SAC as Exhibit #7—attached as Appendix F is a discrimination letter dated February 28, 2018. After careful review, it is clear that "John's" racial acts were evident throughout Petitioner's SAC.

(Both the COA and the District Court failed to recognize Exhibit #5 in Petitioner's SAC. (Evidences, Statement of Facts, etc., was laid out according to the law.) Petitioner's SAC is in strict compliance with Federal rule 8, which states:

A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has

jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief. *See Conley v. Gibson, 455 U.S. 41 (1957)*

Under Fed. R. Civ. P. 8(a) (2), a pleading must contain a short and plain statement of the claim showing that the pleader is entitled to relief. The pleading standard Rule 8 announces does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement. 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. 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 alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. 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.

As for the Serra v. Lappin, 600 F.3d 1191, 1200 case; I contend based on the following researched information:

Parties, Pro Se Litigants

Leave to amend should be freely given, Fed. R. Civ. P. 15(a), and a pro se litigant in particular should be afforded every reasonable opportunity to demonstrate that he has a valid claim.

"[D]ismissal of a pro se complaint without leave to amend is proper only if it is absolutely clear that the deficiencies of the complaint could not be cured by amendment. "citation omitted. In deciding a FRCP 12(b) (1) motion.

Nielsen v. Rabin, 746 F.3d 58 Appeal from an order of 1 the United States District Court for the Eastern District of New York (Eric N. Vitaliano, Judge) granting the defendant's motion to dismiss and denying the plaintiff leave to amend his complaint. We hold that amendment would not be futile and that leave to amend should have been granted. Accordingly, we REVERSE the decision to deny leave to amend and REMAND to the District Court for further proceedings consistent with this opinion. See also, Najera vs. Green 2019 U.S. Dist. LEXIS 65202. A case in which Plaintiff was granted leave to amend his third amended complaint.

"Generally, leave to amend should be freely given, and a pro se litigant in particular should be afforded every reasonable opportunity to demonstrate that he has a valid claim." *Matima v. Celli, 228 F.3d 68, 81 (2d Cir. 2000)* (internal [**5] quotation marks and citation omitted). . Tolbert v. Smith, 790 F.3d 427, Evidence, Burdens of Proof The requirements of a prima facie case for a plaintiff

alleging employment discrimination change as the case progresses. Ultimately, the plaintiff will be required to prove that the employer-defendant acted with discriminatory motivation. However, in the first phase of the case, the prima facie requirements are relaxed. Reasoning that fairness required that the plaintiff be protected from early-stage dismissal for lack of evidence demonstrating the employer's discriminatory motivation before the employer set forth its reasons for the adverse action it took against the plaintiff, the U.S. Supreme Court ruled that, in the initial phase of the case, the plaintiff can establish a prima facie case without evidence sufficient to show discriminatory motivation 438 (2d Cir. 2015) (noting that direct "smoking gun" evidence of discriminatory motive is often lacking)

Haines v. Kerner, 404 U. S. 519 (1972), a *pro se* complaint, "however inartfully pleaded," must be held to "less stringent standards than formal pleadings drafted by lawyers" and can only be dismissed for failure to state a

claim if it appears " `beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.' " *Id.*, at 520-521, quoting Conley v. Gibson, 355 U. S. 41, 45-46 (1957)

See Atkins v. Astrue, 2011 U.S. Dist. LEXIS 40451, and the court granted Atkins' motion for leave to amend the pleadings and the Commissioner's motion to dismiss for lack of subject matter jurisdiction was denied.

It goes without questioning that Appellant's SAC has federal jurisdiction. At the same time, Appellant was issued a right-to-sue letter by the EEOC and was directed to file in the Federal District court if interested in pursuing the matter. See ***NOW v. Sperry Rand Corp., 457 F. Supp. 1338***

The filing of timely charges of employment discrimination with the Equal Employment Opportunity Commission (EEOC) and the receipt of a right to sue letter from the EEOC are normally jurisdictional prerequisites to

commencing a Title VII civil action. When an organization institutes a complaint with the EEOC and requests a right to sue letter from the agency, it has fulfilled these prerequisites. If the EEOC errs in refusing to issue the right to sue letter, the organization, having done everything within its power to comply with the procedural requirements of Title VII, is not barred from maintaining an action.

The futility threshold is akin to that for a motion to dismiss; thus, if the amended complaint could not survive Rule 12(b)(6) scrutiny, then the amendment is futile and leave to amend is properly denied. *See, e.g.,* Burger King Corp. v. Weaver, 169 F.3d 1310, 1320 (11th Cir. 1999)

However Petitioner's SAC survives FRCP 12 (b) (6)

FRCP Rule 12(b) pertains to pretrial motions, and 12(b)(6) specifically deals with **motions to dismiss for failure to state a claim upon which relief can be granted**.

CONCLUSION

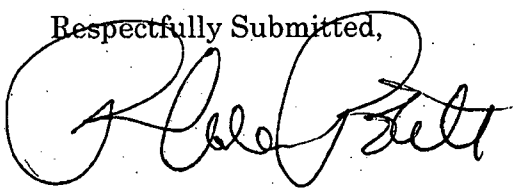
For the reasons set forth in this Petition. Rhonda Polite respectfully requests this Honorable Court grant rehearing and her Petition for a Writ of Certiorari.

CERTIFICATE OF GOOD-FAITH

Submitted to this Honorable Court in accordance to Supreme Court Rule 44, Petitioner submits this good-faith certificate.

I, Rhonda Polite submit this good-faith certificate, in saying that this Petition For Rehearing is presented in good faith and not for delay.

Respectfully Submitted,



Rhonda Polite

Additional material from this filing is available in the Clerk's Office.