

National Office
99 Hudson Street, Suite 1600
New York, NY 10013

T 212.965.2200
F 212.226.7592

www.naacpldf.org



Washington, D.C. Office
1444 Eye Street, NW, 10th Floor
Washington, DC 20005

T 202.682.1300
F 202.682.1312

December 23, 2009

Julia Gagne
Hearing Clerk
Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Ms. Gagne:

On behalf of John Payton, I am submitting his written responses to follow-up questions from Committee members regarding his testimony at the United States Senate Committee on the Judiciary hearing entitled, "Has the Supreme Court Limited Americans' Access to Courts?" on December 2, 2009.

I am also submitting grammatical changes to the transcript of John Payton's oral testimony before the Committee. As requested, we have marked the changes directly on the transcript and flagged the pertinent pages.

If you have any questions, please contact me at 202-682-1300.

Thank you.

Sincerely,

A handwritten signature in blue ink, which appears to read 'Leslie Proll', is written over the typed name.

Leslie Proll
Director, Washington Office

Enclosures

JOHN PAYTON'S RESPONSES TO
WRITTEN QUESTIONS FROM SENATORS FRANKEN AND COBURN
DECEMBER 23, 2009

Responses to questions from Senator Franken

- 1. Both *Ashcroft v. Iqbal*, 129 S. Ct. 1937, and *Gross v. FBL Financial Services*, 129 S. Ct. 2343, came down this year. In other words, right now, employers are making tough employment decisions, cutting pay and laying people off, and right now, the Supreme Court is making it harder for employees to get their day in court, and actually win when they get there. What effect has this timing had on employees who are the victims of discrimination?**

In a series of 5-4 decisions, including *Iqbal* and *Gross*, a narrow conservative majority of the Supreme Court has made it more difficult for victims of discrimination to obtain redress at precisely the moment that robust enforcement of our nation's anti-discrimination laws is most essential. Discrimination of all forms thrives during an economic downturn. The recession has had a particularly severe impact for racial minorities. For instance, the unemployment rate for African American men, ages 16 to 24, was 34.5% in October 2009, more than three times the rate for the general population.¹ Additionally, while the recession may be ending for Wall Street, it remains a devastating reality for the older American workers whose rights were directly and adversely affected by the Supreme Court's decision in *Gross*. Ensuring that the federal courts remain open and accessible to all Americans is important to help maintain social cohesion and inclusiveness at a time when our society is under severe economic stress.

- 2. Please describe your views on the impact of a plausibility standard in assessing a motion to dismiss in civil rights cases. Is such a standard workable in the civil rights context?**

The new heightened plausibility standard promulgated by the Supreme Court in *Iqbal* and *Twombly* is particularly unworkable in the civil rights context. For instance, when a defendant files a motion to dismiss a complaint claiming intentional race discrimination, *Iqbal* directs the judge to review the allegations in the complaint and determine—based on his or her “judicial experience and common sense”—whether lawful intent or racial animus is a more plausible explanation for the events that occurred.² That inquiry is necessarily highly subjective because it requires judges to draw upon their own personal background and assumptions. There is a significant risk that discrimination may be viewed as an aberration from twenty-first-century societal norms. Accordingly, it may be the case that racial animus is thus considered an implausible explanation for a particular event or occurrence—especially in the absence of the type of “smoking gun” evidence that is often produced through discovery, which plaintiffs are not generally entitled to obtain at the pleading stage of litigation.

¹ V. Dion Haynes, *Blacks Hit Hard by Economy's Punch*, WASH. POST, Nov. 24, 2009; see also Charles M. Blow, *Black in the Age of Obama*, N.Y. TIMES, Dec. 4, 2009.

² *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950-51 (2009).

Responses to questions from Senator Coburn

1. In your testimony, you cited *Vallejo v. City of Tucson* as an example of how *Twombly* and *Iqbal* affect voting rights. In that case the court found that although plaintiff was not given a provisional ballot when he arrived without sufficient identification, this was a “garden variety” and “isolated” error in a lawful election that did not amount to racial discrimination. In your testimony, you noted that the plaintiff in this particular case was dismissed without ever having the benefit of discovery. However, a study by the Caltech/MIT project found that the effects of long lines at polling stations and inaccuracies in the registration database could have effectively cost as many as six million Americans their vote in the 2000 election. Do you believe that each of these six million voters should be able to bring suits against cities, counties, and states across the country and force them to expend the significant costs associated with discovery for what are likely “garden variety” errors?

In my written testimony, I cited *Vallejo v. City of Tucson* in order to highlight a key problem with the new heightened pleading standard promulgated in *Iqbal* and *Twombly*. In *Vallejo*, city officials conceded that they wrongfully denied a provisional ballot to Frank Vallejo, a Mexican American disabled veteran. A key contested factual issue was whether or not this conceded error was an “isolated incident.”³ Vallejo contended that it was the result of a discriminatory municipal practice or procedure; if that allegation proved true, the city could have been held liable under the Voting Rights Act. Prior to *Iqbal* and *Twombly*, it had never been the case that a federal court was authorized to resolve such a contested factual issue at the pleading stage. Under the judicial system enshrined by our Constitution, laws, federal rules, and political traditions, such issues should be resolved by fact-finders, following a period of discovery, to help determine the merits of the claims. Relying on *Iqbal* and *Twombly*, the district court in *Vallejo* usurped the fact-finder’s role and effectively made findings in favor of the city—without even affording the plaintiff an opportunity for discovery to determine whether the city was acting pursuant to a discriminatory policy or practice. In so doing, Vallejo was denied the ability to appropriately vindicate his rights.

The NAACP Legal Defense and Educational Fund, Inc. (LDF) strongly believes that voters who have been disenfranchised in such a way that may violate the Voting Rights Act and other federal protections should be able to prosecute their claims. The 2000 election—which resulted in the widespread disenfranchisement of minority voters including nearly one million African American citizens—firmly established that increased vigilance and aggressive enforcement are necessary to prevent the erosion of our bedrock democratic rights. Investigations by LDF and others revealed glaring deficiencies in state and local voting policies and practices, ranging from defective and inferior voting equipment, which had a particularly severe impact on minority communities, to reckless or intentionally discriminatory voter roll purges. The results of these investigations helped prompt important congressional action to further safeguard

³ No. CV 08-500 TUC DCB, 2009 WL 1835115, at *2 (D. Ariz. June 26, 2009).

Americans' voting rights, including the Help America Vote Act (HAVA), Public Law 107-252, signed into law in October 2002.

2. You also mentioned prisoner litigation in your testimony. Even after Congress enacted the Prison Litigation Reform Act, prisoners have still been able to haul city officials into court for all sorts of implausible claims – from claims of cruel and unusual punishment when a prison physician and nurse would not provide more than a prompt X-ray and two examinations for a hurt pinky finger to claims of deliberate indifference to a serious medical need when an inmate was not given his toothpaste of choice. How do you reconcile your argument that prisoner civil rights and access to courts should be protected with cases like these?

- a. Are these the sorts of cases you deem worthy of proceeding to discovery?**
- b. If not, on what basis do you believe a court could dismiss such claims before discovery if S. 1504 were enacted?**

In my written testimony, I discussed one recent case, *Kyle v. Holinka*, that involved a challenge to a prison's policy of racial segregation in cell assignments.⁴ The plaintiff alleged that prison officials made numerous statements acknowledging the discriminatory policy, and there was no question that those officials were subject to suit. Rather, the dispute centered on whether the plaintiff should also be able to proceed against the prison warden and other high ranking officials. Post *Iqbal*, the district court dismissed the claim against the warden and the other high ranking officials on the ground that the plaintiff failed to allege any facts showing that they implemented the discriminatory policy. This decision highlights the detrimental impact of the new heightened pleading standards promulgated by *Iqbal* and *Twombly*. It seems entirely implausible that a warden could fail to notice that prison staff were operating a segregated prison, or that they would have continued to do so if the warden had ever ordered an end to the practice.

More generally, it is critical that government officials are held accountable for unlawful discrimination wherever it occurs. As the Supreme Court has made clear, "[p]rison walls do not form a barrier separating prison inmates from the protections of the Constitution."⁵ The Prison Litigation Reform Act was never intended to close off access to the courts in cases such as *Kyle v. Holinka*, where prisoners allege severe patterns or practices of racial discrimination. Without more information, it is difficult for me to comment on complaints alleging other types of violations. Suffice it to say, we believe that there are adequate procedural measures in place to ensure that non-meritorious claims alleged by prisoners do not move forward in the federal court system.

⁴ No. 09-cv-90-slc, 2009 WL 1867671 (W.D. Wis. June 29, 2009)..

⁵ *Turner v. Safley*, 482 U.S. 78, 84 (1987).

- 3. Another aspect of your testimony dealt with employment discrimination. Because the proposed legislation would sustain even those complaints consisting of only conclusory or implausible allegations, would this not subject government officials and agencies to meritless lawsuits filed by former employees with an ax to grind? Worse yet, could not former employees file claims against the government merely for harassment, and then later hope to find a claim as discovery progressed?**

A return to the law which has existed for the last fifty years would in no way subject the government to meritless lawsuits. There is no empirical evidence that, prior to *Iqbal* and *Twombly*, the federal courts were permitting meritless employment discrimination lawsuits of this nature to proceed. To the contrary, the data reveals that federal courts too often have disfavored employment discrimination plaintiffs, and this atmosphere appears to have discouraged potential plaintiffs from seeking redress in federal courts.⁶

Moreover, it is LDF's position that the proposed legislation should not have a significant impact on employment discrimination cases for the following reason. *Iqbal* and *Twombly* did not overrule the Court's prior 2002 decision in *Swierkiewicz v. Sorema N.A.* In *Swierkiewicz*, the Supreme Court unanimously and expressly rejected a heightened pleading standard in employment discrimination cases. For several reasons, *Swierkiewicz* remains good law.⁷ *Iqbal* did not even cite *Swierkiewicz*, and the Supreme Court has repeatedly insisted that it "does not normally overturn, or so dramatically limit, earlier authority *sub silentio*."⁸ Moreover, *Iqbal* relied heavily on *Twombly*, in which the Court explicitly distinguished *Swierkiewicz* and affirmed its continuing vitality.⁹

Nevertheless, as I explained in my written testimony, some courts have erroneously applied *Iqbal* and *Twombly* to employment discrimination cases. Legislation that addresses the detrimental impact of these two cases should help clear up the confusion, and thus prevent unwarranted dismissals of employment discrimination claims at the pleading stage before plaintiffs have the opportunity to obtain discovery to support their allegations. Discovery is particularly important in employment discrimination cases because it is often only through review of an employer's records that a "smoking gun" is revealed.

⁶ See, e.g., Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?* 3 Harv. L. & Pol'y Rev. 103 (2009).

⁷ 534 U.S. 506 (2002).

⁸ *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000).

⁹ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569-70 (2007).

4. **The U.S. Supreme Court and lower federal courts across the country have indicated that *Conley*'s "no set of facts" language is impossible to apply literally because it would allow a wholly conclusory statement of a claim to survive a motion to dismiss whenever the court could imagine some set of facts that would support recovery. For this reason, courts have been applying the *Conley* standard in a non-literal, practical way for decades. If the proposed legislation passes, do you believe a literal application of the standard is appropriate, or should courts look to cases decided after *Conley* but before *Twombly* for guidance?**

In the five decades after the Supreme Court decided *Conley*, no Supreme Court Justice ever "express[ed] any doubt" about the "adequacy" of *Conley*'s interpretation of the Federal Rules of Civil Procedure.¹⁰ To the contrary, prior to *Iqbal* and *Twombly*, the Supreme Court repeatedly and consistently rebuffed attempts by lower courts to undermine *Conley*.¹¹ There is no question that *Iqbal* and *Twombly* changed the rules of the game for civil litigants. The key point in *Conley* is this: "[A]ll the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."¹² As the Court emphasized in *Conley*, "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."¹³ *Iqbal* and *Twombly* place renewed emphasis on precisely the sort of pleading gymnastics that *Conley* and the Federal Rules rejected. The demise of *Conley*'s "fair notice" approach to pleading encourages litigants to engage in excessive wrangling and delay at the pleading stage and thus impedes practical and fair-minded resolution of civil rights claims and other litigation on the merits.

¹⁰ *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 578 (2007) (Stevens, J., dissenting).

¹¹ See, e.g., *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993).

¹² *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (quoting Fed. R. Civ. P. 8(a)(2)).

¹³ *Id.* at 48.