

Q&A
The Iqbal Decision Affects Civil Pleading¹

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- Q.** Our most disabled clients are experiencing problems obtaining community based services. We are considering a federal court case to argue that officials with the state department of health and their contractors are implementing policies that discriminate against our clients based on their disability. Are there recent cases that we should review?
- A.** Yes. *Ashcroft v. Iqbal* announced standards that affect how complaints must be pled and included discussion that could affect government officials' liability. The Court found Javid Iqbal's complaint did not provide sufficient factual allegations to plausibly support his claim that high-ranking Bush administration officials had discriminated against him because he is an Arab Muslim.

Discussion

On its face, *Ashcroft v. Iqbal* does not appear to have anything to do with discrimination claims against state health officials. See 129 S.Ct. 1937 (2009). The case concerns the detention activities of the FBI following the September 11th attacks.

Javid Iqbal, a Pakistani Muslim, filed a "Bivens" action against federal prison guards, wardens, and numerous federal officials, including Attorney General John Ashcroft and FBI Director Robert Mueller.² The complaint alleged that Mr. Iqbal was arrested in November 2001 and placed in a maximum security prison where he was beaten, subjected to unjustified strip searches, prevented from engaging in prayer, and berated as a terrorist. Mr. Iqbal alleged that "under the direction of Defendant Mueller,"

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² *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388(1971), recognizes an implied private cause of action for damages against federal officials alleged to have violated the plaintiff's constitutional rights. The *Iqbal* majority notes that implied causes of action are disfavored and that it could have decided against Iqbal by refusing to extend *Bivens* to a claim sounding in the First Amendment. However, obviously wanting to discuss other issues, the Court assumed without deciding that the First Amendment claim was actionable under *Bivens*. See *Iqbal*, 129 S.Ct. at 1948.

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the FBI arrested and detained Arab Muslim men; that Defendants Ashcroft and Mueller approved a policy of detaining and holding these men in highly restrictive environments; and that “each knew of, condoned, and willfully and maliciously agreed to subject” Mr. Iqbal to harsh conditions “as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.” 129 S.Ct. at 1944 (quoting complaint). Ashcroft was named as the “principle architect” of the policy and Mueller as “instrumental in [its] adoption, promulgation, and implementation.” *Id.* Mr. Iqbal claimed that these actions by defendants Ashcroft and Mueller violated his First and Fifth Amendment rights. *Id.*

A 5-4 majority of the Supreme Court decided that the complaint did not state a claim against Ashcroft and Mueller. The Court held the pleadings did not meet the standards of Fed. R. Civ. P. 8 but also included an unnecessary discussion of individual liability. The majority repeatedly expressed concern with results—namely that litigation not interfere with “the proper execution of the work of the Government” in response to the unprecedented attacks of September 11. 129 S.Ct. at 1953.

Rule 8 after Twombly/Iqbal

Under Rule 8(a)(2), a pleading must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” Until recently, courts applied 50-year-old precedent to determine whether a complaint met the requirements of Rule 8. A complaint would not be dismissed for failure to state a claim unless it appeared “beyond doubt” that the plaintiff could “prove no set of facts in support of his claim which would entitle him to relief.” *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The district court in *Iqbal* applied this standard to deny the defendants’ motion to dismiss.

Two years ago, in *Bell Atlantic Corp. v. Twombly*, the Supreme Court backed away from *Conley* and announced a “plausibility standard.” 550 U.S. 544 (2007). The *Twombly* Court pointed out that, under Rule 8, the complaint must “give the defendant fair notice of what the ... claim is and the grounds upon which it rests.” *Id.* at 555 (quoting *Conley*, 355 U.S. at 47). According to the Court, such grounds require “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Id.* Thus, “naked assertion” devoid of “further factual enhancement” will not do. *Id.* at 570. Rather, to survive a motion to dismiss, a complaint must allege facts, accepted as true, to “state a claim to relief that is plausible on its face.” *Id.* The court of appeals in *Iqbal* applied this standard to deny the defendants’ motion to dismiss.³

³ Justice Stevens’s bitter dissent in *Twombly* pointed out that the majority’s rebuke of the *Conley* standard had not been sought by any party before the Court. *Twombly*, 550 U.S. at 579 (Stevens, J., dissenting). He concluded that the “transparent policy concern that drives the decision is the interest in protecting antitrust defendants—who in this case are some of the wealthiest corporations in our economy—from the burdens of pretrial discovery,” a concern which should not “provide an adequate justification for this law-changing decision.” *Id.* at 596. Interestingly, the Court appeared to mitigate *Twombly* one week later in a per curiam decision that allowed a pro se plaintiff to proceed with his complaint. See *Erickson v. Pardus*, 127 S.Ct. 2197 (2007). However, *Ashcroft v. Iqbal* makes it clear that the Court intended *Twombly* to reject the straightforward notice pleading that governed civil

Reversing the Second Circuit, *Iqbal* reinforces *Twombly*. According to the *Iqbal* Court, two principles underlie the decision in *Twombly*. First, conclusory factual allegations are not enough. While Rule 8 departs from the “hyper-technical, code-pleading regime of a prior era,” it does not, according to the Court, “unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.” 129 S.Ct. at 1949-50.⁴ Writing for the majority, Justice Kennedy noted the plausibility standard “demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.* at 1949. The “sheer possibility that a defendant has acted unlawfully” is not enough, and a complaint that pleads facts that are “merely consistent with” liability “stops short of the line between possibility and plausibility of ‘entitlement to relief.’” *Id.* (citing *Twombly*, 550 U.S. at 557). Winding the discussion back to Rule 8, the Court held that when well-pleaded facts do not permit the court to infer more than the possibility of misconduct, “the complaint has alleged—but it has not ‘show[n]’—that the pleader is entitled to relief.” *Id.* at 1950 (citing Fed. R. Civ. P. 8(a)(2)).

The second *Twombly* principle cited in *Iqbal* concerns the demeanor of the reviewing judge. According to the Court, the review of the complaint will be “context-specific,” requiring the court to “draw on its judicial experience and common sense.” *Id.* at 1940.

Applying this souped-up plausibility test to Mr. Iqbal’s allegations, the Court, first, “identif[ied] the allegations in the complaint that are *not* entitled to the assumption of truth.” *Id.* at 1951 (emphasis added). As noted above, the complaint alleged that the defendants “knew of, condoned, and willfully and maliciously agreed” to subject Mr. Iqbal to confinement “solely on account of his religion, race, and/or national origin and for no legitimate penologic interest.” The complaint further alleged that Ashcroft was the “principle architect” of the policy and that Mueller was “instrumental” in implementing it. According to the Court, these allegations were “bare assertions” that amounted to nothing more than a “formulaic recitation of the elements” of a discrimination claim. *Id.* The Court concluded that “the conclusory nature of respondent’s allegations, rather than their extravagantly fanciful nature, . . . disentitles them to the presumption of truth.” *Id.* Compare 129 S.Ct. at 1961 (Souter, J., dissenting) (illustrating how the majority picks and chooses which allegations to highlight as conclusory, while ignoring other allegations that detailed the government policies).

The Court next considered the remaining factual allegations to determine whether they plausibly suggested an entitlement to relief. The Court found the complaint was insufficient because it did not “show, or even intimate” that Ashcroft and

complaints for over 50 years. For a more comprehensive discussion of *Twombly*, see Jane Perkins, Gill Deford, Matthew Diller, & Gary F. Smith, *The Supreme Court’s 2006-2007 Term: The Shift to the Right Takes Shape*, 41 CLEARINGHOUSE REV. J. OF POV. L. & POL. 442, 442-45 (Nov.-Dec. 2007).

⁴ Justice Breyer’s separate dissent points out the result-oriented nature of the decision, noting that there are numerous case management and discovery limitations that trial courts have historically employed to avoid unwarranted burdens on public officials. See 129 S.Ct. at 1961-62 (Breyer, J., dissenting).

Mueller purposefully housed detainees in the maximum security setting because of their race, color, and/or national origin. *Id.* at 1951-52. What is most interesting about this aspect of the decision is that the Court goes outside of the pleadings to find an “obvious alternative explanation” and draw its own conclusions about the defendants’ state of mind. *Id.* at 1951 (discussing a nondiscriminatory intent to “detain aliens .. who had potential connections to those who committed the terrorist attacks”). *Compare* Fed. R. Civ. P. 9(b) (“Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.”). The Court was clearly affected by the context of the case and protective of government officials who were dealing with the aftermath of the September 11 attacks.

The significance of this decision cannot be underplayed. While *Iqbal* did set forth allegations that were consistent with the defendants’ liability, the Court found them to be too conclusory and required, instead, that the complaint allegations *show* the reviewing judge that the pleader is entitled to relief. It is not clear how, absent discovery or a well-placed mole, Mr. *Iqbal* could have alleged more.

Nevertheless, to withstand the plausibility test announced in *Iqbal*, a complaint will need to place heavy emphasis on factual allegations. However, even with well-pled factual allegations, the Court has injected an unmistakable element of subjectivity into the review by allowing the trial judge to disregard allegations when his “common sense” tells him that he does not believe in the plaintiffs’ case. And while the complaint included allegations that a legal violation had occurred, the court went outside of the pleadings to find alternative explanations for why the government officials acted as they did.

Qualified immunity also discussed

The majority included an uncalled for, but significant discussion of the requirements for holding high-ranking officials liable for the acts of their subordinates. As noted, the plaintiff filed a *Bivens* action against the government officials. The Court has long held that government officials will not be held liable for the conduct of their employees and agents under a theory of *respondeat superior*. *See Iqbal*, 129 S.Ct. at 1948 (citing cases). However, this immunity is qualified, and government officials can be held liable under “a spectrum of possible tests for supervisory liability.” *See Id.* at 1958 (Souter, J. dissenting) (describing various tests). Plaintiff *Iqbal* relied upon one of these tests, alleging that the defendants were liable because of their “knowledge and acquiescence in their subordinates’” unlawful conduct. *Id.* at 1949. The Court did not accept this theory; stating:

[T]o state a claim based on a violation of a clearly established right, respondent [*Iqbal*] must plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but *for the purpose of* discriminating on account of race, religion, or national origin. .. [E]ach Government official, his or her title notwithstanding, is only liable for his or her own misconduct.

Id. at 1948-49 (emphasis added). Thus, the federal officials needed to have more than knowledge of or acquiesce in the Constitutional violation; rather, they needed to have participated in it. This discussion could be particularly far reaching because courts' reasoning on supervisory responsibility typically applies to both *Bivens*-type actions involving federal officials and to section 1983 actions involving state officials.

In a stinging dissent, Justice Souter complains that the Court's discussion of supervisory liability is "especially inappropriate." 129 S.Ct. at 1957 (Souter, J., dissenting). It occurred *sua sponte*, without any briefing from the parties. *Id.* at 1956-57. Moreover, the discussion had no bearing on the majority's resolution of the case. *Id.* at 1954-55, 1958. Although the majority stated that it needed to establish the elements of supervisory responsibility so that it could determine whether the plaintiff had made the requisite showing under Rule 8, the dissent points out that this was "uncalled for." *Id.* at 1956-57. This is because defendants Ashcroft and Mueller had conceded in their petition for certiorari that the plaintiffs' theory of liability was correct and that they would be liable if they had actual knowledge of the discrimination by their subordinates and had exhibited deliberate indifference to that discrimination. *Id.* at 1956 (citing Pet. for Cert. 29 and noting that the defendants had only asked the Court to decide whether they could be held personally liable on the theory that they had constructive notice of their subordinates' unconstitutional conduct). While Justice Souter expresses fear that the majority opinion has actually eliminated *Bivens* supervisory responsibility, that concern will await future clarification as to whether this discussion was dicta.

The dissent also takes the majority to task for its supercharged application of *Twombly*:

Twombly does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true. We made it clear, on the contrary, that a court must take the allegations as true, no matter how skeptical the court may be.... 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. at 1959.

Conclusions and Recommendations

The parameters of the *Iqbal* decision are still to be determined. Clearly, the case will be used to extend extremely strong protection to government officials for the range of their responses to the September 11 attacks. The case will also affect civil proceedings in general. Advocates should:

- Read *Iqbal* and carefully refer to it when preparing a complaint. Opinions from the lower courts should also be consulted. Not surprisingly, the case is causing a

stir. Since it was announced on May 18, 2009, over 600 cases have cited it.

- Remember that *Iqbal* and *Twombly* have revised the Rule 8 pleading standard and that there will be tension as the lower courts match the plausibility standard against the requirements of Rule 8. On its face, Rule 8(a) still requires only notice pleading, a short and plain statement of the claim showing that the pleader is entitled to relief. However, *Iqbal/Twombly* interject notions of “plausibility” and “common sense” into the mix that could cause some judge to approach complaints with affirmative skepticism. Accordingly, plaintiffs must strive to keep the proper lens on the review. “[I]n keeping with Rule 8(a), a complaint should only be dismissed at the pleading stage where the allegations are so broad, and the alternative explanations so overwhelming, that the claims no longer appear plausible.” *Chao v. Ballista*, __ F. Supp. 2d __, 2009 WL 1910954, at *5 (D. Mass. July 1, 2009).
- When drafting a complaint, focus on fully establishing the context of the case and concrete facts. As *Iqbal* makes clear, the plausibility standard is highly contextual. It will depend on the particular claims asserted, the elements of these claims, and the entirety of the factual landscape alleged in the complaint. Avoid broad and sweeping factual statements. The facts should be set forth in full—with clear explanation of each defendant’s unlawful conduct. Avoid conclusory statements or use them only after the particular facts have been amplified. As the district court in *Chao v. Ballista* noted, “Allegations become ‘conclusory’ where they recite only the elements of the claim and, at the same time, the court’s commonsense credits a far more likely inference from the available facts.” *Id.* (citing *Madanado v. Fontanes*, 568 F.3d 263 (1st Cir. 2009)).
- When describing the facts of your case, remember that the judge will be reviewing them against his own experience and common sense. Account, when necessary, for alternative explanations for the defendants’ conduct. And if a motion to dismiss is filed, distinguish the context of your case from that of *Iqbal* and the *Iqbal* Court’s repeated concern that the Bush administration officials faced “a national and international security emergency unprecedented in the history of the American Republic.” 129 S.Ct. at 1954.
- *Iqbal* can also affect pending complaints. If a court should decide that a pending complaint fails to meet the pleading standard, ask the court to allow you to amend the complaint rather than dismiss the case. See generally *Moss v. U.S. Secret Service*, 572 F.3d 962, 965 (9th Cir. 2009) (reversing district court’s denial of motion to dismiss and stating that plaintiffs should be granted leave to amend their complaint so that they have the opportunity to comply with *Iqbal/Twombly*).
- Monitor federal legislative developments. Senator Arlen Specter has introduced the “Notice Pleading Restoration Act of 2009” to reverse the pleading standards announced in *Iqbal* and *Twombly*. The bill states that, unless Congress or the Federal Rules of Civil Procedure provide otherwise, federal courts will not

dismiss complaints under Rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court in *Conley v. Gibson*. See S.1504, 111th Cong (2009).