No. 00-1853

In the Supreme Court of the United States

AKOS SWIERKIEWICZ,
Petitioner,

v.

SOREMA N.A.,
Respondent.

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

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BRIEF *AMICI CURIAE* OF NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, AARP, AMERICAN CIVIL LIBERTIES UNION, THE NATIONAL PARTNERSHIP FOR WOMEN AND FAMILIES, THE NATIONAL WOMEN'S LAW CENTER, AND NOW LEGAL DEFENSE AND EDUCATION FUND IN SUPPORT OF PETITIONER

PAUL W. MOLLICA
Counsel of Record
MEITES, MULDER, BURGER & MOLLICA
208 South LaSalle Street
Suite 1410
Chicago, IL 60604
(312) 263-0272

PAULA A. BRANTNER
Senior Staff Attorney
NATIONAL EMPLOYMENT LAWYERS ASSOCIATION
44 Montgomery Street
Suite 2080
Francisco, CA 94107
(415) 296-7629

DANIEL B. KOHRMAN
THOMAS W. OSBORNE
AARP FOUNDATION LITIGATION

MELVIN RADOWITZ
AARP
601 E Street, N.W.
Washington, DC 20049
(202) 434-2060

STEVEN R. SHAPIRO
LENORA M. LAPIDUS
JAMES D. ESSEKS
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500

JUDITH L. LICHTMAN
JOCELYN C. FRYE
NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES
1875 Connecticut Avenue, N.W.
Suite 650
Washington, DC 20009
(202) 986-2600

MARCIA D. GREENBERGER
DEBORAH CHALFIE
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, Suite 800
Washington, DC 20036
(202) 588-5180

MARTHA F. DAVIS
NOW LEGAL DEFENSE AND EDUCATION FUND
395 Hudson Street
New York, NY 10014
(212) 925-6635

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INTEREST OF AMICI CURIAE[1]

NELA, a voluntary membership organization of more than 3000 attorneys nationwide, is the country's only professional membership organization of lawyers who regularly represent workers in employment, labor, and civil rights disputes. As part of its advocacy efforts, NELA regularly supports litigation affecting the rights of individuals in the workplace. NELA has filed numerous amicus curiae briefs before the U.S. Supreme Court and the federal appellate and district courts regarding the proper interpretation and application of employment discrimination laws to ensure that those laws are fully enforced and that the rights of workers are fully protected. Some of the more recent cases before this Court include: Wright v. Universal Maritime Service Corp., 525 U.S. 70 (1998); Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Industries v. Ellerth, 524 U.S. 742 (1998); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133 (2000); Circuit City Stores, Inc. v. Adams, 121 S. Ct. 302 (2001).

AARP is a nonprofit membership organization serving more than thirty-five million people age 50 and older that is dedicated to addressing the needs and interests of older

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[1] The position amici take has not been approved or financed by petitioner or his counsel. No counsel for any party had any role in authoring this brief. Written consents of both parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3(a).

Americans. One of AARP's primary objectives is to strive to achieve dignity and equality in the workplace through positive attitudes, practices, and policies towards employment and retirement. In pursuit of this objective, AARP has since 1985 filed more than 200 amicus briefs before this Court and federal appellate and district courts. Nearly 40% of all AARP members—14 million people—are employed. They have strong interests in the outcome of this case, which will affect their rights under the Age Discrimination in Employment Act and Title VII of the Civil Rights Act of 1964. In addition, because older people have a higher incidence of disabilities than the overall population, significant numbers of AARP members rely on laws based on Title VII, such as Title I of the Americans with Disabilities Act, to address disability-based discrimination in the workplace.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. Over the last four decades, the ACLU has appeared before this Court in numerous cases involving the proper interpretation of those civil rights laws, both as direct counsel and as amicus curiae. Additionally, the ACLU has repeatedly opposed a heightened pleading standard in civil rights cases because of the impediment it imposes on civil rights plaintiffs seeking meaningful access

to the courts. This case involves the imposition of a heightened pleading standard on a federal complaint alleging employment discrimination based on age and national origin. Its proper resolution is therefore a matter of significant concern to the ACLU and its members throughout the country.

The National Partnership for Women & Families (National Partnership) is a national advocacy organization that develops and promotes policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Since its founding in 1971, the National Partnership (formerly the Women's Legal Defense Fund) has worked to advance equal employment opportunities by monitoring agencies' EEO enforcement, challenging employment discrimination in the courts, and leading efforts to promote employment policies such as the Family and Medical Leave Act and the Pregnancy Discrimination Act.

The National Women's Law Center ("NWLC") is a nonprofit, legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. Since 1972, NWLC has worked to secure equal opportunity for women in the workplace, including through the full enforcement of Title VII of the Civil Rights Act of 1964 as amended. NWLC has participated as amicus curiae in numerous cases involving employment law and civil rights issues.

NOW Legal Defense and Education Fund (NOW Legal Defense) is a leading national nonprofit civil rights organization that has used the power of the law to define and defend women's rights for over thirty years. NOW Legal Defense has appeared before this Court in many employment discrimination cases, including Faragher v. City of Boca Raton, 524 U.S. 742 (1998), Burlington Industries v. Ellerth, 524 U.S. 742 (1998), and Reeves v. Sanderson Plumbing Products, 530 U.S. 133 (2000). NOW Legal Defense is particularly concerned that the heightened pleading standard required by the court of appeals below will frustrate plaintiffs' meaningful access to the federal courts in future employment discrimination cases.

SUMMARY OF ARGUMENT

The Second Circuit's decision squares neither with the plain terms of the Federal Rules of Civil Procedure, nor with the spirit of substantial justice that animates them. The Federal Rules decreed a clean break with code pleading in favor of notice pleading, epitomized by Rule 8(a)(2) and reflected in other provisions in the Federal Rules. This Court's interpretation of Rule 12(b)(6) in Conley v. Gibson, 355 U.S. 41 (1957), backed by virtually every Court of Appeals, mandates simplicity in pleading employment discrimination cases. The heightened pleading requirement suggested by the Second Circuit in Title VII and ADEA cases is unnecessary and inequitable: employers have already viewed the merits through statutorily-mandated EEOC charge processing procedures and they command the key facts. Nor should employees be required to plead particular legal theories (such as pretext) in the complaint because the facts may ultimately lend themselves to alternative theories of proof.

ARGUMENT

Federal Rule of Civil Procedure 84 commends simple form complaints to courts and practitioners, "intended to indicate the simplicity and brevity of statement which the rules contemplate." By way of example, the model complaint for negligence omits reference to the common law elements of proof for that cause of action:

> 1. Allegation of jurisdiction.
>
> 2. On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.
>
> 3. As a result plaintiff was thrown down and had his leg broken and was otherwise injured, was prevented from transacting his business, suffered great pain of body and mind, and incurred expenses for medical attention and hospitalization in the sum of one thousand dollars.
>
> Wherefore plaintiff demands judgment against defendant in the sum of _____ dollars and costs.

Fed. R. Civ. P., Form 9. Instead of a detailed recitation of causation and the tortfeasor's duty of due care, the model complaint rests on a bare "conclusory" allegation of negligence.

The petitioner, with the brevity exemplified by this form, alleged that respondent Sorema N.A. fired him on account of national origin and age, in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq. and the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"). This Court must decide whether the petitioner's claim should have expired solely owing to the terseness of his complaint.

The framers of the Federal Rules elected

substantial justice and the litigation of merits over the fusty formalism of code pleading. The Rules, departing from pre-existing practice, no longer force pleadings to carry the entire weight of stating, narrowing and resolving fact issues in a case. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202 at 68-69 (2d ed. 1990) (hereinafter "WRIGHT & MILLER"). Instead, the Rules afford parties pre-trial conferences, discovery, summary judgment and (ultimately) trials to winnow down fact issues. In particular, Federal Rule of Civil Procedure 8(a)(2) commands that a "pleading . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief. . . ."

Yet the appellate court's decision below retreats to the era of code pleading, demanding that an employment discrimination plaintiff plead both facts and a legal theory before the privilege of litigating. The court specified that a plaintiff must allege facts establishing a prima facie case under the framework of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) ("McDonnell Douglas"). McDonnell Douglas, however, set out a framework for what must be proved at trial. The Court of Appeals' extension of McDonnell Douglas is so at odds with the framework of the Federal Rules, and this Court's definitive holdings in Conley v. Gibson, 355 U.S. 41 (1957) and Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993), that it cannot stand. Amici request that the Court reverse the decision

below and remand for further proceedings.

I. THE FEDERAL RULES DISFAVOR COURT-IMPOSED, HEIGHTENED PLEADING REQUIREMENTS

A. The Federal Rules Decisively Rejected Code Pleading in Favor of Notice Pleading

A reexamination of the requirement of "fact" pleading was an important aspect of federal courts' procedural reforms during the 1930s and 1940s that led to the current Federal Rules of Civil Procedure. Professor Richard L. Marcus summarized the background law as thus:

> Common law pleading, which was originally oral, evolved over centuries into an increasingly detailed written exercise. During the same period, the forms of action were developing, and their limitations reinforced pleading difficulties. In order to prevail, the common law plaintiff had to choose the correct form of action. He and his lawyer then embarked on an exchange of pleadings with the defendant that was designed ultimately to produce a single issue for resolution by a judge or trial by jury, with trial itself as something of an afterthought to the pleading process.

Richard L. Marcus, The Revival of Fact Pleading Under the Federal Rules of Civil Procedure, 86 COLUM. L. REV. 433, 437 (1986) (footnotes omitted). The framers of the Federal Rules, most notably Dean (later Second Circuit Judge) Charles Clark, advocated a procedural order privileging

discovery and trial on the merits over pleading practice. See, e.g., Charles Clark, The Handmaid of Justice, 23 WASH. U.L.Q. 297, 318-19 (1938) ("in the case of a real dispute, there is no substitute anywhere for a trial").

This Court celebrated the departure from pre-Rules practice:

> Under the prior federal practice, the pre-trial functions of notice-giving issue-formulation and fact-revelation were performed primarily and inadequately by the pleadings. Inquiry into the issues and the facts before trial was narrowly confined and was often cumbersome in method. The new rules, however, restrict the pleadings to the task of general notice-giving and invest the deposition-discovery process with a vital role in the preparation for trial. The various instruments of discovery now serve (1) as a device, along with the pre-trial hearing under Rule 16, to narrow and clarify the basic issues between the parties, and (2) as a device for ascertaining the facts, or information as to the existence or whereabouts of facts, relative to those issues.

Hickman v. Taylor, 329 U.S. 495, 500-01 (1947) (footnotes omitted).

The centerpiece of this reform was Rule 8(a)(2) which states that "[a] pleading . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to

relief. . . ." 5 WRIGHT & MILLER, supra, § 1202 at 68 ("Rule 8 is the keystone of the system of pleading embodied in the federal rules"); Judge Patricia M. Wald, Summary Judgment at Sixty, 76 TEX. L. REV. 1897, 1917 (1998) (describing Rule 8 as the "jewel in the crown of the Federal Rules").

This Court's preeminent interpretation of Rule 8(a)(2) remains Conley v. Gibson, 355 U.S. 41 (1957). African-American railway workers alleged that their union breached its duty of fair representation under the Railway Labor Act when it allowed them to be replaced or demoted in favor of white employees. Conley rejected the union's argument that the complaint lacked sufficient detail to support the general allegations of discrimination:

> The decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all 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. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified "notice pleading" is made possible by the liberal opportunity for discovery and the other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts

> and issues. [Id. at 47-48, footnote omitted.]

This Court continues to hold that under this rule, a party has "no duty to set out all of the relevant facts in his complaint." Atchison Topeka and Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 568 n.15 (1987).

This Court has also rejected judicial ingenuity directed against the notice pleading standard. In Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163 (1993), the Court unanimously held that federal courts may not apply a pleading standard "more stringent than the usual pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure in civil rights cases alleging municipal liability" under section 1983. Leatherman noted that "the Federal Rules . . . address in Rule 9(b) the need for greater particularity in pleading certain actions, but do not include . . . any reference to complaints alleging municipal liability under § 1983. Expressio unius est exclusio alterius." Id. at 168. The Court noted that regardless of whether heightened pleading standards might be desirable, such a result "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." Id. Courts, in sum, must honor Rule 8(a)(2) in substance and not innovate for the sake of docket clearing.

Judge Richard A. Posner in Jackson v. Marion County, 66 F.3d 151, 153 (7th Cir. 1995), so affirmed in a civil rights case where a complaint was dismissed for lack of specificity:

> [Leatherman] rejects . . . the imposition of heightened pleading requirements in cases governed by the Federal Rules of Civil Procedure unless required by the rules themselves, which is to say by Rule 9. The Court did leave open the possibility that complaints against defendants who might have a defense of immunity (which municipalities do not . . .) may have to be pleaded with particularity. The immunity is against being sued as well as against having to pay damages and would be undermined if the defendant had to engage in pretrial discovery in order to find out exactly what wrong the plaintiff was charging him with. So Rule 9 may not be exhaustive. But apart from the rule itself and a tiny handful of arguably appropriate judicial supplements to it, a plaintiff in a suit in federal court need not plead facts; he can plead conclusions. . . . The pressure of heavy caseloads in the district courts . . . has placed strains on the Federal Rules of Civil Procedure. Those rules, drafted at a time when the federal courts were less busy, may . . . not have kept up with the growth in federal litigation. Increasingly the rules are bent—Rule 56 to allow cases that formerly would have gone to trial to be disposed of on summary judgment, Rules 8 and 12 to allow cases that formerly would have gotten at least as far as summary judgment to be decided on the

> pleadings. . . . Most judges are pragmatists, and will allow rules to be bent when the pressure is great. But "bent" does not mean "broken." . . . Leatherman makes clear that the federal courts are not to interpolate a requirement of fact pleading into the federal rules.

Thus, "'I was turned down for a job because of my race' is all a complaint has to say" to satisfy Rule 8(a)(2) in a Title VII action. Bennett v. Schmidt, 153 F.3d 516, 518 (7th Cir. 1998).

B. The Cumulative Force of the Federal Rules Advantages Economical Pleading

In addition to Rule 8(a)(2) and Form 9 of Rule 84, both noted above, a walking tour of other sections of the Federal Rules reinforces the mandate of notice pleading.

1. Rule 7(c): "Demurrers, pleas, and exceptions for insufficiency of a pleading shall not be used." A companion to Rule 8, this section abolished formal common law challenges to the insufficiency of pleadings. This section advanced the framers' common goal of shifting the litigants' battle from the pleadings to the merits. The framers provided an alternative to such practice in the face of an unclear pleading under Rule 8(b): when the defendant cannot adequately affirm or deny allegations, it "shall so state and this has the effect of a denial." The defendant thus suffers no prejudice at the pleading stage and may

conduct discovery to clarify the claim.

Though seldom noted today, Rule 7(c) was a sensation when first adopted. "Whether Rule 7(c) would succeed in its objective was a matter of considerable doubt at the time of the promulgation and adoption of the federal rules . . . . Despite the clarity of this policy, it took a number of years to persuade the bench and bar that Rule 7(c) means what it says, and that demurrers are not to be entertained in actions in the federal courts." 5 WRIGHT & MILLER, supra, § 1196 at 556-58.

2. Rule 8(e)(1): "Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required." Courts interpret this provision, in the context of employment discrimination cases, to require a statement of the basis of discrimination, and no more. See, e.g., EEOC v. J.H. Routh Packing Co., 246 F.3d 850, 853 (6th Cir. 2001) ("[a]n accusation of discrimination on the basis of a particular impairment provides the defendant with sufficient notice to begin its defense against the claim"); Bennett, 153 F.3d at 518 ("a requirement that complaints contain all of the evidence needed to prevail at trial, or at least all the facts that would have been required under the pre-1938 system of code pleading, would induce plaintiffs to violate Rule 8(e) . . . by larding their complaints with facts and legal theories").

3. Rule 8(f): "All pleadings shall be so construed as to do substantial justice." As a leading treatise notes, "This provision is not

simply a precatory statement but reflects one of the basic philosophies of practice under the federal rules." 5 WRIGHT & MILLER, supra, § 1286 at 546-48. This Court cited this section in Conley, holding that "[f]ollowing the simple guide of Rule 8(f) . . . , we have no doubt that petitioners' complaint adequately set forth a claim and gave the respondents fair notice of its basis." Conley, 355 U.S. at 48. Courts of appeals also cite this section to construe Title VII, ADEA and related anti-discrimination complaints. See, e.g., Sparrow v. United Air Lines, Inc., 216 F.3d 1111, 1114 (D.C. Cir. 2000); Yamaguchi v. U.S. Dept. of the Air Force, 109 F.3d 1475, 1480-81 (9th Cir. 1997).

4. Rule 9(b)-(h): Rule 9 specifies particular allegations that must be plead with specificity. This Court in Leatherman noted that "perhaps if Rules 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b)." Leatherman, 507 U.S. at 168. It held, though, that further exceptions to Rule 8 not already expressed in Rule 8 may only be created through the rulemaking process. Id.

5. Rule 12(e): "If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading." Here lies the tool that most nearly meets the needs of courts and advocates who find a Title VII or ADEA pleading too obscure to comprehend or

answer. See Marcus, supra, 86 COLUM. L. REV. at 452 ("[p]roviding notice would seem, after all, to be the function of a motion for a more definite statement under Rule 12(e)"). This Court recently so noted in a decision rejecting a heightened burden of proof for "unconstitutional motivation" cases brought against public officials. Crawford-El v. Britton, 523 U.S. 574, 597 (1998) (noting that the district court may order a reply to a defendants' answer under Rule 7(a) or a more definite statement of the plaintiff's claim under Rule 12(e)). As the Seventh Circuit noted in an employment case, "the [employer] could have requested a more definite statement under Rule 12(e) if [it] believed that it needed more information about [plaintiff's] allegations." Scott v. City of Chicago, 195 F.3d 950, 952 (7th Cir. 1999). Sorema, N.A., did not file such a motion below.

6. Rule 56: The complement to judicial restraint on Rule 12(b)(6) motions to dismiss is Rule 56 summary judgment. As this Court noted in Celotex Corp. v. Catrett, 477 U.S. 317, 327 (1986):

> Before the shift to "notice pleading" accomplished by the Federal Rules, motions to dismiss a complaint or to strike a defense were the principal tools by which factually insufficient claims or defenses could be isolated and prevented from going to trial with the attendant unwarranted consumption of public and private resources. But with the advent of "notice pleading," the motion to dismiss seldom fulfills this function any more, and its place has been taken by the motion for summary judgment.

Summary judgment takes place only after the parties have had an opportunity for full discovery. Id. at 326 (citing Rule 56(f)). And in contrast to the pleading stage, summary judgment contemplates a review of the facts. Lujan v. National Wildlife Federation, 497 U.S. 871, 889 (1990) (noting that Rule 8(a), unlike Rule 56, "presumes that general allegations embrace those specific facts that are necessary to support the claim"). An attack on the plaintiff's prima facie case in an employment discrimination action may suitably occur, if at all, at the summary judgment stage after a sufficient opportunity for discovery.

C. Rule 12(b)(6) Does Not Allow Dismissal of a Complaint

Simply Because It Pleads Discrimination in a Conclusory Fashion

The role of Rule 12(b)(6) in a notice pleading regime found definition in Conley. The union defendant argued that plaintiffs' complaint failed to state a claim. But this Court held that the allegations were sufficient:

> In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Here, the complaint alleged, in part, that petitioners were discharged wrongfully by the Railroad and that the Union, acting according to plan, refused to protect their jobs as it did those of white employees or to help them with their grievances all because they were Negroes. If these allegations are proven there has been a manifest breach of the Union's statutory duty to represent fairly and without hostile discrimination all of the employees in the bargaining unit.

Id. at 45-46, footnote omitted. Some two decades later, in Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), the Court reaffirmed the restrictive Conley standard: "[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims."

Conley initiated a continuous line of authority supporting an uncomplicated standard of pleading and strict enforcement of Rule 12(b)(6).[2] The Court has applied these precepts specifically in the employment discrimination arena. In McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273, 283 n.11 (1976), this Court rejected an employer's argument under Title VII that plaintiffs alleging racial discrimination "were required to plead with 'particularity' the degree of similarity between their culpability in the alleged theft and the

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[2] See, e.g., Village of Willowbrook v. Olech, 528 U.S. 562, 565 (2000) (plaintiff stated claim of equal protection; complaint that could "fairly be construed as alleging that the Village intentionally demanded a 33-foot easement as a condition of connecting her property to the municipal water supply where the Village required only a 15-foot easement from other similarly situated property owners," that "the Village's demand was 'irrational and wholly arbitrary' and that the Village ultimately connected her property after receiving a clearly adequate 15-foot easement"); Brower v. County of Inyo, 489 U.S. 593, 597 (1989) (in Fourth Amendment case, reversing dismissal of complaint where "Petitioners have alleged the establishment of a roadblock crossing both lanes of the highway"); Hospital Bldg. Co. v. Trustees of Rex Hospital, 425 U.S. 738, 746 (1976) (reversing dismissal of antitrust complaint; "dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly"); Cruz v. Beto, 405 U.S. 319, 322 (1972) (reversing dismissal of prisoner's religious discrimination complaint).

involvement of the favored coemployee, Jackson." Hishon v. King & Spalding, 467 U.S. 69, 73 (1986), another Title VII case, reversed a Rule 12(b)(6) dismissal and reaffirmed that "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." There is no hint in any of this Court's decisions requiring particularized facts in Title VII or ADEA pleadings in order for them to survive a Rule 12(b)(6) motion.

The Courts of Appeals regularly cite to Conley to reverse Rule 12(b)(6) dismissals of employment discrimination complaints. Most courts hold that plaintiffs need not have alleged particular facts to establish a prima facie case. See, e.g., Weston v. Pennsylvania, 251 F.3d 420, 428-29 (3d Cir. 2001) (citing Conley, court finds that bare allegation of hostile work environment was sufficient to meet Rule 8 pleading requirements and survive dismissal for failure to state a claim); J.H. Routh Packing Co., 246 F.3d at 851 ("The Federal Rules of Civil Procedure provide for a liberal system of notice pleading"); Sparrow, 216 F.3d at 1114 ("The grounds for the district court's dismissal of Sparrow's complaint are inconsistent with Rule 8 and Conley"); Bennett, 153 F.3d at 518 ("[t]o the extent the district court required plaintiff to include in the complaint allegations sufficient (if proved) to prevail at trial, the court imposed a requirement of fact-pleading"); Yamaguchi, 109 F.3d at 1480-81 ("these liberal pleading rules only require that the averments

of the complaint sufficiently establish a basis for judgment against the defendant"); Ring v. First Interstate Mortg., Inc., 984 F.2d 924, 926 (8th Cir. 1993) ("the [McDonnell Douglas] prima facie case under this analysis is an evidentiary standard—it defines the quantum of proof plaintiff must present to create a rebuttable presumption of discrimination that shifts the burden to defendant to articulate some legitimate, nondiscriminatory reason for its conduct," but "is not a proper measure of whether a complaint fails to state a claim").

The Second Circuit appears to be the outlier, as the present case demonstrates. Recently, in Gregory v. Daly, 243 F.3d 687 (2d Cir. 2001), the court reversed dismissal of a Title VII complaint under Rule 12(b)(6). But while citing Conley, it reaffirmed that a plaintiff must set forth enough facts in her complaint to set forth a prima facie claim. It held that "a simple declaration that defendant's conduct violated the ultimate legal standard at issue (e.g., it was 'because of sex' or 'severe or pervasive') does not suffice" to survive a motion to dismiss. Id. at 692. The lower court's demand that a plaintiff cite facts in support of each element of McDonnell Douglas departs from the settled standard of Conley by requiring initial pleading of facts and a legal theory.

II. HEIGHTENED PLEADING RULES CANNOT BE JUSTIFIED IN EMPLOYMENT DISCRIMINATION CASES

Pleading requirements are somewhat elastic,

and this Court has recognized that trial courts may enjoy a limited discretion to insist that pleadings contain some additional detail in exceptionally complex cases, such as antitrust conspiracies. Associated General Contractors of California, Inc. v. California State Council of Carpenters, 458 U.S. 519, 528 n.17 (1983) (in a Clayton Act conspiracy case, this Court observed that "[c]ertainly in a case of this magnitude, a district court must retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed"). But see McLain v. Real Estate Bd. of New Orleans, Inc., 444 U.S. 232, 248 (1980) (Conley standard "applies with no less force to a Sherman Act claim"). Whatever scale of complexity may apply to civil cases, however, individual disparate treatment cases under Title VII, ADEA or related statutes—important though they may be—are scarcely the toughest. Hence, courts' limited discretion to require more detailed pleading has never been extended to employment discrimination cases, nor should it be.

There is no justification to single out employment discrimination cases for heightened pleading requirements. If anything, notice pleading makes especial sense in these cases: employers have already viewed the merits through statutorily-mandated procedures and usually have command of the key facts.[3]

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[3] As discussed more fully below, these include the (continued...)

Under these circumstances, requiring the plaintiff to produce even more facts at the pleading stage is inequitable. And contrary to the Second Circuit's holding below, a plaintiff should not be obliged to commit to a particular legal theory of discrimination (such as pretext) at the pleading stage.

A. The Employer Already Has Notice of the Claim Through the EEOC Charge

Under Title VII, as a precondition to litigation, a "charge" must be filed with the EEOC by a person aggrieved by an unlawful employment practice. The charge "shall be in writing under oath or affirmation and shall contain such information and be in such form as the Commission requires." 42 U.S.C. § 2000e-5(b). (Coincidentally, the Court is presently reviewing another case under this section. Edelman v. Lynchberg College, 121 S. Ct. 2547 (2001).) The EEOC requires a charge to include a "[a] clear and concise statement of the facts, including pertinent dates, constituting the alleged unlawful employment practices." 29 C.F.R. ¶1601.12(a)(3). The ADEA

(...continued)
complainant's filing of a charge, whose terms define the contours of the claims that later may be brought in federal court; investigation of the charge by EEOC, including presentation of the charge to the employer; and in some instances, conciliation between employer and employee.

does not precisely mirror the Title VII charge filing requirements, 29 U.S.C. § 626(d), but the EEOC nevertheless imposes the same "clear and concise" standard on ADEA charges. 29 C.F.R. ¶1626.8(a)(3).

Thus the employer obtains sufficient, formal notice of the employee's particular claims before litigation begins. See, e.g., White v. New Hampshire Dept. of Corrections, 221 F.3d 254, 263 (1st Cir. 2000) ("the administrative charge affords formal notice to the employer and prospective defendant of the charges that have been made against it") (internal quotation omitted); Cable v. Ivy Tech State College, 200 F.3d 467, 477 (7th Cir. 1999) ("[a] claim falls within the scope of the EEOC complaint if it is like or reasonably related to the charges in the EEOC complaint and if it reasonably could have developed from the EEOC's investigation of the charges before it") (internal quotation omitted). Indeed, an employee risks waiver of any claims not specifically included in a charge. See, e.g., Chanda v. Engelhard/ICC, 234 F.3d 1219, 1224-25 (11th Cir. 2000) (failure to check national origin box on EEOC charge form waived such claim); Cheek v. Western & Southern Life Ins. Co., 31 F.3d 497, 500 (7th Cir. 1994) (claim not raised in EEOC charges is barred from being raised in district court).

Thus, even before the complaint is filed, an employer is already on notice about the dimensions of the employee's claim and the facts he or she asserts. It is difficult to conceive of any prejudice suffered by an employer that

has already viewed the employee's administrative charge if an employee does not also detail those facts in her complaint.

B. In Employment Discrimination Cases, Employers Control the Key Facts

Notice pleading in employment discrimination cases dovetails with the insight that the employer ordinarily controls information critical to a plaintiff's claim. See, e.g., Bell v. Birmingham Linen Service, 715 F.2d 1552, 1556 (11th Cir. 1983) (McDonnell Douglas-Burdine method of establishing a prima facie case addresses circumstance that "employer enjoys greater access to proof of reasons for its own employment decisions"); Loeb v. Textron, 600 F.2d 1003, 1014 (1st Cir. 1979) ("the employer has the best access to the reasons that prompted him to fire, reject, discipline or refuse to promote the complainant"). The employer has custody of personnel files; data of the gender, race and age composition of the workforce; comparative information about similarly situated employees and like information—the building blocks of any disparate treatment claim. Demanding that plaintiff step up to the plate through her pleading, without a period of discovery of such information, upends the reforms intended by the Federal Rules.

C. The Decision Below Requires Premature Pleading of Legal Theories

Another holding implicit in the Second Circuit's decision is that plaintiffs in employment discrimination cases must spell out their legal theory (here, the pretext or

indirect method), as well as their facts, for defendants in advance. This again misapprehends the role of notice pleading under the Federal Rules. "The courts keep reminding plaintiffs that they don't to have to file long complaints, don't have to plead facts, don't have to plead legal theories." Kirksey v. R.J. Reynolds Tobacco Co., 168 F.3d 1039, 1041 (7th Cir. 1999). See also Evans v. McDonald's Corp., 936 F.2d 1087, 1091 (10th Cir. 1991) (Rule 8(a)(2) allows "the defendant fair notice of the claims against him without requiring the plaintiff to have every legal theory or fact developed in detail before the complaint is filed and the parties have opportunity for discovery"); McCalden v. California Library Assoc., 955 F.2d 1214, 1223 (9th Cir. 1990) (plaintiff needn't plead legal theories). The Second Circuit's approach harkens back to the discredited "theory of the pleadings" doctrine, which demanded that there be no departure from a theory as originally plead in a complaint. 5 WRIGHT & MILLER, supra, § 1219 at 188-89.

An employment discrimination plaintiff is not, of course, limited to the pretext method of proof ratified by this Court in McDonnell Douglas. Since McDonnell Douglas, the Court has held consistently that the McDonnell Douglas test forms just one model of a prima facie case, not an immutable scheme. See International Brotherhood of Teamsters v. United States, 431 U.S. 324, 358 (1977) (improper for defendants to argue that McDonnell Douglas pattern was the only means whereby the plaintiff could

establish a prima facie case because "[o]ur decision in that case . . . did not purport to create an inflexible formulation"); Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) ("[t]he method suggested in McDonnell Douglas for pursuing [the disparate treatment] inquiry . . . was never intended to be rigid, mechanized, or ritualistic"). Other methods sanctioned by this Court include disparate impact (Watson v. Fort Worth Bank & Trust Co., 478 U.S. 977 (1988)), the so-called direct evidence method (Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)) and pattern-or-practice (Franks v. Bowman Transp. Co., 424 U.S. 747 (1976)). The plaintiff should not be obliged to commit herself to any one theory at the pleadings stage prior to appropriate discovery.

CONCLUSION

For the foregoing reasons, amici respectfully request that the judgment of the United States Court of Appeals for the Second Circuit be reversed.

Respectfully submitted,

PAUL W. MOLLICA
Counsel of Record
MEITES, MULDER, BURGER & MOLLICA
208 South LaSalle Street
Suite 1410
Chicago, IL 60604

(312) 263-0272

PAULA A. BRANTNER
Senior Staff Attorney
NATIONAL EMPLOYMENT
LAWYERS ASSOCIATION
44 Montgomery Street
Suite 2080
San Francisco, CA 94107
(415) 296-7629

DANIEL B. KOHRMAN
THOMAS W. OSBORNE
AARP FOUNDATION
LITIGATION

MELVIN RADOWITZ
AARP
601 E Street, N.W.
Washington, DC 20049
(202) 434-2060

STEVEN R. SHAPIRO
LENORA M. LAPIDUS
JAMES D. ESSEKS
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
125 Broad Street
New York, NY 10004
(212) 549-2500

JUDITH L. LICHTMAN
JOCELYN C. FRYE
NATIONAL PARTNERSHIP
FOR
WOMEN & FAMILIES
1875 Connecticut Avenue,

N.W.
Suite 650
Washington, DC 20009
(202) 986-2600

MARCIA D. GREENBERGER
DEBORAH CHALFIE
NATIONAL WOMEN'S LAW CENTER
11 Dupont Circle, Suite 800
Washington, DC 20036
(202) 588-5180

MARTHA F. DAVIS
NOW LEGAL DEFENSE AND EDUCATION FUND
395 Hudson Street
New York, NY 10014
(212) 925-6635