Employment & Labor Relations Law

AMERICAN BAR ASSOCIATION

Section of Litigation Summer 2010 Vol. 8 No. 3

Employer Pandemic Flu Planning Beyond H1N1: Lessons Learned

By Christine Kenny

It has been over one year since the discovery of the H1N1 flu virus. In the wake of that discovery, many employers responded by establishing pandemic-flu and emergency-response policies. In February 2010, the Centers for Disease Control and Prevention (CDC), with input from the U.S. Department of Homeland Security (DHS) and Department of Health and Human Services (HHS), published an updated "Guidance for Businesses and Employers to Plan and Respond to the 2009–2010 Influenza Season."[1] The CDC's guidelines not only covered recommendations to use during the 2009–2010 H1N1 flu season but also recommended strategies for future use in the event a more severe outbreak were to occur.

As cautioned by the CDC, however, the guidance, which focuses on healthcare and safety concerns in the workplace, must be reconciled with existing state and federal workplace laws. On October 9, 2009, the Equal Employment Opportunity Commission (EEOC) published an updated technical-assistance document about implementing pandemic planning strategies in a manner that is consistent with the Americans with Disabilities Act (ADA).[2]

The CDC's guidelines were essentially divided into two categories: 1) recommendations to use during the 2009–2010 flu season or future flu viruses of similar severity, and 2) recommendations to consider adding if a more severe flu season occurs. Some of the strategies the CDC recommends that employers implement include:

Continued on page 3

Must Affirmative Defenses in Employment Litigation Be "Plausible" after *Iqbal*?

By William J. Simmons

Coverage of the U.S. Supreme Court's rulings in *Ashcroft v. Iqbal*[1] and *Bell Atlantic v. Twombly*[2] has primarily focused on the use of what might be called the "plausible pleading standard" to attack claims for relief. It is now clear as a threshold matter that the plausibility pleading standard applies to claims brought under the federal labor and employment laws.[3]

Some jurisdictions, however, have begun to require that defendants plead "plausible" affirmative defenses or else the defenses will be stricken pursuant to Rule 12(f).[4] Other courts have flatly rejected plaintiffs' overtures to apply the plausibility pleading standard espoused in *Twombly* and *Iqbal* to affirmative defenses.[5] Indeed, this is so divisive a subject that not only do courts across the country strongly disagree, but sometimes, even courts within the same judicial district have admittedly arrived at conflicting conclusions.[6]

Labor and employment practitioners should be prepared for a growing wave of arguments as to whether the plausibility pleading standard applies to the assertion of affirmative defenses, and ready to assess the practical implications that arise from recent court decisions addressing the issue.

The *Iqbal/Twombly* Standard

Any discussion of *Iqbal* and *Twombly*'s application to affirmative defenses must begin with the relevant language contained in Federal Rule of Civil Procedure

Continued on page 12

 Published in *Employment & Labor Relations Law*, Volume 8, Number 3, Summer 2010. © 2010 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Chairs' Column

Arley Harrel

Jeremy Sosna

Kimberly Stith

As chairs of the Employment and Labor Relations Law Committee, we have the privilege of serving over 2,000 members and working with a talented group of committed subcommittee chairs. This year, our subcommittee chairs have done a tremendous job, and it's important to thank them for their hard work and dedication to increasing the value of your membership.

Brian Koji (committee vice chair) and William Martucci, our newsletter editors, along with a dedicated editorial board, continue to do a great job producing our quarterly newsletter. This timely source of detailed information will soon be provided to you in an electronic format only.

In addition to providing you with a traditional newsletter, the committee has worked to improve our website and delivery of current information electronically and quickly. For this effort, we wish to thank Todd Sorensen and Celina Joachim, web editors. Hopefully, you all have joined our LinkedIn network and routinely visit our committee's website at www.abanet.org/litigation/committees/employment where short articles of interests are updated frequently with the help of John Ybarra and Azeez Hayne, our Hot Topics chairs.

If you would like to have a short article posted on the web or a longer article included in our newsletter, please let us know.

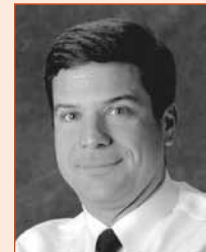
We hope you were able to attend our CLE teleconference earlier this year on "Woodshedding Witnesses: Limits To What Could Be One of the Law's Dirty Little Secrets." This program was a huge success thanks to Darryl McCallum and Theresa Bult, Programs Subcommittee chairs. Ann Marie Painter (former committee chair) and Maureen Knight, Membership Subcommittee chairs have begun surveying new members and welcome suggestions from other members about ways to make this committee better.

And finally, Cathy Beveridge, editor of the second edition of the *Employment Litigation Handbook*, deserves special thanks for shepherding this wonderful resource to completion. It is available through the ABA's Web Store and provides solutions to the important procedural and substantive problems you will encounter in assessing, settling, litigating, and appealing any type of employment case—no matter your level of experience or whether you represent management or an employee. We hope you add it to your practice library.

In addition, we encourage you to attend the ABA's 2010 Annual Meeting August 5– August 10 in San Francisco; please stay tuned for more information on our committee's networking dinner to be held during the meeting.

Our aim is to provide labor and employment litigators with cutting-edge educational and networking opportunities to improve and expand their practices, and if there is anything you believe will better help our committee reach this goal, please let us know. While we are proud of the committee's direction, we know we can always do better and welcome your input and involvement.

Message from the Editors


William C. Martucci

Brian Koji

This issue contains a number of recurring matters that employment-and-labor-relations lawyers face on a day-to-day basis. The insights provided are practical and sound. The first two articles focus on pleadings requirements as articulated by the Supreme Court and how those affect practitioners.

The first article, entitled "Employer Pandemic Flu Planning Beyond H1N1: Lessons Learned," written by Christine Kenny, is an analysis of how best to establish pandemic-flu and emergency-response policies. In the course of the analysis, the guidance from the CDC is considered and evaluated in the context of the requirements of the EEOC in connection with its ADA guidelines and the requirements of Title VII. The author concludes that finalizing pandemic planning policies in preparation for the next pandemic necessitates a careful reading of the the CDC's guidance and EEOC guidelines, as well as consideration of leave policies guided by other laws, including the Family and Medical Leave Act. Unquestionably, the guidance of the CDC is helpful in establishing the appropriate background for the required legal analysis.

The second article, "Must Affirmative Defenses in Employment Litigation Be 'Plausible' after *Iqbal*?" written by William Simmons, addresses the applicability of the plausibility

Continued on page 11

 Published in *Employment & Labor Relations Law*, Volume 8, Number 3, Summer 2010. © 2010 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Employment & Labor Relations Law
AMERICAN BAR ASSOCIATION

Chairs

Arley Harrel aharrel@ williamskastner.com
Jeremy Sosna jsosna@ fordharrison.com
Kimberly Stith kstith@wm.com

Editors

William C. Martucci wmartucci@shb.com
Brian Koji bkoji@anblaw.com

Editorial Board

Anessa Abrams aabrams@ fordharrison.com
Debra L. Raskin draskin@Vladeck.com

Committee Chairs Emeriti

M. Elaine Jacoby
Carol A. Mager
Wayne J. Positan
John W. Robinson IV
Victoria D. Stratman
Herbert E. Gerson
Ann Marie Painter
Barry V. Frederick
Barbara Evans
Jon W. Green
Jeffrey I. Kohn
Susan Potter Norton
Margaret Harris
Diane A. Seltzer

ABA Publishing

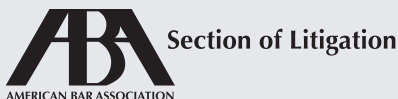
Associate Editor J.R. Haugen
Graphic Designer Sonya Taylor

Employment & Labor Relations Law (ISSN: 1937-3406) is published by the ABA Section of Litigation, 321 N. Clark Street, Chicago, IL 60654. The views expressed within do not reflect the views of the American Bar Association, the Section of Litigation or the Employment and Labor Relations Committee.

Copyright © 2010 American Bar Association. All rights reserved. For permission to reprint, contact ABA Copyrights & Contracts, 321 N. Clark Street, Chicago, IL 60654; fax: (312) 988-6030; email: copyright@abanet.org.

Address corrections should be sent to the American Bar Association, c/o ABA Service Center, 321 N. Clark Street, Chicago, IL 60654.

www.abanet.org/litigation/committees/employment



Section of Litigation

Flu Planning

continued from front cover

encouraging vaccinations for employees; advising sick employees to stay home; taking measures to protect employees who are at higher risk for complications;[3] preparing for increased numbers of employee absences (for their own illness and those of family members) and planning for continuity of essential business functions; advising employees to take precautionary steps before traveling; and preparing for the possibility of school dismissals or closures. Under circumstances involving flu virus more severe than the 2009 H1N1 flu outbreak, the CDC recommends that employers also actively screen employees who report to work; allow for alternative work environments for employees at higher risk for flu complications; increase social distancing in the workplace; and cancel nonessential business travel.

The guidance is consistent with the Occupational Safety and Health Administration's requirement that employers provide employees with a workplace that is "free from recognized hazards that are causing or are likely to cause death or serious harm to its employees."[4] However, these guidelines need to be tailored by the mandates of the ADA and its implementing regulations.

Squaring the CDC Guidance with the EEOC's ADA Guidelines

In October 2009, the EEOC published a revised technical-assistance document specifically covering Titles I and V of the ADA and pandemic planning in the workplace.[5] As explained by the EEOC, the ADA is relevant to pandemic preparation in at least three major ways. First, the ADA regulates employers' disability-related inquiries and medical examinations for all applicants and employees, with or without disabilities.[6] Second, the ADA prohibits excluding employees with disabilities from the workplace for health or safety reasons unless they pose a "direct threat."[7] Third, the ADA requires employers provide reasonable accommodation during a pandemic for individuals with disabilities.[8]

While the CDC encourages active screening of employees for evidence of the flu, the ADA simultaneously prohibits employee disability-related inquiries or medical examinations unless they are job-related and consistent with business necessity.[9] Generally, a disability-related inquiry or medical examination of an employee is job-related and consistent with business necessity when an employer has a reasonable belief, based on objective evidence that: 1) an employee's ability to perform essential job functions will be impaired by a medical condition; or 2) an employee will pose a direct threat due to a medical condition.

A reasonable belief by an employer "must be based on objective evidence obtained, or reasonably available to the employer, prior to making a disability-related inquiry or requiring a medical examination." A "direct threat" is defined as a "significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." If an individual poses a direct threat, he or she is not protected by the ADA.

The EEOC further explains that whether pandemic influenza rises to the level of a direct threat depends on the severity of the illness. If the CDC or local public-health authorities determine that the illness is akin to seasonal flu, it would not pose a direct threat justifying disability-related inquiries or medical examination. However, if the pandemic influenza is determined to be more severe, it might pose a direct threat to operations. It is important to keep in mind that whether an employee poses a direct threat in the workplace must be based on objective information, "not on subjective perceptions . . . [or] irrational fears" about disabilities.[10]

Surveying and Screening

The EEOC cautions that before a pandemic occurs, an employer may not ask an employee to disclose if he or she has a compromised immune system or a chronic health condition that would make the employee more susceptible to complications

Christine Kenny is an associate in the Philadelphia, Pennsylvania, office of Saul Ewing LLP.

 © 2010 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

of influenza. Thus, screening of employees to predict absenteeism levels before a pandemic arises is limited. According to the EEOC, before a pandemic is declared, employers may make inquiries that are not disability-related (i.e., those designed to identify potential non-medical reasons for absence during a pandemic (transportation issues)), simultaneously with those asking about medical reasons for a possible absence, as long as the employee can answer whether one of those reasons would apply in a "yes" or "no" fashion.[11]

Whether an employee poses a direct threat in the workplace must be based on objective information.

During a pandemic, however, employers have greater latitude in making employee inquiries. In conditions akin to the 2009 H1N1 virus pandemic or seasonal flu, an employer is free to ask whether an employee is experiencing any flu symptoms. In a more severe case of pandemic flu, an employer may ask a more pointed question even if disability-related, as the employer is justified by a reasonable belief based on objective evidence that the severe form of pandemic flu poses a direct threat.

Medical Examinations

Under the ADA, prior to a pandemic flu outbreak, medical examinations are only permitted if all employees or applicants in the same job category are required to undergo medical examinations and if the information obtained from the examinations are treated as confidential and maintained separately. During an influenza pandemic, medical examinations, which include such minor intrusions as measuring an employee's body temperature, are generally prohibited until the pandemic influenza is declared by local authorities to be mere severe or widespread than the 2009 H1N1 virus.

An employer, however, may not require all of its employees to submit to the influenza vaccine. In this regard, some employees may be entitled to an exemption from a mandatory vaccination requirement based on an ADA disability that prevents them from getting vaccinated. In addition, employees who have a sincerely held religious belief that prevents them from taking the vaccine are protected under Title VII. In both of these cases, the employer must make a reasonable accommodation unless there would be an undue hardship to the employer.[12]

Requiring Employees to Stay Home

Under both the CDC's guidance and the EEOC's guidelines, advising an employee who becomes ill with symptoms of influenza-like illness during a pandemic to stay home from work is not a disability-related action if the illness is akin to seasonal influenza or the 2009 H1N1 virus. This action is also allowed under the ADA if the illness is serious enough to pose a direct threat. Likewise, an employer may encourage an employee to telework and may use teleworking as a reasonable accommodation under the ADA.

In sum, finalizing pandemic planning policies in preparation for the next pandemic will require a careful reading of the CDC's guidance and the EEOC's guidelines, as well as consideration of an employer's leave policies guided by the Family and Medical Leave Act. This assistance, in conjunction with contemporaneous advice from local health authorities, should assist employers with compliance.

Endnotes

1. *See* Center for Disease Control and Prevention, *Guidance for Businesses and Employers to Plan and Respond to the 2009–2010 Influenza Season*, *available at* www.cdc.gov/h1n1flu/business/guidance.

2. *See* Equal Employment Opportunity Comm'n, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* (2009), *available at* www.eeoc.gov/facts/pandemic_flu.html.

3. Individuals who are at higher risk for complications are defined by the CDC as children under 5 years of age, adults over 65 years of age, pregnant women, adults with certain chronic illnesses or weakened immune systems, or people younger than 19 years of age receiving long-term aspirin therapy.

4. Occupational Safety Health Act of 1970, 29 U.S.C. 654 at section 5(a).

5. *See* Equal Employment Opportunity Comm'n, *Pandemic Preparedness in the Workplace and the Americans with Disabilities Act* (2009), *available at* www.eeoc.gov/facts/pandemic_flu.html.

6. *Id.* (citing 42 U.S.C. § 12112(d)(4)(A); *see also* EEOC, Enforcement Guidance: Pre-employment Disability-Related Questions and Medical Examinations B.1 (1995), *available at* www.eeoc.gov/policy/docs/preemp.html.

7. *Id.* (citing 42 U.S.C. §§ 12111(3), (8); 29 C.F.R. §§ 1630.2(r), 1630.15(b)(2)).

8. *Id.* (citing 42 U.S.C. §§ 12112(b)(5), 12111(3); 29 C.F.R § 1630.2(r)).

9. An inquiry is "disability-related" if it is likely to elicit information about a disability. A general question for a diagnosis is a disability-related inquiry, as is a question about an individual's immune system because a compromised immune system can be associated with conditions such as cancer or HIV/AIDS, for example. However, asking an employee about cold or flu symptoms he or she has is not disability-related. A "medical examination" is a procedure or test that seeks information about an individual's physical or mental impairments or health.

10. *Id.* (citing the ADA regulations at 29 C.F.R. pt. 1630 app. § 1630 2(r)).

11. For a suggested form ADA-compliant pre-pandemic employee survey, *see id.* at p. 5.

12. Undue hardship standards should be considered under both the ADA (i.e., whether there is significant difficulty or expense to the employer) and Title VII (i.e., whether there is "more than de minimis cost" to the operation of the employer's business).

 © 2010 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

The Americans with Disabilities Act Amendments Act of 2008

By Lisa R. Hasday

The Americans with Disabilities Act (ADA) Amendments Act of 2008 amended the ADA, the landmark disability statute that President George H. W. Bush signed into law in 1990. President George W. Bush signed the ADA Amendments Act into law on September 25, 2008. The new statute took effect on January 1, 2009.[1]

The primary objective of the Amendments Act is, as indicated in the statute's subtitle, "[t]o restore the intent and protections" of the ADA. In particular, the Amendments Act was intended to overturn two controversial Supreme Court decisions that had interpreted the ADA to impose a strict standard for determining disability.[2] Those decisions resulted in many lower courts never getting beyond threshold disability determinations to determine whether discrimination had occurred.

The Amendments Act retains the ADA's definition of "disability." Under that definition, someone is disabled if he or she (1) has a physical or mental impairment that substantially limits one or more major life activities, (2) has a record of such an impairment, or (3) is regarded as having such an impairment.[3] The Amendments Act adds provisions that change the way that the "disability" definition should be interpreted.

Nearly every court that has addressed the issue of retroactivity has concluded that the new statute applies only prospectively, not retrospectively, to conduct that preceded January 1, 2009. The Sixth Circuit arrived at a different result, however, in an unpublished opinion involving injunctive relief rather than monetary damages.[4]

Agency Involvement

The Amendments Act directed the Equal Employment Opportunity Commission (EEOC) to revise its regulations in accordance with the new statute. On September 23, 2009, the EEOC issued a notice of proposed rulemaking as well as a question-and-answer guide on the notice. Afterward, the EEOC and the Department of Justice's Civil Rights Division held four "town hall listening sessions" in Oakland, California; Philadelphia; Chicago; and New Orleans to obtain input on the proposed regulations from the business and disability communities. Members of the public could also submit comments via phone, mail, or fax. On November 23, 2009, the public-comment period ended. The EEOC has not yet issued its final regulations as of this writing.

For the first time, Congress has specifically granted the EEOC authority to issue regulations interpreting the general provisions of the ADA, including the definition of "disability." Under prior law, Congress gave the EEOC authority to implement only Title I of the ADA, which does not include the "disability" definition.[5] The pending EEOC regulations will therefore be especially significant.

"Major Life Activity"

What changes does the Amendments Act contemplate? First, the new statute clarifies the meaning of "major life activity." Although the ADA did not define this term, EEOC regulations promulgated under the ADA defined major life activities as "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working."[6] The EEOC later added sitting, standing, lifting, and reaching; mental and emotional processes such as thinking, concentrating, and interacting with others; and—something that I'm sure is dear to all of us—sleeping.[7] The Supreme Court, for its part, had defined major life activities as activities "of central importance to most people's daily lives."[8]

The Amendments Act provides an illustrative, non-exhaustive list that includes most activities that the EEOC had recognized in addition to some activities that the agency had not specifically recognized, such as eating, bending, reading, and communicating. The new statute also expressly includes "major bodily functions" within the concept of major life activities, which includes "functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions."[9] The EEOC's notice of proposed rulemaking adds a few activities to the list that the agency's regulations had previously included. It also recognizes functions of the hemic (blood), lymphatic, and musculoskeletal systems.[10]

"Substantially Limits"

Next, the Amendments Act clarifies the meaning of "substantially limits." The ADA again did not specifically address how the term "substantially limits" should be construed. However, an EEOC regulation promulgated under the ADA defined "substantially limits" to mean "[s]*ignificantly restricted* as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform that same major life activity."[11]

The Supreme Court had also addressed the meaning of "substantially limits." In *Toyota Motor Manufacturing. Kentucky, Inc. v. Williams*, the Court considered whether a person with carpal tunnel syndrome was substantially limited in the major life activity of performing manual tasks. In interpreting the language of "substantially limits," the Court started from the general premise that the ADA's statutory terms needed to be "interpreted strictly to create a demanding standard for qualifying as disabled." The Court concluded that "to be substantially limited in performing manual tasks, an individual

Lisa R. Hasday is an assistant U.S. attorney in Dallas, Texas.

 Published in *Employment & Labor Relations Law*, Volume 8, Number 3, Summer 2010. © 2010 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

must have an impairment that *prevents or severely restricts* the individual from doing activities that are of central importance to most people's daily lives."[12]

An impairment is a disability if it "substantially limits" the ability to perform a major life activity.

The Amendments Act expressly rejects these regulatory and judicial interpretations of "substantially limits" as "expressing too high a standard." However, the new statute does not mandate an alternative standard. Instead, it directs the EEOC to revise its regulations defining the term "substantially limits" to provide broader coverage, consistent with the purpose of the new act.[13] Accordingly, the EEOC's notice of proposed rulemaking rejects the idea that an impairment must prevent, or severely or significantly restrict, an individual. Rather, the notice states that an impairment is a disability if it, staying with the precise statutory language, "substantially limits" an individual's ability to perform a major life activity.[14]

Most Mitigating Measures Ignored

Under the new statute, "substantially limits" determinations must be made without regard to the ameliorative effects of mitigating measures, examples of which are listed in the statute. The list includes medication, equipment, prosthetics, hearing aids, assistive technology, reasonable accommodations, and learned behavioral or adaptive neurological modifications.[15] The EEOC's notice of proposed rulemaking also includes surgical interventions that do not permanently eliminate an impairment.[16]

The act makes exceptions for ordinary eyeglasses and contact lenses, as opposed to low-vision devices that "magnify, enhance, or otherwise augment a visual image."[17] Thus, ordinary eyeglasses and contact lenses may be considered in assessing whether an individual has a disability. However, the new statute prohibits covered entities from using qualification standards, employment tests, or other selection criteria based on an individual's "uncorrected vision" unless the standard, test, or criterion "is shown to be job-related for the position in question and consistent with business necessity."[18]

The Amendments Act's stand on mitigating measures is a break from recent Supreme Court jurisprudence. In *Sutton v. United Air Lines*, the Court held that "disability under the [ADA] is to be determined with reference to corrective measures."[19] Therefore, the Supreme Court had excluded from being disabled those individuals who could mitigate the effects of their impairments.

Changes to the "Regarded As" Disability Prong

The third prong of the disability definition provides for individuals who are "regarded as" having a substantially limiting impairment. The Amendments Act makes significant changes to the "regarded as" prong. The ADA provided that "no covered entity shall discriminate against a qualified individual *with a disability*."[20] The new statute changes the "with a disability" language to "on the basis of disability."[21] This change takes the emphasis away from proving the existence of a disability and toward proving that the basis for the discrimination was disability.

In addition, under the new statute, an individual may satisfy the "regarded as" definition by establishing "that he or she has been subjected to a [prohibited] action . . . because of an actual or perceived physical or mental impairment *whether or not the impairment limits or is perceived to limit a major life activity*."[22] Thus, the requirement that an impairment "substantially limit" a major life activity no longer applies in cases where an individual relies on the "regarded as" prong.

To prevent abuse of this provision by individuals who are perceived to have minor ailments that last only a short time, the statute now also provides that the "regarded as" prong "shall not apply to impairments that are transitory and minor," and defines a "transitory impairment" as one "with an actual or expected duration of 6 months or less."[23] There is no such exclusion for the first two prongs of the disability definition because the "substantially limits" requirement applies in those cases.

Finally, the Amendments Act also clarifies that individuals who are only "regarded as" disabled, but not actually impaired, are not entitled to reasonable accommodation.[24]

Rules of Construction

The Amendments Act contains various rules of construction regarding the definition of disability. Notably, the statute points out that "[a]n impairment that is episodic or in remission is a disability if it would substantially limit a major life activity when active."[25] The report of the House Committee on the Judiciary accompanying the new statute cites as examples in which this provision would apply cases involving individuals with epilepsy who experience episodic seizures, and individuals with multiple sclerosis or cancer.[26]

The EEOC's notice of proposed rulemaking also contains rules of construction, some of which mirror the Amendments Act's rules. The notice adds that (1) "[t]he comparison of an individual's limitation to the ability of most people in the general population often may be made using a common-sense standard, without resorting to scientific or medical evidence" and (2) "[i]n determining whether an individual has a disability, the focus is on how a major life activity is substantially limited, not on what an individual can do in spite of an impairment."[27]

"Consistent" Disabilities

The notice of proposed rulemaking identifies impairments that will "consistently" meet the disability definition. The identified impairments, which are merely illustrative, are deafness, blindness, intellectual disabilities, partially or completely missing limbs, mobility impairments requiring the use of a wheelchair, autism, cancer, cerebral

 Published in *Employment & Labor Relations Law*, Volume 8, Number 3, Summer 2010. © 2010 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

palsy, diabetes, epilepsy, HIV and AIDS, multiple sclerosis, muscular dystrophy, major depression, bipolar disorder, post-traumatic stress disorder, obsessive compulsive disorder, and schizophrenia.[28]

In addition, the notice lists impairments that may be substantially limiting for some individuals, but require more analysis. Those impairments are asthma, high blood pressure, learning disabilities, a back or leg impairment, psychiatric impairments such as panic or anxiety disorders and non-major depression, carpal tunnel syndrome, and hyperthyroidism. Millions of Americans have these conditions and, even if an employee is taking medication to treat such a condition, the employee may still be covered under the new statute.[29]

However, even if employees have impairments that "consistently" meet the definition of disability, the employees must establish not only that they were discriminated against "on the basis of disability" but also that they are "qualified."[30] The Amendments Act has not changed this requirement. A "qualified" individual is one who, "with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[31]

Other Changes

Besides adding provisions that change the way that the "disability" definition should be interpreted, does the Amendments Act do anything else? Yes. One other change worth noting is that the statute now clarifies that "reverse discrimination" claims based on lack of a disability are not authorized.[32] Other than that, the Amendments Act retains many of the same provisions as the ADA. The new statute does not, for instance, change the definitions of "qualified" (as already discussed), "impairment," "disparate treatment," "reasonable accommodation," or the affirmative defenses of "undue hardship" and "direct threat."

While the new statute is not all new, it is important for practitioners in this area to be aware of its changes and plan accordingly.

Example of "Working"

One example where you can see the effect the Amendments Act has had is in the major life activity of "working." According to EEOC regulations promulgated under the ADA, a person had to be disqualified from a "class" or "broad range" of jobs to be substantially limited in working.* Under the EEOC's notice of proposed rulemaking, a person must be disqualified only from a "type of work," examples of which include commercial truck driving, assembly-line jobs, food-service jobs, clerical jobs, or law-enforcement jobs. These examples may still seem pretty broad but, as the notice points out, "[a]n individual with a disability will usually be substantially limited in another major life activity, therefore generally making it unnecessary to consider whether the individual is substantially limited in working."**

* See 29 C.F.R. § 1630.2(j)(3)(i).
** 74 Fed. Reg. 48,442.

Endnotes

1. Pub. L. No. 110-325, § 8, 122 Stat. 3559 (2008).
2. *See* Toyota Motor Mfg., Ky. Inc. v. Williams, 534 U.S. 184 (2002); Sutton v. United Air Lines, 527 U.S. 471 (1999).
3. *See* 42 U.S.C. § 12102(1); 29 C.F.R. § 1630.2(g).
4. *See* Jenkins v. Nat'l Bd. of Med. Examiners, 2009 WL 331638, at *2 (6th Cir. Feb. 11, 2009).
5. *Compare* Pub. L. No. 110-325, § 6, 122 Stat. 3559, *with* 42 U.S.C. §§ 12102, 12116; *Sutton*, 527 U.S. at 479.
6. 29 C.F.R. § 1630.2(i).
7. 29 C.F.R. pt. 1630, app. § 1630.2(i); EEOC Compl. Man. (BNA) § 902.3(b) (1995); EEOC Notice No. 915.002, EEOC Enforcement Guidance on the ADA and Psychiatric Disabilities (1997).
8. *Toyota*, 534 U.S. at 198.
9. *See* Pub. L. No. 110-325, § 4(a), 122 Stat. 3555 (codified at 42 U.S.C. § 12102(2)(A) and (B)).
10. Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, as Amended (Notice of Proposed Rulemaking), 74 Fed. Reg. 48,431, 48,440 (proposed Sept. 23, 2009).
11. 29 C.F.R. § 1630.2(j)(1) (emphasis added).
12. *Toyota*, 534 U.S. at 197, 198 (emphasis added).
13. Pub. L. No. 110-325, § 2, 122 Stat. 3553–3554.
14. 74 Fed. Reg. 48,432.
15. Pub. L. No. 110-325, § 4, 122 Stat. 3556.
16. 74 Fed. Reg. 48,441.
17. Pub. L. No. 110-325, § 3, 122 Stat. 3556.
18. Pub. L. No. 110-325, § 5, 122 Stat. 3557 (codified at 42 U.S.C. § 12113(c)).
19. *Sutton*, 527 U.S. at 488.
20. 42 U.S.C. § 12112(a) (2000) (emphasis added).
21. 42 U.S.C. § 12112(a).
22. Pub. L. No. 110-325, § 4(a), 122 Stat. 3555 (codified at 42 U.S.C. § 12102(3)(A)) (emphasis added).
23. Pub. L. No. 110-325, § 4(a), 122 Stat. 3555 (codified at 42 U.S.C. § 12102(3)(B)).
24. *Compare* Pub. L. No. 110-325, § 6(a)(1), 122 Stat. 3558 (codified at 42 U.S.C. § 12201(h)), *with* 42 U.S.C. § 12112(b)(5)(A).
25. Pub. L. No. 110-325, § 4(a), 122 Stat. 3556 (codified at 42 U.S.C. § 12102(4)(D)).
26. H. R. Rep. No. 110-730 (Part 2) at 19 (2008).
27. 74 Fed. Reg. 48,440.
28. 74 Fed. Reg. 48,441.
29. 74 Fed. Reg. 48,442.
30. 42 U.S.C. § 12112(a).
31. 42 U.S.C. § 12111(8); *see also* 29 C.F.R. § 1630.2(m).
32. Pub. L. No. 110-325, § 6, 122 Stat. 3557–3558.

 © 2010 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

What Does It Really Take to "Nudge" the Complaint over the Line under *Iqbal* and *Twombly*?

By Carla R. Walworth and Mor Wetzler

Two watershed U.S. Supreme Court cases on pleading standards, *Ashcroft v. Iqbal* and *Bell Atlantic v. Twombly*, set off a firestorm of controversy.[1] From extended and sometimes sharp dissenting opinions, volumes of legal commentary, legislative action seeking to overturn the decisions, and calls to revise the Federal Rules of Civil Procedure, *Iqbal* and *Twombly* have been lightning rods of criticism. Both *Iqbal* and *Twombly* have been hailed and decried for cutting off frivolous lawsuits, slamming courthouse doors, limiting abusive discovery tactics, short-cutting legitimate inquiry, reducing pressure to settle lawsuits, foreclosing remedies for actual wrongs, and countless other outcomes.

Federal courts have struggled to apply *Iqbal* and *Twombly*. Most courts recognize the standards set forth as both new and, from the plaintiff's perspective, a heightened pleading standard. Yet in some courts, *Iqbal* and *Twombly* seem to have less impact on outcomes than originally predicted. To these courts, the standard is new, but the outcome is the same. These courts rely on well-developed pleading standards and familiar mechanisms, viewing them as not inconsistent with *Iqbal* and *Twombly*, and perhaps more understandable. To other courts, *Iqbal* and *Twombly* are limited either expressly or by application to their unique contexts in national-security and antitrust cases, notwithstanding the Supreme Court's express admonition that *Iqbal* and *Twombly* construe Fed. R. Civ. P. 8 as applied to all cases. In short, *Iqbal* and *Twombly* may have announced a new standard and invited heightened scrutiny of complaints, but the influence of the decisions is neither as palliative nor as draconian as was hoped or feared.

Carla R. Walworth is a partner and Mor Wetzler is an associate with Paul, Hastings, Janofsky & Walker LLP in New York, New York.

"What Does It Really Take to 'Nudge' the Complaint over the Line under Iqbal *and* Twombly*?" by Carla R. Walworth and Mor Wetzler, 2010,* PP&D *18:3, pp. 4–6. Copyright © 2010 by the American Bar Association. Reprinted with permission.*

Iqbal and *Twombly* Do Modify the Playbook

In 2007, the Supreme Court decided *Twombly*, an antitrust case, holding that to survive a motion to dismiss, a complaint must show a "plausible" entitlement to relief. Two years later, in *Iqbal*, a national-security discrimination case, the Supreme Court held that *Twombly*'s pleading standard applies to all civil cases. In *Iqbal* and *Twombly*, the Supreme Court established a two-step process to assess the viability of complaints. First, courts must filter out conclusory allegations and legal conclusions, giving them no weight. Second, while assuming the remaining "well-pleaded" factual allegations are true, the court must determine whether they show an entitlement to relief that is "plausible." In conducting this case-specific analysis, the court may take into account its judicial experience and common sense and may consider more likely explanations for the conduct, other than illegal behavior.

At first glance, *Iqbal* appears to be a radical change from the oft-cited standard under *Conley v. Gibson*[2] and its progeny. Indeed, without overruling the case, *Iqbal* expressly "retires" the *Conley* standard. In 1957, the Supreme Court decided *Conley*, an employment-discrimination case. Holding that the complaint had sufficiently plead discrimination by a labor union, *Conley* stated that it was following, "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."

Compared to this frequently quoted "no set of facts" standard, *Iqbal* changed the standard considerably. Under *Iqbal*, the "no set of facts" test does not end the inquiry, since only a complaint stating a "plausible" claim for relief survives a motion to dismiss.[3] *Twombly* described the *Conley* language as "an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint."[4] *Twombly* clarified that, while the *Conley* gloss was incomplete, *Twombly* should *not* be read to impose a "probability requirement" or a "'heightened' pleading standard."[5] *Twombly* explained that *Conley* had merely described "the breadth of opportunity to prove what an adequate complaint claims, not the minimum standard of adequate pleading to govern a complaint's survival." But, in practice, is the new standard different from the analysis that courts already apply?

The Old Playbook

Although *Iqbal* and *Twombly* retire *Conley*'s "no set of facts" standard, they also reaffirm the vitality of many decades-old pleading doctrines. Of course, Fed. R. Civ. P. 8(a)(2) is the starting point: "[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." "Notice" pleading is all that is required.[6] As *Iqbal* explained, "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era."[7] "The 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."[8]

Overall, only a "short and plain statement" is required, not "detailed factual allegations" or the "particularity" Fed. R. Civ. P. 9 demands for claims of fraud or mistake.[9] "No technical form is required;" Fed. R. Civ. P. 8(d)(1) provides that

 © 2010 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

allegations "must" be "simple, concise, and direct" and Fed. R. Civ. P. 8(e) provides that "[p]leadings must be construed so as to do justice." Courts still must accept "well-pleaded" factual allegations as true in considering a motion to dismiss. Yet, neither legal conclusions[10] nor conclusory factual allegations[11] need be considered. Mere "labels and conclusions" or a "formulaic recitation of the elements of a cause of action will not do."

Courts may still draw reasonable inferences from allegations and must do so in the pleader's favor.[12] Courts cannot assess the credibility of allegations (that is, their truthfulness) on a motion to dismiss.[13] Rather than weigh the likelihood that the evidence will support the allegations, courts must assume all allegations are true and can be supported by evidence. Ultimately, courts must still determine if the factual allegations show an entitlement to relief. All of these traditional pleading doctrines are alive and well under *Iqbal* and *Twombly*.

The New Playbook

Iqbal and *Twombly* spell out a two-step framework for evaluating complaints. In the first step, the court whittles down the complaint to "well-pleaded" factual allegations. In the second step, the court weighs whether the remaining allegations plausibly state a claim for relief.

Accept All Non-Conclusory Factual Allegations as True

Initially, courts must distinguish between factual allegations and legal conclusions and distinguish between "conclusory" and "factual" allegations. Even fact-based allegations are rejected if they are conclusory. *Iqbal* states that a court must accept as true all of the allegations in the complaint, but directs that legal conclusions should not be considered and deserve no weight.[14] Stated differently, *Iqbal* instructs that complaints must "show" rather than merely "allege" the plaintiff's entitlement to relief.[15] This line between "showing" and "alleging" appears to create a new test, but the difference between the terms is not new.

Even pre-*Iqbal*, complaints were judged on whether they "showed" an entitlement to relief. After all, this requirement stems from Rule 8, rather than any new *Iqbal* standard.[16] Although the line between "showing" and "alleging" is not new, it is also no clearer after *Iqbal*. But reminiscent of the dichotomy between procedural and substantive rules, this distinction is significantly more difficult in application than in theory.

Weigh the Remaining Allegations

In the second step, courts evaluate the "well-pleaded" facts alleged in the complaint to determine whether they show a plausible entitlement to relief. This introduction in *Twombly* of "the line between possibility and plausibility of 'entitlement to relief'" is the notion most loudly denounced as a radical change to the pleading standard.

Under this standard, allegations must "nudge" across the plausibility "line" to survive a motion to dismiss. This seeming "line," however, is murky at best. *Iqbal* offers the following guidance: The "plausibility" line rests somewhere above "mere possibility" and requires that the claim be more than "merely consistent" with liability. The complaint must have the "heft" to state a claim.[17] The standard is not a "probability requirement" (which would be too high), yet "asks for more than a sheer possibility that a defendant has acted unlawfully." This demarcation between "plausibility" and "sheer" or "mere" possibility is as indefinite as the spattering of descriptions suggests.

The concept of "plausibility" itself is far from clear-cut. The term "plausibility" does not appear in *Black's Law Dictionary* and the general dictionary definition of "plausibility" is nearly indistinguishable from "credibility" as defined in *Black's Law Dictionary*.[18] Notably, searches reveal a surprising number of decisions issued after *Iqbal* that decide or discuss motions to dismiss for failure to state a claim without any mention of *Iqbal*, *Twombly*, or plausibility.[19]

Complaints must set forth "sufficient factual matter" to show the claim is facially plausible, meaning "the pleaded factual content allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." But the "sufficiency" courts evaluate is not the credibility of the evidence, but whether the factual matter alleged—assumed to be true—sufficiently shows the claim is facially plausible. So what amount of factual matter is "sufficient" to show plausibility? Courts must find more than a "mere possibility of misconduct." Yet a well-pleaded complaint may proceed "even if it strikes a savvy judge that actual proof of those facts is improbable, and that recovery is very remote and unlikely."[20] *Twombly* further directs that courts should not apply the standard as a "probability requirement." Despite all these directives, however, the plausibility standard is unclear at best.

This step of the analysis also bears striking resemblance to the analysis set forth in *Conley*. After all, "it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence" supporting the plaintiff's allegations.[21] *Iqbal* thus may not have clarified the precise line a claim must cross to succeed and, in echoing *Conley* on this issue, it also may not have shifted the line in practice.

Another highly criticized factor in evaluating "plausibility" is consideration of other "more likely explanations."[22] The language used by the Supreme Court and its application of "more likely explanations" suggest that courts must consider only *obvious* alternative explanations. As the Eighth Circuit Court of Appeals noted, "[r]equiring a plaintiff to rule out every possible lawful explanation for the conduct he challenges would invert the principle that the complaint is construed most favorably to the nonmoving party, and would impose the sort of probability requirement at the pleading stage which *Iqbal* and *Twombly* explicitly reject."[23]

Iqbal also set off alarms by stating, as one of the working tenets underlying the "plausibility" standard," that courts should rely on their judicial experience and common sense in evaluating a complaint. But this concept too is not novel. Before *Iqbal*, the Supreme Court granted courts discretion to use common sense in a variety of contexts.[24] The appellate courts also regularly recognize and affirm the use of common sense and judicial discretion.[25] Indeed, while some might view the discretion to use common sense as allowing a court to decide as it sees fit, court

 © 2010 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

proceedings devoid of common sense likely are not desirable either.

Has *Iqbal* Introduced Anything New?

Under the new two-step analysis, courts continue to decide motions to dismiss in much the same way as before *Iqbal*. It may then be tempting to cast *Iqbal* and *Twombly* as limited to their circumstances or even as an example of "bad facts making bad law." This is especially so, given the extensive discussion of the potential impact of litigation on high-ranking civil servants charged with national security and frivolous litigation and weak case management in large antitrust cases. But unlike *Twombly*, which could be limited to antitrust cases, *Iqbal* expressly stated that, by interpreting Rule 8, it described the pleading standard for *all* civil cases.

> **The predicted apocalypse has not arrived, even for cases implicating national security.**

Nonetheless, some courts have disregarded *Iqbal* as limited to the "qualified immunity" context.[26] Perhaps *Iqbal* sets itself up to be distinguished as a national-security decision that, understandable in its context, does not really affect pleading standards. The *Iqbal* Court discussed the terrorist attacks of September 11, 2001, highlighted the "high-ranking Government officials" involved, and stated that the high costs of defending litigation "are only magnified when Government officials are charged with responding to, as Judge Cabranes aptly put it, 'a national and international security emergency unprecedented in the history of the American Republic.'"[27] Moreover, *Iqbal* is not the first time that the Supreme Court has highlighted the uniqueness of national-security issues.[28] This potential distinction between national-security cases and other civil cases remains to be developed (or rejected) over time, but some decisions already support this dichotomy.

For example, the Second Circuit Court of Appeal's 5–4 en banc decision in *Arar v. Ashcroft* dismissed a similar national-security complaint, causing the dissenting judges to state that "[i]t is difficult to deny the existence of 'special factors counseling hesitation' in this case"; "It . . . may be that to the extent actions against 'policymakers' can be equated with lawsuits against policies, they may not survive *Iqbal*"; and, "We share what we think to be the majority's intuition that this case would likely turn largely, if not entirely, on decisions of national security and diplomacy . . ."[29] In another national-security case, the Ninth Circuit Court of Appeals rejected the suggestion by the *Arar* dissent that "lawsuits against policies[] may not survive *Iqbal*," and reversed the dismissal of a complaint challenging the policy of using the material witness statute to hold suspected terrorists.[30] Until more cases are decided, the importance of national security to *Iqbal*'s outcome and pleading standard remains to be seen.

Conclusion

Iqbal was heralded as a drastic change in pleading requirements and was expected to lead to an unprecedented wave of dismissals. But the predicted apocalypse has not arrived, even for cases implicating national security. Rather, much of the landscape remains unchanged: Complaints are liberally construed, and courts continue to apply judicial experience and require pleadings to show an entitlement to relief, sometimes described as "plausible." The introduction of the concept of "plausibility" provides an additional "tool" for courts to analyze complaints, but without mandating that more complaints must be dismissed. As the courts struggle to interpret the precise language of Supreme Court precedent, it is not surprising that *Iqbal* has been often cited and yet resulted in confusion. The distinctions it suggests are murky. Particularly where courts describe the standard as "merely plausible" or "only plausible," it does not take much to nudge a claim "across the line." Over time, cases may begin to explicate these distinctions, but for now, the "playing field" for motions to dismiss appears to remain largely unchanged.

Endnotes

1. Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).
2. 355 U.S. 41 (1957).
3. United States ex rel. Lobel v. Express Scripts, Inc., No. 09-1047, 2009 WL 3748805 (3d Cir. Nov. 10, 2009).
4. *Twombly*, 550 U.S. at 563.
5. *Id.* at 556, 595 n. 14.
6. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002).
7. *Iqbal*, 129 S.Ct. at 1950.
8. *Swierkiewicz*, 534 U.S. at 514 (citing *Conley*).
9. *Twombly*, 550 U.S. at 555.
10. *Compare, e.g.*, Papasan v. Allain, 478 U.S. 265, 286 (1986) (courts need not accept the truth of legal conclusions in a complaint) *with* Monroe v. City of Charlottesville, 579 F.3d 380 (4th Cir. 2009) (affirming dismissal where allegations underlying coercion claim were legal conclusions), *petition for cert. filed*, Dec. 28, 2009. *See also Twombly* at 555.
11. *Compare, e.g.,* DM Research v. Coll. of Am. Pathologists, 170 F.3d 53, 55–56 (1st Cir. 1999) (affirming dismissal despite "indulging" the plaintiff, because the court need not accept bald assertions or subjective characterizations) *with* McTernan v. City of York, 577 F.3d 521, 532 (3d Cir. 2009) (affirming dismissal of First Amendment claim based on conclusory allegations).
12. *See, e.g.*, Selevan v. N.Y. Thruway Auth., 584 F.3d 82 (2d Cir. 2009).
13. *See, e.g.*, *In re* Sofamor Danek Group, Inc., 123 F.3d 394, 400 (6th Cir. 1997).
14. *Iqbal*, 129 S.Ct. at 1949.
15. "Where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not shown—that the pleader is entitled to relief." *Iqbal*, 129 S.Ct. at 1949.
16. "A pleading that states a claim for relief must contain . . . a short and plain statement of the claim *showing that the pleader is entitled to relief*." Fed. R. Civ. P. 8(a)(2) (emphasis added).
17. *Iqbal*, 129 S.Ct. at 1949.
18. *Compare* Merriam-Webster Online

 • Published in *Employment & Labor Relations Law*, Volume 8, Number 3, Summer 2010. © 2010 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Dictionary (2010) ("plausible: adj. . . . 3 : appearing worthy of belief") *with* Black's Law Dictionary, (8th ed. 2004) ("credibility, n.: The quality that makes something (as a witness or some evidence) worthy of belief.").

19. *See, e.g.,* Westlaw search ((("motion to dismiss" /s (grant granted denied)) & ("12(b)(6)" (fail! /3 "state a claim")) /s dismiss!) & da(aft 5/18/2009)) % (iqbal plausib! twombly "Bell Atlantic" Tellabs Swierkiewicz), in database ALLFEDS yielding 2016 results on February 4, 2010.

20. *Twombly*, 550 U.S. at 556 (internal quotations omitted).

21. *Id.*

22. Plausibility, introduced in *Twombly*, resurfaced in the Supreme Court's *Tellabs* decision, holding that a plaintiff alleging fraud under section 10(b) of the Securities Exchange Act of 1934 "must plead facts rendering an inference of scienter *at least as likely as* any plausible opposing inference." Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 311 (2007) (emphasis in original). But considering "plausible opposing inference[s]" creates a circular difficulty, since a claim, and therefore an alternative explanation, is itself only plausible if it is more likely than other "obvious alternative explanations." This seeming contradiction may be explained by *Tellabs*' limited application to the securities context. *See, e.g.,* S. Cherry St., LLC v. Hennessee Group LLC, 573 F.3d 98 (2d Cir. 2009) (distinguishing between *Iqbal*'s pleading standard and the Private Securities Litigation Reform Act's higher pleading standard). *See also* W. Va. Inv. Mgmt. Bd. v. Doral Fin. Corp., 2009 WL 2779119, at *3 (2d Cir. Sep 3, 2009).

23. Braden v. Wal-Mart Stores, Inc., No. 08-3798, 2009 WL 4062105 at *9 (8th Cir. Nov. 25, 2009) (internal quotations omitted).

24. *See, e.g.,* Rompilla v. Beard, 545 U.S. 374, 387 (2005); Digital Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 881 (1994); Connick v. Myers, 461 U.S. 138, 143 (1983); Machibroda v. United States, 368 U.S. 487, 495 (1962).

25. *See, e.g.,* Otal Invs. Ltd. v. M.V. Clary, 494 F.3d 40, 60 (2d Cir. 2007); U.S. v. Leahy, 464 F.3d 773, 790 (7th Cir. 2006); U.S. v. Washington, 318 F.3d 845, 856 (8th Cir. 2003); Meloff v. N.Y. Life Ins. Co., 240 F.3d 138, 148 (2d Cir. 2001); Miller v. Caterpillar Tractor Co., 697 F.2d 141, 144 (6th Cir. 1983).

26. *See, e.g.,* Smith v. Duffey, 576 F.3d 336, 339–40 (7th Cir. 2009).

27. *Iqbal*, 129 S.Ct. at 1953 (quoting Iqbal v. Hasty, 490 F.3d 143, 179 (2d Cir. 2007)).

28. *See, e.g.,* Zadvydas v. Davis, 533 U.S. 678, 696 (2001); Mathews v. Diaz, 426 U.S. 67, 81–82 (1976).

29. Arar v. Ashcroft, 585 F.3d 559, 601, 602, 605 (2d Cir. 2009) (Sack, dissenting).

30. Al-Kidd v. Ashcroft, 580 F.3d 949 (9th Cir. 2009).

Editors' Message

continued from 2

standard to affirmative defenses. The article highlights the need for labor-and-employment practitioners to be prepared for the growing wave of arguments concerning the plausibility standard. Federal Rule of Civil Procedure 8 articulates the requirement that a short and plain statement of the claims must be stated. While Federal Rule of Civil Procedure 8(c) requires that any avoidance or affirmative defense must be pled, it is silent on the manner of pleading. In reviewing the Supreme Court cases articulated in the appropriate pleading standard in *Iqbal* and *Twombly*, it is noted that courts have taken various approaches with respect to applying the plausibility standard or not applying the standard in the affirmative defense. Certainly, the standard applies generally to labor-and-employment-law cases, but it may be quite some time before we know whether affirmative defenses in employment litigation must "be plausible" after *Iqbal*. The article is comprehensive in its review of key decisions that apply the standard in various ways in this context.

The ADA Amendments of 2008 are outlined and discussed in the third article in this issue. Lisa Hasday begins by noting that the primary objective of the Amendments Act is to restore the intent and protections of the ADA. Certain Supreme Court decisions were to be reframed and overturned so that the appropriate threshold for disability terminations would be broadened. While the Amendments Act retains the ADA's definition of "disability," it does add provisions that change the way that the "disability" definition is to be interpreted. For example, for the first time, Congress has granted the EEOC the authority to issue regulations interpreting the general provisions of the ADA, including the definition of disability. The author notes that there are changes with respect to various terms of art, including major life activity, substantially limits, working, and the impact of litigating regarding as and mitigating measures. The article provides a crisp overview of the key statutory amendments.

The fourth article in this issue is entitled "What Does It Really Take to 'Nudge' the Complaint over the Line under *Iqbal* and *Twombly*?" In this article, Carla Walworth and Mor Wetzler provide a careful analysis of recent Supreme Court decisions concerning the heightened pleading standard of plausibility. In reviewing *Iqbal* and *Twombly*, the authors ask how the playbook has been modified. The authors note that *Iqbal* and *Twombly* spell out a two-step framework for evaluating complaints. In the first step, the court whittles down the complaint to "well-pleaded" factual allegations. In the second step, the court weighs whether the remaining allegations plausibly state a claim for relief. In the review of cases in various subject-matter areas, the authors conclude that although *Iqbal* and *Twombly* were heralded as constituting a drastic change in pleading requirements and was expected to lead to an unprecedented wave of dismissals, the reality thus far is that the pleadings playing field appears to remain largely unchanged.

We delight in your written submissions and encourage you to provide articles of interest to those engaged in the national employment-and-labor-relations practice. Your contributions are at the heart of our committee's work.

 © 2010 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

Affirmative Defenses

continued from front cover

8. Rule 8(a)(2) provides that any "pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." It applies to "[d]efenses; [a]dmissions and [d]enials" and states that "[i]n responding to a pleading, a party must: (A) state in short and plain terms its defenses to each claim asserted against it; and (B) admit or deny the allegations asserted against it by an opposing party." Rule 8(c) applies to "[a]ffirmative [d]efenses" and requires that "[i]n responding to a pleading, a party must affirmatively state any avoidance or affirmative defense," including any defenses in the list of enumerated affirmative defenses set forth in the rule.

Courts have traditionally disfavored motions to strike, even more so than motions to dismiss.

Thus, while Federal Rule of Civil Procedure 8(c) requires that any "avoidance or affirmative defense" be pled, it is silent on the required manner of pleading, leading to the instant controversy surrounding the application of *Iqbal* and *Twombly* to the rule. Deciding those cases in the context of plaintiffs' claims for relief under Rule 8(a)(2), the Supreme Court in *Iqbal* and *Twombly* held that "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."[7] The Court directed lower courts to use their "judicial experience and common sense" to determine, on a case-by-case basis, whether a complaint states a "plausible claim for relief" and cautioned that "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct," the complaint will fail to meet this standard.[8] Therefore, after *Iqbal* and *Twombly*, "[w]here 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."[9] Under this standard, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements," are insufficient to withstand a motion to dismiss.[10]

In arriving at the plausibility pleading standard, the Court seemed particularly concerned about the subjection of a party to the rising costs of discovery based on a plaintiff's assertion of only speculative claims. In fact, the Court emphasized in *Iqbal*: "Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions."[11] In addition, in *Twombly*, the Court rejected notions that "careful case management," scrutiny at the summary-judgment stage, or "lucid jury instructions" can sufficiently control discovery expenses to allow a less-than-plausible claim to withstand a motion to dismiss, stating that "the threat of discovery expense will push cost-conscious defendants to settle even anemic cases before reaching those proceedings."[12] Thus, the "plausibility pleading" standard was born—one major question that remains, however, is whether it translates to affirmative defenses.[13]

Courts Applying the Plausibility Pleading Standard for Affirmative Defenses

Courts applying *Iqbal* to affirmative defenses typically highlight that pleading standards under Rules 8(a)(2) and 8(c) were construed similarly prior to *Iqbal*. Under this view, the courts see no reason to depart from that general proposition after *Iqbal*.[14] As one Kansas district court reasoned, "[i]t makes no sense to find that a heightened pleading standard applies to claims but not to affirmative defenses."[15] The court in *Hayne* determined that "the purpose of pleading requirements is to provide enough notice to the opposing party that indeed there is some plausible, factual basis for the assertion and not simply a suggestion of possibility that it may apply to the case," although the court recognized that "Rule 8(c) for affirmative defenses does not contain the same language as 8(a)(2), requiring 'a short and plain statement of the claim.'" *Hayne* instead relied upon the language in Rule 8(b)(1)(A) to support its application of the plausibility pleading standard to affirmative defenses, arguing that Rule 8(b)(1) applies to "Defenses; In General" according to its sub-heading, and that Rule 8(c)(1) merely "provides a helpful laundry list of commonly asserted affirmative defenses to emphasize that avoidances and affirmative defenses must indeed be pleaded to be preserved."

Indeed, courts may conclude that "sauce for the goose is sauce for the gander," and that if plaintiffs must abide by *Iqbal*, so should defendants.[16] Notably, however, courts applying *Iqbal* to strike affirmative defenses have indicated they will liberally allow defendants to amend to reassert stricken defenses if information uncovered in discovery will support it.[17]

Courts Rejecting the Plausibility Pleading Standard for Affirmative Defenses

Courts refusing to apply the *Twombly/Iqbal* plausibility pleading standard to affirmative defenses have distinguished between Rules 8(a)(2), 8(b) and 8(c). They note that Rule 8(a)(2) only addresses "claims for relief," and although Rule 8(b) mandates that a party state its defenses "in short and plain terms"—language similar to Rule 8(a)(2)—that requirement does not apply to *affirmative* defenses, which are the province of Rule 8(c).[18] As put succinctly in *Charleswell v. Chase Manhattan Bank, N.A.*:[19]

> Rule 8(c)(1), which provides for affirmative defenses, states only that "a party must affirmatively state any

William J. Simmons is an associate with Littler Mendelson's Philadelphia, Pennsylvania, office.

 • Published in *Employment & Labor Relations Law*, Volume 8, Number 3, Summer 2010. © 2010 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

> avoidance or affirmative defense." Fed. R. Civ. P. 8(c)(1). There is no requirement under Rule 8(c) that a defendant "show" any facts at all. Thus, the Court rejects plaintiffs' arguments on this issue.

Courts also emphasize that neither *Iqbal* nor *Twombly* "mention affirmative defenses or any other subsection of Rule 8" but rather "focused exclusively on the pleading burden that applies to plaintiffs' complaints."[20]

One of the major reasons for not applying the plausibility pleading standard to affirmative defenses is that the policy reasons motivating *Iqbal* and *Twombly* do not translate to defenses in a straightforward manner. *Twombly* and *Iqbal* were admittedly concerned with the rising costs of discovery, especially when engendered by barebones pleading suggesting insufficient investigation into the merits of a case prior to filing suit. This concern is amplified in circumstances where a plaintiff may have months or even years to conduct a reasonable investigation prior to filing suit, yet still cannot present the court with facts to support a plausible claim for relief. Courts have recognized, however, that defendants typically have much less time to prepare an answer to a complaint—as little as 21 days—which makes it seem less equitable to place stricter pleading requirements on affirmative defenses.[21] These timelines might be further compressed as a practical matter when larger corporate defendants are involved, as even a properly served complaint may take an inordinate amount of time to percolate to the appropriate person within the organization to address it, and individuals with relevant knowledge may have left the company's employ by the time a lawsuit is filed. Similarly, in most employment cases, it is not readily apparent that allowing an affirmative defense to stand, even if ultimately unsupported by the facts, will engender the degree of unnecessary and expensive discovery the U.S. Supreme Court was worried about in *Twombly* and *Iqbal*.

Also, some courts have drawn a distinction between the device used in challenging affirmative defenses—the motion to strike—and the motion to dismiss. In deciding not to apply *Iqbal* to affirmative defenses, these decisions have noted that courts have traditionally disfavored motions to strike, even more so than motions to dismiss.[22]

Finally, other courts dismiss the applicability of the plausibility standard to affirmative defenses as a non-issue or avoid it altogether. One district court in Wisconsin flatly stated, "[d]espite the arguments of the parties to the contrary, the pleading requirements outlined in *Twombly* and *Woodfield* [a 5th Circuit decision issued prior to *Twombly*] are not materially different."[23] Similarly, the court in *Luvata Buffalo, Inc. v. Lombard General Insurance Co.* held that it "need not answer that question [of whether *Iqbal* applies to affirmative defenses], for the Second Circuit made clear [prior to *Iqbal*] that 'affirmative defenses which amount to nothing more than mere conclusions of law and are not warranted by any asserted facts have no efficacy.'"[24] By the same token, the court in *Cosmetic Warriors, Ltd. v. Lush Boutique, L.L.C.*, while applying *Twombly* to affirmative defenses, nonetheless noted that under certain circumstances, "merely pleading the name of the affirmative defense may [still] be sufficient" to survive a motion to strike.[25]

Application to Labor and Employment Cases

There is currently scarce authority specifically addressing the plausibility pleading standard in the context of standard labor and employment litigation affirmative defenses. *Holdbrook v. Saia Motor Freight Line* involved claim of public-policy wrongful termination removed on diversity grounds,[26] and the defendant asserted typical "stock" employment affirmative defenses such as failure to state a claim, statute of limitations, failure to exhaust administrative remedies, good-faith conduct, and workers' compensation bar,[27] but the court did not discuss the employment nature of the claims or affirmative defenses in deciding not to apply the plausibility pleading standard to the defenses.

The U.S. District Court for the Southern District of Texas, in *Tran v. Thai*,[28] applied *Iqbal* to affirmative defenses in a Fair Labor Standards Act (FLSA) action and differentiated between affirmative defenses for which the defendant should have pled factual support at the time of pleading, and those that it need not. Thus, the court struck the defendants' good-faith defenses under 29 U.S.C. §§ 259(a) and 260, reasoning that they should "know the bases for their affirmative defenses that they relied on a regulation, order, ruling, approval, or interpretation of the Wage and Hour Division and that they acted in good faith," and allowed the defendants 18 days to amend with additional facts. However, the court denied the plaintiff's motion to strike the defendants' failure-to-mitigate defense, reasoning that the defendants could only obtain information supporting that defense through discovery.

The U.S. District Court for the Western District of Oklahoma, in *Burget v. Capital West Securities, Inc.*,[29] applied *Iqbal* in an Americans with Disabilities Act (ADA) failure-to-accommodate and termination case to strike some of the employer's affirmative defenses, including its statute of limitations and *Farragher-Ellerth* defenses. The court noted that the plaintiff had pled facts demonstrating that it was impossible that the statute of limitations barred his claim, and that because the employer had terminated the plaintiff, and he had thus suffered a tangible adverse employment action, the *Farragher-Ellerth* defense was unavailable as a matter of law.

If anything can be garnered from the first labor and employment cases on this subject, then, it is that stock affirmative defenses for which all of the relevant facts should be within a defendant's control early in the litigation are most at risk of being stricken under the plausibility pleading standard. In light of the relative scant authority on this subject, though, the parties in employment litigation must be ready to assess, at an early stage: (1) whether the plausibility standard is likely to apply to affirmative defenses in their jurisdiction; (2) if so, what facts will be necessary to plead the relevant affirmative defenses; and (3) whether a motion to strike is worth the time and expense of litigating in any event. In making this assessment, the parties need to consider the likelihood that even if the plausibility standard applies to affirmative defenses, a court will allow a defendant to reassert stricken defenses at a later stage of

 © 2010 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

the litigation if facts have been discovered to support them. Indeed, courts at times have called motions to strike "time wasters,"[30] and apparently no court has yet held, for instance, that just because a corporate defendant may have had "institutional" knowledge of facts supporting a stricken affirmative defense at the time of pleading, it is somehow barred from reasserting the affirmative defense later when the individuals actually involved in the matter become aware of those facts. Meanwhile, defendants—whether employees facing claims that they breached restrictive covenants, or employers accused of discrimination or wage and hour violations—should work proactively with their counsel at early stages of litigation to marshal and assess facts that pertain to affirmative defenses, not just the plaintiff's claims, to best position them should the plaintiff move to strike based on *Iqbal*.

As some state courts have begun to adopt the *Iqbal* and *Twombly* plausibility pleading standard to plaintiffs' claims,[31] we can reasonably expect that the dispute over whether the standard also applies to affirmative defenses, and if so, how stringently it should be applied, will continue to spread not only to other federal judicial districts but also to the states. Therefore, it may be quite some time before we really know whether affirmative defenses in employment litigation must be "plausible" after *Iqbal*.

Endnotes

1. 129 S. Ct. 1937 (2009).

2. 550 U.S. 544 (2007).

3. Fowler v. UPMC Shadyside, 578 F.3d 203 (3d Cir. 2009) (applying *Iqbal* to employment-discrimination claims); EEOC v. Concentra Health Servs., 496 F.3d 773, 777 (7th Cir. 2007) (applying *Twombly* in Title VII action brought by EEOC); Falso v. Ablest Staffing Servs., 328 Fed. Appx. 54 (2d Cir. 2009) (Title VII and ADA); Rederford v. US Airways, Inc., 589 F.3d 30, 35 (1st Cir. 2009) (ADA); *Dellinger v. Sci. Applications Int'l Corp.*, 2010 U.S. Dist. LEXIS 32861 at **3–6 (E.D. Va. Apr. 2, 2010) (FLSA).

4. Whereas Rules 12(b)(6) and 12(c) are used to attack claims for relief, Rule 12(f) is the typical device used to challenge affirmative defenses, because it permits striking from a pleading "an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter."

5. For convenience, this article will use the term "plaintiffs" to refer to all parties asserting claims seeking relief, whether plaintiffs, defendants asserting counter-claims, third-party plaintiffs, or cross-claimants.

6. *See, e.g.,* Burget v. Capital W. Secs., Inc., 2009 U.S. Dist. LEXIS 114304, at **3–4 (W.D. Okla. Dec. 8, 2009) (explicitly acknowledging split among courts in the Western District of Oklahoma).

7. *Iqbal*, 129 S. Ct. at 1949.

8. *Id.* at 1950.

9. *Id.* at 1949.

10. *Id.*

11. *Id.* at 1950.

12. *Twombly*, 550 U.S. at 559.

13. The nature of a bona fide affirmative defense under Rule 8(c) is beyond the scope of this article. *See, e.g.,* Carter v. United States, 333 F.3d 791, 796 (7th Cir. 2003) (noting conflict among courts as to whether damages cap is an affirmative defense).

14. *See, e.g.,* Cosmetic Warriors, Ltd. v. Lush Boutique. L.L.C., 2010 U.S. Dist. LEXIS 16392 at *3–7 (E.D. La. Feb. 1, 2010) (relying on *Twombly* to strike affirmative defenses of "boilerplate" affirmative defenses of laches, equitable estoppel and trademark abandonment, and noting that "[t]he Fifth Circuit held in *Woodfield v. Bowman* [193 F.3d 354, 362 (5th Cir. 1999)] that an affirmative defense is subject to the same pleading requirements as the Complaint."); Magicon v. Weatherford Int'l, 2009 U.S. Dist. LEXIS 126500, at **5–6 (S.D. Tex. Aug. 10, 2009); OSF Healthcare Sys. v. Banno, 2010 U.S. Dist. LEXIS 7584, at **2–4 (C.D. Ill. Jan. 5, 2010) ("[*Twombly* and *Iqbal*] dealt with whether a complaint's allegations satisfied pleading requirements, but their statements seem equally applicable to affirmative defenses, given that affirmative defenses are subject to those same pleading requirements") (citing Heller Financial, Inc. v. Midwhey Powder Co., Inc., 883 F.2d 1286, 1294 (7th Cir. 1989)); Greenheck Fan Corp. v. Loren Cook Co., 2008 U.S. Dist. LEXIS 75147, at **5–6 (W.D. Wis. Sept. 25, 2008) (same, relying on *Heller*); HCRI TRS Acquirer, LLC v. Iwer, 2010 U.S. Dist. LEXIS 41552, at *9 (N.D. Ohio Apr. 28, 2010) ("the pleading requirements for affirmative defenses are the same as for claims of relief").

15. Hayne v. Green Ford Sales, Inc., 2009 U.S. Dist. LEXIS 119886, at **9–11 (D. Kan. Dec. 22, 2009).

16. Kaufmann v. Prudential Ins. Co. of Am., 2009 U.S. Dist. LEXIS 68800, at **1–2 (D. Mass. Aug. 6, 2009) ("Assuming, without deciding, that sauce for the goose is sauce for the gander, the court is inclined to think that a defendant has the same Rule 8 obligations with respect to notice pleading as does a plaintiff," but holding that even under *Iqbal*, designation of a defense listed in Rule 8(c) is sufficient to satisfy pleading obligations); *Burget*, 2009 U.S. Dist. LEXIS 114304, at **5–6 ("An even-handed standard as related to pleadings ensures that the affirmative defenses supply enough information to explain the parameters of and basis for an affirmative defense such that the adverse party can reasonably tailor discovery").

17. Carretta v. May Trucking Co., 2010 U.S. Dist. LEXIS 26302, at **5–6 (S.D. Ill. Mar. 11, 2010); *Hayne,* 2009 U.S. Dist. LEXIS 119886, at **14–15 (noting that "[t]he majority of cases applying the *Twombly* pleading standard to affirmative defenses and striking those defenses have permitted the defendant leave to amend"); Darnell v. Hoelscher*, Inc*., 2009 U.S. Dist. LEXIS 112942, at **5–6 (S.D. Ill. Dec. 4, 2009); *Greenheck Fan Corp.*, 2008 U.S. Dist. LEXIS 75147, at **5–6 ("Just as the rules taketh, they giveth. Because affirmative defenses are governed by the rules of pleadings, defendant can amend its affirmative defenses 'as a matter of course' pursuant to Rule 15"); Safeco Ins. Co. of Am. v. O'Hara Corp., 2008 U.S. Dist. LEXIS 48399, at *2 (E.D. Mich. June 25, 2008).

18. McLemore v. Regions Bank, 2010 U.S. Dist. LEXIS 25785, at **46–47 (M.D. Tenn. Mar. 18, 2010); *see also* Romantine v. CH2M Hill Eng'rs, 2009 U.S. Dist. LEXIS 98699, at *3 n.1 (W.D. Pa. Oct. 23, 2009) ("Plaintiff argues that the wording of 8(b) is similar to that of 8(a) to which *Twombly* clearly applies. This fails to address the fact that affirmative defenses are not governed by 8(b) but by 8(c)"); *cf.* BJ Energy LLC v. PJM Interconnection, LLC, 2010 U.S. Dist. LEXIS 36969 at *14 (E.D. Pa. Apr. 13, 2010) (declining to strike failure-to-mitigate defense, although defendant alleged no facts in support, and stating, "[a]n affirmative defense pled in general terms will not be deemed insufficient as long as it gives plaintiffs fair notice of the nature of the defense").

19. 2009 U.S. Dist. LEXIS 116358, at **12–13 (D.V.I. Dec. 8, 2009); First Nat'l Ins. Co. of Am. v. Camps Servs., 2009 U.S. Dist. LEXIS 149, at **4–5 (E.D. Mich. Jan. 5, 2009).

20. *McLemore*, 2010 U.S. Dist. LEXIS 25785, at *46; *see also First Nat'l Ins. Co. of Am.*, 2009 U.S. Dist. LEXIS 149, at **4–5 (stating, "*Twombly*'s analysis of the "short and plain statement" requirement of Rule 8(a) is inapplicable to this motion under Rule 8(c)"); Westbrook v. Paragon Sys., U.S. Dist. LEXIS 88490, at **1–2 (S.D. Ala. Nov. 29, 2007) (rejecting application of plausibility pleading

 © 2010 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.

standard to affirmative defenses and noting "*Twombly* was decided under Rule 8(a)"); Am. Res. Ins. Co. v. Evoleno Co., LLC, 2007 U.S. Dist. LEXIS 55181, at *6 n.7 (S.D. Ala. July 30, 2007).

21. Holdbrook v. Saia Motor Freight Line, LLC, 2010 U.S. Dist. LEXIS 29377, at *4 (D. Colo. Mar. 8, 2010) ("Moreover, as noted by Defendant, it is reasonable to impose stricter pleading requirements on a plaintiff who has significantly more time to develop factual support for his claims than a defendant who is only given 20 days to respond to a complaint and assert its affirmative defenses."); *see Kaufmann*, 2009 U.S. Dist. LEXIS 68800, at *2 n.1 (reserving decision on whether *Iqbal* applied to affirmative defenses and noting, "[o]ne might argue for less than complete parity, as plaintiff, as the instigator of the litigation, has the initial good faith burden to investigate and verify the validity of her claims").

22. *Holdbrook*, 2010 U.S. Dist. LEXIS 29377, at **4–5 ("I recognize that some district courts have extended the pleading requirements o[f] *Twombly* and *Iqbal* to affirmative defenses, but conclude that the better-reasoned approach is that taken by other district courts that have declined to do so, particularly in light of the disfavored status of motions to strike") (internal citations omitted); Champion Bank v. Reg'l Dev., LLC, 2009 U.S. Dist. LEXIS 40468, at **4–5; 11–12 (E.D. Mo. May 13, 2009) (applying *Twombly* pleading standard to counterclaim, and a "cannot succeed under any circumstances" test to affirmative defenses); Lincoln Elec. Co. v. Nat'l Std., LLC, 2010 U.S. Dist. LEXIS 26810 at **2–3 (N.D. Ohio Mar. 19, 2010) (refusing to dismiss affirmative defense and stating that "A motion to dismiss is subject to a different standard" than a motion to strike).

23. Voeks v. Wal-Mart Stores*, Inc*., 2008 U.S. Dist. LEXIS 846, at *16 (E.D. Wis. Jan. 7, 2008).

24. 2010 U.S. Dist. LEXIS 19334 (W.D.N.Y. Mar. 4, 2010) (citing Shechter v. Comptroller of City of New York, 79 F. 3d 265, 270 (2d Cir. 1996); *see also Safeco Ins. Co. of Am*., 2008 U.S. Dist. LEXIS 48399, at **1–2 (noting that the court's operating procedures in place prior to *Twombly* already cautioned counsel against asserting blanket and boilerplate affirmative defenses with no relation to the case).

25. 2010 U.S. Dist. LEXIS 16392, at *4.

26. *See* Compl. (Docket #1, Ex. A), Holdbrook v. Saia Motor Freight Line, L.L.C., No. 09-cv-02870 (D. Colo.)

27. *See* Answer (Docket #7), Holdbrook v. Saia Motor Freight Line, L.L.C., No. 09-cv-02870 (D. Colo.).

28. 2010 U.S. Dist. LEXIS 17946, at **3–7 (S.D. Tex. Mar. 1, 2010); *See also generally* Pena v. Coastal QSR, LLC, 2010 U.S. Dist. LEXIS 43461 (M.D. Fla. May 4, 2010) (in FLSA overtime litigation, striking affirmative defenses that appeared repetitive or unclear while allowing the defendant the opportunity to amend, but denying motion to strike affirmative defense of estoppel where the defendant had pled that the defense applied "to the extent that Plaintiff now seeks to contradict his prior representations as to his hours of work and status").

29. 2009 U.S. Dist. LEXIS 114304, at **6–10.

30. Holtzman v. B/E Aerospace, Inc., 2008 U.S. Dist. LEXIS 42630, at *2 (S.D. Fla. May 28, 2008).

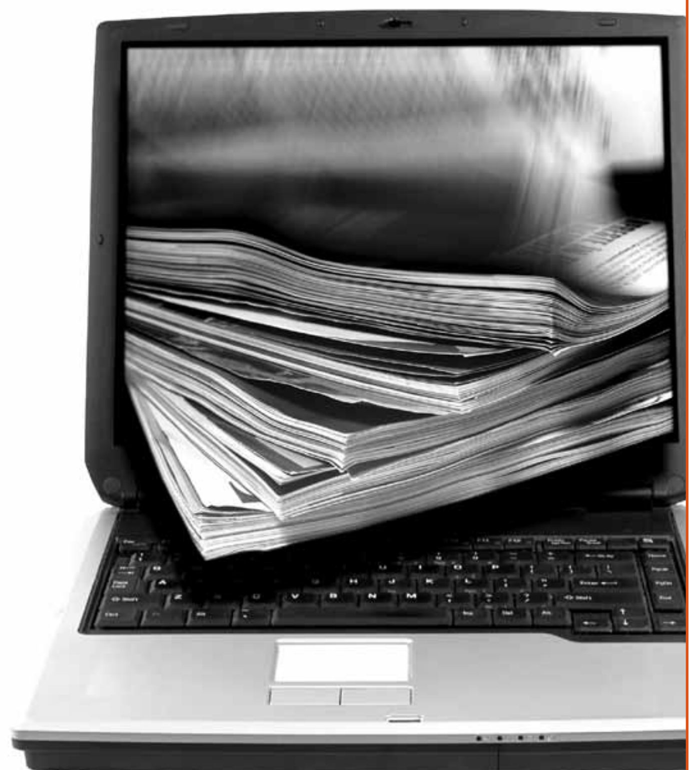
31. *See, e.g.,* Iannacchino v. Ford Motor Co., 888 N.E.2d 879, 890 (Mass. 2008); Vagas v. City of Hudson, 2009 Ohio 6794, P13 (Ohio Ct. App. Dec. 23, 2009); Murray v. Motorola, Inc., 982 A.2d 764, 783 (D.C. 2009); Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville & Davidson County, 2009 Tenn. App. LEXIS 683 (Tenn. App. Oct. 12, 2009); Jones v. L.S. Holdings, Inc., 2010 V.I. LEXIS 8 (V.I. Super.. Feb. 25, 2010); BASF Corp. v. POSM II Props. P'ship, L.P., 2009 Del. Ch. LEXIS 33, at n. 43 (Del. Ch. Mar. 3, 2009); Sisney v. State, 754 N.W. 2d 639, 643 (S.D. Jul. 23, 2008).

CONTROL HOW YOU RECEIVE YOUR MEMBER PERIODICALS

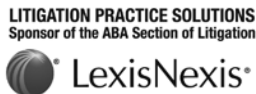
Manage your periodicals by linking to the Subscriptions Portal.

Select between print and electronic delivery options if available.

www.abanet.org/esubscription



 © 2010 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.



Nonprofit Organization
U.S. Postage
PAID
American Bar Association

Section of Litigation
American Bar Association
321 North Clark Street
Chicago, Illinois 60654

In This Issue

1 Employer Pandemic Flu Planning Beyond H1N1: Lessons Learned

Must Affirmative Defenses in Employment Litigation Be "Plausible" After *Iqbal*?

2 Chairs' Column

Message from the Editors

5 The Americans with Disabilities Act Amendments Act of 2008

8 What Does It Really Take to "Nudge" the Complaint over the Line under *Iqbal* and *Twombly*?

If you would like to chair a subcommittee, write an article for the newsletter, speak at a program, organize a CLE, or participate in some other way in serving the desires and needs of our members, please let us hear from you. You may contact us at:

Arley Harrel, Cochair
Williams Kastner
Tel: 206.628.6625
aharrel@williamskastner.com

Jeremy Sosna, Cochair
Ford & Harrison LLP
Tel: 612.486.1704
jsosna@fordharrison.com

Kimberly G. Stith, Cochair
Waste Management, Inc.
Tel: 713.512.6291
kstith@wm.com

 • Published in *Employment & Labor Relations Law*, Volume 8, Number 3, Summer 2010. © 2010 by the American Bar Association. Reproduced with permission. All rights reserved. This information or any portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.