

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

JOHN D. FRESHWATER

Case No. 2:09cv464

Plaintiff

Judge: FROST

vs.

MOUNT VERNON CITY SCHOOL
DISTRICT BOARD OF EDUCATION, et al.

Defendants.

**PLAINTIFFS' FRESHWATER'S MOTION FOR LEAVE TO FILE OUT OF TIME A
MEMORANDUM CONTRA TO DEFENDANT LYNDA WESTON'S MOTION TO DISMISS**

Now comes Plaintiffs' Freshwater's, by and through counsel, to motion this Court for leave to file out of time Plaintiffs' memorandum contra to Defendant Weston's motion to dismiss (attached) for the reasons stated in the attached memorandum.

MEMORANDUM IN SUPPORT

Pursuant to Local Rule 7.2(a)(2) counsel for Plaintiffs' had twenty-one (21) days from the date of service to file Plaintiffs' memorandum in opposition to Defendant Weston's motion to dismiss. Defendant Weston filed her motion to dismiss on August 5, 2009 (Doc. 14). Accordingly, Plaintiffs' counsel had until at least August 26, 2009, to file Plaintiffs' memorandum in opposition.

Regrettably, counsel for Plaintiffs' mistakenly calendared the due date for filing Plaintiffs' motion as due by September 25, 2009, instead of the correct date. Presumably, counsel for Plaintiffs' confused this Court's ORDER as stated on August 7, 2009, (Doc.16) wherein the Court scheduled Defendant Weston's motion for a "...non-oral hearing on September 25, 2009."

Plaintiffs' counsel learned of his mistake on September 14, 2009, after returning to work from an illness which is documented by the attached medical provider's letter attached hereto as Exhibit A. Counsel for Plaintiffs humbly requests leave to file Plaintiffs' motion.

I. Law

Pursuant to Local Rule 7.2(a)(2) failure to file a memorandum in opposition may be cause for the Court to grant any Motion, other than one which would result directly in an entry of final judgment or an award of attorney fees.

Fed. Rule Civ. P. Rule 6(b) of the Federal Rules of Civil Procedure provides that when a party moves the court to accept a filing after the relevant deadline, the court may do so "where the failure to [file before the deadline] was the result of excusable neglect." The governing legal standard for excusable-neglect determinations is a balancing of five principal factors: (1) the danger of prejudice to the nonmoving party, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, (4) whether the delay was within the reasonable control of the moving party, and (5) whether the late-filing party acted in good faith. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993).

II. Analysis

Defendant Weston has not nor will be harmed or prejudiced by the filing of Plaintiffs' memorandum in opposition by leave of Court although out of time. Local Rule 7.2(a)(2) provides for a permissive grant of any motion unless the grant would result directly in an entry of final judgment or an award of attorney fees. Denying Plaintiffs' motion for leave would result directly in an entry of final judgment as it relates to the claims by Plaintiffs' against Defendant Weston.

If the Court permits Plaintiffs' motion out of time there will be no impact upon any trial date or preceding discovery deadlines. The excusable neglect by counsel for Plaintiffs' was not within the control of Plaintiffs' but rather the fault of counsel, who contends his actions were in good faith and excusable.

Respectfully submitted,

s/R. Kelly Hamilton

The Law Office of R. Kelly Hamilton (0066403)

Office: 4030 Broadway, Grove City, Ohio 43123

Mail to: P.O. Box 824, Grove City, Ohio 43123

Phone 614-875-4174 Fax 614-875-4188

Email: hamiltonlaw@sbcglobal.net

Attorney for Plaintiffs Freshwater

CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2009, I electronically filed the foregoing *Plaintiffs' Freshwater's Motion For Leave To File Out Of Time AMemorandum Contra To Defendant Lynda Weston's Motion To Dismiss* with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Nicole M. Donovan, Attorney for Lynda Weston, 2006 Kenny Road • Columbus, Ohio 43221

C. Joseph McCullough, Attorney for Lynda Weston, 8977 Columbia Road, Suite A, Loveland, Ohio 45140

Greg Scott, Kathleen Davis, Attorney for David Millstone, 50 West Broad Street, Suite 2500, Columbus, Ohio 43215

Larry Greathouse, Attorney for H.R.On Call, Inc, Julia Herlevi and Thomas Herlevi, 1501 Euclid Avenue, Bulkley Building, Cleveland, Ohio 44115

David K. Smith, Krista K. Keim and Sarah J. Moore, Attorney for Mount Vernon City School District Board of Education, Ian Watson, Jody Goetzman, Steve Short and William White at 3 Summit Park Drive, Suite 400, Cleveland, Ohio 44131

Respectfully submitted,

s/R. Kelly Hamilton

The Law Office of R. Kelly Hamilton (0066403)

Handwritten signature and initials

Sincerely,

Raymond Hamilton is currently under my medical care and may not return to work at this time.
Please excuse him for 5 day(s).
He may return to work on 09/14/2009.

EXHIBIT A

American Health Network, LLC
3154 Park St.
Cleveland, OH 43123-3222
(614) 875-0011



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Defendants.

**PLAINTIFFS' FRESHWATER'S MEMORANDUM CONTRA TO DEFENDANT LYNDA
WESTON'S MOTION TO DISMISS**

Now comes Plaintiffs' Freshwater's with their memorandum contra to Defendant Weston's motion to dismiss. Plaintiffs move this Court to deny Defendant Weston's motion as Plaintiffs contend their allegations are sufficiently plausible to demand Defendant Weston's answer as more fully stated in the attached memorandum.

Respectfully submitted,

s/R. Kelly Hamilton
The Law Office of R. Kelly Hamilton (0066403)
Office: 4030 Broadway, Grove City, Ohio 43123
Mail to: P.O. Box 824, Grove City, Ohio 43123
Phone 614-875-4174 Fax 614-875-4188
Email: hamiltonlaw@sbcglobal.net
Attorney for Plaintiffs Freshwater

MEMORANDUM IN SUPPORT

I. Legal Standard

We hold that an employment discrimination complaint need not include such facts and instead must contain only "a short and plain statement of the claim showing that the pleader is

entitled to relief." Fed. Rule Civ. P. 8(a)(2). *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 508 (2002).

Fed.R.Civ.P. 8(a)(2) requires a plaintiff must articulate a short and plain statement of the claim showing that the pleader is entitled to relief. Additionally the rule permits a party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient. *Id* at (d)(2). Pleadings must be construed so as to do justice. *Id* at (e).

Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief," in order to "give the defendant fair notice of what the ... claim is and the grounds upon which it rests," *Conley v. Gibson*, 355 U. S. 41, 47 (1957) . In *Swierkiewicz*, the Court reiterated the holding in *Conley* adding "(T)his simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims. *Id.* at 512

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

The ordinary rules for assessing the sufficiency of a complaint apply. *Swierkiewicz* at 512, See, e.g., *Scheuer v. Rhodes*, 416 U. S. 232, 236 (1974) ("When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions,

its task is necessarily a limited one. The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims"). Moreover, the precise requirements of a prima facie case can vary depending on the context and were "never intended to be rigid, mechanized, or ritualistic." *Swierkiewicz* at 512 quoting *Furnco Constr. Corp. v. Waters*, 438 U. S. 567, 577 (1978);

In *Swierkiewicz* the Court acknowledged, we have rejected the argument that a Title VII complaint requires greater "particularity," because this would "too narrowly constrict the role of the pleadings." *Swierkiewicz* at 512, citing *McDonald v. Santa Fe Trail Transp. Co.*, 427 U. S. 273, 283, n. 11 (1976). ("[T]o measure a plaintiff's complaint against a particular formulation of the prima facie case at the pleading stage is inappropriate"). *Id.* Before discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case. *Id.* Given that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases. *Id.*

Given the Federal Rules' simplified standard for pleading, "[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." *Hishon v. King & Spalding*, 467 U. S. 69, 73 (1984).

II. Plaintiffs' Facts Alleged

The factual allegations of Plaintiff's complaint are numerous and learned without the aid of discovery pursuant to the applicable civil rules for the State of Ohio as the administrative forum provided pursuant to R.C. §3319.16 does not permit discovery. *Wheeler v. Mariemont Dist. Bd. of Edn.* (1983), 12 Ohio App.3d 102, 107. The factual allegations of Plaintiff's complaint were learned only through incisive cross-examination in the forum provided to Plaintiff John

Freshwater and it is expected the same measure of effort will yield discoverable evidence demonstrating the validity and proof of Plaintiff's claims.

Defendant Weston claims, by and through counsel, that Weston is not an employee of Defendant Mount Vernon City School District Board of Education (BOE). During Defendant Weston's cross-examination in the R.C. §3319.16 forum Weston stated she had been with the "Mount Vernon City School system" for "12 years as an administrator, 10 years as a teacher" having served as "director of teaching and learning since 1997".

Despite claims by Defendant Weston that she was not an employee of Defendant BOE, there is an inference that Weston was actually a person who exercised real or perceived authority on behalf of Defendant BOE. This inference is supported by Defendant Weston's testimony in the R.C. §3319.16 forum wherein Weston testified she "hired" teachers for Defendant BOE. In response to question about whether a teacher for Defendant BOE had access to a particular document Defendant Weston responded:

"Mr. Hamilton, when I hire teachers, I hire teachers who have graduated from recognized colleges who have degrees and have teaching licenses. So we make an assumption when we hire those teachers that they understand the content of what they're teaching. And so any teacher I hire, I would make the assumption that they would understand this, that they would understand what science is and what it is not."

The restraints of the R.C. §3319.16 administrative hearing restricts Plaintiffs' ability to explore areas of evidence critical to solidifying Plaintiff's claims in the instant matter. However, Plaintiff has accumulated evidence providing at least the inferences stated in their complaint.

III. Analysis

Defendant Weston's motion for dismissal pursuant to Fed.R.Civ.P. 12(b)(6) appears to be a farce in that the motion makes claims that are both premature and without merit. Defendant Weston's claim that there exists no set of facts upon which Plaintiffs could prevail is at least

contradicted by the assertions made in the complaint and illustrated by Weston's testimony recited above. If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding. *Swierkiewicz* at 514.

Moreover, claims lacking merit may be dealt with through summary judgment under Rule 56. The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system, which was adopted to focus litigation on the merits of a claim. *Conley, supra*, at 48 "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". *Id.* at 514.

The liberal pleading requirements of the Civil Rules give benefit of the doubt in both law and fact to permit Plaintiffs' claims to survive Defendant Weston's motion as Plaintiffs make out some sort of claim for which a court might provide relief.

Applying the relevant standard, Plaintiffs' complaint easily satisfies the requirements of Rule 8(a) because it gives respondent fair notice of the basis for petitioner's claims. Plaintiff John Freshwater's complaint detailed the events leading to his termination, provided relevant dates, and accordingly gives Defendant Weston fair notice of what Plaintiffs' claims are and the grounds upon which those claims currently rest. In addition, Plaintiffs' state claims upon which relief could be granted without merely relying upon or resorting to a formulaic recitation of the elements of a cause of action.

In *Swierkiewicz* the Court already addressed Defendant Weston's veiled argument that allowing lawsuits based on conclusory allegations of discrimination to go forward will burden the courts and encourage disgruntled employees to bring unsubstantiated suits. "Whatever the

practical merits of this argument, the Federal Rules do not contain a heightened pleading standard for employment discrimination suits. A requirement of greater specificity for particular claims is a result that "must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." *Swierkiewicz* at 515 quoting *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U. S. 163, 168-169 (1993). Lastly, Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits. *Swierkiewicz* at 515.

If Defendant Weston requires a more definite statement of any allegation free of any perceived deficiencies Plaintiffs' most certainly will accept any invitation to do so. Plaintiffs' note that Courts can default a party for filing frivolous Fed.R.Civ.P. 12(b)(6) motions. Successful motions to dismiss a complaint are a rarity, more the subject of law school civil procedure classes than actual practice because of the contemporary practice of mandating liberal pleadings standards. In effect courts will look not so much at the artfulness in the drafting of the complaint as much as the substance of the purported claims with a general policy of determining actions on the merits.

It is for the reasons stated above that Plaintiffs' request this Court deny Defendant Weston's motion to dismiss.

Respectfully submitted,

s/R. Kelly Hamilton
The Law Office of R. Kelly Hamilton (0066403)
Office: 4030 Broadway, Grove City, Ohio 43123
Mail to: P.O. Box 824, Grove City, Ohio 43123
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