A PHOENIX FROM THE ASHES? HEIGHTENED PLEADING REQUIREMENTS IN DISPARATE IMPACT CASES

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Despite the United States Supreme Court’s repeated pronouncements to the contrary, federal courts continue to require heightened pleading in a variety of contexts, although it is not always clear that the courts are fully aware of the consequences of what they are doing. Under a system of notice pleading, such as the Federal Rules of Civil Procedure (the Federal Rules), a litigant must simply state facts that allow the defendant to formulate a responsive pleading. Federal Rule of Civil Procedure (Rule) 8(a)(2) sets forth minimal requirements for a valid pleading: “a short and plain statement of the claim showing that the pleader is entitled to relief.” This provi


2 See, e.g., Raytheon Co. v. Hernandez, 540 U.S. 44, 49 (2003); see infra Part V (discussing the consequences of judicial misapplications of Rule 8 in employment discrimination cases).

3 See FED. R. CIV. P. 8.

4 FED. R. CIV. P. 8(a)(2).
sion reflects a deliberate policy decision of the drafters to focus litigation on the merits of the claim rather than legal technicalities. \(^5\) To this end, the Federal Rules declare that they “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.” \(^6\) Specific to pleadings, Federal Rule of Civil Procedure 8(f) provides that “[a]ll pleadings shall be so construed as to do substantial justice.” \(^7\)

Nevertheless, despite the Supreme Court’s express mandates to the contrary, courts continue to dismiss actions that satisfy notice pleading’s simple command. \(^8\) Recently, in the context of employment discrimination, \(^9\) the Court in *Swierkiewicz v. Sorema N.A.* \(^10\) reiterated that notice pleading governs all civil actions and that no heightened standard applies to such suits. \(^11\) The Supreme Court stated that “an employment discrimination complaint need not include [specific] facts and instead must contain only ‘a short and plain statement of the claim showing that the pleader is entitled to relief.’” \(^12\)

While the language “short and plain statement” seems clear and unequivocal, courts of all levels seem to miss, if not resist, its message. \(^13\) Indeed, even the Supreme Court does not always seem to appreciate the thrust of notice pleading. Just eight months after the Court’s pronouncement in *Swierkiewicz*, which corrected the Second Circuit’s misapplication of Rule 8, \(^14\) the Supreme Court in *Raytheon Co. v. Hernandez* \(^15\) seemed to overlook the same mistake in a closely related context. \(^16\) In that case, the Supreme Court affirmed the Ninth Circuit’s dismissal of a disparate impact claim for “fail[ure] to plead

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\(^7\) Fed. R. Civ. P. 8(f).


\(^11\) Id. at 508.

\(^12\) Id. (quoting Fed R. Civ. P. 8(a)(2)).

\(^13\) See *Am. Nurses’ Ass’n v. Illinois*, 783 F.2d 716, 723 (7th Cir. 1986). In *American Nurses*, the Seventh Circuit commented on litigants’ and lawyers’ failure to follow this simple command in favor of elaborate, overly stated complaints, stating, “[t]he idea of ‘short and plain statement of the claim’ has not caught on. Few complaints follow the models in the Appendix of Forms.” Id. at 723.

\(^14\) See *Swierkiewicz*, 534 U.S. at 509–10.


\(^16\) See id. at 49.
or raise the theory in a timely manner.\textsuperscript{17} Neither the Ninth Circuit nor the Supreme Court seemed to realize that if all that is required of a plaintiff is information sufficient to put the defendant on notice of the claim against him,\textsuperscript{18} the plaintiff’s claim that a specific decision not to rehire him because of his disability was sufficient to state a claim for relief under the Americans with Disabilities Act.\textsuperscript{19} If notice pleading is what it purports to be, then the disparate impact claim in Raytheon ought not to have been dismissed.

This Comment argues that the Supreme Court needs to be consistent in its application of Rule 8, not just in its statements of the theoretical standard. Litigants should be able to rely on the Supreme Court’s pronouncements as to the requirements of their pleadings. Further, requiring litigants to plead more information in order to establish the bona fides of their discrimination claims may leave plaintiffs vulnerable to Rule 12(b)(6) dismissal motions because of their inability to obtain documents from the defendant before discovery commences. Since the Federal Rules already provide mechanisms to weed out unmeritorious claims,\textsuperscript{20} the courts should not overstep their authority at the pleading stage. If there is to be a heightened pleading requirement in certain cases, it should be imposed through legislative action and not through judicial interference or inadvertence.

Part I of this Comment explores the history of pleadings and the birth of the Federal Rules. Part II outlines disparate treatment and disparate impact claims in the employment discrimination context. Part III provides an overview and analysis of the Supreme Court’s pleading jurisprudence. Part IV discusses Raytheon Co. v. Hernandez and the language used by the Court in dismissing the plaintiff’s disparate impact claim, demonstrating a disconnect between the opinion’s language and the Court’s previously articulated approach to pleading. Part V discusses other judicial misapplications of Rule 8 in employment discrimination. Part VI concludes that the continued

\textsuperscript{17} Id.

\textsuperscript{18} See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993); Conley v. Gibson, 355 U.S. 41, 47 (1957) (“[A]ll the Rules require is [the complaint] give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”).


\textsuperscript{20} These mechanisms include the motion for a more definite statement under Rule 12(e), the mandate that a plaintiff’s allegations comport with Rule 11’s requirements of good faith, non-frivolousness, reasonable basis or belief as to evidentiary support, and overall good faith, initial disclosures under Rule 26(a)(1), control of the scope and duration of discovery under Rule 26, pretrial conferences under Rule 16, summary judgment motions under Rule 56(c), and motions for judgment as a matter of law under Rule 50.
aversion to the command of Rule 8 detrimentally affects plaintiffs, especially in cases alleging discrimination. By pleading, “I was a victim of discrimination in violation of Title VII,” the plaintiff’s complaint includes both disparate treatment and disparate impact claims under a notice pleading regime. Courts should not require more particularity to survive a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6).

I. COMMON LAW PLEADING AND THE FEDERAL RULES

At common law, the process of stating a cause of action was difficult and complex. To come before a royal court, the aggrieved party had to first obtain a writ from the king, which conferred jurisdiction on a particular court. Next, the parties would exchange pleadings that narrowed the issue before the court to a single question of law or fact. The parties had to place all their eggs in one basket by specifically stating whether the claims rested in law or equity and by choosing which of the potentially overlapping writs should be applied. Alternative theories of relief were unavailable. These rigid requirements made a litigant’s day in court more a game of semantic skill than a decision on the merits of the claim. In the United States, the technical distinctions were lessened slightly, but continued dissatisfaction led to further reform efforts in the nineteenth century.

The Field Code, promulgated in 1848, was one of the first major procedural reform efforts. Named after David Dudley Field, the

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21 Admittedly, the pleading may in fact have to identify the employment decision in question, such as a refusal to hire, a discharge, or a denial of promotion or raise.
22 See JOHN J. COUND ET AL., CIVIL PROCEDURE: CASES AND MATERIALS 459 (6th ed. 1993) (The system of pleading at common law is “filled in with special instances, inexplicable exceptions, arbitrary rules, and untraversable fictions, the result [being] one of the most complex and snare-ridden creations ever devised by man.”). See generally F.W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW I (1948).
23 See Act of Apr. 8, 1847, ch. 59, § 8, 1848 N.Y. LAWS 66, 67–68.
24 See Act of Apr. 12, ch. 379, 1848 N.Y. LAWS 497, 497 (preamble).
Field Code was adopted in some form by nearly half the states.\textsuperscript{30} Since the federal courts of the period applied state procedural law,\textsuperscript{31} the Field Code competed with older approaches in both federal and state courts.\textsuperscript{32} Although the Field Code helped reduce the number of pleading technicalities,\textsuperscript{33} judges continued to dismiss many complaints as insufficiently pled based on the Field Code pleading standard, which required the plaintiff to allege the “facts constituting a cause of action.”\textsuperscript{34} Plaintiffs had to plead facts supporting each and every element of their claim before discovery without access to materials necessary to do so.\textsuperscript{35} Although the Field Code was a step in the right direction, further action proved necessary.\textsuperscript{36}

In 1934 Congress adopted the Rules Enabling Act,\textsuperscript{37} which authorized the Supreme Court to promulgate uniform pleading and practice rules.\textsuperscript{38} In September of 1938, the Supreme Court set forth the Federal Rules of Civil Procedure.\textsuperscript{39} The Federal Rules attempted a radical re-conception of the approach to pleading.\textsuperscript{40} The main purpose of the Federal Rules was to have courts decide claims based on merit, rather than having courts dismiss claims for failing to comply with a formality.\textsuperscript{41} Among other things,\textsuperscript{42} the Federal Rules did away with fact pleading and gave birth to notice pleading.\textsuperscript{43}
The Federal Rules set forth the pleading standards for all civil actions in federal court. Rule 8 provides that “[a] pleading . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.” The sample forms in the appendix of the Federal Rules, authorized by Rule 84, exemplify the simplicity required under the new system. For example, the following complaints listed in the appendix are sufficient to satisfy the notice requirement of Rule 8:

Complaint for Goods Sold and Delivered
Defendant owes plaintiff [amount] dollars for goods sold and delivered by plaintiff to defendant between [date] and [date].

Complaint for Money Lent
Defendant owes plaintiff [amount] dollars for money lent by plaintiff to defendant on [date].

Complaint for Negligence
On [date] in a public highway called [name] in [place], defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.

Under the notice pleading regime, the complaint does not have to include the plaintiff’s legal theory. A court should ask whether exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.”; FED. R. CIV. P. 2 (“There shall be one form of action to be known as ‘civil action.’”).

Am. Nurses’ Ass’n v. Illinois, 783 F.2d 716, 723 (7th Cir. 1986).

See FED. R. CIV. P. 8, 9, 23.1.

FED. R. CIV. P. 8(a)(2).

FED. R. CIV. P. 84 (“The forms contained in the Appendix of Forms are sufficient under the rules and are intended to indicate the simplicity and brevity of statement which the rules contemplate.”).

FED. R. CIV. P. app. Form 5.


FED. R. CIV. P. app. Form 9. Applying the examples found in the appendix forms to the employment discrimination context, it would seem sufficient to state the general time frame and identify the employment action at issue to survive a Rule 12(b)(6) motion to dismiss. In fact, the Seventh Circuit stated, “[b]ecause racial discrimination in employment is ‘a claim upon which relief can be granted,’ . . . ‘I was turned down for a job because of my race’ is all a complaint has to say.” Bennett v. Schmidt, 153 F.3d 516, 518 (7th Cir. 1998).

Siegelman v. Cunard White Star, Ltd., 221 F.2d 189, 196 (2d Cir. 1955) (“It is not necessary to set out the legal theory on which the claim is based.”); Grant v. City of New York, No. 91 Civ. 4266 (RLC), 1992 U.S. Dist. LEXIS 3615, at *10 (S.D.N.Y. Mar. 25, 1992) (“The normal pleading requirements do not dictate that any particular words be used.”); see also Torry v. Northrop Grumman Corp., 399 F.3d 876, 877–79 (7th Cir. 2005) (allowing a black plaintiff’s race discrimination claim although the complaint included only an allegation of age discrimination in violation of the
recovery is possible under any legal theory, not just the one that may be asserted in the complaint.\textsuperscript{51} In addition, Rule 8(e)(2) authorizes the pleading of alternative or hypothetical claims, “regardless of consistency.”\textsuperscript{52} Further, Rule 54(c), which addresses relief awarded at judgment, provides that “every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party’s pleadings.”\textsuperscript{53} There are “[n]o technical forms of pleading”\textsuperscript{54} and “[a]ll pleadings shall be construed as to do substantial justice.”\textsuperscript{55} Ultimately, the Federal Rules make “pleadings, in and of themselves, relatively unimportant. Cases are to be decided on their merits.”\textsuperscript{56} In sum, “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.”\textsuperscript{57}

In contrast to the normal relaxed rules of pleading for most cases, the drafters of the Federal Rules specified limited instances when Rule 8 does not apply.\textsuperscript{58} Rule 9(b), which addresses those instances where a plaintiff must meet a higher pleading threshold, requires that “circumstances constituting fraud or mistake shall be stated with particularity.”\textsuperscript{59} Thus, for example, securities fraud litigation claims must be pled with particularity.\textsuperscript{60} Particularity is often ex-
plained as the “who, what, when, where, and how of a newspaper story.”\footnote{Christopher M. Fairman, \textit{An Invitation to the Rulemakers—Strike Rule 9(b)}, 38 \textit{U.C. Davis L. Rev.} 281, 288 (2004); \textit{see also} Melder v. Morris, 27 F.3d at 1097, 1100 n.5 (5th Cir. 1994) (using analogy); DiLeo v. Ernst & Young, 901 F.2d 624, 627 (7th Cir. 1990) (same). \textit{See generally} William M. Richman et al., \textit{The Pleading of Fraud: Rhymes Without Reason}, 60 \textit{S. Cal. L. Rev.} 959 (1987).} Similarly, Rule 9(g) requires that special damage claims “be specifically stated.”\footnote{Fed. R. Civ. P. 9(g).} Other than those exceptions, the low threshold of Rule 8 applies. Courts have cited the canon of statutory construction \textit{expressio unius est exclusio alterius}\footnote{"[T]o express or include one thing implies the exclusion of the other, or of the alternative." BLACK'S LAW DICTIONARY 620 (8th ed. 2004).} to support their application of Rule 8’s low threshold for all instances not specifically altered by another Rule.\footnote{See, e.g., Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993); Walker v. Thompson, 288 F.3d 1005, 1007 (7th Cir. 2002) (“As the Supreme Court has recently reaffirmed[,] . . . there is no requirement in federal suits of pleading the facts or the elements of a claim, with the exceptions (inapplicable to this case) listed in Rule 9.”).} Further, Congress has authority to mandate heightened pleading requirements by statute, as it did in 1995 with the Private Securities Litigation Reform Act.\footnote{Pub. L. No. 104-67, 109 Stat. 737 (1995) (codified in scattered sections of 15 U.S.C.).}

A plaintiff may over-plead in two ways. A plaintiff may over-plead by including sufficient detail in her complaint to demonstrate that she is not entitled to relief.\footnote{See \textit{infra} note 67. For example, if the plaintiff alleges that she was injured during surgery, but also states that the defendant was not the surgeon who operated on her, she has plead enough information to show that the complaint does not state a claim against the defendant. Although the complaint may have met the standard for notice pleading, it showed, on its face, that the plaintiff was not entitled to relief.} Thus, the plaintiff forecloses her right to recovery by alleging too much.\footnote{See Bennett v. Schmidt, 153 F.3d 516, 519 (7th Cir. 1998) (“Litigants may plead themselves out of court by alleging facts that establish defendants’ entitlement to prevail.”); In re Wade, 969 F.2d 241, 249 (7th Cir. 1992) (“A plaintiff may plead himself out of court by attaching documents to the complaint that indicate that he or she is not entitled to judgment.”); Hamilton v. O’Leary, 976 F.2d 341, 343 (7th Cir. 1992) (The court is “not obliged to ignore any facts set forth in the complaint or its attached exhibits . . . that undermine the plaintiff’s claim.”).} The second type of over-pleading

\cite{1050}
involves situations where the plaintiff’s complaint is so detailed, so long, and so confusing, that it is not simple enough to meet a notice pleading standard.\footnote{See FED. R. CIV. P. 8(e)(1).} This type of over-pleading arises by implication from the general principles of notice pleading and Rule 8(e)(1), which states that “each averment of a pleading shall be simple, concise, and direct.”\footnote{See FED. R. CIV. P. 8(e)(1).} In \textit{In re Westinghouse Securities Litigation},\footnote{In re Westinghouse Sec. Litig., 90 F.3d 696 (3d Cir. 1996).} the plaintiff’s complaint was over 240 pages long, and thus dismissed for failing to comply with this standard.\footnote{Id. at 702–03; see also Michaelis v. Neb. State Bar Ass’n, 717 F.2d 437, 439 (8th Cir. 1983) (98 pages long); Kuehl v. FDIC, 8 F.3d 905, 905 (1st Cir. 1993) (43 pages of nearly identical claims).} The language of Rule 12(f), which authorizes a court to dismiss any part of a complaint that is “redundant, immaterial, impertinent or scandalous,”\footnote{FED. R. CIV. P. 12(f).} further supports this simplicity requirement.

A complaint fails to comply with Rule 8(a)(2) if it is “so confused, ambiguous, vague, or otherwise unintelligible that its true substance, if any, is well disguised.”\footnote{Salahuddin v. Cuomo, 861 F.2d 40, 42 (2d Cir. 1988); see also Morgens Waterfall Holdings L.L.C. v. Donaldson, Lufkin & Jenrette Secs. Corp., 198 F.R.D. 608, 609 (S.D.N.Y. 2001).} For example, in \textit{Hartz v. Friedman}\footnote{919 F.2d 469 (7th Cir. 1990).} the complaint alleged Racketeer Influenced and Corrupt Organizations Act (RICO)\footnote{18 U.S.C. §§ 1961–1968 (2000 & Supp. II 2002).} violations and spanned 125 pages.\footnote{Hartz, 919 F.2d at 471.} The Seventh Circuit stated:

\begin{quote}
The district court might well have dismissed the plaintiffs’ complaint on the ground that it was an egregious violation of Rule 8(a) . . . including a mass of details which might be relevant and appropriate at trial, but which are clearly surplusage in stating a claim. The volume and form of the pleading make it difficult to sort out the necessary elements of a RICO claim.\footnote{Id.}
\end{quote}

Rule 8(a)(2) can thus be viewed as a floor and a ceiling to the contents of a complaint.
II. OVERVIEW OF DISPARATE TREATMENT AND DISPARATE IMPACT CLAIMS

A brief overview of discrimination law, with emphasis on its pleading and proof regimes, provides a framework for analyzing an area of the law with judicially imposed heightened pleading requirements. Employment discrimination has been and continues to be an area of law filled with progress and misinterpretation. During the Civil Rights Movement, federal legislation attacked the pervasive problem of discrimination in the employment context. Beginning with Title VII of the Civil Rights Act of 1964, it became illegal to discriminate in employment against someone because of his race, color, gender, or national origin. Title VII covers most employers, with its most important exclusion being small employers. While the original enactment of Title VII applied only to private employers, amendments that took effect in 1972 apply the statute to almost all employers including federal, state, and local governments. The anti-discrimination laws multiplied when Title VII was followed with the Age Discrimination in Employment Act of 1967 (ADEA), the Reha-

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78 Pub. L. No. 88-352, § 703(a), 78 Stat. 255 (1964) (codified as 42 U.S.C. § 2000e-2(a) (2000)). Section 703(a) of Title VII, which Congress has never amended, states the basic substantive standard:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.


79 See CHARLES A. SULLIVAN, MICHAEL J. ZIMMER & REBECCA HANNER WHITE, EMPLOYMENT DISCRIMINATION: LAW AND PRACTICE § 1.02 (3d ed. 2002) (those with 15 or more employees).

80 Id. Title VII has been amended on several occasions. Id. Among the most significant changes to the statute were the addition of pregnancy discrimination as a type of sex discrimination in the 1978 amendments and the subsequent clarification of pregnancy discrimination in the 1991 amendments. Id.

81 Pub. L. No. 90-202, 81 Stat. 602 (1967) (current version at 29 U.S.C. §§ 621–634 (2000)). The statute's language closely follows the language of Title VII's substantive provision, but ends each clause with "because of such individual's age" or a similar phrase. See, e.g., 29 U.S.C. § 623(a). The ADEA only provides protection to those individuals at least 40 years of age, 29 U.S.C. § 631(a), and recently in General Land Dynamics Systems, Inc. v. Cline, 540 U.S. 581, 584 (2004), the Supreme Court determined that the ADEA did not prohibit favoring the old over the young.

Individual disparate treatment is the term of art for the typical employment discrimination case—plaintiffs allege that the employer made an adverse employment decision against them because of their race, color, religion, sex, national origin, or disability. For example, in Slack v. Havens, the Ninth Circuit affirmed a district court’s finding of disparate treatment where the employer required African-American plaintiffs to perform a job that it did not require white employees to perform. Plaintiffs in disparate treatment cases must prove discriminatory intent.

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   No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.
42 U.S.C. § 12112(a).
84 Currently, 42 U.S.C. § 1981 provides:
   (a) . . . All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
   (b) . . . For purposes of this section, the term “make and enforce contracts” includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
   (c) . . . The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.
85 See SULLIVAN ET AL., supra note 79, § 1.05.
87 522 F.2d 1091 (9th Cir. 1975).
88 See id. at 1092–93, 1095.
The theory of disparate treatment has generated complicated questions of proof structures beginning with *McDonnell Douglas Corp. v. Green*\(^{90}\) and most recently in *Desert Palace, Inc. v. Costa*.\(^{91}\) In *McDonnell Douglas*, the Court created a four-part process for determining the presence of an intent to discriminate when the plaintiff did not have “direct evidence” of intentional discrimination.\(^{92}\) The Court, in *Price Waterhouse v. Hopkins*,\(^{93}\) altered this structure slightly, holding that when a plaintiff presents direct evidence of intent to discriminate she prevails upon a showing that race was a “substantial factor” in the adverse employment decision.\(^{94}\) As a result of the 1991 amendments to Title VII, the Court announced in *Desert Palace* that a plaintiff could prove a case of intentional discrimination without direct evidence of intent to discriminate when she presented “sufficient evidence” that sex was a motivating factor in the decision.\(^{95}\) It is not clear whether *Desert Palace* supplemented or supplanted *McDonnell Douglas*, but it is clear that a disparate treatment plaintiff must prove intent to discriminate.\(^{96}\)

In contrast, disparate impact claims allege that the employer’s policy, though neutral in application, produces discriminatory effects.\(^{97}\) The theory of disparate impact began in 1971 with the landmark case of *Griggs v. Duke Power Co.*\(^{98}\) For the first time, the Supreme Court held that a plaintiff need not show overt or intentional discrimination to prevail on a Title VII claim.\(^{99}\) A plaintiff could prevail if she could identify “practices that are fair in form, but discriminatory in operation.”\(^{100}\) In *Griggs*, thirteen African-American employees challenged Duke Power’s policy, which required employees to have a high school diploma in four of its five departments.\(^{101}\) Prior to Title VII’s enactment, Duke Power had an overt policy of confining black workers to the labor department.\(^{102}\) The highest salary in the labor department paid less than the lowest salary in any other depart-

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\(^{90}\) 411 U.S. 792 (1973).
\(^{91}\) 539 U.S. 90 (2003).
\(^{92}\) See infra notes 161, 174, 177 and accompanying text.
\(^{93}\) 490 U.S. 228 (1989).
\(^{94}\) Id. at 261–79.
\(^{95}\) *Desert Palace*, 539 U.S. at 95–96.
\(^{96}\) See infra Part IV.
\(^{98}\) 401 U.S. 424 (1971).
\(^{99}\) Id. at 431.
\(^{100}\) Id.
\(^{101}\) Id. at 426.
\(^{102}\) Id. at 427.
After Title VII became effective, Duke Power permitted transfers from the labor department to any other department so long as the applicant either possessed a high school diploma or passed an equivalency exam.

While the evidence showed that the requirements had a racially discriminatory effect, the district court dismissed the case for lack of discriminatory intent in the testing procedures. The Fourth Circuit affirmed in part and reversed in part, reversing the district court’s holding that Title VII did not “encompass the present and continuing effects of past discrimination.” The court, however, affirmed the district court’s determination of the fairness of the testing procedures stating, “since the testing requirement [was] applied to white and Negro employees alike,” it is not racially discriminatory. The Supreme Court disagreed, noting that under Title VII “practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to ‘freeze’ the status quo of prior discriminatory employment practices.” The Court elaborated that an employment practice disproportionately affecting a protected class cannot be maintained unless the practice is job-related and shown to be a business necessity. Once the plaintiff carries her burden of showing that the employment practice causes a disparate impact, the defendant bears the burden of proving job-relatedness and business necessity.

The defense of business necessity is outlined in the Civil Rights Act of 1991. The statute provides that the employer must “demonstrate that the challenged practice is job related for the position in question and consistent with business necessity . . .”

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103 Id.
105 Griggs v. Duke Power Co., 292 F. Supp. 243, 248 (M.D.N.C. 1968). Further, the district court held that testing procedures were expressly allowed under § 703(h), which states that it shall not be “an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin.” Id. at 246.
107 Id. at 1230.
108 Id. at 1235–36.
109 Griggs, 401 U.S. at 430.
110 Id. at 431.
111 SULLIVAN ET AL., supra note 79, § 4.03[A].
113 Id.
ness necessity nor job-relatedness is explicitly defined in the statute, but business necessity takes into consideration more general factors not directly related to the performance of a particular task, while job-relatedness appears to exclude requirements that do not affect the employee’s ability to perform her assigned task. To establish that a requirement is job-related, the employer must show “a manifest relationship to the employment in question.” The Court has not defined the precise boundaries of “business necessity,” and circuit court definitions range from employment practices that are “necessary to the safe and efficient operation of the business” to those practices with an arguably “plausible” connection to operation of the business.

The theory of disparate impact continued to evolve in cases after Griggs, including Dothard v. Rawlinson, which extended disparate impact to gender discrimination claims. In 1989, however, the Supreme Court dramatically changed its prior disparate impact jurisprudence with Wards Cove Packing Co., Inc. v. Atonio. Wards Cove dealt with the long-standing segregation of workers in the Alaskan salmon canneries. The statistics relied on by the lower court showed that the “noncannery” jobs, which were mostly skilled jobs, were predominantly filled by whites while the less desirable, unskilled “cannery” jobs were filled predominantly by nonwhite people.

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114 Sullivan et al., supra note 79, § 4.03[C].
117 Yuhas v. Libbey-Owens-Ford Co., 562 F.2d 496, 499 (7th Cir. 1977).
120 Id. at 646.
121 Id. at 647.
Ninth Circuit found this difference sufficient to establish a prima facie case of disparate impact.\textsuperscript{124} The Supreme Court reversed, finding that the Ninth Circuit improperly focused on the statistics of the total number of whites versus nonwhites.\textsuperscript{125} The Court held that the proper statistical comparison is “between the racial composition of the qualified persons in the labor market and the persons holding at-issue jobs.”\textsuperscript{126} The Court continued, “[r]acial imbalance in one segment of an employer’s work force does not, without more, establish a prima facie case of disparate impact . . . .”\textsuperscript{127} The Court’s opinion in \textit{Wards Cove} caused much debate as to the continued availability of disparate impact to many Title VII plaintiffs, the relevant statistical evidence necessary to show a disparate impact, and the burdens of production and persuasion.\textsuperscript{128}

In response to \textit{Wards Cove} and other limiting decisions by the Supreme Court, Congress added several provisions to Title VII, including § 703(k).\textsuperscript{129} Section 703(k)(1) of Title VII sets forth the elements of a statutory cause of action for disparate impact:

An unlawful employment practice based on disparate impact is established under this title only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration . . . with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.\textsuperscript{130}

\textit{Raytheon Co. v. Hernandez}\textsuperscript{131} is the Supreme Court’s most recent encounter with disparate impact since the 1991 Amendments, and the Court viewed the case as an opportunity to draw sharp borders between disparate treatment and disparate impact, making clear that

\textsuperscript{124} Atonio v. Wards Cove Packing Co., Inc., 827 F.2d 439, 444–45 (9th Cir. 1987).

\textsuperscript{125} \textit{Wards Cove}, 490 U.S. at 650.

\textsuperscript{126} \textit{Id.}

\textsuperscript{127} \textit{Id.} at 653.


\textsuperscript{131} 540 U.S. 44 (2003).
plaintiffs cannot prevail on a disparate treatment claim without proving intent to discriminate.\(^\text{132}\)

### III. The Supreme Court’s Interpretation of Rule 8

The Supreme Court first interpreted the requirements of Rule 8 in *Conley v. Gibson*.\(^\text{133}\) In *Conley*, African American railroad employees sued their union for failing to fairly represent them in violation of the Railway Labor Act.\(^\text{134}\) About forty-five African-American employees were discharged or demoted so that whites could fill their positions.\(^\text{135}\) These ousted employees argued that the Union failed to represent their interests fairly and without regard to race.\(^\text{136}\) The Union moved to dismiss the complaint on several grounds, including failure to state a claim upon which relief could be granted,\(^\text{137}\) but the district court dismissed the complaint on jurisdictional grounds.\(^\text{138}\) The Fifth Circuit affirmed.\(^\text{139}\)

The Supreme Court reversed the dismissal for want of jurisdiction and addressed the sufficiency of the plaintiff’s pleading,\(^\text{140}\) stating that a complaint should not be dismissed for failing to state a claim upon which relief can be granted unless “the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”\(^\text{141}\) The Supreme Court elaborated:

[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is ‘a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.\(^\text{142}\)

\(\text{\textsuperscript{132}}\) *Id.* at 51–52. *See also infra* Part IV.
\(\text{\textsuperscript{134}}\) *Id.* at 42.
\(\text{\textsuperscript{135}}\) *Id.* at 43.
\(\text{\textsuperscript{136}}\) *Id.*
\(\text{\textsuperscript{137}}\) *Id.*
\(\text{\textsuperscript{138}}\) *Conley v. Gibson*, 138 F. Supp. 60, 62–63 (S.D. Tex. 1995) ("Congress did not, by the Railway Labor Act, grant jurisdiction to the federal courts to afford relief for breaches of performance of collective bargaining agreements . . . . The question of federal jurisdiction being decisive, it is not necessary to consider the other contentions made by the parties.") (quoting Hettenbaugh v. Airline Pilots Ass’n, 189 F.2d 319, 321 (5th Cir. 1951)).
\(\text{\textsuperscript{139}}\) *Conley v. Gibson*, 229 F.2d 436 (5th Cir. 1956).
\(\text{\textsuperscript{140}}\) *Conley*, 355 U.S. at 45.
\(\text{\textsuperscript{141}}\) *Id.* at 45–46.
\(\text{\textsuperscript{142}}\) *Id.* at 47 (quoting FED. R. CIV. P. 8(a) (2)).
The Supreme Court pointed to the Federal Rules' liberal amending procedures, flexible discovery provisions, and other pre-trial devices to resolve unmeritorious claims.\textsuperscript{145}

The holding in \textit{Conley} should have ended the speculation as to the level of detail required for notice pleading. Yet, defiant of the Supreme Court’s holding, some circuit courts continued to require more than notice pleading, usually in actions that they disfavored on policy grounds.\textsuperscript{144} The defiance perhaps resulted from the courts’ distaste for the rights asserted in those cases.\textsuperscript{145} For example, the Fifth Circuit began explicitly requiring heightened pleading in cases brought under 42 U.S.C. § 1983.\textsuperscript{146} Section 1983 prohibits violations of a plaintiff’s civil rights under color of law:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects . . . any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .\textsuperscript{147}

The breadth of this language permits a plaintiff to sue for nearly any deprivation under color of state law.

The Supreme Court reaffirmed the meaning of notice pleading and rejected a heightened pleading requirement in \textit{Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit}.\textsuperscript{148} In \textit{Leatherman}, two homeowners sued local officials, the county, and two municipal corporations under § 1983.\textsuperscript{149} The claims arose from two

\textsuperscript{145} Id. at 47–48.

\textsuperscript{144} The courts usually required more detailed pleading in standing cases, qualified immunity cases, civil rights litigation, and prisoners’ rights cases. \textit{See}, \textit{Lujan v. Nat’l Wildlife Fed’n}, 497 U.S. 871, 889 (1990) (ordering summary judgment in favor of the defendant because the plaintiffs failed to plead an individualized injury with sufficient specificity to establish standing under the statutes creating the cause of action); \textit{Schultea v. Wood}, 47 F.3d 1427, 1433–34 (5th Cir. 1995) (en banc) (qualified immunity); Blaze, supra note 1, at 935 (civil rights cases); James Dickson Philips, Jr., \textit{Foreword}, 39 Wash. & Lee L. Rev. 425, 428 (1982) (prisoners’ rights cases); Wingate, supra note 1, at 677 (civil rights cases).

\textsuperscript{145} Rotolo v. Borough of Charleroi, 532 F.2d 920, 927 (3d Cir. 1976) (Gibbons, J., dissenting) ("The explanation . . . for the imposition of a fact pleading requirement in . . . [certain] cases[] must be found in the attitude of the court toward the rights being asserted.").

\textsuperscript{146} \textit{See}, e.g., Rodriguez v. Avita, 871 F.2d 552, 554 (5th Cir. 1989); Palmer v. City of San Antonio, 810 F.2d 514, 516 (5th Cir. 1987); Elliot v. Perez, 751 F.2d 1472, 1479 (5th Cir. 1985).


\textsuperscript{148} 507 U.S. 163 (1993).

\textsuperscript{149} Id. at 165.
separate occasions of alleged forcible entry into their homes in violation of their Fourth Amendment rights against unreasonable searches and seizures. \textsuperscript{150} The first plaintiff alleged that police officers entered his home and assaulted him. \textsuperscript{151} The second plaintiff asserted that police officers entered her home while she was away and shot and killed her two dogs. \textsuperscript{152} The lower court dismissed both claims for their failures to meet the Fifth Circuit’s particularity requirement for § 1983 cases.

In an opinion written by Judge Goldberg, the Fifth Circuit affirmed the decision of the district court.\textsuperscript{153} Concurring specially, in a paragraph entitled “Let Sleeping Dogs Lie,” Judge Goldberg further opined:

The heightened pleading requirement has its proponents and its critics. Its application to section 1983 suits has generated great debate, resulting in what appears to be a circuit split on the issue. . . . [W]e, as a panel of this court, must politely decline [plaintiff’s] invitation to reexamine the wisdom of this circuit’s heightened pleading requirement. Until such a time as the en banc court sees fit to reconsider [its prior case law] and in the absence of an intervening Supreme Court decision undermining our settled precedent, I find myself constrained to obey the command of the heightened pleading requirement.\textsuperscript{154}

The Supreme Court granted certiorari to resolve the issue and rejected the imposition of a heightened pleading requirement in cases involving municipal liability.\textsuperscript{155}

The Supreme Court held that it was “impossible to square the ‘heightened pleading standard’ . . . with the liberal system of ‘notice pleading’ set up by the Federal Rules.”\textsuperscript{156} The Supreme Court reaffirmed its assertion from Conley that Rule 8(a)(2) requires only a short and plain statement. \textsuperscript{157} It concluded its brief opinion by reiterating that Rule 9’s particularity provisions apply only in cases of fraud

\textsuperscript{150} Id. at 164–65.
\textsuperscript{151} Id. at 165.
\textsuperscript{152} Id.
\textsuperscript{153} Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 755 F. Supp. 726, 729–30 (N.D. Tex. 1991). The first case in the Fifth Circuit to explicitly require heightened pleading for a § 1983 claim was Elliott v. Perez, 751 F.2d 1472 (5th Cir. 1985).
\textsuperscript{154} Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 954 F.2d 1054, 1058 1060–61 (5th Cir. 1992).
\textsuperscript{155} Id. at 1060–61 (Goldberg, J., concurring specially).
\textsuperscript{156} Leatherman, 507 U.S. at 165.
\textsuperscript{157} Id. at 168.
\textsuperscript{158} Id.
or mistake. The Supreme Court noted, “perhaps if Rules 8 and 9 were rewritten today, [other] claims . . . might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.”

Leatherman’s clear holding should have put an end to heightened pleading requirements in any case except those involving fraud or mistake. Yet the practice reemerged in the employment discrimination context, with some courts requiring plaintiffs to aver specific facts that would establish a prima facie case of disparate treatment discrimination under the McDonnell Douglas framework. The Supreme Court stepped in again in Swierkiewicz v. Sorema N.A., and for the third time reiterated that Rule 9’s heightened pleading requirement applies only in claims of fraud or mistake.

Plaintiff Swierkiewicz alleged that he was fired in violation of Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967. The plaintiff, a fifty-three-year-old native of Hungary, had been working at Sorema N.A. for nearly six years as its chief underwriting officer and senior vice president. The plaintiff contended that he was then demoted and ostracized in favor of a thirty-two-year-old employee of the same national origin as the plaintiff’s boss. The plaintiff wrote a memorandum to his boss outlining...
his complaints and requesting a severance package.\textsuperscript{168} Sorema’s general counsel responded that the plaintiff could either resign without a severance package or be fired.\textsuperscript{169} When the plaintiff refused to resign, Sorema fired him.\textsuperscript{170}

The trial court dismissed the plaintiff’s complaint because he “ha[d] not adequately alleged a prima facie case because he ha[d] not adequately alleged circumstances that support an inference of discrimination.”\textsuperscript{171} The Second Circuit affirmed,\textsuperscript{172} but the Supreme Court reversed.\textsuperscript{173} The Court noted that, while the \textit{McDonnell Douglas} framework\textsuperscript{174} was the proper way to analyze many cases of individual disparate treatment, it had never required the elements of plaintiff’s prima facie case to be set forth in the pleadings.\textsuperscript{175} Rather, the Court noted, “we have rejected the argument that a Title VII complaint requires greater ‘particularity,’ because this would ‘too narrowly constrict the role of the pleadings.’”\textsuperscript{176} Further, the Supreme Court stated that it would be inappropriate under a notice pleading system to require the \textit{McDonnell Douglas} framework to be pled by every plain-

\textsuperscript{168} \textit{Id.} at 509.
\textsuperscript{169} \textit{Id.}
\textsuperscript{170} \textit{Swierkiewicz}, 534 U.S. at 509.
\textsuperscript{172} \textit{Swierkiewicz} v. Sorema, N.A., 5 Fed. Appx. 63, 64 (2d Cir. 2001). The court relied on its prior case law and held that “[t]o plead discrimination based on age, a plaintiff must allege that (1) he is in the protected age group, (2) he is qualified for the job, (3) he was discharged and (4) the discharge occurred under the circumstances giving rise to an inference of age discrimination.” \textit{Id.} The court affirmed the district court’s determination that the plaintiff failed to allege sufficient facts to give rise to an inference of discrimination. \textit{Id.}
\textsuperscript{173} \textit{Swierkiewicz}, 534 U.S. at 510.
\textsuperscript{174} See \textit{McDonnell Douglas Corp. v. Green}, 411 U.S. 792, 802 (1973). In \textit{McDonnell Douglas}, the Supreme Court announced a four-step framework for deciding disparate treatment claims. See \textit{id.} First, the plaintiff must establish a prima facie case of discrimination by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications. \textit{Id.} If the plaintiff makes out a prima facie case, the burden shifts to the defendant to show a “legitimate, nondiscriminatory reason for the employee’s rejection.” \textit{Id.} Finally, if the defendant provides a legitimate reason, the plaintiff may be given an opportunity to show that the proffered reason is merely a pretext for discrimination. See \textit{id.} at 804.
\textsuperscript{175} \textit{Swierkiewicz}, 534 U.S. at 511.
\textsuperscript{176} \textit{Id.} (quoting \textit{McDonald v. Santa Fe Trail Transp. Co.}, 427 U.S. 273, 283 n.11 (1976)).
tiff since that framework does not apply in cases where direct evidence of discrimination is proved. The Supreme Court continued, “[i]t thus seems incongruous to require a plaintiff, in order to survive a motion to dismiss, to plead more facts than he may ultimately need to prove to succeed on the merits if direct evidence of discrimination is discovered.”

Next, the Court reiterated that the standard set forth in Conley v. Gibson and Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit controlled pleadings in all civil actions not specifically exempted in Rule 9(b). The Court repeated the language of Rule 8(a)(2) and its pronouncement from Conley that a complaint need only “give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.” The Court elaborated that the Federal Rules have extensive preliminary disclosure requirements, liberal discovery provisions, and summary judgment motions to dispose of unmeritorious claims before trial. The Court concluded by reiterating its holding in Leatherman that “[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.’”

IV. Raytheon Co. v. Hernandez

The Court’s trio of notice pleading pronouncements should have nailed the coffin of heightened pleading shut, especially in antidiscrimination cases. Nevertheless, just eight months later in Ray-

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177. Id.; see also Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985) (“[T]he McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination.”). The Court might also have noted that the McDonnell Douglas approach varies with the circumstances of the case. See Furnco Constr. Corp. v. Waters, 438 U.S. 567, 577 (1978) (explaining that the McDonnell Douglas framework was never intended to be “rigid, mechanized, or ritualistic” and the requirements of a prima facie case will vary). No single framework applies under every factual scenario. Id. In fact, in Swierkiewicz itself, the four prongs of McDonnell Douglas could not have been applied literally because the plaintiff was neither a racial minority nor challenging his employer’s refusal to rehire him. See Swierkiewicz, 534 U.S. at 508–09. Given that a proper prima facie case under McDonnell Douglas depends on the facts at issue, it is even more problematic to require such allegations at the pleading stage. See id. at 511.

178. Swierkiewicz, 534 U.S. at 511–12.

179. Id. at 512–13.

180. Id. at 512 (quoting Conley v. Gibson, 355 U.S. 41, 47 (1957)).

181. Id.

182. Id. at 515 (quoting Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993)).

183. Id. at 506; Leatherman, 507 U.S. at 163; Conley, 355 U.S. at 41.
theon Co. v. Hernandez, the Supreme Court allowed heightened pleading to rise from the ashes. In Raytheon, although the plaintiff timely asserted a disparate treatment claim, the Supreme Court affirmed the dismissal of plaintiff’s disparate impact claim since he “failed timely to raise [it].” This is startling—if the plaintiff’s complaint alleges that his employer failed to reinstate him at a particular time in violation of the ADA, then his complaint, under notice pleading, should include all theories of relief, including disparate impact.

The plaintiff, Hernandez, had worked for the defendant for twenty-five years before failing a drug test. Hernandez then resigned in lieu of discharge. Two years later, Hernandez applied for reinstatement to his job with the defendant. Raytheon claimed to have a policy against rehiring former employees who left because of misconduct, thus considering Hernandez ineligible for reinstatement because his employment ended as a result of “misconduct.” The Raytheon employee reviewing the applications testified that she was not aware of the misconduct underlying Hernandez’s resignation, but merely applied the rule against rehiring individuals who left the company because of misconduct. Hernandez then filed a charge with the Equal Employment Opportunity Commission (EEOC) and obtained a right to sue letter.

The district court granted the defendant’s motion for summary judgment on Hernandez’s disparate treatment claim. Applying McDonnell Douglas, it held that, while the defendant could

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185 See id. at 49.
186 Id. at 53–55. Note that “[b]oth disparate-treatment and disparate-impact claims are cognizable under the ADA.” Id. at 53
187 Id. at 46.
188 Raytheon, 540 U.S. at 46. The drug use at issue was Hernandez’s cocaine use.
189 Id. Hernandez voluntarily entered a program after his initial discharge and had been sober for over two years before applying for reinstatement with defendant. Id.
190 Id. at 47.
191 Id.
192 Id. at 47.
193 Raytheon, 540 U.S. at 48.
194 Hernandez v. Hughes Missile Sys. Co., 298 F.3d 1030, 1032 (9th Cir. 2002). Note that Hughes Missile Systems was the defendant and appellee in the district court and the Ninth Circuit, respectively, as opposed to Raytheon, because Raytheon purchased Hughes after the case reached the Ninth Circuit. See Brief for Petitioner at ii, Raytheon, 540 U.S. 44 (No. 02-749), 2002 WL 21092587.
195 Hernandez, 298 F.3d at 1036–37.
carry its burden of production that it had acted for nondiscriminatory reasons, Hernandez had raised a genuine issue of fact that the supposed nondiscriminatory reason for its employment action was pretextual.\(^\text{196}\) In the opinion’s final footnote, the Ninth Circuit affirmed the district court’s dismissal of the plaintiff’s disparate impact theory:

> We affirm, however, the district court’s ruling that Hernandez failed to timely raise his claim of disparate impact. This claim is not pled in the complaint nor did Hernandez raise it prior to the close of discovery. . . . Accordingly, we grant Hughes’s motion to strike the portions of Hernandez’s Reply Brief that discuss his disparate impact claim.\(^\text{197}\)

The Supreme Court reversed the Ninth Circuit’s grant of summary judgment on the disparate treatment claim, opining that the Ninth Circuit improperly analyzed the defendant’s conduct under disparate impact, instead of disparate treatment.\(^\text{198}\) The Court stated:

> [T]he Court of Appeals erred by conflating the analytical framework for disparate-impact and disparate-treatment claims. Had the Court of Appeals correctly applied the disparate-treatment framework, it would have been obliged to conclude that a neutral no-rehire policy is, by definition, a legitimate, nondiscriminatory reason. . . . [T]he only remaining question would be whether . . . “petitioner’s stated reason for respondent’s rejection was in fact pretext.”\(^\text{199}\)

The Court remanded the disparate treatment claim for a determination of whether a reasonable jury could find that the employer’s proffered policy was in fact a pretext for discrimination.\(^\text{200}\)

As to the disparate impact claims, the Court, in similarly cryptic language to that of the Ninth Circuit, affirmed the dismissal of the disparate impact claims holding, “[h]ere, respondent did not timely pursue a disparate-impact claim.”\(^\text{201}\) Unfortunately for the confused, the Supreme Court did not offer much explanation.

*Coleman v. Quaker Oats Co.*,\(^\text{202}\) cited by the Ninth Circuit in dismissing the disparate impact claim in *Hernandez*,\(^\text{203}\) provides further

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\(^{196}\) *Id.* at 1035–36.

\(^{197}\) *Id.* at 1037 n.20 (citations omitted).

\(^{198}\) *Raytheon*, 540 U.S. at 51–52.

\(^{199}\) *Id.* (quoting McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973)).

\(^{200}\) *Id.* at 55.

\(^{201}\) *Id.* at 53.

\(^{202}\) 232 F.3d 1271 (9th Cir. 2000).

\(^{203}\) *Hernandez*, 298 F.3d at 1037 n.20.
insight into the Court’s rationale. The plaintiffs in Coleman were terminated during a widespread reduction in force and claimed that they were terminated on account of their age in violation of the ADEA. The Ninth Circuit noted that the district court held that the plaintiffs had not timely pled disparate impact as a theory of liability and rejected their motion to amend their complaint. The plaintiffs argued that they “need not specifically allege the disparate impact theory in the complaint.”

The Ninth Circuit began its opinion by acknowledging, “[w]e have yet to decide whether both theories of liability—disparate impact and disparate treatment—must be alleged in the complaint in order to provide the basis for later trial or summary judgment.” The plaintiffs relied on Gomes v. Avco Corp. to support their contention that disparate impact did not have to be separately pled.

In Gomes, the plaintiff’s EEOC charge did not specifically include disparate impact as a theory to be pursued. The Second Circuit disagreed with the district court’s holding that the omission of the disparate impact claim from the EEOC charge foreclosed it as a theory of recovery. The Second Circuit elaborated, “an investigation of Gomes’ disparate impact claim would reasonably have flowed from an investigation of his disparate treatment claim” and thus put the defendants on notice of the claim. In Coleman, the Ninth Circuit did not expressly reject the reasoning of Gomes, but noted that “[t]heir case is more akin to Josey v. John R. Hollingsworth Corp.”

204 It is important to note that the discussion in Coleman revolves around the ADEA, see Coleman, 232 F.3d at 1280, not the ADA as in Hernandez. After the Supreme Court’s decision in Hazen Paper Co. v. Biggens, 507 U.S. 604 (1993), the circuit courts of appeals disagreed on the issue of whether disparate impact claims are cognizable at all under the ADEA. Smith v. City of Jackson, 125 S. Ct. 1536, 1543 n.9 (2005). Recently, the Supreme Court answered the issue in the affirmative in Smith v. City of Jackson. See id. at 1544. Disparate impact is cognizable under the ADEA in accord with the Supreme Court’s interpretation under Title VII, prior to the 1991 Amendments. Id. at 1544–45. The Court stated, “Wards-Cove’s pre-1991 interpretation of Title VII’s identical language remains applicable to the ADEA.” Id. at 1545.

205 Coleman, 232 F.3d at 1277.
206 Id. at 1280.
207 Id.
208 Id. at 1291.
209 Id.
210 964 F.2d 1330 (2d Cir. 1992).
211 Coleman, 232 F.3d at 1291.
212 Gomes, 964 F.2d at 1334–35.
213 Id. at 1334.
214 Id. at 1335 (citation omitted).
215 Coleman, 232 F.3d at 1292.
In *Josey*, an African-American employee claimed race discrimination in violation of Title VII when he was denied a promotion and was ultimately fired.\(^{216}\) The district court refused to consider a theory of disparate impact since the plaintiff did not raise it until the close of discovery.\(^{217}\) The Third Circuit affirmed, holding: “The district court found that amendment of Josey’s pleadings after the close of discovery would prejudice the defendant. This court will not weaken the district court’s control over its own docket by requiring a relaxation of pleading requirements.”\(^{218}\) The Ninth Circuit in *Coleman* agreed.\(^{219}\)

It is difficult to square the holdings in *Josey* and *Coleman* with the Supreme Court’s repeated affirmation of the liberal standard of notice pleading under Rule 8. Yet, the Supreme Court essentially affirmed this language in *Raytheon Co. v. Hernandez* by holding that the plaintiff “did not timely pursue a disparate-impact claim.”\(^{220}\) The Supreme Court, by summarily accepting the Ninth Circuit’s dismissal of the plaintiff’s disparate impact claim, muddied the notice pleading waters again after *Swierkiewicz* had seemingly cleared them up.

V. OTHER JUDICIAL MISAPPLICATIONS OF RULE 8

The problem is not limited to a few isolated instances, and many plaintiffs are struggling to properly plead discrimination under disparate treatment and disparate impact. In *Powell v. American General Finance, Inc.*,\(^{221}\) a pro se plaintiff alleged that certain lending institutions discriminated against her because of her race.\(^{222}\) The district court dismissed the plaintiff’s complaint in its entirety.\(^{223}\) In addition to other claims, the plaintiff asserted violations of Regulation B, part of the Equal Credit Opportunity Act (ECOA),\(^{224}\) on theories of disparate treatment and disparate impact.\(^{225}\) The district court stated:

\(^{216}\) *Josey* v. John R. Hollingsworth Corp., 996 F.2d 632, 635 (3d Cir. 1993).


\(^{218}\) *Josey*, 996 F.2d at 642.

\(^{219}\) *Coleman*, 232 F.3d at 1292.


\(^{221}\) 310 F. Supp. 2d 481 (N.D.N.Y. 2004).

\(^{222}\) *Id.* at 487–88.

\(^{223}\) *Id.* at 489.

\(^{224}\) 12 C.F.R. §§ 202.1–17 (2005). Regulation B prohibits lenders from denying credit to individuals because of their race, color, religion, national origin, sex, marital status, or age. *Id.* § 202.1(b).

\(^{225}\) *Powell*, 310 F. Supp. 2d at 487. “Courts analyze disparate treatment claims under the ECOA in the same manner as Title VII employment cases.” *Id.* (citing Gross v. U.S. Small Bus. Admin., 669 F. Supp. 50, 52 (N.D.N.Y. 1987)).
To establish her claim, a plaintiff must allege that she was a member of a protected class, that she was qualified for the loan that she requested, and that the lender declined the loan and showed a preference for a non-protected individual. To establish a *prima facie* case under a disparate impact theory, a plaintiff must identify a specific policy or practice which the defendant has used to discriminate and must also demonstrate with statistical evidence that the practice or policy has an adverse effect on the protected group. . . .

. . . She does not allege any *facts* which would tend to show that she actually had a sufficient credit history, sufficient collateral, and/or a necessary co-signer.226

The district court is requiring too much of the plaintiff at the pleading stage. These elements are necessary to make out a prima facie case of discrimination,227 and are not a standard of pleading sufficiency. The district court should not, at the motion to dismiss stage, require the plaintiff to allege what she will ultimately have to prove to prevail on the merits of her claim since Rule 8 only requires “a short and plain statement of the claim” that allows the defendant to form a responsive pleading.228

In *Weston v. Pennsylvania*,229 the Third Circuit properly stated that “a claimant does not have to set out in detail the facts upon which a claim is based, but must merely provide a statement sufficient to put the opposing party on notice of the claim.”230 Nevertheless, district courts still struggled to follow notice pleading. For example, in *Tomaselli v. Upper Pottsgrove Township*,231 the Eastern District of Pennsylvania held:

Plaintiff’s Complaint fails to set forth in further detail how she was treated adversely during her pregnancy and after her child was born. More specifically, the Complaint contains little detail about the accommodations refused or the content of the comments made. However, based on the liberal notice pleading requirement of Rule 8(a)(2) of the Federal Rules of Civil Procedure, Plaintiff’s Complaint withstands Defendants’ Motion to Dismiss . . . .

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226 Id. at 487–88 (emphasis added) (internal citations omitted).
229 251 F.3d 420 (3d Cir. 2001).
230 Id. at 428.
232 Id. at *9–10.
Further, in *Fairfax v. School District of Philadelphia*\(^{233}\), a former schoolteacher filed a forty-one page, pro se complaint against his former school district employer, alleging, among other things, age, race, and disability discrimination.\(^{234}\) From the outset, the district court seemed frustrated by the plaintiff, presumably for his multiple suits against the same defendant in more than a decade and a half, all of which were either dismissed on the pleadings or at summary judgment.\(^ {235}\) Despite this frustration, the district court should have followed the notice-pleading mandate of both the Third Circuit\(^{236}\) and the Supreme Court.\(^{237}\) Instead, the district court dismissed the plaintiff’s Title VII claims as insufficiently pled.\(^{238}\) It stated:

Plaintiff must first establish a prima facie case of unlawful discrimination by showing that (1) he belongs to a protected class; (2) he applied and was qualified for a job for which the employer was seeking applicants; (3) despite his qualifications, he was rejected; and (4) the circumstances of plaintiff’s rejection give rise to an unlawful discrimination. . . . Plaintiff has failed to make the remaining elements for a prima facie case of unlawful discrimination.\(^ {239}\)

This statement is contrary to the Supreme Court’s holding that “[t]he prima facie case under *McDonnell Douglas* . . . is an evidentiary standard, not a pleading requirement.”\(^ {240}\) Such an obvious contradiction of the Supreme Court’s mandate continues to obscure the simple command of Rule 8 and diminishes certainty at the pleading stage.

Cases from the Fifth Circuit have gone back and forth on the issue of proper pleadings after *Swierkiewicz*.\(^ {241}\) In *Grace v. Bank of America*,\(^ {242}\) the district court correctly held:

Under the highly deferential standard of *Conley v. Gibson*, and viewing the allegations of Grace’s complaint in the light most favorable to her for purposes of deciding the motion to dismiss, the court is unable to say that Grace can prove no set of facts, consis-

\(^{234}\) Id. at *11.
\(^{235}\) Id. at *3–5.
\(^{238}\) *Fairfax*, 2004 U.S. Dist. LEXIS 7750, at *11.
\(^{239}\) Id. at *10–11 (citations omitted).
\(^{240}\) *Swierkiewicz*, 534 U.S. at 510.
\(^{241}\) Id.
tent with the allegations, that would entitle her to relief. The court therefore denies the motion to dismiss . . . .

In Mongo v. The Home Depot, Inc. and Bannister v. Dal-Tile International, Inc., however, the Texas district court appears to apply a different standard.

In Mongo, the plaintiff alleged racial and national origin discrimination, retaliation, and hostile work environment claims against the defendant, Home Depot. The district court dismissed all of the plaintiff’s claims. The district court conceded, “[the plaintiff] is not required to plead all elements of a prima facie Title VII case to survive a Rule 12(b)(6) dismissal.” Yet, the district court continued:

[W]ithout more, [the plaintiff’s] sole allegation that he was reprimanded does not provide the Court with a sufficient factual basis establishing that he would be entitled to relief on his claims of race or national origin discrimination.

. . . [H]e must plead more than mere conclusory allegations . . . [E]ven with the court’s liberal construing of the Complaint, [the plaintiff] fails to plead sufficient facts [showing elements of his disparate impact claim].

The retaliation and hostile work environment claims were similarly dismissed for failing to establish the requisite elements of each claim. This case properly cites to Swierkiewicz, but fails to follow the thrust of its conclusions.

Again, in Bannister, the plaintiff filed an action for employment discrimination. The pro se complaint alleged that the plaintiff “[had] been disparately impacted as a result of the aforementioned

243 Id. (internal citations omitted). In Hayes v. MBNA Tech., Inc., No. 3:03-CV-1766-D, 2004 U.S. Dist. LEXIS 10628, at *56–37 (N.D. Tex. June 9, 2004), a Title VII race discrimination case, the court properly stated, “[t]he motion to dismiss for failure to state a claim is viewed with disfavor and is rarely granted. Dismissal of a claim on the basis of the barebones pleadings is a precarious disposition with a high mortality rate. The complaint must be liberally construed in favor of the plaintiff.” Id. The court eventually dismissed the plaintiff’s action for failure to hire, however, since she did not allege that defendant failed to hire her. Id. at *38.
247 Id. at *9.
248 Id. at *5.
249 Id. at *5–7 (emphasis added).
250 Id. at *7–9.
252 Id. at *1.
unlawful actions of [the] defendant.” The district court dismissed the plaintiff’s disparate impact claim as “plainly inadequate to state a prima facie case of disparate impact discrimination under Title VII.”

The district court outlined a proper disparate impact claim as one that shows the defendant employer “implemented a facially neutral employment practice or policy which causes a significant disparate impact on employees within her Title VII protected class” and “pinpoint[s] the specific factor or factors in [the defendant’s] decision-making process responsible for causing the alleged disparate impact.”

Requiring plaintiffs to plead such detailed facts before discovery is similar to the logic of the Second Circuit in Swierkiewicz v. Sorema N.A., which the Supreme Court rejected. Under a notice pleading system, a plaintiff is not required to plead each and every element of her claim. Through the complaint, a plaintiff need only place the defendant on notice of the claim against him.

VI. CONCLUSION

The Supreme Court has thrice pronounced the standard for a complaint under Rule 8. The mandate is clear—a complaint needs to place a defendant on notice of the claims against him so that a responsive pleading may be formed. A complaint accomplishes this with “a short and plain statement of the claim showing that the pleader is entitled to relief.” The Federal Rules moved away from fact or code-based pleading, reflecting a deliberate policy decision of the drafters to focus litigation on the merits of the claim rather than pleading technicalities. Now, all rules “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action” and “[a]ll pleadings shall be so construed as to do substantial justice.”

The Supreme Court, whenever directly faced with a pleading question, properly upholds the mandate of the Federal Rules. Still, the Supreme Court needs to be consistent in its application of Rule 8,

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253 Id. at *8 (citation omitted).
254 Id. at *9.
255 Id. at *5–6.
257 Id.
259 FED. R. CIV. P. 8(a)(2).
260 FED. R. CIV. P. 1.
261 FED. R. CIV. P. 8(f).
not just in its statements of the standard. The Supreme Court, in *Raytheon Co. v. Hernandez*, affirmed the Ninth Circuit’s dismissal of a disparate impact claim for “fail[ure] to plead or raise the theory in a timely manner.”\footnote{Raytheon Co. v. Hernandez, 540 U.S. 44, 49 (2003).} Neither the Ninth Circuit nor the Supreme Court discussed at length the reasons for this dismissal. In *Raytheon Co. v. Hernandez*, the Ninth Circuit cited *Coleman v. Quaker Oats Co.*\footnote{232 F.3d 1271 (9th Cir. 2000).}, which held that allowing the plaintiff to add a disparate impact claim at a late stage in the proceedings would unfairly prejudice the defendant.\footnote{Id. at 1292–93.} Prejudice assumes that the plaintiff’s original complaint, under a notice pleading standard, did not sufficiently place the defendant on notice of the claims against him.\footnote{See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993); Conley v. Gibson, 355 U.S. 41, 47 (1957) (“[A]ll the Rules require is [a complaint] that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”).}

Take the *Raytheon* facts as an example. Hernandez was denied reinstatement to his previous position. At the pleading stage, prior to discovery, Hernandez was unaware, and had no way of knowing, whether he was terminated because of intentional discrimination (disparate treatment) or because of a neutral policy that falls more harshly on people with his disability (disparate impact). His claim that he was not rehired because of his disability already includes both disparate treatment and disparate impact claims. If notice pleading is what it purports to be, then the disparate impact claim in *Raytheon* should not have been dismissed.\footnote{This applies to any other protected trait such as race, color, national origin, gender, or age. See Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e to 2000e-17 (2000 & Supp. II 2002); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–634 (2000).}

Further, requiring litigants to plead what they will have to prove in a discrimination case may prevent plaintiffs from surviving a Rule 12(b)(6) motion because of their inability to access documents within the defendant’s possession. The Federal Rules of Civil Procedure have other procedural devices to cure deficiencies in proof.\footnote{It is possible, of course, that summary judgment would have been appropriate. If the claim had not been raised before the close of discovery, it is highly likely that the plaintiff would not have had sufficient evidence to resist the defendant’s motion. Such a result, however, would not have clouded the pleading question.} It is

\textsuperscript{263} 232 F.3d 1271 (9th Cir. 2000).  
\textsuperscript{264} Id. at 1292–93.  
\textsuperscript{265} See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 168 (1993); Conley v. Gibson, 355 U.S. 41, 47 (1957) (“[A]ll the Rules require is [a complaint] that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”).  
\textsuperscript{267} It is possible, of course, that summary judgment would have been appropriate. If the claim had not been raised before the close of discovery, it is highly likely that the plaintiff would not have had sufficient evidence to resist the defendant’s motion. Such a result, however, would not have clouded the pleading question.  
\textsuperscript{268} These mechanisms include the motion for a more definite statement under Rule 12(e), the requirements that a plaintiff’s allegations comport with Rule 11’s conditions of good faith, non-frivolousness, reasonable basis or belief as to evidentiary support, and overall good faith; initial disclosures under Rule 26(a)(1), control...}
not the duty or right of the courts to overstep their authority by judicially amending the Federal Rules. If there is to be a heightened pleading requirement in certain cases, it should be imposed through legislative action and not through judicial interference or inadvertence.