

Plaintiff's Pleadings: Pitfalls to Avoid When Drafting the Complaint

by

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1 Introduction

This chapter discusses how to frame a sturdy and effective employment discrimination complaint. It first looks at some preliminary matters that usually set the stage for the drafting itself. It then identifies some of the key strategic points, such as fixing the purpose of the complaint, choosing the legal causes of action, picking the jurisdiction, naming the parties, and demanding relief. The chapter then focuses on the likeliest area of contention awaiting the drafter—attacks on the sufficiency of the complaint. The chapter then walks the reader through the drafting of the complaint, section by section, offering some stylistic tips and, finally, a model, skeleton complaint.

1.1 Ground work

Prior to drafting the discrimination complaint, plaintiffs' lawyers usually have to immerse themselves in the file. Because the facts and law tend to be complex, and the trip to the courthouse delayed by EEOC processing, these suits demand uncommonly deep and prolonged involvement from counsel. This chapter assumes that, before lifting the drafting pen, plaintiff's counsel knows the case well, because he or she has: (1) engaged in client intake and extensive case selection analysis; (2) been involved in any EEOC filing and proceedings; and (3) engaged in some preliminary, albeit unsuccessful, settlement negotiations. Although this overview does not cover these preliminary undertakings, it is worth reviewing what has transpired so far

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because the complaint takes its shape from these pre-drafting stages.

1.1[a] Client intake

Through careful client intake, the plaintiff's lawyer should already have become acquainted with:

- the facts, and gathered the necessary documents and witness information at the client's disposal in order to corroborate the client's version of the facts;
- the major legal theories, by doing the necessary preliminary research; and
- the client's goals, personality, and bearing (as a litigant, witness, and team player through the contemplated long-haul of litigation).

1.1[b] Agency charges, proceedings, or internal procedures

Before filing other types of civil litigation complaints, the attorney may simply need to check the applicable statute of limitations periods and ascertain that the intended court has jurisdiction over the matter and the parties. In employment litigation, however, a host of pre-litigation prerequisites exist, including the exhaustion of internal remedies and compliance with administrative agency procedures. The most familiar prerequisite is processing the Title VII charges through the EEOC before proceeding to court. Similarly, under ERISA, plan participants can enforce benefits claims in court only after they have surmounted the necessary hurdles within their funds and have been issued a final denial of benefits. The typical predicates to filing a complaint thus include:

- EEOC charges for Title VII, ADEA, and ADA claims;
- requests for ERISA benefits, denials by, and appeals to ERISA plan administrators or trustees; and
- internal exhaustion of grievances or other internal labor union remedies.

1.1[c] Continual investigation

Despite all of the pre-litigation steps that the plaintiff's attorney has gone through, his or her case assessment or investigation is not likely to end with the drafting of the complaint. On the contrary, these efforts are ongoing, and are likely to be intensified by the act of drafting the complaint. Putting pen to paper sharpens the focus on those conceptual "stones" that might not have been completely overturned during case intake. With thorough preparation, the attorney should not have to make too many revisions to the theory of the case at the complaint-drafting stage or thereafter. Surprises can never be completely avoided, however, and thus must be expected to some degree during discovery and, occasionally, at trial itself.

1.1[d] Preliminary dispute resolution

Very often, plaintiff's counsel has attempted to resolve the claim prior to drafting the complaint. While exploring settlement is not a prerequisite to commencing an action, it often makes good sense to engage in alternative dispute resolution. It is now accepted wisdom that a prompt and fair settlement can greatly benefit all parties. This being the case, attorneys on each side of the employment bar have come to consider the discussion of settlement practically an ethical obligation. Those who adhere to the old belief that initiating such a dialogue signals weakness probably have not dealt with active employment lawyers recently. Many plaintiffs' lawyers find it good practice to give notice to the defendant of impending litigation in order to explore alternatives to going to court. These communications generally commence with plaintiff's counsel sending a demand letter to the defendant. Obviously, if a complaint must be drafted, these preliminary negotiations will have been unsuccessful. However, the negotiation is never really over and the complaint may figure into the next stage.

1.1[d](1) First use of the complaint

Even if the complaint is never filed, the complaint may play a role in the resolution process. If the initial overtures to resolve the claim are fruitless, it may be because the employer has not taken the plaintiff's demand seriously or perhaps believes it is a bluff that will simply go away. One way for the plaintiff's attorney to overcome this resistance is to take the trouble to prepare a complaint and send it to the adversary, in draft form, prior to filing. Placing the draft complaint in the defendant's hands accomplishes several things. First, it gives the defendant further notice of the strengths of plaintiffs' claims. Second, it underscores the plaintiff's seriousness and commitment to the litigation by tangibly representing the prospect of an imminent and grueling fight. Third, it opens the litigation with an overture of good faith; it forgoes the dubious merit of a sneak attack while emphasizing the merits of the case. One of the drawbacks of using the complaint in early settlement negotiations is the expense of drafting a complaint. This expenditure of time and money obviously should not be undertaken to prompt discussions only. It should be made because the plaintiff intends to commence the action, in which case, it is a necessary expense. There is a heavy cost associated with the sending of a draft complaint, without making good on the threat by filing it. The attorney who repeatedly makes empty threats of litigation by sending draft complaints will eventually lose credibility and may become ineffective in pursuing the client's claims in the pre-litigation stage. The sending of draft complaints, therefore, should not be a routine technique, but rather be reserved for those instances in which the plaintiff wishes to create a final negotiation opportunity before the litigation escalates with the public filing of the complaint.

2 Strategic purpose of the complaint

2.1 Who will read it?

The plaintiff's attorney should pause to consider for whom the complaint is being drafted. The federal rules say that the complaint must give notice to the defendant of the claims being asserted. (See

discussion of Fed.R.Civ.P. Rule 8, below at Section 7.) The complaint, however, is far more complex. Few documents in the law or elsewhere are expected to wear so many hats. Counsel should consider who will read the complaint and focus on what they ideally should come away with. One might consider the following audience members when formulating the complaint and return to this checklist when completing the first draft to see whether the tone and emphasis match the goals.

- The client. For the client, drafting the complaint represents a major milestone. Seeking a vindication of sort in print, the client will often expect a vivid account of the wrong that has radically affected his or her career.
- The court. The drafting attorney must visualize how a skeptical, dispassionate judge or law clerk will read the complaint, picking at each word on a motion to dismiss, dryly measuring every contention and plea against the substantive and jurisdictional requirements of the forum.
- The defendant. Crowding the mind's eye are also the figures of the defendant: the corporate figures, the accused managers who may be named as individual defendants, defense witnesses who may be deposed, and the defense attorneys, all of whom will be reading the complaint. If a negotiated settlement has been pursued, the complaint probably signifies that an impasse has been reached. One way to reach the client's goals through settlement, as discussed above, might be to draft the complaint in such a way as to prod a resolution, without further entrenching the parties into their battle positions.
- The jury. Another drafting attorney might wish to draft the complaint so as to connect with the jury when they, perchance, read the complaint (a trial exhibit) in the jury room when deciding questions of liability or damages.
- The public and press. Public relations should never be the prime consideration, and

attorneys should avoid purposefully disseminating superfluous, harmful allegations in the complaint which may backfire on the client even if they cannot be grounds for defamation. On the other hand, until trial, the complaint will be the primary narrative that explains your case to reporters and, through them, to the world.

Which of these “masters” must the complaint serve? The answer, of course, is that it must serve all of them. On the one hand, a well-drafted complaint is as thorough and meticulousness as a good contract which anticipates and avoids problem that otherwise could lead to wasteful motion practice and legal squabbling. At the same time, it must launch the plaintiff into combat, and, like a battle hymn, exert a pull to join the cause on all who read it. In short, the complaint should:

- Define the controversy. As in any litigation, employment law pleadings do more than initiate a lawsuit. From their service through final judgment and appeal, they define the controversy, parties, and relief sought in the proceedings. This goal is to put in everything that is necessary, omit everything else, and thereby accurately draw the suit’s contours.
- Be persuasive. While the purpose of the complaint is not necessarily to persuade the adversary or the court of the merits of the plaintiff’s action (that will be accomplished during motion practice and the trial) the complaint can, and should, subtly call attention to the strengths of plaintiff’s claim. Although it is understandably one-sided, the complaint will nevertheless persuade the reader if it connects, in black and white, the alleged facts to the legal claims.

3 Choice of law strategies

3.1 Many legal facets of employment complaints

One aspect of employment law not found in other areas of civil litigation is the profusion of new and developing law that focuses on the workplace. One employment dispute can

implicate an almost bewildering array of claims. It is not uncommon to find employment lawyers, who necessarily brainstorm before drafting a complaint, attempting to amend their complaints to add causes of action that did not occur to them until after they had filed the original complaint. Sitting down to draft a complaint can be compared to taking a law school issue spotter exam. For example, an employee drug test may present a Fourth Amendment claim under 42 U.S.C.A. § 1983 for a governmental worker, a breach of contract (collective bargaining agreement) claim under the LMRA (29 U.S.C.A. § 185(a)) for a union member, or an invasion of privacy tort or perhaps no claim at all for a private section employee, depending upon the state's common law. In the case of quasi-public, unionized employees, it is not inconceivable that all of these causes of action might be viable.

When linking the facts to causes of action, the drafter can find that the process reveals theories of the case that had been overlooked. Often, the plaintiff's lawyer's concentration on federal discrimination claims causes him or her to bypass a related state law cause of action or federal wage-and-hour or ERISA claims. To avoid such omissions, plaintiffs' attorneys should set aside some time before drafting the employment complaint to scan, if not methodically review, a comprehensive checklist of substantive claims that courts in the jurisdiction recognize. Scanning employment law treatises may help the attorney to think "outside the box." In New York, such sources might include the authors' chapters on pleadings in Kenneth W. Taber, ed., Employment Litigation in New York, (West 2012), and on employment law in Ostertag and Benson, West's New York General Practice (West 2000), on which portions of this overview are based. Also recommended for national coverage is Janice Goodman, ed., Employee Rights Litigation: Pleading and Practice, (National Employment Lawyers Assoc., Matthew Bender, 2012).

3.1[a] Mini-checklist of employment claims

It is worth noting that an employment complaint often involves claims from two or three branches of law. The following is a non-comprehensive list of topic headings under which causes of action generally fall:

- Discrimination (e.g., Title VII, state FEP laws);
- Benefits/Entitlements (e.g., FMLA, FLSA, ERISA);
- Labor law (e.g., LMRA, LMRDA);
- Anti-retaliation statutes, whistleblowing, legal off-duty conduct;
- Contracts: implied contracts, covenants of good faith and fair dealing, negligent misrepresentation;
- Torts, e.g., intentional infliction of emotional distress, defamation, invasion of privacy, fraud;
- Constitutional claims (public employment): free speech, privacy, due process; and
- Mass layoff terminations (federal and state WARN Acts).

3.1[b] Whether to bring alternative causes of action

Because the laws of the workplace often overlap, the plaintiff's attorney is often faced with the question of how much to put into the complaint. He or she may find, for example, that a sexual harassment claim raises harassment claims under Title VII and the state's fair employment law. It may also raise claims of retaliation, intentional infliction of emotional distress, and possibly even a claim of negligent hiring, retention or supervision. These claims may appear to be duplicative and certain maxims of litigation warn against bringing a pot-luck complaint. For one thing, the same sanction for a bad act cannot be levied twice, e.g., the employee can only receive one award for back pay. Courts sometimes become impatient when they are asked to try multiple claims for the exact same relief. Moreover, the more claims that are brought, the greater the likelihood that some of them will be dismissed, which impairs the

plaintiff's overall credibility, and weakens the main claim. As a result, a plaintiff's employment lawyer might conclude that less is more. This would be wrong. Experience teaches that at the complaint stage it is usually better to err on the side of being inclusive. No one can foresee the many problems that can arise when bringing an employment claim to fruition. After the litigation dust settles, claims that might have seemed at the outset to be a superfluous may turn out to be the only viable ones. Many a jury has rejected what seemed to be a sure-fire discrimination claim but awarded hefty damages instead for a lurking retaliation claim that was added to the complaint as an afterthought. Since it will be harder to amend the complaint late in the proceedings, experienced employment lawyers usually try to put everything into the complaint and to hang on to it for as long as reasonably possible. The plaintiff's attorney should be prepared to let go of tenuous claims when their dismissal appears likely, rather than putting up a losing fight that wastes time and detracts from the main causes of action.

4 Strategic jurisdictional issues

4.1 Jurisdiction and Venue

The plaintiff's attorney typically can choose between at least two courts in which to commence the action. Title VII can be brought in federal or state court because state courts have concurrent jurisdiction over Title VII (and section 1983 claims), while state law discrimination claims may be brought in federal court under the doctrine of pendent jurisdiction, or, where appropriate, diversity jurisdiction. Factors to consider will obviously be the general reputation of the courts or judges with respect to the legal issue, the procedural rules concerning discovery, the body of precedent, and the efficiency of the court.

4.1[a] Avoiding removal by careful drafting

Inattention to the jurisdictional strategy when the complaint is drafted may lead to undesirable consequences. For example, it is often thought that, in some parts of the country, state courts and, in particular, state court juries, are more receptive than their federal counterparts to certain discrimination claims. If the plaintiff's attorney commences the action in state court, the defendant may look for grounds to have it removed to federal court. In many cases, this defense stratagem can succeed if the defendant can show that the plaintiff claimed, as part of damages, a failure to pay ERISA-type benefits, since federal courts have exclusive jurisdiction over ERISA claims. Even if the plaintiff has not specifically asserted an ERISA claim, the plaintiff's factual allegations may give the defense the legal basis to argue that the lawsuit be removed to federal court. The defendant may seek removal of any class action under the Class Action Fairness Act of 2005, where the amount sought exceeds \$5,000,000 and a class member lives outside the state of the filing (as long as that state is the domicile of less than two-thirds of the class). If the state forum is preferred, plaintiff's counsel must steer clear of asserting federal forum claims when drafting the complaint so as to avoid involuntary removal. If federal court is the preferred forum, the plaintiff's attorney may have a venue selection to make. In such cases, differences between jury pools and the local rules of the districts, particularly as they affect discovery under the Federal Rules of Civil Procedure, may impact the decision.

5 Strategic party considerations

5.1 The underlying employment relationship

Once the plaintiff's attorney has become thoroughly familiar with the facts, the next step is to focus on the relevant causes of action that the evidence will support. In doing this, the first consideration must be the nature of the employer-employee relationship. At the outset, the attorney must determine that the client is, indeed, an employee and not an independent contractor

or a type of agent beyond the scope of the employment and labor laws. Within the realm of employment, there are, roughly speaking, three types of covered relationships. Each presents a distinct avenue down which the attorney must go in order to arrive at the appropriate cause[s] of action. The most common relationship is that between a private sector employer and an individual employee. The second kind of relationship is that of governmental/public sector employment. Finally, a separate set of laws govern the relationship between the private or public sector employer and the organized (unionized) employee. A related consideration is whether the client may be a member of a definable class that is entitled to class-based relief.

While there are some causes of action which cross over all three types of employment relationship (e.g., Title VII, but not the ADA which excludes U.S. government (but not state and local government employment), the procedural requirements of these claims will affect the drafting of the complaint. By and large, however, the causes of action available within these three types of relationships are mutually exclusive.

5.2 Naming the parties

Another consideration that has both substantive and procedural ramifications is the question of the proper parties to sue and the naming of those parties in the complaint. For the most part, the facts will determine who may be named a defendant, but often they will subject more than one defendant to liability. The question that most commonly arises in employment litigation is whether the employer organization alone will be sued, or whether individual supervisors and decision makers will be named as defendants in their individual or representative capacities. Whether to sue some or all possible defendants is a decision that will hinge on many factors, including the ability to enforce the judgments; the degree of jury sympathy that may be aroused when suing individuals, the degree of hardship or intimidation

the litigation will cause, indemnification; insurance; joint and several liability; and the unity (or lack thereof) of interest among the defendants. For further discussion about naming the defendants, see Section 8.5 below.

6 Strategic issues regarding relief

6.1 How much money to demand?

Whether to specify an amount of damages in the “wherefore” (or ad damnum clause) at the end of the complaint, or for that matter, at the end of the recitation of each cause of action, is a perennial question. The plaintiff does not have to plead any specific amount of general damages, including compensatory damages. The risk of specifying a damages figure is that it may be too high or too low, either of which can create the wrong assumptions and expectations. High numbers may please the client’s ears but can create the deleterious impression that the plaintiff is greedy and unrealistic. On the other hand, if the plaintiff’s period of unemployment or emotional injury extend for longer than was anticipated, the plaintiff may be justified in asking for multiples of the original amounts if they were too modest. It may be safer to simply request an “award of damages in an amount to be determined at trial.” Local pleading requirements should be consulted with regard to the specificity required for general or special damages, particularly if state law claims are involved.

7 Drafting the federal complaint

7.1 Generally

While general observations can be made regarding the federal complaint, one must be aware that state law requirements must obviously be consulted when drafting pleadings in state court, and local district court rules must be reviewed when proceeding to federal court. The components of a pleading in federal court are set forth in the Federal Rules of Civil Procedure

(Fed. R. Civ. P.) (see, Rule 8[a]) and in the appendix of forms to the rules.

7.2 Notice: From Short and Plain to Plausible on its Face

Under Federal Rule of Civil Procedure 8(a)(2), a complaint 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). The Federal Rules of Civil Procedure do not require a plaintiff to allege specific, detailed facts. Conley v. Gibson, 355 U.S. 41, 47, 78 S.Ct. 99, 103, 2 L.Ed.2d 80 (1957). Instead, Rule 8(a)(2) only require the plaintiff to provide the defendant with “fair notice of what the plaintiffs claim is and the grounds upon which it rests Eckert v. Titan Tire Corp. 514 F.3d 801, 8062008) (internal quotations omitted) (quoting Conley, 355 U.S.at 47); see also Liberty Lincoln-Mercury, Inc. v. Ford Motor Co., 676 F.3d 318, 326 (3d Cir. 2012); Homeless Patrol v. Joseph Volpe Family, 425 F. App’x 60, 62, 2011 WL 2580329 (2d Cir. June 30, 2011).

In 2007, however, the U.S. Supreme Court articulated a heightened pleading standard which adopts a more rigorous reading of Rule 8(a)(2). Bell Atlantic Corporation v. Twombly, 550 U.S. 544 (2007), subsequently reaffirmed and extended in Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009). The heightened standard goes beyond the old Rule 8 (a) “notice pleading” standard and requires a plaintiff to plead “sufficient factual matter... to state a claim that is plausible on its face.” Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555, 570 (2007)). In deciding whether a complaint is plausible, the Supreme Court articulated a two-prong approach. First, a court must separate out “pleadings that... are no more than conclusions” and thus not entitled to the assumption of truth.” Iqbal, 129 S.Ct. at 1949-50. Second, a court must “determine whether the ‘well-pleaded factual allegations, assumed to be true, plausibly give rise to an entitlement to relief.” Iqbal, 129 S.Ct. at 1950 (internal quotation marks omitted).

In Iqbal, the Court noted that “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.... [O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.” The heightened pleading standards of Iqbal/Twombly will apply in every federal civil case, including product liability, employment discrimination, RICO, and diversity cases.

7.3 Granting Leave to Replead

In the wake of Iqbal, plaintiffs’ counsel have become increasingly concerned about the effect of the Supreme Court’s heightened pleading standard on the way that lower courts may now consider motions to dismiss. A review of court decisions since Iqbal, however, demonstrates that courts have generously granted plaintiffs leaves to amend if a court finds that plaintiff’s allegations do not comply with the heightened pleading standard set forth in Iqbal.² In addition, a review of post- Iqbal/Twombly decisions lend support towards another theory—

² See e.g., Manuel v. City of Bangor, 09-CV-339-B-W, 2009 WL 3398489 (D. Me. Oct. 21, 2009) (“[plaintiffs] should be afforded some opportunity to understand what the statutes require, along with an opportunity to supplement their allegations... to avoid a scenario in which their claims are summarily dismissed with prejudice based on a failure to plead sufficient facts”); Beng Soon Lim v. Harvest Int’l Realty, Inc., 08-CV-3505(DRH)(WDW), 2009 WL 4110382 (E.D.N.Y. Nov. 23, 2009) (court found that complaint failed to meet Iqbal standard but grants leave to amend); Hall v. Bristol-Myers Squibb Co., CIV.A.06-5203FLW, 2009 WL 5206144 (D.N.J. Dec. 30, 2009) (fraud case where court allowed leave to amend); but see, Gaskins v. 17 Officers, CIV. A. 09-1982 WJM, 2009 WL 4730189 (D.N.J. Dec. 4, 2009); see e.g., Rush v. Am. Home Mortg., Inc., 2009 U.S. Dist. LEXIS 112530, 12-13 (D. Md. Dec. 3, 2009) (court finds that some of plaintiff’s claims passed even under Iqbal, and on others grants leave to amend); Lozar v. Birds Eye Foods, Inc., 678 F. Supp. 2d 589 (W.D. Mich. 2009) (denies defendants’ motion to dismiss on one of plaintiff’s claims and grants plaintiff leave to amend on the other claim); Griffin v. Meagher, 09-CV-1477, 2009 WL 5174684 (N.D. Ill. Dec. 21, 2009) (finding that one of plaintiff’s claims were sufficiently pled and dismissing the due process claim without prejudice); Montin v. Gibson, 4:09CV3102, 2009 WL 2486441 (D. Neb. Aug. 12, 2009) (dismissed plaintiff’s claim with leave to amend); Moore v. Plock, 8:09CV285, 2009 WL 3352960 (D. Neb. Oct. 19, 2009) aff’d, 377 F. App’x 563 (8th Cir. 2010); Gonzales v. Price, 107CV01391AWISMSPC, 2009 WL 4718850 (E.D. Cal. Dec. 2, 2009) (dismissed plaintiff’s §1983 claim with leave to amend); Mecca v. United States, No. 08-CV-02813-REB-CBS, 2009 WL 4268365 (D. Colo. Nov. 20, 2009) (dismissed plaintiff’s complaint but granted him leave to amend); Chalik v. Westport Recovery Corp., 677 F. Supp. 2d 1322, 1325 (S.D. Fla. 2009) (dismissed plaintiff’s FDCPA claim without prejudice); Akers v. Beal Bank, 668 F. Supp. 2d 197 (D.D.C. 2009) (dismissed plaintiff’s complaint without prejudice where such complaint failed to meet the new Iqbal pleading standard).

Iqbal nullification. In these decisions, the court effectively minimized the harshness of Iqbal by continuing to rely on pre-Twombly case law in support of its decision. In Manuel v. City of Bangor, for example, the court cites Iqbal, but then mitigates the harshness of the plausibility standard by citing case law that relied on the Conley notice pleading standard. Id. at *4 (“The factual allegations need not be elaborate, but they must be minimally sufficient to show a plausible entitlement to relief so that the defendant will have “fair notice of what the . . . claim is and the grounds upon which it rests.”) (citing Erickson v. Pardus, 551 U.S. 89 (2007) (quoting Conley v. Gibson, 355 U.S. 41, 47, (1957))). The Manuel court also cited the pre-Twombly case Swierkiewicz v. Sorema N. A., 534 U.S. 506, 513, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002) for the proposition that “Rule 8(a)’s simplified pleading standard applies to all civil actions, with limited exceptions.” Id. Similarly, in Lozar v. Birds Eye Foods, the court not only granted plaintiff leave to amend, but it also essentially ignored the Twombly/Iqbal’s heightened pleading standard and reaffirmed the Conley notice pleading standard. Specifically, the court stated: “Our Circuit cautions that district courts should not overstate the hurdle that Twombly establishes for plaintiffs to survive a Rule 12(b)(6) or Rule 12(c) motion... 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.’ Specific facts are not necessary; the statement need only ‘give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.’” The court justified its departure from plausibility pleading by holding that the Twombly and Erickson decisions are to be read “in conjunction with one another.” Id. at *32.

While the majority of cases do demonstrate that courts generally dismiss insufficiently pleaded complaints without prejudice, it is not so clear that this mechanism removes the barriers that Iqbal creates for plaintiffs seeking to get into federal court. The core dilemma with Iqbal’s

heightened pleading standard is that it will result in premature disposal of the many complaints filed by civil rights plaintiffs who often will not have access to the information needed to “plausibly” plead their case. Although, courts generously grant leaves to amend, case law suggests that this will not adequately remove the barrier that Iqbal erects for civil rights plaintiffs. A leave to amend, without the benefit of discovery will likely result in amended complaints that look strikingly similar to the originally insufficiently plead complaint. In other words, a leave to amend may simply postpone the inevitable and the court will often dismiss the amended complaint based on the same deficiencies that it identified in plaintiff’s first complaint. See e.g., Getso v. City Univ. of New York, 08 CIV. 7469 (LAP), 2009 WL 4042848 (S.D.N.Y. Nov. 18, 2009) (“The Amended Complaint fails to state that Plaintiff requested and was denied a specific accommodation. Plaintiff’s allegations suggest only that he requested some abstract “reasonable accommodation.” Without being more specific, Plaintiff cannot make out a claim under either the ADA or the Rehabilitation Act.”); Hoffenberg v. Grondolsky, 2009 U.S. Dist. LEXIS 117549, at *12-13 (D.N.J. Dec. 17, 2009) (“Since Plaintiff’s 371-paragraph-plus-dozens-of-new-comments amended complaint fails to comply with the requirements of Rule 8, the amended complaint will be dismissed. Plaintiff cannot keep submitting overly lengthy pleadings, cannot keep recycling his prior submissions and should stop substituting facts for conclusory statements, and should stop his random capitalization, bolding and underlining of words: submissions made in violation of this guidance will not be entertained.”); Wilkins v. Bozzuto & Assocs., 2009 U.S. Dist. LEXIS 115776, at *3-4 (E.D. Pa. Dec. 10, 2009) (“The First Amended Complaint contains two counts of race discrimination [and] includes the same facts in the original Complaint, with one additional fact: Plaintiff declares that to his knowledge, when he was terminated, the employee that replaced him was not African-American.”); Groover v. Chen,

2009 U.S. Dist. LEXIS 122107, at *1-2 (C.D. Cal. Nov. 9, 2009) (“The FAC does not remedy the factual deficiencies in plaintiff’s claim against the County. There are no facts in the FAC suggesting that any County policy, ordinance, or custom caused plaintiff’s arrest, detention, and prosecution, as required to state a claim for municipal liability under Monell. Plaintiff’s FAC included facts that were missing from his original complaint concerning his false arrest and malicious prosecution claims against Chen and Wood.”).

In short, if Iqbal is to remain the law, courts must come up with new procedural mechanisms to protect the claims of numerous civil rights plaintiffs. Taken together, these cases demonstrate that it is increasingly important that Plaintiff’s counsel engage in a thorough investigation of plaintiff’s claims and draft a thorough and non-conclusory complaint.

7.4 Pro Se Standard

Although the court must limit its review to the facts stated on the face of the complaint, (Allen v. WestPoint-Pepperell, Inc., 945 F.2d 40, 44 (2d Cir.1991)),³ a complaint drafted by a pro se plaintiff must be construed liberally. McGarry v. Pallito, 687 F.3d 505, 509 (2d Cir. 2012); Julian v. New York City Transit Authority, 857 F.Supp. 242 (E.D.N.Y.1994), aff’d, 52 F.3d 312 (2d Cir.1995) (citing Haines v. Kerner, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972) (per curiam)). Because the sanction of dismissal is harsh, courts are adjured to apply the rule of liberal construction “with particular strictness where the complaint alleges a violation of civil rights.” Alie v. NYNEX Corp., 158 F.R.D. 239, 243 (E.D.N.Y.1994) (citing Branum v. Clark, 927 F.2d 698, 705 (2d Cir.1991)); see also McGarry v. Pallito, 687 F.3d 505, 510 (2d 2012)

³ The complaint may include: (1) documents appended to the complaint; (2) documents incorporated by reference in the complaint; and (3) facts taken on judicial notice. Pungitore v. Barbera, No. 12-1795-cv, 2012 WL 6621437, at *2 (2d Cir. Dec. 20, 2012). Moreover, the court may consider documents that the plaintiff relied upon in drafting the complaint and bringing the suit. Magnifico v. Blumenthal, 471 F.3d 391, 398 (2d Cir. 2006); Rothman v. Gregor, 220 F.3d 81, 88-9 (2d Cir. 2000). In the discrimination context, the court may even review the record of the EEOC. See, e.g., Holowecki v. Federal Express Corp., 440 F.3d 557, 565 (2d Cir. 2006), aff’d, 552 U.S. 389 (2008).

(“[The Second Circuit is] cautious about the hasty dismissal of complaints alleging civil rights violations.”).

7.5 Avoiding judicial McDonnell Douglas traps.

Most employment discrimination litigation is based on circumstantial evidence. In order to raise an inference of intentional discriminatory treatment with such evidence under Title VII, a plaintiff must be prepared to show that he or she: “(1) was a member of a protected class; (2) was qualified for a particular position; (3) was not hired for, or was fired from, the position; and (4) the position remained open and was ultimately filled by another applicant or employee, or alternatively, the rejection, discharge or other adverse treatment occurred under circumstances giving rise to an inference of discrimination.” Quarantino v. Tiffany & Co., 71 F.3d 58, 63-64 (2d Cir.1995) citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)). Pleading the first element, i.e., the protected characteristic, is usually fairly straightforward, as is the third, adverse treatment — prong. The second and fourth elements are the most treacherous. One of the more pernicious developments, however, has been the trend towards forcing the plaintiff to set forth proof of “qualifications” in the second prong, which is addressed below.

The Supreme Court has been clear that the McDonnell Douglas standard is not a pleading requirement. Swierkiewicz v. Sorema N. A. 534 U.S. 506, 510, 122 S.Ct. 992, 997 (2002). Although the Court explained that a plaintiff in an employment discrimination lawsuit need not plead “specific facts establishing a prima facie case under the framework set forth in McDonnell Douglas,” Id. at 508, the extent to which the facts plead must be plausible under the framework

is “somewhat of an open question” following Twombly and Iqbal.⁴ See Hedges v. Town of Madison, 456 F. App’x 22, 23, 2012 WL 101199 (2d Cir.2012) (summary order); see also Kassman, 2013 WL 452913, at *4 n. 2 (citing Jackson v. Cnty. of Rockland, 450 F. App’x 15, 19 (2d Cir.2011) (summary order); Schwab v. Smalls, 435 F. App’x 37, 39–40 (2d Cir.2011) (summary order)). Regardless, the Second Circuit requires all employment discrimination claims to at least satisfy Twombly and Iqbal. See Hedges, 456 F. App’x 23. Thus, courts often use the elements of a prima facie case as an “outline” for determining the plausibility of the allegations. See, e.g., Kassman v. KPMG LLP, No. 11 Civ. 3743(JMF), 2013 WL 452913, at *4 (S.D.N.Y. Feb. 7, 2013); Sommersett v. City of N.Y., No. 09 Civ. 5916(LTS)(KNF), 2011 WL 2565301, at *5 (S.D.N.Y. June 28, 2011); Murphy v. Suffolk Cnty. Cmty. Coll., 10-CV-0251 (LDW) (AKT), 2011 WL 5976082, at *5 (E.D.N.Y. Nov. 29, 2011).

7.5[a] Proving qualifications in the McDonnell Douglas prima facie case.

Some district courts have ignored the proper constraints of the McDonnell Douglas test and have set the plaintiffs’ burden of pleading too high. They do this by collapsing the later, rebuttal stages of the McDonnell Douglas inquiry into a prima facie analysis. Under the McDonnell Douglas and its progeny, if the plaintiff successfully establishes a prima facie case, the burden of production shifts to the defendant to articulate a “legitimate, nondiscriminatory reason” for its actions. Texas Dep’t of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981)). If the defendant fails to satisfy this burden, plaintiff prevails. If the defendant satisfies this burden, then the presumption of intentional discrimination is negated; the employee must then prove by a preponderance of the evidence that the defendant intentionally discriminated against her. She

⁴ See Brian S. Clarke, Grossly Restricted Pleading: Twombly/Iqbal, Gross, and Cannibalistic Facts in Compound Employment Discrimination Claims, 2010 Utah L. Rev. 1101, 1141 n. 177 (2010); see generally Joseph A. Seiner, The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases, 2009 U. Ill. L. Rev. 1011 (2009) (discussing tension between Swierkiewicz and Twombly and Iqbal).

may do this by showing that the “non-discriminatory” reasons the employer offered were merely a pretext for intentional discrimination.

The prima facie requirement for making a Title VII claim “is not onerous.” Burdine, 450 U.S. at 253, and poses “a burden easily met.” Wrenn v. Gould, 808 F.2d 493, 500 (6th Cir.1987). This is because the prima facie phase “merely serves to raise a rebuttable presumption of discrimination by ‘eliminat[ing] the most common nondiscriminatory reasons for the [employer’s treatment of the plaintiff].’ “Hollins v. Atlantic Co., 188 F.3d 652, 659 (6th Cir.1999) (quoting Burdine, 450 U.S. at 253-54). It is “only the first stage of proof in a Title VII case,” and its purpose is simply to “force [a] defendant to proceed with its case.” E.E.O.C. v. Avery Dennison Corp., 104 F.3d 858, 861-62 (6th Cir.1997). This “division of intermediate evidentiary burdens” is not meant to stymie plaintiffs, but simply serves to “bring the litigants and the court expeditiously and fairly to the ultimate question.” Burdine, 450 U.S. at 253. Cline v. Catholic Diocese of Toledo, 206 F.3d 651, 660 (6th Cir. 2000). Essentially, courts have erred by forcing the plaintiff to overcome the defendants’ nondiscriminatory reasons in the prima facie pleading itself. This inevitably will impede the plaintiff at the prima facie stage and ensure the dismissal of the complaint on the Rule 12(b)(6) motion.

The Sixth Circuit dissected this approach and revealed its flaws in Cline v. Catholic Diocese of Toledo. Id. In Cline, a teacher at a Catholic school sued when her contract was not renewed because she was unmarried and pregnant. To rebut her charge of pregnancy discrimination, the school contended that it did not renew her contract because she violated its policy against premarital sex. On the school’s motion to dismiss her complaint, the district court found the teacher “unqualified” under prong two of the prima facie case because she had not lived up to the promises she made to “exemplify the moral values taught by the Church.” It dismissed

her complaint because her pregnancy due to premarital sex meant that “she no longer met all the qualifications of her position.” Even compelling evidence as to her qualifications (i.e., her evaluations and teaching record) could not overcome these moral failings. In reversing, the Sixth Circuit Court of Appeals rejected the district court’s approach of measuring her qualifications against the employer’s purported standards within the context of the McDonnell Douglas inquiry. It noted that the district court, by using the school’s purported “non-discriminatory reason” as the measuring stick of the teacher qualifications at the prima facie stage, defied the Burdine Court’s intent. Forcing plaintiffs to make such a proof at the prima facie stage, the Court reasoned, confuses the relatively light burden of making out a prima facie case with the later and more onerous task of showing by preponderance of the evidence that the defendant’s proffered reason is merely a pretext for discrimination. This “conflation may prematurely terminate a plaintiffs case since she generally has more opportunity to present evidence at the rebuttal stage than at the prima facie stage.” Id.

The Sixth Circuit further noted that the “logical coherence of the McDonnell Douglas test requires that the proper inquiry be whether the plaintiff is qualified for the position independent of the non-discriminatory justification produced by the defense (which the plaintiff argues is either discriminatory or a pretext for discrimination).” Only this approach, wrote the Court, “squares” with the Burdine Court’s “explanation that the prima facie step serves to eliminate the most common nondiscriminatory reasons for the plaintiffs rejection.” Id. at *4-8. Although the Cline decision involved the second prong of the prima facie McDonnell Douglas test in the context of pregnancy discrimination, the plaintiff should be on guard for courts that similarly “conflate” the ultimate burdens (of setting forth evidence that overcomes the defense) into the prongs of the prima facie test.

Because variations exist among the courts when it comes to weighing the plaintiff's allegations under the McDonnell Douglas test; the best advice is to study the court decisions in your jurisdiction when drafting the complaint, and look for these nuances. Then be prepared to answer a Rule 12(b)6 motion if the court is one that misinterprets the minimal pleading standards of the McDonnell Douglas test.

7.5[b] The fourth McDonnell Douglas prong

To satisfy the fourth element of the McDonnell Douglas inquiry, the complaint must, at the very least, attribute the adverse treatment to the racial, or other forbidden, animus. The question is whether the plaintiff can simply make that conclusory allegation and survive a motion to dismiss or, if not, what kinds of facts must be alleged. Often courts look for a factual allegation of some sort of comment, comparison, timing coincidence, or irregularity in policy or practice, from which discriminatory motivation can be inferred. Again, the low McDonnell Douglas threshold, combined with the requirements of Fed.R.Civ.P. Rule 8 should not require any factual proof in the complaint, but rather at the summary judgment stage. Yet, courts routinely demand different levels, strengths and varieties of factual allegation to satisfy the fourth element of the McDonnell Douglas inquiry. Much depends on the court and the kind of adverse treatment that is at issue. A complete look at the many different standards have been used to weigh the allegations of the fourth prong is beyond the scope of this overview. The nuances given to the McDonnell Douglas test by the court that will hear the suit should be carefully researched when drafting the complaint.

8 Drafting the complaint

8.1 Numbered Paragraphs

Under Fed R. Civ. P. Rule 10(b), all averments should be made in separately numbered

paragraphs. This is to facilitate the “clear presentation” of the matter set forth. To add clarity to the allegations:

1. Give each section of the complaint a centered heading in capitals or bold type (e.g., Parties, Venue, etc.)
2. Give each cause of action a number and a title that refers to the statute section or legal theory being invoked.
3. Use short, easy to read sentences throughout. Avoid the use of adverbs, adjectives, or any hyperbole.

Failure to touch on the main requirements, which are noted below, may result in the dismissal of the complaint under Fed.R.Civ.P. Rules 12(b)(6) or 56. Deficiencies that are identified by the defendant in such motions may be cured by a motion to amend the complaint under Rule 15(a), if it will not unduly prejudice the defendant. If the complaint is so profoundly deficient as to make any of its allegations or claims frivolous, the plaintiff and his or her attorney may face sanctions under Fed.R.Civ.P. Rule 11.

8.2 The Caption

The caption should include the name of the court, the parties, their capacities (i.e. whether they are being sued in their representative or individual capacity), the docket number, and the title of the papers. Once the complaint is filed and a docket number and judge are assigned, that number, together with the initials of the judge, must appear to the right of the caption in all pleadings and papers filed thereafter. Once they have been fully listed in the complaint, the names of all defendants, except the first “name” plaintiff, can be replaced by an “et al.” designation in subsequent litigation documents. Just above the caption, many attorneys place the information that used to grace the tinted paper litigation “backs.” That information, placed in the upper left-hand corner, includes the law firm’s name, address and telephone number.

8.3 Introductory Statement

An introductory statement is not required, but is advisable. An introductory statement will thereafter help orient the reader before the elements of the cause of action(s) are alleged. Use the first numbered paragraph to summarize the action. (e.g., “1. This is an action for disability discrimination in violation of the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq., arising from the termination of plaintiffs employment as [position] of [defendant] on [date] etc.”).

8.4 Jurisdictional statement

Federal complaints require a jurisdictional statement. Motions filed under Fed.R.Civ.P. Rule 12(b)(1) challenge the subject matter jurisdiction of the district court. The court’s dismissal of a case for lack of subject matter jurisdiction is not a decision on the merits and does not prevent the plaintiff from pursuing the claim in a court that has proper jurisdiction. Although the first place courts look when determining whether they have jurisdiction is the complaint, the plaintiff at all times bears the burden of demonstrating that subject matter jurisdiction exists and may do so with other evidence. Subject matter jurisdiction in discrimination suits is usually conferred by an express provision in the statute at issue (e.g., Title VII, 42 U.S.C.A § 2000e-5(f)) or based on a federal questions (28 U.S.C.A. §§ 1331 and 1343(4)). Claims under Title VII are strictly governed by its venue provision, 42 U.S.C.A § 2000e-5(f) which provides that an action may be brought in “any judicial district in the state in which the unlawful employment practice is alleged to have been committed, in the judicial district in which the employment records relevant to such practice are maintained or administered, or in the judicial district in which the aggrieved person would have worked but for the alleged employment practice.”

8.5 Parties

The plaintiff’s status as an “employee” and the defendant’s status as an “employer” are requirements for recovery under Title VII and must be set forth in the complaint.⁵ See Arbaugh v. Y&H Corp., 546 U.S. 500, 516, 126 S. Ct. 1235, 1245, 163 L. Ed. 2d 1097 (2006) (holding that “the threshold number of employees for application of Title VII is an element of a plaintiff’s claim for relief, not a jurisdictional issue”); see also EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 259, 111 S.Ct. 1227, 113 L.Ed.2d 274 (1991).

When identifying the parties, the drafter of the complaint should state whether they are being sued in their capacities as representatives of the business entity or as individuals or both. Use one paragraph to describe the plaintiff (or each plaintiff if there are more than one), and another separate paragraph to identify each defendant. Alternatively, in the case of multiple parties, use subsections to describe each of the parties under the heading of plaintiffs and defendants. If standing to sue under a statute requires that certain criteria be met, (e.g., “employer” or “employee”), plaintiff’s counsel must state that the parties meet those requirements. Plaintiff’s counsel should further state any factual allegations needed to support the status, e.g., “as

⁵ However, the same is not true of the statutes’ numerical threshold. Arbaugh held that Title VII’s numerical threshold does not circumscribe federal-court subject-matter jurisdiction. Instead, the employee-numerosity requirement relates to the substantive adequacy of Arbaugh’s Title VII claim. The court held “of course, Congress could make the employee-numerosity requirement “jurisdictional,” just as it has made an amount-in-controversy threshold an ingredient of subject-matter jurisdiction in delineating diversity-of-citizenship jurisdiction under 28 U.S.C. § 1332. But neither § 1331, nor Title VII’s jurisdictional provision, 42 U.S.C. § 2000e-5(f)(3) (authorizing jurisdiction over actions “brought under” Title VII), specifies any threshold ingredient akin to 28 U.S.C. § 1332’s monetary floor. Instead, the 15-employee threshold appears in a separate provision that “does not speak in jurisdictional terms or refer in any way to the jurisdiction of the district courts.” Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 394, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982). Given the “unfair [ness]” and “waste of judicial resources,” App. to Pet. for Cert. 47, entailed in tying the employee-numerosity requirement to subject-matter jurisdiction, we think it the sounder course to refrain from constricting § 1331 or Title VII’s jurisdictional provision, 42 U.S.C. § 2000e-5(f)(3), and to leave the ball in Congress’ court. If the Legislature clearly states that a threshold limitation on a statute’s scope shall count as jurisdictional,¹¹ then courts and litigants will be duly instructed and will not *516 be left to wrestle with the issue. See Da Silva, 229 F.3d at 361 (“Whether a disputed matter concerns jurisdiction or the merits (or occasionally both) is sometimes a close question.”)).

[plaintiff]’s supervisor, [individual defendant] has the power to make personnel decisions regarding [plaintiff]’s employment.” This can be done in the section “Parties,” e.g., “Plaintiff is a female citizen of the United States and a resident of (County), New York. Defendant (name) is a Corporation is an employer within the meaning of 42 U.S.C.A. § 2000e-(b).” If the defendant challenges these allegations in a motion to dismiss, it is unlikely the court will rule without a developed record. This is because the factual findings regarding subject matter jurisdiction are often intertwined with the merits of a Title VII case. The court will not dismiss the case for lack of subject matter jurisdiction unless the plaintiff’s claim to be an employee is wholly insubstantial and frivolous. See, e.g., Worldwide Parking, Inc. v. New Orleans City, 123 F. App’x 606, 608 (5th Cir. 2005); Moore v. Lafayette Life Ins. Co., 458 F.3d 416, 444 (6th Cir. 2006).

8.5[a] Individual versus official capacities

It is necessary to name individual defendants in their official and individual capacities, if one wishes to hold them both personally and their employer liable. It is also good practice to separately name the employer, as well. Failure to name the employer as a defendant is not necessarily fatal, in that naming the individual officers or board members of an employer in their official capacity has been held to be the same thing as naming the employer. See Georgiu v. Sterling Mounting & Finishing, 1 F. App’x 47, 50 (2d Cir. 2001); Consolmagno v. Hosp. of St. Raphael, No. 3:11CV109 PCD, 2011 WL 4804774, * at 6 (D. Conn. Oct. 11, 2011). However, Fed.R.Civ.P. Rule 10(a)’s statement that the caption must contain the names of all parties makes it preferable to add the defendant entity’s name to the complaint and to serve it on the entity, so as to avoid all possible contentions, including statute of limitations issues. See e.g., Bennett v. Schmidt, 153 F.3d 516, 520 (7th Cir. 1998); Williams v. Bradshaw, 459 F.3d 846, 849 (8th Cir. 2006); Abecassis v. Wyatt, No. 09-3884, 2012 WL 4664040, * at 27 (S.D. Tex.

Sept. 30, 2012).

8.6 Factual Allegations

This is the plaintiff's prime opportunity to tell an arresting, moving story. If each paragraph contains a single allegation, it will, among other things, compel the defendant to admit or deny every individual factual recitation more clearly. The question of how many facts to include should be weighed with the following considerations in mind. On the one hand, there is the more-is-better school. This approach is often a sound one, given the particular vagaries of employment law, as discussed at Section 3.1[b]. At the onset of litigation, plaintiff's counsel cannot know how the legal claims and theories may play out. Once litigation is under way, one may find that a crucial cause of action was not specifically alleged. The plaintiff's lawyer will then be grateful for having fully recited the facts in the complaint, thereby giving, perhaps inadvertently, the necessary notice which preserves the claims that can be broadened later at the evidence (and defenses) emerge. This will make it much easier to amend the complaint, if necessary, to formally allege the omitted cause of action. In this regard, it should be noted that the federal rules (Fed.R.Civ.P. Rule 15(b)) allow the plaintiff to ask for relief based on facts alleged in the complaint even if demand for relief was demanded in the complaint. On the other hand, being overly explicit in the fact statement has some drawbacks. If any of the facts prove to be unsupported by evidence they will prompt motions to strike, impair credibility, and perhaps even lead to sanctions under the federal rules.

8.6[a] Facts common to all claims

Some factual allegations may be common to all the causes of action. They can be stated

under a heading that indicates they apply to all the claims. Such allegations can include (and be subheaded) procedural requirements, e.g., the “plaintiff filed a timely charge of race discrimination with the Equal Employment Opportunity Commission (“EEOC”) and brings this action within ninety (90) days of the receipt of a Notice of Right To Sue, issued by the EEOC on [date], a true and accurate copy of which is attached hereto as Exhibit 1.” See 42 U.S.C. § 2000e-5(f).

That said, it should be noted that the filing requirements of Title VII are not jurisdictional prerequisites to bringing suit in federal court, but are more akin to statutes of limitation and are subject to the doctrines of waiver, estoppel, and equitable tolling. See Zipes v. Trans World Airlines, Inc., 455 U.S. 385, 393, 102 S.Ct. 1127, 71 L.Ed.2d 234 (1982); see also Union Pac. R. Co. v. Bhd. of Locomotive Engineers & Trainmen Gen. Comm. of Adjustment, Cent. Region, 558 U.S. 67, 130 S. Ct. 584, 597 (2009). Although the ninety-day filing requirement is not jurisdictional, in the absence of extenuating circumstances, it is a statutory precondition to the maintenance of any action under Title VII in federal court. See e.g Sessions v. Rusk State Hosp., 648 F.2d 1066, 1070 (5th Cir.1981)); Masoodi v. Lockheed Martin Corp., No. 10-807, 2011 WL 837150, * at 4 (E.D. La. Mar. 3, 2011) . Other common factual allegations can include the plaintiffs hiring and initially positive work experience, and so on.

8.6[b] Causes of action

The heart of the complaint is the pleading of the cause(s) of action. After the common factual allegations are enumerated, the causes of action can be set forth under separate headings. Each cause of action will generally begin by setting forth any additional factual allegations necessary to establish the cause of action or summarize the relevant allegations culled from the general statement. The drafter should try to achieve a complete, readable narrative in the

common factual allegations section and do so as well within the allegations supporting each specific cause of action, all the while keeping redundancy to a minimum, if possible. Although a plaintiff might get by, at least in the Seventh Circuit, by simply stated that he or she was fired because of [racial] discrimination (see discussion at Section 7.1), an early opportunity to persuade the court and the adversary will be lost if nothing more is stated.

8.6[b](1) Alleging the elements of the claim

Under the conventional view, the complaint should set forth factual allegations that, taken together, satisfy the elements of the cause of action. When drafting the elements of the causes of action it is useful to refer to jury instructions, as they will track the essential requirements of the claim. It may be worthwhile to go beyond pattern instructions or old jury charges, however, in assembling the vital elements. One should keep in mind that no two claims are alike, nor any two courts identical. Research may reveal significant nuances in the elements of substantive law that the local courts have adopted in applying the law to specific factual permutations like those in issue.

As long as the requisite factual elements have been alleged, the plaintiff will be deemed to have pled the cause of action, even if the name of the cause of action has never been mentioned or the wrong cause of action is mentioned. Nevertheless, for the sake of clarity, it is better practice to state the name given to the particular cause of action. The first time this can be done is in the introductory statement, as mentioned above. The next opportunity may be a heading over the factual allegations relating to the particular cause of action. If supportable factual allegations can be tied to each prong of the cause of action, the plaintiff should be able to survive any motion to dismiss the complaint. Of course, to deflect attacks on deficiencies in the complaint, the plaintiff's attorney should refer to decisions regarding Rule 8, such as Bennett v. Schmidt, 153

F.3d 516, 520 (7th Cir. 1998); Tamayo v. Blagojevich, 526 F.3d 1074, 1081 (7th Cir. 2008)) discussed at length above.

8.6[c] Class action allegations

Before alleging class actions, the drafter must be familiar with the requirements of Fed.R.Civ.P. Rule 23(a) and (b)(2). It should be noted that “as soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained.” Fed.R.Civ.P. 23(c)(1). This means that before the district court takes up other business, such as motions to dismiss which can lead to final judgment, the court should determine whether class status is appropriate. This is so that everyone (including the putative class members) will have knowledge of whose interests are at stake.

8.7 Prayer for relief

The demand for judgment or relief requires a short statement of the remedies being sought. It is best to set forth each cause of action in the complaint and to enumerate the relief being sought with respect to each one separately. This is usually done under the “WHEREFORE” heading. See Section 6, above.

8.8 Jury Demand

Fed.R.Civ.P. Rule 38(b) provides that a jury demand must be made if a jury trial is sought. The jury demand can be included in the pleadings. Often the words “jury trial demand” are written in capital or bold letters and placed to the right of the caption just under the document number of the case, as well as spelled out in a numbered paragraph under its own subsection. If this is not done, the plaintiff has within ten fourteen days of filing the complaint to make a jury trial demand, according to Rule 38(b).

8.9 Signatures

Fed.R.Civ.P. Rule 11 provides that the pleadings must be signed by an individual attorney of record (or by the pro se party). The paper must state the signer's address, e-mail address, and telephone number. Fed. R. Civ. P. 11. Pleadings cannot be signed in the name of counsel's law firm. Some districts require that the attorney's name be followed with his/her initials (without middle initial) and the final four digits of his/her Social Security number, for identification purposes.

8.10 Verification

Although rare, certain statutory causes of action specify that the complaint or other papers must be verified. (See e.g., 29 U.S.C. § 501(b), governing breach of fiduciary duty claims in union democracy actions.)

9 Checklist for Drafting Federal Complaints

1. Initial considerations

- In which district court will jurisdiction and venue be proper?
- What method of service is available to acquire personal jurisdiction over the defendant(s).
- What administrative processing or dismissals are required in order to commence the action?
- What other exhaustion requirements must be satisfied?

2. Does federal law require leave to bring the complaint? See e.g., 29 U.S.C. § 501(b), governing union democracy actions asserting breach of fiduciary duty claims.

3. Preparation of the complaint, signed by a member of the bar of the district in which the action is to be filed.

4. Filing of the summons and complaint with the clerk of the district court along with filing fee. A summons form can be obtained from the court, along with any cover sheets the district may

require to be completed.

5. Completion of service of the summons and complaint within 120 days after filing of the complaint and before the expiration of the applicable statute of limitations. The, plaintiff may request a waiver of service by the defendant in Fed.R.Civ.P. 4(d)(4). (See Official Form 1B in the Appendix of Forms to the Fed.R.Civ.P.)

6. Filing of proof of service within the defendant’s answering time. Fed.R.Civ.P. 4(l). Filing of papers, thereafter, before or reasonably after their service. Fed.R.Civ.P. 4(l).

10 Federal Complaint: Sample Form

UNITED STATES DISTRICT COURT

[] DISTRICT OF [STATE]

[NAME OF PLAINTIFF],

Plaintiff,

Civ. --- (XXX)

COMPLAINT AND

JURY TRIAL DEMAND

against

[NAME OF DEFENDANT], individually and

as [Title of Position], and [Name of

DEFENDANT Organization]

Defendants.

Plaintiff [NAME OF PLAINTIFF][“Plaintiff or “Short name”], as and for his/her complaint, by

his/her undersigned counsel, alleges as follows:

INTRODUCTION

1. This is an action to remedy violations of the rights of [plaintiff] under [state name(s) of statutes that are the basis of the claims, if applicable]. [Summarize the cause of action in one sentence].

JURISDICTION and VENUE

The jurisdiction of the Court is invoked pursuant to [cite the statutory provisions which give the court jurisdiction for each statute]. [If federal jurisdiction is also based on diversity or citizenship, state the diverse citizenship and that the damages, exclusive of interest and costs, are in excess of fifty thousand dollars.] [If state claims are included, state that “This Court’s pendent jurisdiction is also invoked pursuant to (statutory reference).”]

The unlawful employment practices alleged herein were committed in whole or in part in the (N, W]tern District of [State].

CLASS ACTION ALLEGATIONS (if any)

[Here allege the scope of the class, their number, the claims that are typical of the class, that there are questions of law common to the members of the class, the failure of defendant to make appropriate relief with respect to the class.]

PARTIES

Since [date], [plaintiff] has been employed by [defendant].

Plaintiff served as the [job title] of [defendant] from [dates], when he/she was removed from his/her employment duties by [defendant]. Plaintiff resides at [address].

[If plaintiff is suing under a statute, then allege appropriate status, e.g., at all relevant times

herein, [plaintiff] was an “employee” of [defendant] within the meaning of 42 U.S.C. §§ 2000e et seq.]

[Defendant] is a [state of incorporation, type of corporation, e.g., [State] non-profit] corporation.

[Here, describe defendant’s business]. [Defendant] has, and at all relevant times had, its principal place of business at [address].

(If business owners or supervisors are being sued in their individual capacities, allege as follows:

Defendant [supervisor], upon information and belief, resides at [address]. At all times relevant herein, [supervisor] has been employed by [defendant], most recently as its [position].

As [plaintiff]’s supervisor during most of his/her employment at [defendant], [supervisor 1] had the power to make personnel decisions regarding [plaintiff]’s employment.

Defendant [supervisor2] . . . etc.)

(If there are any unnamed defendants, e.g., “John/Jane Doe,” describe who or what they are to the extent possible).

[If plaintiff is suing under a statute, then allege appropriate status for defendant, e.g., At all relevant times herein, [defendant was an “employer” of [plaintiff] within the meaning of 42 U.S.C. §§ 2000e et seq.]

FACTS

[Here state the facts that form the basis of one or more cause(s) of action.]

PROCEDURAL REQUIREMENTS

[Plaintiff] has satisfied all procedural requirements prior to commencing this action. (Where there are required administrative proceedings [i.e, the issuance of an EEOC right to sue letter] or other administrative exhaustion required before commencing suit, state that they have been satisfied.)

AS AND FOR A FIRST CAUSE OF ACTION

(Name of statute under which claim arises, [e.g., “Title VII § 704(a)”])

[Here reallege any previous factual allegations, by their paragraph.]

Here allege the factual allegations that constitute the particular cause of action, or any additional facts not previously alleged that are particular to this cause of action.]

By engaging in the foregoing conduct, [defendant] has violated [plaintiff]’s rights under [state relevant statutory revisions].

By acting as aforescribed, [defendant] acted with malice or with reckless disregard for [plaintiff]’s rights, causing [plaintiff] [state injuries] and entitling [plaintiff] to [state remedies sought, e.g., damages in the amount of (amount)].

[Repeat in this manner, as necessary, for each additional cause of action]

PRAYER FOR RELIEF

WHEREFORE, [plaintiff] prays that this Court enter judgment against the [defendant] as follows:

- (a) under the First Cause of Action, ordering the individual defendants to [state demand for monetary relief];
 - (b) under each Cause of Action, granting any injunctive relief as may be appropriate;
 - (c) (if applicable) under the each Cause of Action, awarding plaintiff costs and, under the First Cause of Action, reasonable attorneys' fees; and
- directing such other and further relief as the Court may deem proper.

JURY DEMAND

Plaintiff demands a jury of six persons on all claims stated herein.

Dated: City and State

Month day, year

NAME OF LAW FIRM

Attorneys for Plaintiff

By:

[Name of Attorney] [ID #] A

Member of the Firm

[address]

[telephone]

Verification (if needed)

STATE OF [])

: ss:

COUNTY OF [])

[NAME OF PLAINTIFF], being duly sworn, deposes and says:

I am the plaintiff in this action. I have read the foregoing complaint and know the content thereof; the same is true to my knowledge, except as to matters therein stated to be alleged upon information and belief, and as to those matters I believe them to be true.

[Name of Plaintiff]

[Jurat, if verified]

Sworn to before me this

day of , 201 .