IN THE SUPREME COURT OF THE UNITED STATES

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AKOS SWIERKIEWICZ, :

Petitioner :

v. : No. 00-1853

SOREMA, N.A. :

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Washington, D.C.

Tuesday, January 15, 2002

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:17 a.m.

APPEARANCES:

HAROLD I. GOODMAN, ESQ., Philadelphia, Pennsylvania; on behalf of the Petitioner.

JEFFREY P. MINEAR, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae, supporting the Petitioner.

LAUREN R. BRODY, ESQ., New York, New York; on behalf of the Respondent.

C O N T E N T S

P R O C E E D I N G S

(11:17 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 00-1853, Akos Swierkiewicz v. Sorema.

Mr. Goodman.

ORAL ARGUMENT OF HAROLD I. GOODMAN

ON BEHALF OF THE PETITIONER

MR. GOODMAN: Mr. Chief Justice, and may it please the Court:

This c case brings up for review a fairly straightforward but nonetheless essential question as it applies to Federal practice and procedure, namely, whether or not notice pleading is sufficient with compliance with Rule 8(a)(2), or whether or not the rule requires some element of fact pleading to overcome a Rule 12(b)(6) motion to dismiss. It arises in the context of a title VII national origin and an age discrimination case under the ADEA. Mr. Swierkiewicz was fired from his job by Sorema, his former employer. He brought suit in the district court claiming that that firing was based upon his national origin -- he's Hungarian -- and his age. He was about 51 at the time.

He pled that there was no valid reason for his discharge. He pointed to the fact that he himself had incurred a history over 2 years of discrimination based on

his national origin and his age, coming from 1995, when he was demoted from his position as chief underwriting officer, through and including two successive years where he was the victim of continuous discrimination by being excluded from meetings, business decisions, and isolated and denied any career growth.

The Second Circuit, affirming the Southern District of New York, concluded that conclusory allegations of discrimination, what it referred to as naked allegations, were insufficient. Some facts had to be proved, proved via a complaint, because it adopted as a pleading standard this Court's elements of a prima facie case in McDonnell Douglas v. Green.

QUESTION: You don't deny that some facts have to be stated, do you?

MR. GOODMAN: I do not.

QUESTION: I mean, can I come in just with a complaint that says, I have been unlawfully discriminated against by my employer, who is -- and I name the employer.

MR. GOODMAN: I think if you did not identify the adverse action, there would not be sufficient information alleged to be able to sustain a motion for dismissal. However, even in that --

QUESTION: That was contained here? They --

MR. GOODMAN: Absolutely.

QUESTION: You would have to also allege, wouldn't you, that you were discriminated against because of your race, or because of your nationality?

MR. GOODMAN: Absolutely.

QUESTION: And you again say that was done here.

MR. GOODMAN: Five times in the complaint. Five times, so that while I absolutely agree that sufficient information must be pled, a) to put a defendant on notice, what is this claim all about, so I can begin the investigative work of defending it and responding via a responsive pleading, and ultimately so that the case can have res judicata effect so that we know what the claim is that normally, as this Court's precedents unanimously and consistently have said, notice pleading, and more particularly, simplified notice pleading is more than enough.

So we contrast what the Second Circuit did with three critical barometers. The first and most critical are these Court's precedents, starting, of course, with Conley in 1957, a case brought under the Railway Labor Act claiming that the union did not fairly represent the interests of African American conductors and porters. As Justice Black, writing for the Court, said, the allegations were entirely general, but in response to the union's argument that more specificity, some specificity

had to be alleged, the Court wrote, the law requires unions to represent minorities on the same basis as nonminorities. That --

QUESTION: Mr. Goodman, why do you start with Conley v. Gibson rather than Dioguardi v. Durning. I thought that was always the classic.

MR. GOODMAN: Dioguardi is my favorite case, simply because it has been authored by then Judge and later Chief Judge Clark, who was the reporter for this Court's advisory committee. It was decided in 1944, and the argument the Government made in opposition to the complaint, which was a pro se complaint, was simply that some facts had to be alleged to support the plaintiff's claims that the Government a) had undersold his medicinal tonic, and b) had lost two cases of his medicinal tonic, to which Judge Clark said, no, the time for ascertaining the facts under the new Federal system, then 6 years old, was through discovery, and if the case was nonmeritorious, through summary judgment, but it's enough that this pro se litigant simply said, you deprived me of my goods, you undersold my property. That is the leading case and, indeed, in Conley --

QUESTION: That's the leading case? I would think you might say a case from this Court were a leading case --

MR. GOODMAN: Well --

QUESTION: -- as opposed to one from the Second Circuit.

(Laughter.)

MR. GOODMAN: I do, indeed. I do, indeed, and that's why I started with Conley, but it is interesting and, I think, prophetic, that footnote 5 of Conley cites Dioguardi with approval.

Now, in Conley the Court rebuffed unanimously the claim that some specificity had to be embossed upon the complaint. 17 years later, in Scheuer, again a unanimous court then through Chief Justice Burger rebuffed claims by Ohio that the National Guard and the Governor of Ohio, who were defendants, were sued on a 1983 damage claim with only the bare allegation that the National Guard had done wrong and was responsible for the deaths of the plaintiffs in that case, rebuffing unanimously the argument that some facts had be pled. The Court turned aside that holding and that case of the Sixth Circuit and, indeed, said, you do not need to do it in a complaint. Notice pleading, as we pointed out in Conley, is more than sufficient. You will have sufficient time to flesh out issues, to learn facts in discovery.

Had that been the end of the trilogy, it would have been enough, but, as this Court knows, just 9 years

ago, 8 years ago, in 1993 in Leatherman, again confronted with a similar issue in a 1983 municipal liability case, the Court had to decide whether or not some facts were essential to a 1983 failure-to-train case under Canton. The decision of the Sixth Circuit, which was accepted on review, had said in no uncertain terms the complaint here alleges no facts, none, to support the failure-to-train case. In response, the Court, through the Chief Justice, unanimously said no. We meant what we said in Conley. Rule 8(a)(2) is sufficient if a plaintiff provides information that puts a defendant on notice of the claims. That's all that's required.

If, today, we had to revise the rules there is a process for doing that and that might result, for 1983 purposes, in a revision to Rule 8(a)(2) such as that 9(a)(2), which now only requires particularity in cases of fraud and mistake, might have a third entry for particularity purposes, a 1983 action, for example, or here. If, upon proper review and the process of this Court's committee and its adoption of rules and those by Congress, it was felt that a title VII case or an age case ought to also require particularity, that would be the time and that would be the place to do it.

But I submit that there are two substantial other reasons for reversal here, and they are bedded in

the Federal rules and have not changed in six decades, and they emanate from Rule 84, the rule, scarcely utilized, but is important in this case, which simply says the forms, the official forms that are attached to the rules, are sufficient for Federal pleading. In particular, Rule, or a Form 5 deals with goods sold and delivered. It's one sentence. Between June of 1936 and December of 1936 the plaintiff had goods for which the defendant was responsible, wherefore clause, prayer for relief. That was deemed sufficient.

Official form 9, a three-paragraph complaint alleging negligence. A defendant, driving a vehicle on Boylston Street in Boston, committed negligence. Injuries result --

QUESTION: Negligently drove. Negligently drove.

MR. GOODMAN: Negligently drove, doesn't deal with what the standard of care was, whether it was breached, whether there was or was not causation.

QUESTION: Mr. Goodman, if --

QUESTION: It gave a date. It gave a date, too, didn't it?

MR. GOODMAN: It did.

QUESTION: Okay.

MR. GOODMAN: As we did here.

QUESTION: Yes.

QUESTION: If the judge said, okay, this complaint measures up to Conley v. Goodman, but I don't want to allow extensive discovery fishing expeditions, what can the judge do to curtail the pretrial proceeding?

MR. GOODMAN: Rule 16 gives the district court considerable discretion to isolate issues, to isolate discovery. If, for example, a Rix-type defense was raised, which isn't true in this case, on statute of limitations ground -- a professor denied tenure. The complaint doesn't mention anything about the date the tenure was denied, but does say the date employment ended. The University of Pennsylvania determines that we know when the tenure decision was made. It's not pled in the complaint.

At a Rule 16 conference it requests the trial court to isolate that issue, allow discovery to be taken on that issue, and allow summary judgment to follow on that issue. If it's granted, the case is over. If it's denied, the case proceeds on full merits. There are numerous arsenal of remedies that district courts have to both curtail --

QUESTION: Mr. Goodman, may I ask you this question: Is one of the things the district judge can do, is -- you refer on page -- in paragraph 31 of the

complaint to a particular memorandum which your client sent to the other side, and the other side filed an affidavit saying, here's the memorandum. They put the whole memorandum in. May the judge review that memorandum and take it into account in ruling on the motion?

MR. GOODMAN: Uh -- excuse me. Not in the context, I think, of this case, for two reasons. One, it was an ex parte submission. The affidavit of defense counsel says, I received a request from the district court. Plaintiff was never notified of it. I thought it was odd that it was made of defense counsel, so there was no --

QUESTION: Supposing you did give notice and you didn't challenge the genuineness of the -- of that paper,. could the judge look at it in deciding the case?

MR. GOODMAN: I think in some instances, yes, but not --

QUESTION: In this instance.

MR. GOODMAN: Not in this, because it raises all sorts of questions of credibility and inference.

Mr. Swierkiewicz, for example, referred to a hostile work environment. He work -- he indicated --

QUESTION: Well, I'm assuming the judge would resolve all instances in favor of the plaintiff. If the judge did that, could the judge look at the affidavit in

ruling on the motion to -- I mean, look at the paper that's referred to in the complaint and ruling on the sufficiency of the complaint?

MR. GOODMAN: I think so. I think so. I think it depends, though, on the substance of the document. I'm assuming that authenticity, for example, is not in dispute. I'm assuming that all inferences in the document on a motion to dismiss are going to be accorded to the plaintiff and not to the defendant. Assuming that, and also assuming that the underlying document is essential to the case, then, I think, under the case law it may be considered by the district court.

QUESTION: Well, it must be essential, if you refer to it in your complaint.

MR. GOODMAN: Yes. That's why I answered the question yes.

QUESTION: In the Rule 16 conference can the judge say, I've looked at this pleading, and it passes under the Federal rule, but I think discovery would be expedited if you made it much, much more complete. I want to file an amended complaint setting forth the allegations and the reasons for your injury in much more detail. Can he do that?

MR. GOODMAN: I think it is permissible, but largely an abuse of discretion if the court has stated,

which was implicit or explicit, Justice Kennedy, in your question, that the complaint satisfies Rule 8(a)(2). If the complaint were deemed so vague and ambiguous, to quote precisely rule 12(e), a defendant could make that motion to flush out much more factual, or more information, or regarding either liability or damages, but I would say except in the most egregious case a sua sponte direction by a district court who has said, it is my view that your complaint satisfies 8(a)(2), it would be precisely what Rule 8(a)(2) and the simplified notice pleading requirements were intended to avoid, which was a lot of litigation up front to avoid a disposition on the merits.

QUESTION: So then the other option is for the judge to allow discovery to go forward but on a limited basis and keep control of it that way?

MR. GOODMAN: Absolutely and, of course, the revisions to the rules, both in terms, for example, of the number of interrogatories, the number of depositions, have gone a considerable way towards that effect in any event, but the district court has considerable latitude to add to that.

QUESTION: Mr. Goodman, I think this case in a way puts notice pleading to the test. In the form complaint that you referred to involving an automobile accident, you know, ordinarily automobile accidents don't

happen unless there's been some negligence on the part of one party or the other, but you get hit with a car, and you know, have reason to suspect there was some negligence.

But people are fired, people are not promoted all the time, without any necessary implication of wrongdoing, and something seems wrong that when you're dismissed you can say, I was dismissed because I'm a Hungarian, without having any evidence whatever, and can bring a complaint and then use the courts essentially as an investigatory arm to find out whether you indeed do have any basis for complaining. I think it just seems --

MR. GOODMAN: I think there are two responses to that. First of all, if the complaint is frivolous or bought in bad faith, as an officer of the court the plaintiff's law him or herself would be exposed to damages, so there's got to be some sort of good faith at the outset in making that kind of allegation.

QUESTION: So the lawyer must know something more than the mere fact that I was fired, and I think I was fired because I was a Hungarian. Presumably the lawyer has to ask the client, why do you think you were fired because you were a Hungarian? What makes you think that was the reason?

MR. GOODMAN: I think you're --

QUESTION: And if you can tell that to the lawyer, why can't you put it in the complaint?

MR. GOODMAN: The question is whether or not you must put it in the complaint, and for purposes of this Court's precedents, and again I come back to Conley and Scheuer and Leatherman, the only way that they must be put in the case, with all due respect, is if Rule 8(a)(2) were amended, or Rule 9(b) were amended, and if --

QUESTION: You're certainly not required to plead the evidence in support of your charge.

MR. GOODMAN: Exactly, and that was my last point, and I'll end with it, and that is that the decision of the district court here in effect conflated elements of evidence with elements of pleading.

McDonnell Douglas v. Green was a recognition of what we all know to be true. Employers do not look you in the eye and say you're too old, I'm firing you, you're Hungarian, you are black, you are a woman, you are disabled. It doesn't work that way. That's what McDonnell Douglas did. It said, we can find an indirect way, circumstantially, to come to the same result. This is what a plaintiff needs do to overcome summary judgment or to prevail at trial.

The Second Circuit, unlike every circuit that has considered the issue, namely, The D.C., the Third,

the Sixth, the Seventh, the Eighth, and the Ninth, made you put the evidence at the outset of the case and if I might, Justice Scalia, much of that evidence is not known to the plaintiff at the outset.

As this Court has held just last term in Reeves, the key to the evidence frequently is in the hands of the defendant: Who replaced Mr. Swierkiewicz? Why was he fired instantly, on the spot? Who made that decision? You need discovery for that.

QUESTION: You say some of it must be known to the plaintiff. It's just not enough that I'm Hungarian, I'm fired. I just can't come into a lawyer and say, sue this guy because I'm Hungarian and he fired me.

MR. GOODMAN: I agree with that.

QUESTION: And I think he fired me because I'm Hungarian. You have to find something else.

MR. GOODMAN: And this complaint pleads far more than that. This complaint pleads 2 years of ongoing continuous discrimination based on national origin and based on age.

Now, I would say that if it said I was fired because I'm Hungarian, because I'm 51, gives the date in April 1997, identifies the individual who fired him, Francois Chavel, identifies five other people who were fired for cause and got substantial severance benefits,

that that satisfied any kind of notice pleading ever set up by this Court. We did more than we had to.

For those reasons --

QUESTION: I think last was not even necessary. That to the last was not --

MR. GOODMAN: Correct. For those reasons we respectfully request the Court to reverse. Thank you.

QUESTION: Very well, Mr. Goodman.

Mr. Minear.

ORAL ARGUMENT OF JEFFREY P. MINEAR

ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE, SUPPORTING THE PETITIONER

MR. MINEAR: Thank you, Mr. Chief Justice, and may it please the Court:

The court of appeals in this case clearly erred in ruling that the pleadings, in this case the complaint, were insufficient. The Court's -- this Court's ruling in Conley v. Gibson makes clear that notice is what's essential in the complaint. In this case, the complaint set forth a short and plain statement of the claim, and it indicated a request for relief.

QUESTION: It was nine pages long, wasn't it?

MR. MINEAR: Yes, it was.

QUESTION: Can you necessarily say that's a short statement?

MR. MINEAR: Well, obviously the length of the complaint will vary on the degree of complexity of the case, but I think that simply underscores the fact that this complaint was more than ample in setting forth the necessary elements of a complaint.

What's important about the complaint in this case is, it did identify both the adverse action that was involved and also allege that the adverse action was the product of a prohibited discrimination. That was sufficient to put the employer on notice of the basis for the complaint, and provided a basis for relief if proved at trial.

The Federal rules do not require that a party include additional facts that go beyond this, including what the employer calls here an inference of discrimination. Rule 9 makes clear that elements of conditions of mind, for instance, can be averred generally, and that includes matters such as intent and motive, and the Federal rules certainly do not require that the parties set forth all the elements of a prima facie case under McDonnell Douglas v. Green.

As petitioner's counsel has pointed out, that ruling of the Second Circuit basically confuses the requirements for pleading a complaint, and the evidentiary burdens that a plaintiff would bear at trial in proving a

disparate treatment case in a situation where circumstantial evidence was being used.

QUESTION: Suppose a person simply feels -- he's been fired, and he thinks his work was good, and the employer said it was bad, so he thinks, they couldn't have fired me because my work was bad. It's good. What reason could there have been? Well, I sense an anti-Hungarian atmosphere in this office. That's it. All right, so they write that into the complaint right there.

Now, you see, I did good work, he said it was bad work, he fired me, and I think it's because I'm a Hungarian, all right. Good faith. He believes it.

Now -- automatically get discovery and costs, quite a lot of money?

MR. MINEAR: You certainly do not automatically --

QUESTION: How could a judge refuse discovery on that -- on these --

MR. MINEAR: Very simply, the complaint in this situation presents an issue of fact. Was there, or was there not discrimination, and the Federal rules contemplated the mechanism for resolving that issue was summary judgment. In this case, the defendant's counsel is free to bring a motion --

QUESTION: But we're talking about discovery.

How does the judge refuse discovery in my case?

MR. MINEAR: It may be that a complete refusal of discovery is not appropriate, but what's important here is that Rule 16, which deals with pretrial conference, coupled with Rule 26, regulating discovery, and Rule 56, dealing with --

QUESTION: So then, what the Second Circuit is actually saying is, since the judge can't refuse discovery in my case, let's go back and look and see what the cause of action is, and the cause of action is such that my case doesn't really fall within it. I mean, I'm trying to figure out what they're driving at. It must be something like that.

MR. MINEAR: Well, I think that the problem the Second Circuit discerned is, as Justice Scalia pointed out, it's very easy to allege discrimination and, in fact, it can sometimes be very difficult to prove it as well. The Federal rules deal with the situation by providing a mechanism, by providing a procedure. The complaint is needed to put the parties on notice of what the --

QUESTION: Does the complaint, Mr. Minear, require you under the Federal rules to put in all the elements of a cause of action in order to survive a 12(b)(6) motion?

MR. MINEAR: Your Honor, no, it does not, and in

fact this was one of the aims of the advisory committee in 1938, when we revised the rule, to get away from the code practice of requiring the facts of the cause of action all be pleaded. That led itself --

QUESTION: That's why these rules religiously avoid determining cause of action. You do not have to plead the elements of a cause of action.

MR. MINEAR: That is exactly right, and I think that principle is clearly enough established to be Hornbook law. We cite a selection of the cases that deal with this on page 13 of our brief.

QUESTION: May I ask you one question? In paragraph 31 of the complaint, they refer to this memorandum as outlining the plaintiff's grievances and requesting -- outlining grievances, then the memorandum was put into the record by the defendant and the judge reviewed the memorandum and thought it didn't really show any discrimination. He said at oral argument plaintiff's counsel concedes that there's nothing in the memorandum from which an inference of age or national origin discrimination can be made, and if that were true, would that provide any basis for a 12(b)(6) motion?

MR. MINEAR: Well, if I can break down this question and answer it in several parts, first of all we agree it may well have been abuse of discretion for the

district court to have considered this memorandum rather than converting the motion to summary judgment where questions of fact and -- rather than having to take all the inferences, giving all of the inferences to the plaintiff, the facts could be waived with regard to the meaning of that memorandum.

We think that if the memorandum in fact provided no basis for this suit whatsoever and it was the only basis on which the plaintiff had premised is claim, then that might, in fact, be fatal to the complaint, but that's not the situation here and, in fact, there are inferences that can be drawn from that memorandum, such as the reference to a glass ceiling, that could be read favorably to the plaintiff to support his cause of action.

QUESTION: You'd have to allow discovery anyway before you could rule under 12(b)(6), right?

MR. MINEAR: Under the circumstances of considering this memorandum, I think it makes it very difficult not being included in discovery, and I that means that it should be converted to a summary judgment motion under Rule 12(b)(6).

QUESTION: Yes. That's the difference, basically, between a 12(b)(6) motion and a motion for summary judgment, is that the 12(b)(6) is just on the basis of the pleadings, and the summary judgment is,

presumably you can consider affidavits and depositions that are taken outside the pleadings.

MR. MINEAR: That's exactly right, Your Honor.

QUESTION: That's exactly what I meant, that you couldn't get rid of the case on the basis of summary judgment without allowing discovery, so there's basically no way to prevent being subjected to discovery on the basis of a claim by somebody who just suspects, with no reason to suspect, that he has been fired because he's Hungarian.

MR. MINEAR: I think that's not, strictly speaking, true in this sense, that the way Rule 56 is structured is that if the defendant makes the motion for summary judgment the plaintiff is under an obligation to come forward with the facts sufficient to indicate there's a triable issue. If the plaintiff does not have those facts, it can request discovery at that point.

QUESTION: Well, what is it that -- how would you describe the standard that's binding on the plaintiff and his attorney for firing the complaint, going back to Justice Breyer's question? You say, you know, I think there could be something wrong here. I'd like to discover. Is that enough?

MR. MINEAR: No, I don't think it's enough.

QUESTION: It has to be well-founded suspicion.

Is there some verbal formulation that floats around the legal world, in the legal world that helps me?

MR. MINEAR: I think the benchmark for the complaint is whether it provides the employer fair notice of the action. That's how the complaint --

QUESTION: What is the standard of confidence, the standard of belief that the plaintiff and the attorney must have before starting the action?

MR. MINEAR: I think that's set forth in Rule 11, and that requires a good faith belief --

QUESTION: A good faith belief?

MR. MINEAR: Yes, a good faith belief that there are facts to support the action.

Now, it may often be the case that the facts are not --

QUESTION: Well, you could have a good faith belief that is entirely erroneous. I mean, I am sure that I was fired because I'm Hungarian. I don't know a single fact, but by God, I really believe that there are some facts. Is that enough -- and he conveys that to his lawyer.

MR. MINEAR: Well, this is the important role that the lawyer and the officer of the court plays in policing these efforts. The lawyer himself must make an investigation.

QUESTION: Well, doesn't he have to investigate the state of mind of the plaintiff to determine is bona fides, or does he -- is there some objective standard implicit in the good faith, there have to be some objective basis for the good faith belief?

MR. MINEAR: Well, I'm not sure if we can fine-tune the standard here to that degree. I think the important point is that these facts, these issues can be promptly tested through summary judgment, and summary judgment is designed to deal summarily with those cases which are not substantial, that are not substantial.

There may be a requirement of some level of discovery, but the district court, who is -- has the tools available to structure discovery, can limit discovery to those issues that are in fact -- provide the --

QUESTION: Your client says, you know, I can tell by looking at people whether they're lying or not, and I think the employer lied to me. I just can tell.

MR. MINEAR: For a lawyer, I think that would be an insufficient basis on which to go forward.

QUESTION: Mr. Minear, what is the status in today's trial where -- it's a long time ago, but we used to make -- see a lot of complaints where facts were alleged on information and belief, and therefore they would set them out very particularly but not necessarily

conclusively, but I don't see any information and belief allegations in this complaint. Is that approach used today at all?

MR. MINEAR: It continues to be used, Your Honor.

Thank you.

QUESTION: Thank you, Mr. Minear.

Ms. Brody, we'll hear from you.

ORAL ARGUMENT OF LAUREN R. BRODY

ON BEHALF OF THE RESPONDENT

MS. BRODY: Mr. Chief Justice, and may it please the Court:

This case presents the question of whether a plaintiff must allege an inference of discrimination in order to stay the claim under title VII in the Age Discrimination and Employment Act. The petitioner here alleged that his employment was terminated on account of his national origin and age. The district court and the court of appeals both found that this allegation was insufficient to sustain a claim, and that petitioner had --

QUESTION: May I ask you right at the outset, because I want to get to -- if the complaint itself, without illumination from the memorandum that you put in, was sufficient, would he lose because you create a

different atmosphere from looking at the memorandum?

MS. BRODY: Your Honor, no. The memorandum --

QUESTION: So we can look at the case without looking at the memorandum?

MS. BRODY: You can look at the case without looking at the memorandum, because the complaint alleges that the memorandum outlined the petitioner's grievances with the company and requested a severance package. There is nothing from that allegation which suggests that there was any kind of discrimination, and that is sufficient in order for the court --

QUESTION: 31 is not enough by itself, but there are other allegations in there to at least raise an inference, I think.

MS. BRODY: There are no other allegations in this complaint that raise an inference. What the petitioner has alleged here is generally that he was Hungarian, that he was a Hungarian -- that he was of Hungarian heritage --

QUESTION: No, paragraph 37 alleges plaintiff's age and national origin were motivating factors in Sorema's decision to terminate his employment. That's pretty direct.

MS. BRODY: Justice Stevens, that's conclusion. That is not permitted by the Federal Rules of Civil

Procedure or by this Court's decisions, including Conley v. Gibson, which said that in order to provide fair notice the plaintiff must provide in the complaint a statement of the claims that gives fair notice of what the claims is, as well as the grounds on which --

QUESTION: Well, why isn't that fair notice, Ms. Brody? He claimed the employer discriminated against him because of his nationality and because of his age.

MS. BRODY: Yes, he does, Your Honor, but that's -- Mr. Chief Justice, but that's a conclusion, and that is not sufficient under Federal rules.

QUESTION: What do you mean by saying it's a conclusion?

MS. BRODY: It's a conclusion that does not set forth what Rule 8 requires, and Rule 8 says that you have to indicate what the grounds on which the claim is based --

QUESTION: Ms. Brody, why is it any more or less of a conclusion, any different from negligently drove? Form 9 says that's enough, just say negligent -- tell the time and place and say, defendant negligently drove. You don't have to say whether he was speeding, or went out of his line, or anything like that. You just say negligent. Isn't that a conclusion, that he drove in a manner that was negligent? What facts -- flush that out.

MS. BRODY: Your Honor, if you look at that complaint, that Form 9 complaint, which alleges negligence, it sets forth all the elements of the claim. It alleges a duty. The defendant was driving on a highway and had an obligation to do so with care. It alleges a breach of that duty, which is that he drove --

QUESTION: I don't see that -- what you added maybe so, but the form doesn't say that. It says, gives the place, and it says, negligently drove.

MS. BRODY: Those are reasonably inferences that can be drawn from a very simple negligence action.

QUESTION: Well, surely the same inferences could be drawn here, couldn't they? It seems to me this is more precise, these allegations, than the allegations Justice Ginsburg just described about the simple word negligently.

MS. BRODY: Mr. Chief Justice, I don't believe that's the case, because in the negligence action when an individual drives a car into another individual, it can be inferred that negligence was involved in that.

QUESTION: You don't have to infer it. It says it.

MS. BRODY: It does say it, Your Honor, but in an employment situation, when an individual is terminated, individuals are terminated every day.

QUESTION: Yes, but here he alleged that he was terminated because of his nationality and because of his age.

MS. BRODY: There is nothing that connects his nationality and his age with the termination of his employment.

QUESTION: Well, he -- but he says that he was terminated for that reason. I think if you want to have him spell it out in more detail, you're asking that he plead evidence, which I don't think is required.

MS. BRODY: Mr. Chief Justice, we are not asking that a plaintiff plead evidence. We agree that that is not appropriate at the pleading stage, and a complaint does not have to contain any evidence. All that a complaint has to contain are allegations based on the plaintiff's good faith belief that he was terminated because the circumstances indicated that there was discrimination.

All that the plaintiff has to allege is some inference of discrimination, and that inference is not the employer's reason for the termination. There are surrounding circumstances that occur when an employee is terminated. It does not occur in a vacuum, and this Court has identified various circumstances under which the inference arises. It arises when one employee is treated

differently than another employee because of their protected class. It arises when --

QUESTION: I thought there was a statement here that other people who had been -- were not let go, people for whom there was cause. wasn't there something to that effect?

MS. BRODY: Justice Ginsburg, there is nothing in connection with the termination of employment that indicates that the petitioner was treated differently from other employees. There were allegations that were made relating to an act that occurred 2 years later -- excuse me, 2 years earlier, in 1995, when the petitioner claims that he was demoted, and he makes various allegations about other individuals who were of different nationalities, different citizenships, and different ages, but he does not connect any of those allegations to his situation, which is being a United States citizen of Hungarian heritage.

The problem is that those prior allegations relating to an act which occurred prior to his termination and which are time-barred do not have any reference --

QUESTION: But he can still use them to show that is the mind set of the employer.

It seems to me that you are asking to have facts alleged in this complaint which, like it or not, the

Federal rules don't require.

MS. BRODY: Justice Ginsburg, I respectfully disagree. We were not asking the petitioner to allege facts. We were only asking him to make good faith allegations which would give rise to some inference of discrimination.

QUESTION: Sorry, then I'm confused, because I -- you don't -- an inference isn't the kind of thing that you allege. An inference is the kind of thing that you make, so you must be saying he has to allege facts that would give rise to an inference, or if you -- are you saying that?

MS. BRODY: That -- facts, factual allegations.

QUESTION: That would -- you have -- he has to allege certain facts that would give rise to an inference, all right.

MS. BRODY: That is correct.

QUESTION: What he did allege was, he alleged as a matter of fact over 2 years people who he alleges were factually less qualified and were either younger or not Hungarian obtained all kinds of advantages that he did not, and then he was fired because of his grievances, and a fair reading is that is both a factual allegation, and grievance refers to what he called -- said earlier in the complaint, so why don't those facts give rise to an

inference that his -- what he said was the conclusion?

MS. BRODY: Those allegations import into this case a concept which has never been asserted, and that is this continuing violation theory. The petitioner -- there are two separate acts here. There is a demotion and a termination, and the petitioner is trying to link those by making the conclusory allegation that there was ongoing discrimination during this 2-year period, but this Court has already held in Rix that a conclusory allegation like that cannot link two separate acts.

What we need to do is look at the circumstances at the time of the termination of employment.

QUESTION: Which case are you mentioning now?

MS. BRODY: Rix v. Delaware State College.

QUESTION: Was that a 12(b)(6) case?

MS. BRODY: That was a 12(b)(6) case, Your Honor.

QUESTION: And the complaint was held insufficient?

MS. BRODY: The complaint was held insufficient, and this Court refused --

QUESTION: Well, it was held to be time-barred because the relevant time was when he lost his seniority, rather than when he was terminated, and here you're arguing that the only evidence of discrimination is that

during the 2 or 3 years before they treated the French employees better than the Hungarian employees, and it's unreasonable to infer from that that the discharge was similarly motivated.

MS. BRODY: That is correct.

QUESTION: And they say it was, and so there's an issue of fact.

MS. BRODY: But it's not a matte of unreasonableness. It's a matter of, there's one act which is time-barred, and there's a second act, and you could not link them, especially in this particular case, where the allegations relating to the so-called demotion are totally directed to the demotion and don't carry over into the termination of an employment.

QUESTION: But if even one of them was a good claim, it shouldn't have been dismissed. Are you saying that neither the demotion nor the termination is sufficiently pleaded?

MS. BRODY: The demotion claim cannot be considered because it's time-barred. The petitioner did not file an EEOC charge issue within 300 days of that act, so that is something that is an unfortunate event in history, as has been stated by the Court in Rix, and it cannot be used to bolster a claim that occurred, or that might have arisen 2 years later. The fact that an

employer, and we don't think he did, may have taken an act that was discriminated, was discriminatory 2 years prior to the act that is the subject matter of the complaint, doesn't mean that the second act is also discriminatory, and they cannot be combined and put together --

QUESTION: Well, why not? I mean, it doesn't mean, of course, that it is, but it is evidence that it is.

MS. BRODY: Your Honor, in certain situations such as a harassment case where there is -- are continuing acts of discrimination that occur, that might be appropriate, but in a case like this, where separate and discrete acts are being alleged, and the first act was completed in 1995 -- nothing more happened after that -- there is no reasonable basis for linking these two acts together and basing the termination on the demotion allegations. In fact, to do so would really circumvent the statute of limitations, because it would permit a plaintiff to base a present claim on a time-barred claim, and that --

QUESTION: Well, does he nowhere allege that his firing was because he was Hungarian, or because he was -- because of his age?

MS. BRODY: He makes the conclusory allegations that I was terminated because of my national origin and

age, but that does not -- that alone is not sufficient to sustain the claim, a claim, and that is what this Court has stated in Conley, in which it emphasized that the plaintiff had to set forth the grounds on which the claim rests.

I believe that this Court also has endorsed that view in the other 12(b)(6) cases that it has considered, such as Rix, such as Sutton, which Justice O'Connor went through and analyzed the statutory elements of the claims to determine whether or not the claims had met them.

QUESTION: What was lacking in Conley? What was lacking?

MS. BRODY: There was nothing lacking in the complaint in Conley. In fact, if you look at it, it alleges all the elements of the claim, and it does so on a rather specific basis. It states in Conley that there were 45 positions that were purportedly abolished that were held by African Americans. The complaint then goes on to allege that Caucasians were hired to fill those 45 positions. It then goes on to allege that the union did not represent the plaintiffs in that case and did not try to protect their jobs, and then it says there's a violation of the statute.

What the defendant was trying to do in Conley was to get specific and particular information about what

provisions of the collective bargaining agreement were violated and other specific information which is not required, so that if you look at all of the complaints that have been considered by this Court and even by the circuit courts, you see that each of those complaints are sufficient on their face and they contain more than enough allegations to state the elements of the claims.

QUESTION: But unfortunately you don't have any in which we find a complaint insufficient because it does not contain that detail. I mean, that's what you need. I mean, you might well say all these cases in which we've approved going forward with the litigation stated a lot more, but what you need is a case where we approved granting the 12(b)(6) motion because there was not enough detail.

MS. BRODY: I --

QUESTION: That's hard to find.

MS. BRODY: I think the case that we have, the best case that we have to refer to is the Sutton case, where the Court looked at each of the allegations of the complaint, determined whether or not the plaintiff was disabled, and refused to accept the conclusory allegation that the plaintiff made that she was disabled.

QUESTION: It wasn't because the allegations weren't sufficiently detailed. It was because accepting

the truth of all the details set forth in the complaint, it didn't state what the Court regarded as a violation of the statutes.

MS. BRODY: That's correct.

QUESTION: I mean, that would be like saying in this case, well, even if he were -- his age and national origin were motivating factors in the decision, that doesn't violate the statute, you have to do something more, and I suppose maybe you could argue that, that motivation isn't enough, it's got to be the sole cause, or something like that.

MS. BRODY: Your Honor --

QUESTION: There was plenty -- it isn't -- the Sutton case was not an absence of detail in the complaint.

MS. BRODY: And Your Honor, this is not a case about the absence of detail or specificity. This is a case about allegations being made giving rise to some sort of inference, some sort of suggestion, some hint of discrimination, and there is nothing here --

QUESTION: That sounds like evidence again. There is notice that the complaint is that I was fired because of my age and my national origin. Now, it's -- this case comes to us from the Second Circuit, and that's why I mentioned Dioguardi v. Durning, because even if it doesn't come from this Court, I assumed that what Judge

Clark wrote way back then is still law of the circuits, for the Second Circuit, which is why I find it very puzzling this Court reached the result it did.

MS. BRODY: Your Honor, if you look at the Dioguardi complaint you will see that all of the elements of the claim are alleged in that complaint.

QUESTION: What do you mean by elements? I thought it was, indeed, Hornbook law that you are not required under the Federal rules to plead the elements that constitute a, quote, cause of action?

MS. BRODY: That is correct, Your Honor, but there has to be something in the complaint that goes to the heart of the claim and, in a discrimination case, the heart of the claim is the discrimination. In a breach of contract case, the heart of the claim is the breach, and if you identify the contract, you identify the breach, you identify the injury, you have satisfied the elements, or the essence of that claim, and that is required in a discrimination case.

QUESTION: Well, wait --

QUESTION: And what he did was not equivalent to defendant owes plaintiff X dollars for goods sold and delivered on a certain date.

MS. BRODY: No, Your Honor. No, Your -- he's not made the showing that Rule 8 requires, and there's a

reason that the word showing is used in Rule 8. It doesn't say, all you have to do is identify the claim -- this is a title VII claim -- and it doesn't say that then you can follow that by conclusion I was discharged because of my national origin --

QUESTION: There's a lot more than that in this complaint. It does run on for several pages doesn't it?

MS. BRODY: It goes on for several pages, but the facts do not support the conclusion, that is, the factual allegations, and there are factual allegations in this complaint, and interestingly, petitioner doesn't claim that he doesn't have to allege that he was a member of a protected class, he doesn't claim that he doesn't have to allege that he was qualified, and he doesn't claim that he did not have to allege that there was an adverse employment action. All he claims is that he doesn't have to set forth any allegations that would give rise to this inference of discrimination, and it doesn't necessarily have to be the inference. It just has to be --

QUESTION: Those elements are not necessary for -- to win, are they? They're necessary to establish a prima facie case that would insulate you against a preliminary dismissal, but you can win a case without establishing the prima facie elements.

I mean, suppose I can't show that I'm a member

of a protected class, but -- and I can't show that other people were fired, but what happened in this case is that this employer just had a thing against white male Anglo Saxons, clearly not a protected class, but it was because -- and I have evidence that will prove that, that I was fired because I was a white male Anglo Saxon, and this employer just hated white male Anglo Saxons. That's a valid complaint, isn't it?

MS. BRODY: Your Honor, you would have to look at the four corners of the complaint and determine whether there were any other allegations in it.

QUESTION: No, but you're arguing this case as though it is an essential -- it is essential to win a title VII claim that you establish a prima facie case, and I don't think it is.

MS. BRODY: Your Honor, I believe under McDonnell Douglas if you're going to base your claim on an inferential case that you do need to allege and prove the elements of the prima facie case.

QUESTION: Unless you have other manners of establishing liability.

MS. BRODY: That is correct.

QUESTION: And those are questions of fact which need not be pleaded. Those are the evidentiary proof.

MS. BRODY: Your Honor, the word evidence has

been used frequently, and neither the court of appeals, the district court, or the respondent here is suggesting that a petitioner or plaintiff must allege facts or set forth evidence. All he has to do is have a good faith basis for making allegations, and if you look at all the discrimination cases that have come before this case, going back to McDonnell Douglas, there has always been an allegation of some inference of discrimination, and that --

QUESTION: I've never seen an allegation of an inference. I've only seen an allegation of facts, and I bring this up again because now you say he doesn't have to allege facts, but I thought your whole case was he did have to allege facts.

MS. BRODY: The case is that he has to make factual allegations.

QUESTION: Okay. Then you're saying he has to allege facts.

MS. BRODY: Yes, Your Honor.

QUESTION: And so -- all right. I don't want to go in circles, but I want to be sure that you agree about that. You're talking about a failure to allege certain facts.

MS. BRODY: Yes. Allegations are based on facts, and I think that you have to make allegations which

have some factual basis in order to go forward with the case.

QUESTION: Well, in addition to what he said, he also said that everybody else, and he names about 10 people, who were dismissed were dismissed for cause and given severance benefits, but he was dismissed without cause and wasn't given severance benefits. Well, that seems directly related to the dismissal and, moreover, reading it in light of what he said before, he alleges as a conclusion that this shows I was dismissed without severance because of my nationality or because of my age. Why aren't those facts that give rise to an inference, at least as much as, I was in an accident and therefore he's negligent?

MS. BRODY: Because those allegations alone are insufficient in that he does not allege the national origin of any of those individuals, some of whom could be Hungarian. He doesn't state. He doesn't allege the age of those individuals who were terminated and allegedly received severance packages. For all we know, they could be over 50. There's nothing that indicates that those people received the treatment that they did because of their national origin.

QUESTION: But is that really essential to pleading a claim for relief here? I mean, supposing he

had left out what happened to these six people and simply said that he was dismissed from his employment because he was Hungarian and because of his age, what more than what I've just said ought he to have alleged to have complied with the bare minimum?

MS. BRODY: What he ought to have alleged is the kind of allegation that is alleged in McDonnell Douglas, that is alleged in McDonald v. Santa Fe, that is alleged in Rix. All these allegations in all these cases raise --

QUESTION: But McDonnell Douglas I don't think was ever meant to be a pleading requirement. It was a way, as Justice Scalia said, to survive summary judgment and get to the jury.

MS. BRODY: McDonnell Douglas can be used as a pleading requirement, and it is sensible for it to be so used --

QUESTION: Well --

MS. BRODY: -- because at the pleading stage --

QUESTION: I think many of us would agree with you that it would be sensible for it to be so used, but the rules just don't provide for it.

MS. BRODY: McDonnell Douglas reflects title VII. It incorporates the provisions of title VII, and in order to eventually prove a title VII case, which is an

inferential case, you're going to have to plead the elements --

QUESTION: There's a huge difference between pleading a case and proving a case, and pleading a case does not require you to put forward your evidence. You could ask pinpointed questions. You say what was wrong with this is they didn't identify the national origin, whatever. You send a set of interrogatories, get the answers to those questions, and if they show that everybody else is Hungarian, he's out of court.

You could have asked for a more definite statement, I suppose, if you said this is so vague I can't answer it.

MS. BRODY: Your Honor, the idea that a complaint need only allege a conclusion in order to proceed with discovery and summary judgment and trial --

QUESTION: This count, Rule 11 -- this person was represented before the district court, right?

MS. BRODY: Correct.

QUESTION: In fact, the same counsel, and there was a representation to the court made by the attorney under Rule 11 that says there's a good basis in law and fact for this charge. Does that count for nothing?

MS. BRODY: That does count for something, but the problem which we're addressing here is that there are

not sufficient allegations in this complaint which indicate that discrimination has anything to do with --

QUESTION: And the best case you have for that is the statute of limitations case, which is an affirmative defense that, if the time is up, that's it. There's nothing -- you could have all the beautiful facts in the world, so that statute of limitations, you can answer the complaint with that and get summary judgment on this spot, or even, arguably, 12(b)(6), but you have given the statute of limitations as the only pleading case. The others were all cases that plaintiffs won, and you're searching for language that you can pull out of them to say, ah, but in other circumstances they would have lost.

MS. BRODY: I think that if you look at McDonald v. Santa Fe Trail you will see that the Court there utilized McDonnell Douglas on a 12(b)(6) motion, and it examined the allegations in the complaint there to determine whether or not the plaintiff had alleged facts which could give rise to an inference of discrimination. That was one of the issues in McDonnell Douglas, and that is a case where this Court applied McDonnell Douglas and required an inference of discrimination.

QUESTION: What case are you referring to now?

MS. BRODY: That is the case, McDonald v. Santa Fe Trail Transportation.

QUESTION: That was a dismissal under 12(b)(6)?

MS. BRODY: That was a dismissal on a 12(b)(6).

The other case that I would refer the Court to is Baldwin County Welcome Center v. Brown, which is a case where this Court held that a right-to-sue letter issued by the Equal Employment Opportunity Commission did not constitute a complaint because it did not comply with Rule 8 notice and did not set forth the factual basis for a claim.

A right-to-sue letter has all the information that the plaintiff put in his --

QUESTION: You have to file a paper that's called the complaint, and a right-to-sue letter is not that. You can't go into court and say, here's a nice letter, court, and I'd like you to proceed. You have to have a complaint. The rules say that. The right-to-sue letter isn't a complaint, so I don't think that takes you very far.

MS. BRODY: Well, I don't believe that you have to have a document that's entitled, Complaint, in order to file it as a complaint with the court.

This Court did not hold that the right-to-sue letter was not appropriate as a complaint because of its title. This Court held that there were no factual allegations contained in that complaint for which a basis

of the claim could be stated.

QUESTION: I'm confused. The right-to-sue letter would have come from the EEOC.

MS. BRODY: That's correct, and the plaintiff in that case took the right-to-sue letter, went to court, and filed it.

QUESTION: But that was not the plaintiff's pleading. That was a notice from the EEOC.

MS. BRODY: Well, the plaintiff called that his pleading, and he proceeded on that as his pleading.

QUESTION: May I ask you just one question, as having studied the complaint as carefully as you have? Do you interpret the charge that your client was discriminating against this person because he was Hungarian, or because he was not French?

MS. BRODY: Your Honor, that's an excellent question, and I think there has been a use of these terms very loosely. I believe that what he petitioner is arguing is the latter point, that he was discriminated against because he was not French, and I believe it was because he was not a French citizen. He alleges that these other individuals in the company were French national.

In his EEOC charge he makes clear that he regards them as French citizens and, in fact, one of them,

one of these French nationals is actually of Greek heritage, so the discrimination that we re talking about here is really not based on national origin at all. It's based on citizenship and, as this Court knows from Espinoza, that is not covered by title VII. It isn't a proper basis for a discrimination claim.

QUESTION: The case that you cited, Santa Fe, that was a case that the plaintiff -- where the plaintiff prevailed against the 12(b)(6).

MS. BRODY: Yes, Your Honor, that is correct.

QUESTION: Well, I thought you gave that to us as an example of where McDonnell Douglas had been applied at the pleading stage to dismiss the case on 12(b)(6) grounds.

MS. BRODY: Oh, Your Honor, I may have misspoke on that, but the Court --

QUESTION: So all of your cases, then, are cases in which the plaintiff surmounted the 12(b)(6) hurdle, and there's language in that -- you -- for this mythical case that hasn't yet occurred.

MS. BRODY: Your Honor, I think that Rix, I think that Evans, and I think that Sutton area 11 cases where the claims were dismissed, which assist us in this case and indicate the kind of notice that is required, because even though --

QUESTION: If I allege that the defendant gave me a dirty look, I'm going to be tossed out on 12(b)(6), and I could describe all the grimaces and everything else, and it won't do me any good because the law doesn't recognize such a claim.

MS. BRODY: That is correct. That is correct.

QUESTION: That's --

MS. BRODY: However, that's in effect what this plaintiff did. He wrote this memorandum in which he complained about his treatment by the company.

QUESTION: I thought when you -- there is evidence outside the four corners of the complaint, then you can bring it as a Rule 56 summary judgment motion, not a 12(b)(6) motion, so technically that, if you're supposed to look only to the complaint on a 12(b)(6) motion that should not have been considered.

MS. BRODY: Your Honor, I think that it is universally recognized that if a document is referred to and relied on in the complaint, it is regarded as being incorporated into the complaint, and it's proper for the Court to look at it on a 12(b)(6) motion.

QUESTION: Thank you, Ms. Brody.

MS. BRODY: Thank you.

QUESTION: Mr. Goodman, you have 1 minute remaining.

REBUTTAL ARGUMENT OF HAROLD I. GOODMAN

ON BEHALF OF THE PETITIONER

MR. GOODMAN: Just to follow up on Justice Ginsburg's comment about McDonald, on the very point raised, the complaint was sustained and not denied. At 427 U.S. 283, footnote 11, the Court held that there was no requirement for particularity as defendant had requested, and thus sustained the complaint.

Second, and last, in 1953 the Ninth Circuit recommended to the advisory committee that Rule 8, too, be amended to add this phrase at the end, namely the statement in the complaint shall contain facts constituting a cause of action. In 1955, the court's advisory committee rejected it. It said that it only requires a general statement.

Thank you.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Goodman. The case is submitted.

(Whereupon, at 12:17 p.m., the case in the above-entitled matter was submitted.)