Not Yet Scheduled For Oral Argument

United States Court of Appeals for the Fourth Circuit

No. 18-2253

THOMAS MILLER,

Appellant

v.

MARYLAND DEPARTMENT OF NATURAL RESOURCES,

Appellee

APPEAL FROM THE U.S. DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Amicus Curiae Brief of the Metropolitan Washington Employment Lawyers Association in Support of Appellant

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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Signature: Alan R. Kabat Date: 2/13/2019

Counsel for: Amicus MWELA

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I certify that on 2/13/2019 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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STATEMENT OF INTEREST

The Metropolitan Washington Employment Lawyers Association ("MWELA"), a professional association of over 300 attorneys, is the local affiliate of the National Employment Lawyers Association ("NELA"), the largest professional membership organization in the country comprised of lawyers who represent workers in employment, labor, and civil rights disputes. MWELA has previously submitted amicus briefs to this Court, as well as to the appellate courts in Maryland, Virginia, and Washington, D.C.

MWELA respectfully submits this amicus brief to aid this Court in addressing whether the court below abused its discretion in denying Mr. Miller's motions for leave to amend his complaint of employment discrimination on the ground that such amendment would be futile. The disposition of this issue could have an important effect on the ability of employees to enforce their statutory rights to bring discrimination complaints in the federal district courts. For this important reason, MWELA respectfully submits this amicus brief.

STATEMENT PURSUANT TO RULE 29(c), FED. R. APP. P.

Pursuant to Rule 29(c), Fed .R. App. P., *amicus* states that:

(A) *Amicus* alone authored the entire brief, and no attorney for a party authored any part of the brief; and

(B) Neither any party nor any party's counsel contributed money that was

intended to fund preparing or submitting the brief, exclusive of the dues counsel on appellant's side have paid for their membership in *amicus* MWELA; and

(C) No person, other than the *amicus curiae*, their members and cooperating attorneys, and their counsel, contributed money that was intended to fund preparing or submitting the brief.

STATEMENT OF THE ISSUES

Whether the district court applied the wrong legal standard in denying Mr. Miller's motions for leave to amend his complaint of employment discrimination on the ground of futility when the district court:

(1) Failed to consider the principle in *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002), that a plaintiff need not establish a prima facie case of discrimination in his complaint;

(2) Dismissed Mr. Miller's claim that his former employer "regarded him" as being disabled based on an erroneous interpretation of the "transitory and minor" defense to a "regarded as" claim of disability discrimination; and

(3) Dismissed Mr. Miller's retaliation claim even though it alleged only a two-day gap between his protected activity and his termination.

SUMMARY OF FACTS RELEVANT TO *AMICUS* BRIEF[1]

On September 20, 2016, Thomas Miller was terminated from his employment with the Maryland Department of Natural Resources ("DNR") as a recruit/Police Officer Candidate. After pursuing his administrative remedies before the U.S. Equal Employment Opportunity Commission, he filed a complaint with the U.S. District Court for the District of Maryland in which he alleged

[1] This distilled factual summary is based on the Appellant's opening brief and the district court's decision, and so contains no individual record citations.

disability discrimination and retaliation.

Before serving DNR, Miller filed a First Amended Complaint, which alleged violations of the Rehabilitation Act, 29 U.S.C. §§ 701 *et seq.*, and the Maryland Fair Employment Practices Act, Md. Code Ann., State Gov't §§ 20-1001 *et seq.* for, among other claims: (1) failure to accommodate; (2) discriminatory termination based on Mr. Miller's disabilities; (3) discriminatory termination based on perceived disability; and (4) wrongful termination based on protected activity.

While the parties briefed DNR's Motion to Dismiss and/or for Summary Judgment, Mr. Miller filed a Motion for Leave to Amend Complaint (Dec. 22, 2017), and shortly thereafter filed a Motion for Leave to Amend Complaint and Docket the Third Amended Complaint (Dec. 26, 2017). Mr. Miller's amended complaints were intended to clear up any doubt that he was disabled, that is, that he incurred impairments that substantially limited major life activities. However, the district court denied the motions for leave to file the amended complaints as futile and dismissed Mr. Miller's complaint with prejudice.

As noted by the district court, the First Amended Complaint pleads that Mr. Miller's neck injury "caused him difficulties" but not that it substantially impaired a major life activity. (Memorandum Opinion, at 13, ECF No. 20). The district court held that this pleading was insufficient to state a plausible claim that Mr. Miller had a disability that substantially impaired a major life activity. (*Id*. at 13-

15). In so holding, the district court found that the First Amended Complaint contains no "allegations related to Miller's neurological system, let alone allegations that connect the function of his neurological system to his purported impairments." (*Id*. at 15).

However, Mr. Miller's Third Amended Complaint alleges that:

> 67. Mr. Miller's neurological system was substantially limited by pain from the injury, which also caused him difficulties with lifting, running, sleeping, driving, and pulling and turning his neck, and required medications including Flexeril and 800mg ibuprofen.

(Third Am. Compl., ¶ 67, ECF No. 15-1). The Third Amended Complaint also alleges that management "was concerned that Miller was abusing prescription drugs (which Miller needed for the pain and sleep deprivation caused by the neurological disability) to stay operational." (*Id*. at ¶ 87). The district court acknowledged that lifting and sleeping are major life activities. (Memorandum Opinion, at 13, ECF No. 20). However, the district court denied Mr. Miller's motion for leave to file his Third Amended Complaint, finding the above allegations to be "conclusory statements devoid of factual allegations" that would satisfy the major bodily function element of a disability claim. (*Id*. at p. 22).

The district court also found that Mr. Miller failed to state a plausible claim that DNR regarded him as disabled because he failed to plead with specificity the duration of his impairments. (Memorandum Opinion, at 15-16, ECF No. 20). Although the district court cited 42 U.S.C. § 12102(3)(B) (Mem. Op. at 16),

pursuant to which an individual cannot be "regarded as" having a disability when the impairment is "transitory and minor," the district court did not address whether or not Mr. Miller's impairments were "minor."

As for Mr. Miller's retaliation claim, the district court held that a two-day gap between his last accommodation request and DNR's decision to terminate him was not, by itself, sufficient to establish a causal connection between Mr. Miller's protected activity and his termination. (*Id*. at 18). Based on that, and on a finding that Miller did not specifically allege which individuals were involved in the decision to terminate him, the district court concluded that "Miller fails to adequately allege a prima facie case of retaliation." (*Id*. at 19).

STANDARD OF REVIEW

Mr. Miller's motions for leave to file the second and third amended complaints are governed by Rule 15(a), Fed R. Civ. P., which states that where, as here, a plaintiff has already amended his complaint once as a matter of course, he may amend his complaint a second time "only with the opposing party's written consent or the court's leave." In general, leave to amend a complaint pursuant to Rule 15(a) shall be "freely" granted "when justice so requires." Rule 15(a)(2), Fed. R. Civ. P. The matter, however, is committed to the discretion of the district court, and the district court may deny leave to amend "when the amendment would be prejudicial to the opposing party, the moving party has acted in bad faith, or the

amendment would be futile." *Equal Rights Center v. Niles Bolton Assocs.*, 602 F.3d 597, 603 (4th Cir. 2010).

A court may deny a motion to amend on the grounds that the amendment would be "futile" when an amended complaint cannot survive a motion to dismiss for failure to state a claim. *Bond v. United States*, 742 Fed. Appx. 735, 736 (4th Cir. 2018) (*per curiam*), *petition for cert. filed* (U.S. Dec. 17, 2018) (No. 18-782). "Leave to amend, however, should only be denied on the ground of futility when the proposed amendment is clearly insufficient or frivolous on its face." *Johnson v. Oroweat Foods Co.*, 785 F.2d 503, 510 (4th Cir. 1986). An amendment is also futile if it would fail to withstand a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). *Perkins v. United States*, 55 F.3d 910, 917 (4th Cir. 1995); *United States ex rel. Wilson v. Kellogg Brown & Root, Inc.*, 525 F.3d 370, 376 (4th Cir. 2008).

A district court's decision to deny a motion to amend a complaint is reviewed for abuse of discretion. *Bond*, 742 Fed. Appx. at 736-37. A district court abuses its discretion "by resting its decision on a clearly erroneous finding of a material fact, or by misapprehending the law with respect to underlying issues in litigation." *Id.* (quoting *Scott v. Family Dollar Stores, Inc.*, 33 F.3d 105, 112 (4th Cir. 2013)).

SUMMARY OF ARGUMENT

Amicus respectfully submits that this Court should determine that it is error for a district court to deny an employment discrimination plaintiff's motion for leave to file an amended complaint on the ground of futility and then dismiss his complaint with prejudice, where the district court applied the wrong legal standard.

First, a district court should not apply the standard for establishing a *prima facie* case of discrimination to the pleading standard that a plaintiff must satisfy in order to survive a motion to dismiss. This was in direct contravention of the Supreme Court's instruction in *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506 (2002), which is still binding precedent, that establishing a *prima facie* case of discrimination is an evidentiary standard, not a pleading requirement. This error puts plaintiffs in a "Catch-22" in which they are barred from obtaining discovery because they cannot, in their complaint, establish a *prima facie* case based on information that they could have obtained only through discovery.

Second, a district court should not dismiss a plaintiff's "regarded as" disability discrimination claim based upon an erroneous interpretation of the exception for "transitory and minor" impairments that automatically applies to any transitory impairment, no matter how far from "minor" it may be. Further, a district court should address the separate issue of whether a plaintiff's alleged impairment was minor, and such a determination is more appropriately made at the

summary judgment stage or before a jury.

Third, a district court should not dismiss a retaliation claim on the ground that a two-day gap between a protected activity and an adverse action is not sufficient to establish a prima facie case of discrimination. This determination contravenes not only *Swierkiewicz* but also other case law holding that temporal proximity that is "very close" is sufficient by itself to establish a prima facie case of retaliation.

ARGUMENT

I. Complaints of Discrimination Should Not be Dismissed for Failure to Plead a Prima Facie Case of Discrimination.

Amicus submits that this Court should hold that complaints of discrimination should not be dismissed, as here, for failure to plead a *prima facie* case of discrimination. Here, the district court rejected the Third Amended Complaint as not being specific enough. In so holding, the district court required Mr. Miller not only to plead that he had an actual disability and was regarded as disabled but also to establish a *prima facie* case of disability discrimination.

The district court erred in requiring Miller to demonstrate a prima facie case of disability discrimination before discovery had begun, which was contrary to the holding in *Swierkiewicz v. Sorema, N.A.* 534 U.S. 506, 511 (2002), that establishing a *prima facie* case of discrimination is an evidentiary standard, not a pleading requirement. In *Swierkiewicz*, the Supreme Court held that a

discrimination complaint cannot be dismissed for failure of the complainant to make out a prima facie case of discrimination before any discovery has taken place. *Id*. at 515. Instead, the district court's task of reviewing the sufficiency of an employment discrimination case "is necessarily a limited one . . . The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Id*. at 511. The Supreme Court's holding was based on the pleading standard it had articulated in *Conley v. Gibson*, 355 U.S. 41 (1957), which required that a plaintiff need only provide fair notice of his claim and the grounds upon which it rests. Amicus submits that Mr. Miller's complaint accomplished that.

Amicus further submits that the district court committed the same error when it dismissed Mr. Miller's retaliation claim because Mr. Miller "fails to adequately allege a *prima facie* claim of retaliation." (Memorandum Opinion, at 19, ECF No. 20). In reaching that conclusion, the district court relied on decisions granting or denying summary judgment, none of which addressed whether the plaintiffs' complaints should survive a motion to dismiss. (*Id*., pp. 18-19).

Amicus recognizes that the *Conley* pleading standard was abrogated in *Bell Atlantic v. Twombly*, 550 U.S. 544, 570 (2007), in which the Court announced a new standard under which allegations must be more than conclusory and must be sufficient "to raise a right to relief above the speculative level," *id*. at 555,

including sufficient facts to state a claim that is "plausible on its face, *id*. at 570. In *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) the Court made clear that the *Twombly* standard applies in all civil actions, including discrimination claims.

Yet, neither *Twombly* nor *Iqbal* overruled *Swierkiewicz*. Indeed, *Twombly* expressly reaffirmed *Swierkiewicz*'s holding that the "use of a heightened pleading standard for Title VII cases was contrary to the Federal Rules' structure of liberal pleading requirements." *Twombly*, 550 U.S. at 570. This Court has recognized that *Swierkiewicz* remains binding precedent and that, to this day, a plaintiff is not required to plead a *prima facie* case of discrimination to survive a motion to dismiss. *See*, *e.g.*, *Woods v. City of Greensboro*, 855 F.3d 639, 648 (4th Cir. 2017) (citing *McCleary-Evans v. Maryland Dep't of Transp.*, 780 F.3d 582, 585 (4th Cir. 2015)). Under *Swierkiewicz*, challenges to the merits of a plaintiff's disability discrimination claim should be "dealt with through summary judgment under Rule 56" with the benefit of a developed record. *Swierkiewicz*, 534 U.S. at 514; *see also Woods*, 855 F.3d at 652.

As this Court acknowledged, discrimination cases "are particularly vulnerable to premature dismissal" because they "are more likely to suffer from informational asymmetry, pre-discovery." *Woods*, 855 F.3d at 652. Because of such information asymmetry, commentators have recognized that:

> Plaintiffs are caught in a catch-22. They must put facts in their complaint to nudge their claim from possible to plausible. Often the only way to get

> such facts is through discovery. But the court will not permit discovery unless the plaintiffs provide the very facts they cannot discover. Thus, plaintiffs' complaints die on the vine not because they lack merit, but because plaintiffs do not have the same access to information that the defendants do.

Suzette M. Malveaux, *The Jury (or More Accurately the Judge) is Still Out for Civil Rights and Employment Cases Post-Iqbal*, 57 N.Y.L. Sch. L. Rev. 719, 727 (2012-2013).

Here, the district court prematurely dismissed Mr. Miller's complaint without allowing him an opportunity, through discovery, to establish that he was disabled, that his employer regarded him as disabled, and that his termination was in retaliation for having requested reasonable accommodation. Especially as to the latter two elements, an employer would have decidedly greater access to relevant information. By dismissing Mr. Miller's complaint, the district court is prematurely shutting the door to discovery based on its opinion that a plaintiff's claims are weak. However, the pleading standard set out in *Twombly* and *Iqbal* "was not intended to serve as a federal court door-closing mechanism for arguably weak cases, even assuming this case fits the description of 'arguably weak.'" *Woods*, 855 F.3d at 652.

Thus, amicus respectfully submits that this Court should hold that it is error for a district court to improperly and prematurely close the door on a plaintiff's pursuit of his discrimination complaint.

II. A "Regarded As" Disabled Claim Should Not be Dismissed Solely on a Finding that an Alleged Impairment is Transitory When the Court has not also Addressed Whether the Impairment is Minor.

A person is regarded as disabled if a prohibited action is taken because of an actual or perceived impairment, "whether or not the impairment limits or is perceived to limit a major life activity." 42 U.S.C. § 12102(3). The "regarded as" prong "means that the individual has been subjected to an action prohibited by the ADA as amended because of an actual or perceived impairment that is not both 'transitory and minor.'" 29 C.F.R. § 1630.2(g)(1)(iii). As the EEOC interprets this language, for a "regarded as" claim to be dismissed based on a "transitory and minor" defense, an employer must demonstrate that the impairment is both "transitory *and* minor." 29 C.F.R. Part 1630, App. § 1630.2(l) ("the regulations provide an exception to coverage under the 'regarded as' prong where *the impairment on which a prohibited action is based is both transitory . . . and minor*." (emphasis added); *see also Mayorga v. Alorica, Inc.,* No. 12-21578, 2012 WL 3043021, at *8-9 (S.D. Fla., July 25, 2012) (to establish a defense against a "regarded as" claim, defendant must demonstrate that the impairment is transitory and minor).

Thus, amicus respectfully submits that it is improper for a district court, as happened in this case, to dismiss a "regarded as" claim as alleging a "transitory and minor" impairment by finding the alleged impairment to be "transitory" without

also addressing whether it is also "minor."

Whereas "transitory" is defined in 42 U.S.C. § 12102(3) and further explained by 29 C.F.R. § 1630.15(f), neither the statute nor the regulations define "minor." Yet, the EEOC's interpretive guidance notes that absent the "transitory and minor" defense, the "regarded as" prong of the definition of disability:

> … would have covered individuals who are regarded as having common ailments like the cold or flu, and this exception responds to concerns raised by members of this business community regarding potential abuse of this provision and misapplication of resources on individuals with minor ailments that last only a short period of time.

29 C.F.R. Part 1630, App. § 1630.2(l). Here, Mr. Miller's alleged neurological impairment is far more serious than "common ailments like the cold or flu." The law provides no bright line between impairments that are "minor" and those that are not. As such, whether an injury is minor "is a factual determination that cannot be resolved on a motion to dismiss" but, instead "is typically addressed at summary judgment." *Kerrigan v. Bd. of Educ. of Carroll County*, No. 14-3153, 2015 WL 4591053, at *5 (D. Md. July 28, 2015). It is evident from the face of Mr. Miller's complaint that his injury was not minor. As one court has recognized:

> Impairments such as physical injuries are difficult to classify categorically because the nature of such injuries varies. The regulations indicate that a physical injury such as a back injury may be minor, but certainly not all back injuries (or other physical injuries) are minor such that they may be treated categorically as minor or not.

Mesa v. City of San Antonio, No. 17-cv-654, 2018 WL 3946549 (W.D. Tex. Aug. 16, 2018).

Therefore, assuming arguendo, that Mr. Miller's impairment was transitory, amicus submits that whether a disability discrimination plaintiff's impairment was also minor is a question more appropriate for summary judgment or before a jury, and should not be resolved at the motion to dismiss stage.

III. Temporal Proximity that is "Very Close" is Sufficient to Establish a Causal Connection Between Protected Activity and an Adverse Employment Action.

Finally, amicus submits that this Court should hold that it is error for a district court not to recognize temporal proximity as a basis for pleading a causal connection between an employee's protected activity and the employer's adverse employment action against the employee. Here, the district court, in dismissing Mr. Miller's claim that he was terminated in retaliation for having requested reasonable accommodation for his impairment, held that Mr. Miller "cannot establish causation based on the two-day gap between his last purported request for accommodation and the decision to terminate his employment." (Memorandum Opinion, at 18-19, ECF No. 20). Besides ignoring *Swierkiewicz* and requiring Mr. Miller to establish a prima facie case of retaliation at the complaint stage, the district court's dismissal of his retaliation claim runs counter to the Supreme Court's holding in *Clark County School District v. Breeden*, 532 U.S. 268 (2001),

that temporal proximity between an employer's knowledge of protected activity and an adverse employment action is sufficient evidence of causality to establish a prima facie case of retaliation when the temporal proximity is "very close." 532 U.S. at 273; *see also King v. Rumsfeld*, 328 F.3d 145, 151 (4th Cir. 2003) (citing *Williams v. Cerberonics, Inc.*, 871 F.2d 452, 457 (4th Cir. 1999)) (a termination that occurred two months and two weeks following employer's receipt of notice that plaintiff filed an EEO complaint gives rise to a sufficient inference of causation to satisfy the prima facie requirement).

CONCLUSION

Amicus respectfully submits that this Court should hold that the correct legal standard in addressing a motion for leave to amend a complaint for disability discrimination and retaliation encompasses (1) the principle established in *Swierkiewicz* that plaintiffs, especially in employment cases, should not be required to establish their *prima facie* cases in their complaints before discovery has taken place; (2) interpretation of the "transitory and minor" exception cannot ignore the word "minor" and instead must read that phrase as a whole; and (3) temporal proximity, such as a two-day gap between a protected activity and an adverse employment action, can establish a *prima facie* case of retaliation.

Respectfully submitted,

/s/ Rosa M. Koppel

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Dated: Feb. 13, 2019

/s/ Rosa M. Koppel
Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February 2019, I caused the foregoing brief to be served by this Court's electronic case filing system on the following:

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