

1                   IN THE SUPREME COURT OF THE UNITED STATES

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3   AKOS SWIERKIEWICZ,                   :

4                   Petitioner                   :

5           v.                   :   No. 00-1853

6   SOREMA, N.A.                   :

7   - - - - -X

8                   Washington, D.C.

9                   Tuesday, January 15, 2002

10           The above-entitled matter came on for oral  
11   argument before the Supreme Court of the United States at  
12   11:17 a.m.

13   APPEARANCES:

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

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

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

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1 P R O C E E D I N G S

2 (11:17 a.m.)

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

5 Mr. Goodman.

6 ORAL ARGUMENT OF HAROLD I. GOODMAN

7 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

16 MR. GOODMAN: I do not.

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

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

24 QUESTION: That was contained here? They --

25 MR. GOODMAN: Absolutely.

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

4 MR. GOODMAN: Absolutely.

5 QUESTION: And you again say that was done here.

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

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

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

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

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

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

1 MR. GOODMAN: Well --

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

4 (Laughter.)

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

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

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

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

13             If, today, we had to revise the rules there is a  
14    process for doing that and that might result, for 1983  
15    purposes, in a revision to Rule 8(a)(2) such as that  
16    9(a)(2), which now only requires particularity in cases of  
17    fraud and mistake, might have a third entry for  
18    particularity purposes, a 1983 action, for example, or  
19    here. If, upon proper review and the process of this  
20    Court's committee and its adoption of rules and those by  
21    Congress, it was felt that a title VII case or an age case  
22    ought to also require particularity, that would be the  
23    time and that would be the place to do it.

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



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

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

15 QUESTION: Negligently drove. Negligently  
16 drove.

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

20 QUESTION: Mr. Goodman, if --

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

23 MR. GOODMAN: It did.

24 QUESTION: Okay.

25 MR. GOODMAN: As we did here.

1 QUESTION: Yes.

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

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

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

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

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

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

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

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

18 QUESTION: In this instance.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. GOODMAN: I think you're --

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

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

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

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

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

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

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

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

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

14 MR. GOODMAN: I agree with that.

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

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

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



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

3 For those reasons --

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

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

8 QUESTION: Very well, Mr. Goodman.

9 Mr. Minear.

10 ORAL ARGUMENT OF JEFFREY P. MINEAR

11 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

12 SUPPORTING THE PETITIONER

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

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

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

23 MR. MINEAR: Yes, it was.

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

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

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

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

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

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

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

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

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

15            MR. MINEAR:   You certainly do not  
16    automatically --

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

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

25            QUESTION:   But we're talking about discovery.

1 How does the judge refuse discovery in my case?

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

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

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

21 QUESTION: Does the complaint, Mr. Minear,  
22 require you under the Federal rules to put in all the  
23 elements of a cause of action in order to survive a  
24 12(b)(6) motion?

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

1 fact this was one of the aims of the advisory committee in  
2 1938, when we revised the rule, to get away from the code  
3 practice of requiring the facts of the cause of action all  
4 be pleaded. That led itself --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25 QUESTION: It has to be well-founded suspicion.

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

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

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

9 MR. MINEAR: I think that's set forth in Rule  
10 11, and that requires a good faith belief --

11 QUESTION: A good faith belief?

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

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

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

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



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

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

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

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

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

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

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

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

6 Thank you.

7 QUESTION: Thank you, Mr. Minear.

8 Ms. Brody, we'll hear from you.

9 ORAL ARGUMENT OF LAUREN R. BRODY

10 ON BEHALF OF THE RESPONDENT

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

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

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

1 different atmosphere from looking at the memorandum?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 Federal rules don't require.

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

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

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

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

17 MS. BRODY: That is correct.

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



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

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

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

13 QUESTION: Which case are you mentioning now?

14 MS. BRODY: Rix v. Delaware State College.

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

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

18 QUESTION: And the complaint was held  
19 insufficient?

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

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

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

5 MS. BRODY: That is correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16 MS. BRODY: I --

17 QUESTION: That's hard to find.

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

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

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

4 MS. BRODY: That's correct.

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

12 MS. BRODY: Your Honor --

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

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

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

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

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

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

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

20 QUESTION: Well, wait --

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

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

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

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

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

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

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



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

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

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

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

20 QUESTION: Unless you have other manners of  
21 establishing liability.

22 MS. BRODY: That is correct.

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

25 MS. BRODY: Your Honor, the word evidence has

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

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

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

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

19           MS. BRODY: Yes, Your Honor.

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

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

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

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

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

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

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

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

10  
11 QUESTION: But McDonnell Douglas I don't think  
12 was ever meant to be a pleading requirement. It was a  
13 way, as Justice Scalia said, to survive summary judgment  
14 and get to the jury.

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

18 QUESTION: Well --

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

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

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

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

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

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

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

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

19            MS. BRODY:  Correct.

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

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

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

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

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

23 QUESTION: What case are you referring to now?

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

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

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

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

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

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

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

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

1 of the claim could be stated.

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

7           QUESTION: That's --

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

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

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

22          QUESTION: Thank you, Ms. Brody.

23          MS. BRODY: Thank you.

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

1 REBUTTAL ARGUMENT OF HAROLD I. GOODMAN

2 ON BEHALF OF THE PETITIONER

3 MR. GOODMAN: Just to follow up on Justice  
4 Ginsburg's comment about McDonald, on the very point  
5 raised, the complaint was sustained and not denied. At  
6 427 U.S. 283, footnote 11, the Court held that there was  
7 no requirement for particularity as defendant had  
8 requested, and thus sustained the complaint.

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

16 Thank you.

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

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