Finally, the Dog Pound alleged a due process violation, stating that the City's denial of the 2009 application was done "with the specific purpose of preventing" the Dog Pound from competing with local businesses. The court did not address this argument, however, holding that the claim was waived since it was not taken up in the Dog Pound's briefs supporting the amended complaint.

http://www.ca6.uscourts.gov/opinions.pdf/14a0189n-06.pdf (last accessed Mar. 20, 2014).

Procedure: Failure to Allege Prima Facie Elements in Title VII Action Does Not Justify Dismissal of Claim

Miller v. Carolinas Healthcare System, No. 13-1856 (4th Cir., Mar. 13, 2014).

The Fourth Circuit has reversed in part a lower court decision which dismissed a pro se plaintiff's Title VII action, finding that even cursory pleadings of retaliation, failure to promote, and race discrimination were sufficient to survive a Rule 12 (b) (6) motion.

Gregory Miller was terminated by Carolinas HealthCare System (CHS) and filed suit, pro se, alleging that CHS had discriminated and retaliated against him in violation of Title VII of the Civil Rights Act (Title VII). Specifically, he asserted a litany of violations: (1) discrimination based on sex, age, race and color; (2) blacklisting, invasion of privacy, and violation of the North Carolina Recording Law; (3) failure to promote based on race; (4) hostile work environment; and (5) retaliation. CHS moved to dismiss under Rule 12 (b) (6) for failure to state a claim upon which relief could be granted, which was granted by the district court. Miller appealed.

HELD: On appeal, the Fourth Circuit affirmed much of the lower court decision, but reversed as to its dismissal of Miller's claims for race discrimination, failure to promote, and retaliation.

DISCUSSION: The Fourth Circuit recited the relevant legal parameters: To survive a motion to dismiss under Rule 12 (b) (6), plaintiff's factual allegations must be enough to "raise a right to relief above the speculative level" and statements of bare legal conclusion "are not entitled to the assumption of truth." However, "what Rule (12) (b) (6) does not countenance are dismissals based on a judge's disbelief of a complaint's factual allegations," and "a pro se complaint 'is to be liberally construed . . . and must be held to less stringent standards than formal pleadings drafted by lawyers." (citations omitted).

The Circuit Court also pointed out that the Supreme Court has recognized that specific facts are not necessary in a pleading, and a plaintiff need only give the defendant fair notice of what the claim is and the grounds upon which it rests. In the case of Title VII actions, the Supreme Court has cautioned that a plaintiff is not required to plead facts that constitute a prima facie case (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506 (2002).

Under this analysis, the district court had improperly granted CHS's motion to dismiss Miller's discrimination and retaliation claims. "In analyzing Miller's discrimination and retaliation claims under the burden-shifting framework adopted by the Supreme Court in *McDonnell Douglas*

Corp. v. Green, 411 U.S. 792, 802-04 (1973), the district court essentially required Miller to allege a prima facie case as to these claims."

The Circuit Court found that the lower court had (1) dismissed Miller's race discrimination claim because he offered no facts to support that he was performing his job in a satisfactory manner; (2) dismissed the failure to promote claim because Miller did not identify a specific position; and (3) dismissed the retaliation claim because Miller did not sufficiently allege that he had engaged in protected activity. The Fourth Circuit held that these elements were needed to establish a prima facie case, and their omission did not invalidate the sufficiency of Miller's complaint. Affirmed in part, reversed in part, and remanded.

http://www.ca4.uscourts.gov/Opinions/Unpublished/131856.U.pdf (last accessed Mar. 20, 2014).

Qualified Immunity: Regulations Allowing Revocation of Permit Do Not Preserve Immunity Where Officials Had Discretion to Take Less Onerous Action

Royal Crown Day Care LLC v. Department of Health and Mental Hygiene of the City of New York, No. 12-4959-cv (2d Cir. Mar. 19, 2014).

In a case involving retaliation against a day care that complained to a state senator of unfair regulatory action, the Second Circuit has confirmed that qualified immunity is not preserved merely because government officials can point to regulations authorizing their taking of adverse action, if there is a degree of discretion on their part and a less onerous approach.

Royal Crown LLC was issued a permit by New York City's Department of Health and Mental Hygiene (DOHMH) in 2009, to operate as a children's day care center. The operator of a rival day care informed Royal Crown that she had connections at DOHMH and would have Royal Crown "shut down" unless it paid her. Royal Crown informed defendant Aurora Villareal, a manager at DOHMH, about the threat, but Villareal did not take action (in fact, she subsequently pleaded guilty to charges of conspiracy to commit fraud for accepting bribes from the rival day care in exchange for giving it favorable treatment).

Royal Crown wrote to a state senator asking for help, alleging that the DOHMH was corrupt and was helping rival day cares to shut it down. The senator's office contacted DOHMH. In mid-2010 the DOHMH commenced an investigation of Royal Crown, developed reports showing code violations by Royal Crown and revoked its authority to operate.

Royal Crown and its owner brought suit against the DOHMH and various officials, alleging due process violations, unconstitutional takings, and retaliation in contravention of the First Amendment. The district court granted defendants' motion for summary judgment on plaintiffs' procedural due process and takings claims but refused to their motion as to First Amendment retaliation and qualified immunity. Three individually named defendants (including Villareal) appealed the denial of their qualified immunity.