

trial court imposed upon Petitioner the burden of overcoming its sua sponte presumption of purposeful discrimination, not only did it forego any cogent *Batson* analysis, but it also deprived Petitioner of his statutory right to exercise peremptory challenges. *Batson*, however, only imposes limitations on the exercise of peremptory challenges; it does not abolish them. *Batson*, 476 U.S. at 99 n. 22, 106 S.Ct. 1712. Petitioner had a substantial and legitimate expectation that he would be tried by a jury selected in accordance with Indiana state law and federal constitutional law, including those provisions guaranteeing his right to exercise peremptory challenges. Instead, Petitioner was deprived of his liberty by a jury whose very creation involved a denial of his statutory and constitutional rights. Consequently, Petitioner was denied due process and equal protection of the law in violation of the Fourteenth Amendment. *Cf. Hicks v. Oklahoma*, 447 U.S. 343, 100 S.Ct. 2227, 65 L.Ed.2d 175 (1980) (holding that denial of a criminal defendant's right to be sentenced by a jury in accordance with state law effected an arbitrary deprivation of his liberty without due process of law). Owning to this violation of Petitioner's constitutional rights, it is clear that the state trial court proceedings, and the state supreme court review thereof, resulted in a decision contrary to, and involving an unreasonable application of, federal law as determined by the United States Supreme Court in *Batson* and its progeny. The district court therefore properly granted the petition for writ of habeas corpus.

CONCLUSION

Because the trial court and the Indiana Supreme Court deviated significantly from the *Batson* line of cases with respect to selection of the jury that convicted Petitioner, and such deviation violated Petitioner's due process and equal protection

rights under the Fourteenth Amendment, the district court's decision granting Petitioner habeas relief pursuant to 28 U.S.C. § 2254 is AFFIRMED.



**UNITED STATES of America By and
Through Joseph E. GARST,
Plaintiff-Appellant,**

v.

**LOCKHEED-MARTIN CORPO-
RATION, et al., Defen-
dants-Appellees.**

No. 02-3175.

United States Court of Appeals,
Seventh Circuit.

Argued April 14, 2003.

Decided May 8, 2003.

Rehearing and Rehearing En Banc
Denied June 2, 2003.

Relator filed qui tam action under False Claims Act (FCA), alleging that contractor had filed false or fraudulent claims for payment on government contract. The United States District Court for the Northern District of Illinois, John F. Grady, J., 2002 WL 1794004, dismissed third amended complaint with prejudice. Relator appealed. The Court of Appeals, Easterbrook, Circuit Judge, held that dismissal for failure to conform complaint to pleading rules was warranted.

Affirmed.

1. Federal Civil Procedure ¶636

United States ¶122

Requirement that allegations of fraud be pleaded with particularity applies to claims under False Claims Act (FCA), which condemns fraud but not negligent errors or omissions. 31 U.S.C.A. § 3729 et seq.; Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

2. Federal Civil Procedure ¶636

Allegations that government contractor promised to do a task for specific amount, but eventually billed more than twice that amount without meeting contract requirements, did not satisfy requirement that allegations of fraud underlying relator's claim under False Claims Act (FCA) be pleaded with particularity; relator had to allege that contractor made statement knowing that it was false, or that it had no intention to perform. 31 U.S.C.A. § 3729 et seq.; Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

3. Federal Civil Procedure ¶1795

Dismissal for failure to conform complaint to pleading rules was warranted when length and complexity of amended pleadings filed by relator in *qui tam* action under False Claims Act (FCA), which contained 400 paragraphs covering 155 pages, followed by 99 attachments, rendered complaint unintelligible. 31 U.S.C.A. § 3729 et seq.; Fed.Rules Civ.Proc.Rules 8(a), 9(b), 28 U.S.C.A.

4. Federal Civil Procedure ¶673

Rule indicating that complaint should set forth short and plain statement of the claim requires parties to make their pleadings straightforward, so that judges and adverse parties need not try to fish a gold coin from a bucket of mud. Fed.Rules Civ.Proc.Rule 8(a), 28 U.S.C.A.

5. Federal Civil Procedure ¶654.1

Surplusage in complaint can and should be ignored, and instead of insisting that the parties perfect their pleadings, a judge should bypass the dross and get on with the case.

6. Federal Civil Procedure ¶1772

District court is not authorized to dismiss a complaint merely because it contains repetitious and irrelevant matter.

Patricia Kiper Rummer, Lisle, IL, Nicola S. Tancredi (argued), Tancredi & Associates, Oakbrook Terrace, IL, for Plaintiff-Appellant.

David Marx, Jr., McDermott, Will & Emery, Joshua T. Buchman (argued), Office of the U.S. Atty., Chicago, IL, for Defendants-Appellees.

Before CUDAHY, POSNER, and
EASTERBROOK, Circuit Judges.

EASTERBROOK, Circuit Judge.

In 1990 the Department of Veterans Affairs chose Lockheed-Martin as the supplier of a new office automation system that was supposed to provide software, hardware, and services for database management and other services across a secure nationwide network. Lockheed performed under this contract between 1991 and 1997. Shortly after the VA replaced Lockheed with a different vendor, Joseph Garst, who used to work at the VA, filed this *qui tam* action on behalf of the United States. Garst alleged that Lockheed had violated the False Claims Act, 31 U.S.C. §§ 3729–33, by over-promising and under-performing, submitting fraudulent claims in the process. After reviewing Garst's allegations, the Department of Justice declined

to take over the suit, leaving it in private hands.

[1] Garst's complaint did not allege any specific fraud, leading Lockheed to move for its dismissal. (We use "Lockheed" as a collective description for all defendants, which include multiple corporate subsidiaries. Lockheed Martin Integrated Solutions Co., which performed the services under the contract, has been sold since 1997 to ACS State and Local Solutions, Inc., a subsidiary of Affiliated Computer Services, Inc., but Lockheed apparently retains all potential liability in this case.) Before the district court could act on Lockheed's motion, Garst filed an amended complaint. At 16 pages and 71 paragraphs, it was 50% longer than the initial complaint—but, the district judge concluded, no better. The court dismissed it for failure to plead fraud with particularity, 158 F.Supp.2d 816 (N.D.Ill.2001), a requirement that applies because the False Claims Act condemns fraud but not negligent errors or omissions. The district court observed that Garst had not given any specific example of a fraudulent claim. The judge permitted Garst to try again but reminded him of the need to allege "the who, what, when, where, and how: the first paragraph of any newspaper story." See *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7th Cir.1990). The judge instructed Garst to file an organized and concise document.

Garst's second amended complaint ballooned to 74 double-spaced pages with 198 paragraphs. Concise it was not. Before Lockheed could respond, Garst filed a third amended complaint, which broke the scale at 109 pages containing 345 numbered paragraphs; this document had 74 attachments, many of them lengthy. Lockheed asked the district judge to dismiss this complaint for failure to plead fraud with particularity, as Fed.R.Civ.P.

9(b) requires, and for the omission of any "short and plain statement of the claim", as Fed.R.Civ.P. 8(a)(2) contemplates. These rules are not in conflict: it is possible to write a short statement narrating the *claim*—which is to say, the basic grievance—even if Rule 9(b) requires supplemental particulars. But the district judge concluded that this complaint is so sprawling as to be essentially incomprehensible (a Rule 8 problem) and that despite the bloat it lacks details outlining fraud (a Rule 9 shortcoming). Instead of dismissing this complaint, the judge directed Garst to file a more definite statement. To make sure that Garst knew exactly what was needed, the judge explained that the statement "should be brief and should as to each count: (1) identify specific false claims for payment or specific false statements made in order to obtain payment; (2) if a false statement is alleged, connect that statement to a specific claim for payment and state who made the statement to whom and when; and (3) briefly state why those claims or statements were false" (underlining in original). Garst responded with 23 single-spaced pages plus 25 new attachments. The statement is loaded with so many acronyms and cross-references to the third amended complaint (plus its attachments) that no one could understand it without juggling multiple documents. Concluding that matters had taken a turn for the worse, the district judge threw up his hands and dismissed the complaint, with prejudice, for Garst's inability or unwillingness to conform his pleadings to Rules 8 and 9. 2002 WL 1794004, 2002 U.S. Dist. LEXIS 14307 (N.D.Ill. July 31, 2002).

The third amended complaint and statement together equate to 155 double-spaced pages and more than 400 numbered paragraphs, plus 99 attachments. You'd think that all this paper and ink would be

enough to narrate at least one false claim. Yet Garst's appellate brief does not extract from the pleadings a single instance of a false statement made to obtain payment. A few selections from the "more definite statement" show why, after four years of overseeing Garst's efforts to plead a claim, the district judge's patience ran out. Here is the first paragraph of the "more definite statement," right under the caption "SPECIFIC FALSE OR FRAUDULENT CLAIMS FOR PAYMENT (SFCFP)" (a caption that shows Garst's love of inscrutable acronyms):

Claim for \$2,584,926.04, MDS Ex. 1, TAC Ex. 47, submitted on August 9, 1993 and related payments by T.A. Sieverson, Vice-President of Lockheed Integrated Solutions Company, Lockheed Corporation to VA Contracting Officer Steve Stapleton for equipment and service provided during Phase I and Phase II of the OA & MM/ISMS LAN/WAN PROJECT. See TAC ¶¶ 141-181, 217-243, 252, 280-282, 291-295.

The acronyms alone force readers to look elsewhere. MDS means "More Definite Statement" and "TAC" means "Third Amended Complaint." LAN is local area network, WAN is wide-area network, and PROJECT appears to be the word "project" masquerading as an acronym. What "OA & MM/ISMS" might mean, we have not endeavored to discover. It is not defined anywhere in the more definite statement. To understand the paragraph one would have to read two exhibits and *seventy-seven* paragraphs scattered throughout the third amended complaint! This is simplification? Yet still one would not learn (a) what Sieverson said, (b) why it is false, and (c) what OA & MM/ISMS stands for. Paragraph 21 of the "specific false claims" reads: "All Lockheed invoices and payments within the statute of limitations following Lockheed purchasing tickets in excess of one thousand dollars

for VA presidential appointees and senior executives, as detailed in TAC ¶ 55-Ex 5 and 6." This is specific? How does "[a]ll Lockheed invoices and payments within the statute of limitations" zero in on the fraud? And, once again, what were the statements and why were they false? Garst reveals in his appellate brief that, in his view, any claim for payment implies that the vendor has not violated any ethical rules and that by lobbying the VA's top officials Lockheed committed such violations. Why ethical problems (if any) equate to fraudulent claims is hard to see; at all events, the pleading defect is that Garst has made it so hard to grasp his point.

[2] The second section of the "more definite statement" begins with the caption "SPECIFIC FALSE STATEMENTS OR RECORDS MADE IN ORDER TO OBTAIN PAYMENT". The first paragraph in this section reads:

The total claims for the OA & MM LAN/WAN are fraudulent or false because Lockheed's cost estimate given to the VA's Stapleton was false because, to obtain the project task order, Lockheed told the VA that it could accomplish the OA & MM LAN/WAN statement of work for \$1.2 million, a savings of \$700,000 over the previously selected Banyan VINES configuration. Lockheed billed the VA for at least \$2.6 million and never delivered a working LAN/WAN that met the contract requirements. Lockheed submitted the false cost statement to the NOAVA Contracting Officer (Stapleton). TAC ¶ 141, Ex. 41.

"NOAVA" stands for "National Office Automation for Veterans Affairs." VINES expands to "Virtual Integrated Network Services" but used in this paragraph is the name of a competitor's product rather than

an acronym for a family of network protocols. What “the OA & MM LAN/WAN statement of work” might be is a mystery; perhaps Garst meant to say “segment of work.” A contention that the “total claims” are false again fails the requirement of specificity. What did Lockheed say? This time Garst at least hints at a falsehood: Lockheed promised to do a task for \$1.2 million and eventually billed \$2.6 million without meeting contract requirements. (Other parts of the complaint and statement suggest that the shortcoming that most concerns Garst is Lockheed’s inability to make the network secure enough for the transmission of military secrets, though an outsider might suppose that a database of pensions and health benefits does not require quite that degree of sophisticated encryption.) Yet failing to keep one’s promise is just breach of contract, and cost overruns in government procurement projects may occur without fraud. To satisfy Rule 9(b), Garst had to allege that Lockheed said something knowing at the time that the representation was false (or not intending to perform); failures to satisfy the customer *ex post* are not fraud, for as Judge Friendly remarked there is no “fraud by hindsight.” *Denny v. Barber*, 576 F.2d 465, 470 (2d Cir.1978). See also *Murray v. Abt Associates, Inc.*, 18 F.3d 1376 (7th Cir.1994). The VA hired Lockheed to solve problems. That Lockheed knew in advance that there were problems (the most charitable description of Garst’s allegations), some of which turned out to be insuperable (by Lockheed’s staff, at least), does not come close to alleging fraud with particularity.

[3,4] We could go on with other paragraphs of the complaint and statement, but there would be little point to the exercise. Some come closer to specific allegations of deceit but fail to link them to any claim for payment. (Lockheed says that it swallowed some of the costs, and did not sub-

mit bills, when it realized that certain objectives could not be achieved.) But even if it were possible to navigate through these papers to a few specific instances of fraud, why should the court be obliged to try? Rule 8(a) requires parties to make their pleadings straightforward, so that judges and adverse parties need not try to fish a gold coin from a bucket of mud. Federal judges have better things to do, and the substantial subsidy of litigation (court costs do not begin to cover the expense of the judiciary) should be targeted on those litigants who take the preliminary steps to assemble a comprehensible claim. Garst’s lawyer filed documents so long, so disorganized, so laden with cross-references and baffling acronyms, that they could not alert either the district judge or the defendants to the principal contested matters.

[5,6] Some complaints are windy but understandable. Surplusage can and should be ignored. Instead of insisting that the parties perfect their pleadings, a judge should bypass the dross and get on with the case. A district court is not “authorized to dismiss a complaint merely because it contains repetitious and irrelevant matter, a disposable husk around a core of proper pleading.” *Davis v. Ruby Foods, Inc.*, 269 F.3d 818, 820 (7th Cir. 2001). But although “[f]at in a complaint can be ignored”, *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir.1998), “dismissal of a complaint on the ground that it is unintelligible is unexceptionable.” *Davis*, 269 F.3d at 820. Length may make a complaint unintelligible, by scattering and concealing in a morass of irrelevancies the few allegations that matter. Three other circuits have held that length and complexity may doom a complaint by obfuscating the claim’s essence. See *In re Westinghouse Securities Litigation*, 90 F.3d 696, 702–03 (3d Cir.1996) (600 paragraphs spanning

240 pages); *Kuehl v. FDIC*, 8 F.3d 905, 908–09 (1st Cir.1993) (358 paragraphs in “only” 43 pages); *Michaelis v. Nebraska State Bar Association*, 717 F.2d 437, 439 (8th Cir.1983) (144 paragraphs in 98 pages). At 400 paragraphs covering 155 pages, and followed by 99 attachments, Garst’s distended pleadings join that unsavory company. A concise statement of the claim illustrated by 400 concrete examples of fraud would be one thing, but 400 variations on the kind of paragraph we have quoted are quite another. Complaints like this are pestilential, and the district court showed great restraint in wading through four iterations plus one “more definite statement” before giving up. Garst received more judicial attention than his pleadings deserved.

AFFIRMED



John BYRNE, Plaintiff–Appellant,

v.

**AVON PRODUCTS, INC.,
Defendant–Appellee.**

No. 02–2629.

United States Court of Appeals,
Seventh Circuit.

Argued April 14, 2003.

Decided May 9, 2003.

Employee who was discharged for sleeping on the job brought action against his former employer under Americans with Disabilities Act (ADA) and Family and Medical Leave Act (FMLA). The United States District Court for the Northern

District of Illinois, Milton I. Shadur, J., entered summary judgment in favor of employer, 2002 WL 1052036, and employee appealed. The Court of Appeals, Easterbrook, Circuit Judge, held that: (1) time off from work for extended period of time was not reasonable accommodation under ADA for employee who was unable to work because of severe depression, but (2) genuine issues of material fact as to whether employee’s severe depression rendered him unable to work or to give his employer notice of his condition, and whether change in employee’s behavior before he was hospitalized was enough to notify employer that he suffered from serious health condition precluded summary judgment under FMLA.

Vacated and remanded.

1. Civil Rights ⇐173.1

Time off from work for extended period of time was not reasonable accommodation under ADA for employee who was unable to work because of severe depression; employee’s inability to work removed him for class of “qualified” individuals protected by ADA. Americans with Disabilities Act of 1990, § 102(a), 42 U.S.C.A. § 12112(a).

2. Civil Rights ⇐173.1

Sort of accommodation contemplated by the ADA is one that will allow the person to perform the essential functions of the employment position; not working is not a means to perform the job’s essential functions. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.

3. Federal Civil Procedure ⇐2497.1

Genuine issues of material fact as to whether employee’s severe depression rendered him unable to work or to give his employer notice of his condition, and