

THE TROUBLE WITH *TWOMBLY*: A PROPOSED PLEADING STANDARD FOR EMPLOYMENT DISCRIMINATION CASES

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Amorphous. This is how the Supreme Court's recent pleading paradigm has been appropriately described. In Bell Atlantic Corp. v. Twombly, the Supreme Court abandoned the well-known pleading standard it had adopted fifty years earlier in Conley v. Gibson that a complaint should be dismissed only where there is no set of facts that could entitle the plaintiff to relief. In its place, the Court adopted a new rule that the pleadings must set forth sufficient facts to state a plausible claim. Though Twombly arose in the context of an antitrust case, its holding has already been extended by the lower courts to other areas of the law. The extent to which Twombly creates a new pleading standard for employment discrimination plaintiffs is unclear, and there is already disagreement among the judiciary over this question. If applied rigidly, Twombly threatens to raise the bar for civil rights litigants seeking to plead their claims.

This Article attempts to determine how strictly the courts have been applying Twombly to employment discrimination plaintiffs by examining the dismissal rates of employment discrimination cases in the year before and the year following Twombly. The results revealed a higher percentage of decisions that granted a motion to dismiss in the employment context when the courts cited the new Supreme Court decision. Through individual examination of these cases, this Article argues that the courts should be more cautious when using the plausi-

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bility standard to dismiss discrimination claims early in the proceedings.

To help resolve the current confusion in this area of the law, this Article proposes a new pleading framework for all employment discrimination cases, which complies with the recent plausibility standard set forth by the Supreme Court. The unified model proposed by this Article would bring more certainty to the pleading process and assist the courts and litigants in assessing the sufficiency of employment claims. This Article concludes by explaining how the proposed pleading framework comports with the legal scholarship following the *Twombly* decision.

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“I’m just wondering where the Supreme Court is pointing the possession arrow on us right now.”

—Judge for the Court of Appeals for the Seventh Circuit
questioning at oral argument whether *Twombly*
abrogated the circuit’s pleading jurisprudence.¹

I. INTRODUCTION

Former Vice President Hubert H. Humphrey once stated that “[t]he right to be heard does not automatically include the right to be taken seriously.”² And so it is with victims of employment discrimination. Though Title VII of the Civil Rights Act of 1964 (Title VII) provides redress to those who are discriminated against in the workplace because of their race, sex, gender, national origin, or religion,³ these victims often face an uphill battle in having their claims taken seriously in the federal court system. That battle may have just become even more difficult.

The Supreme Court recently announced a new standard for pleading under the Federal Rules of Civil Procedure in *Bell Atlantic Corp. v. Twombly*.⁴ In doing so, the Court “retire[d]”⁵ the standard it had announced fifty years earlier in *Conley v. Gibson*⁶ that a complaint should not be dismissed unless the plaintiff “can prove no set of facts in support of his claim which would entitle him to relief.”⁷ In its place, the Court adopted a new rule that to survive a motion to dismiss, a plaintiff must set forth in the complaint “enough facts to state a claim to relief that is

1. Audio Recording of Oral Argument, *EEOC v. Concentra*, 496 F.3d 773 (7th Cir. 2007) (No. 06-3436), available at <http://www.ca7.uscourts.gov/fdocs/docs.fwx?caseno=06-3436&submit=showdkt&yr=06&num=3436>. These comments were made only four days after the Supreme Court’s *Twombly* decision. *Id.*

2. Paul Healey, *De Minimus Curat Lex: A Compendium of Legal Trivia*, 89 LAW LIBR. J. 55, 84 (1997).

3. See 42 U.S.C. § 2000e–e-17 (2006).

4. 127 S. Ct. 1955 (2007). While this Article was in the process of going to print, the Supreme Court issued its decision in *Ashcroft v. Iqbal*, No. 07-1015 (U.S. May 18, 2009), <http://www.supremecourtus.gov/opinions/08pdf/07-1015.pdf>. *Iqbal* confirms that the plausibility standard announced in *Twombly* applies to “all civil actions,” *id.* at 20, but did not otherwise alter the *Twombly* standard. Further analysis of the impact of *Iqbal* on employment discrimination cases will be warranted, but the proposed pleading framework set forth in this Article should remain valid even after *Iqbal*.

5. *Twombly*, 127 S. Ct. at 1969.

6. 355 U.S. 41 (1957).

7. *Id.* at 45–46.

plausible on its face.”⁸ The change is significant in that it potentially raises the bar for the specificity with which a complaint must be alleged. Though only a year old, *Twombly* has already generated significant debate in both the federal courts and legal scholarship over the appropriate pleading standards under the Federal Rules.⁹ Indeed, the decision has already been cited thousands of times.¹⁰

Twombly arose in the context of complex antitrust litigation.¹¹ The decision, however, has been extended beyond this sphere into other areas of the law.¹² The extent to which the Supreme Court’s plausibility framework will apply to employment discrimination complaints is not completely known,¹³ and there is already disagreement in the judiciary over the impact of the Supreme Court’s decision on Title VII litigation.¹⁴ If applied too rigidly, *Twombly* would significantly raise the bar for victims of employment discrimination and potentially result in numerous meritorious claims being prevented from proceeding to discovery.¹⁵

As the Supreme Court’s plausibility standard for federal pleadings has been in place for over a year, enough data are now available to perform an analysis of the impact of the decision on employment discrimination cases. With this goal in mind, I conducted a search of all federal district court decisions issued the year before and the year after *Twombly* that addressed a motion to dismiss in the context of a Title VII case. The study examined those federal district court decisions issued the year prior to *Twombly* that relied on the *Conley* decision, as well as those decisions issued the year following *Twombly* that relied on the new Supreme Court decision. A total of 532 opinions were analyzed as part of this study, and the results demonstrated a higher percentage of decisions that granted a motion to dismiss in the Title VII context when the courts relied on *Twombly*. The data are further illuminated by individual examination of the decisions, which revealed that the lower courts are unquestionably using the new plausibility standard to dismiss Title VII claims.

Perhaps even more problematic is that employment discrimination litigants are already having a difficult time getting their claims before a

8. *Twombly*, 127 S. Ct. at 1974 (emphasis added).

9. See discussion *infra* Parts V, VII (discussing the approach of federal courts and legal scholarship in light of the *Twombly* decision).

10. To find cases citing *Twombly*, 127 S. Ct. 1955, I ran a Westlaw KeyCite search of the case on February 4, 2009.

11. See *Twombly*, 127 S. Ct. at 1961.

12. See discussion *infra* Parts V, VII (discussing the approach federal courts have taken to *Twombly* and the views of academic scholarship).

13. See, e.g., *Wilkerson v. New Media Tech. Charter Sch.*, 522 F.3d 315, 321 (3d Cir. 2008) (“[T]he exact parameters of the *Twombly* decision are not yet known . . .”).

14. See discussion *infra* Part V.B (discussing the approaches of the Third Circuit and Seventh Circuit after *Twombly*).

15. See A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-Conley Era*, 52 How. L.J. 99, 158–61 (2008) (arguing that an overly rigid approach to civil rights claims after *Twombly* may prevent valid cases from proceeding).

jury. With the assistance of researchers at the Federal Judicial Center (FJC), I was able to attain further data on the success rates of employment discrimination plaintiffs when faced with a motion for summary judgment filed by the defendants. The results of this analysis revealed that over 80 percent of defendants' motions for summary judgment in employment discrimination cases are either granted or granted-in-part when decided by the district court.¹⁶ Thus, even when Title VII plaintiffs are permitted to engage in discovery, there is still a substantial likelihood that their claims will fail to make it to trial.

Given the difficulty employment discrimination litigants already face in having their claims heard, this Article proposes that the courts should exercise great caution before applying *Twombly* too rigidly. One way of avoiding rigid pleading requirements while still complying with Supreme Court case law is for the courts to adopt a uniform framework for analyzing the sufficiency of Title VII complaints. A uniform system would clarify the confusion created over the pleading requirements and permit plaintiffs to easily understand what facts must be set forth in the complaint. *Twombly*'s plausibility standard has appropriately been called "amorphous,"¹⁷ and more certainty is needed in this area of the law to provide guidance to the parties and the courts.¹⁸

This Article attempts to answer the question of what facts are necessary to establish a plausible claim of employment discrimination, and proposes a pleading framework that could be used by the courts to analyze the sufficiency of all Title VII complaints. I am aware of no explicit rules or requirements for employment discrimination plaintiffs to follow when pleading their claims. It is time for a uniform approach to be established so that the parties may easily weigh the facts set forth in a complaint against a single consistent standard. Such a framework would save the courts and litigants significant judicial resources by avoiding unnecessary disputes over the sufficiency of a complaint. At this early stage of the proceedings, it should be far simpler to determine whether the case should be permitted to proceed.

This Article begins by analyzing the history of the motion to dismiss and its application to employment discrimination litigation. The Article then analyzes the implications of the Supreme Court's recent announcement in *Twombly* of the plausibility standard for pleading. The Article subsequently sets forth the data revealing the impact of the *Twombly* decision uncovered by an extensive search of Title VII federal district court decisions over a two-year period. The Article also sets forth the results of the FJC's analysis of the success of plaintiffs defending against summary judgment motions that was performed at the author's request. The

16. See discussion *infra* Part IV.D. (explaining the results of the FJC study).

17. See Spencer, *supra* note 15, at 160.

18. See *id.*

Article then proposes a new framework for analyzing the sufficiency of all Title VII complaints, and explains the contours of the proposal. The Article concludes by explaining how the proposal fits within the recent academic scholarship on this issue.

II. THE MOTION TO DISMISS

A. History

Under the early American legal system, there were separate procedural structures for cases brought pursuant to the common law or equity.¹⁹ Suits brought under equity were not as rigid as those brought under the common law, though “[p]leadings in equity provided a more detailed statement of the facts.”²⁰ By the mid-nineteenth century, several states had adopted various code systems of pleading that integrated characteristics of both the common law and equity.²¹ Over time, a preference grew for a system with less stringent pleading requirements and more “relaxed pleading rules” that would serve as the “handmaid of justice.”²² Against this backdrop, the Federal Rules of Civil Procedure were born.

The Federal Rules of Civil Procedure were put in place in 1938.²³ The new rules were embraced “with great fanfare” and seen as “an obvious advance over the earlier rules of procedure that were embodied in the standard codes.”²⁴ Rule 8(a)(2) of the Federal Rules sets forth the standard for pleadings brought in federal court: “A pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief.”²⁵

The adoption of this rule firmly established so-called notice pleading in the federal courts,²⁶ whereby plaintiffs are not required to include a

19. See, e.g., Mark D. Robins, *The Resurgence and Limits of the Demurrer*, 27 SUFFOLK U. L. REV. 637, 640 (1993).

20. *Id.* at 641; see also Kendall W. Hannon, Note, *Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1812 (2008) (“The ultimate result at common law was a complex, verbose, and convoluted pleading that did not make clear what, exactly, the suit was predicated on.”).

21. Robins, *supra* note 19, at 641.

22. *Id.* at 643 (internal quotation omitted); see also Paul J. McArdle, *A Short and Plain Statement: The Significance of Leatherman v. Tarrant County*, 72 U. DET. MERCY L. REV. 19, 23 (1994) (“The provisions governing pleadings, amendments thereof, joinder of claims and parties, and discovery were liberally structured to promote adjudication on the merits of a lawsuit and eliminate procedural traps resulting in the misdisposition of a case.”).

23. See Linda S. Mullenix, *The Counter-Reformation in Procedural Justice*, 77 MINN. L. REV. 375, 380 (1992).

24. Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL’Y 61, 62 (2007).

25. FED. R. CIV. P. 8(a)(2).

26. See Robins, *supra* note 19, at 644; see also Koan Mercer, Comment, “*Even in These Days of Notice Pleadings*”: *Factual Pleading Requirements in the Fourth Circuit*, 82 N.C. L. REV. 1167, 1169–70 (2004) (“In laying out the Rules’ pleading requirements, the drafters of Rule 8(a)(2) explicitly avoided using the charged term ‘facts.’”).

comprehensive factual statement in their complaint “so long as defendants receive fair notice of the nature and basis of the claims against them.”²⁷ The notice pleading standard is still somewhat ambiguous, however, and leaves significant room for the courts to interpret whether a particular complaint satisfies the contours of the rule.²⁸ The Supreme Court has weighed in several times on how the rule should be construed, with notable decisions in the civil rights and employment discrimination contexts.²⁹

B. *Interpreting Federal Rule of Civil Procedure 8*

The Supreme Court’s most significant decisions interpreting Rule 8 and the standard for motions to dismiss have tended to arise in the civil rights and employment discrimination contexts. The two most significant of these decisions are *Conley v. Gibson*³⁰ and *Swierkiewicz v. Sorema N.A.*³¹

I. *Conley v. Gibson*

Conley, one of the Supreme Court’s earliest decisions on this issue, is also one of the most cited. Indeed, prior to the decision being abrogated by *Twombly*,³² the *Conley* case was the fourth-most cited decision by the federal courts,³³ and had been called “the most important federal decision on pleading of the twentieth century.”³⁴

In *Conley*, a group of black railroad workers sued their union under the Railway Labor Act.³⁵ The employees alleged in their complaint that the collective bargaining agreement between the workers and the railroad gave the employees “certain protection from discharge and loss of seniority.”³⁶ The employees further alleged that the railroad purported to eliminate forty-five jobs held by black workers who were subsequently terminated or demoted and that the railroad filled the positions with white workers after the black employees had been removed.³⁷ The union, which was “acting according to plan,” failed to protect the black workers despite their requests to do so and “refused to give them protec-

27. Mercer, *supra* note 26, at 1172.

28. See Robins, *supra* note 19, at 644–45.

29. See discussion *infra* Part II.B.

30. 355 U.S. 41 (1957).

31. 534 U.S. 506 (2002).

32. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007).

33. Adam N. Steinman, *The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy*, 63 WASH. & LEE L. REV. 81, 87 (2006).

34. McArdle, *supra* note 22, at 26.

35. *Conley*, 355 U.S. at 42–43.

36. *Id.* at 43.

37. *Id.*

tion comparable to that given white employees,” thus failing to represent them “equally and in good faith.”³⁸ According to the complaint, the union’s actions violated the protections to fair representation set forth in the Railway Labor Act, and the plaintiffs sought appropriate relief.³⁹

The district court dismissed the complaint for lack of jurisdiction, and the appellate court affirmed.⁴⁰ The Supreme Court found jurisdiction in the case, however, and further considered the sufficiency of the pleadings set forth in the complaint.⁴¹ In addressing this issue, the Court set forth the standard for considering a motion to dismiss the complaint for failure to state a claim:

In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff *can prove no set of facts* in support of his claim which would entitle him to relief.⁴²

Applying this standard, the Court concluded that the plaintiffs’ allegations (1) that they were improperly terminated and (2) that the union was intentionally failing to protect their employment as it had for white workers, were sufficient to state a claim under the federal rules.⁴³ If proven, these allegations could establish “a manifest breach of the Union’s statutory duty to represent fairly and without hostile discrimination” the black workers.⁴⁴ The Court specifically rejected the defendant’s argument that the complaint set forth generalities and failed to provide specific facts.⁴⁵ The Court asserted that “[t]he decisive answer to this is that the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim” and that “all the Rules require is ‘a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”⁴⁶

The Court thus emphasized that these types of discrimination claims are subject to the rule of “simplified notice pleading” and that there is still “liberal opportunity for discovery and other pretrial procedures” that will require litigants “to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.”⁴⁷ The Court was careful to reject any argument that would turn the Federal Rules of Civil Procedure into a “game of skill” where “one misstep by

38. *Id.*

39. *Id.*

40. *Id.* at 43–44.

41. *Id.* at 44–45.

42. *Id.* at 45–46 (emphasis added).

43. *Id.* at 46.

44. *Id.*

45. *Id.* at 47.

46. *Id.*

47. *Id.* at 47–48.

counsel may be decisive to the outcome.”⁴⁸ *Conley* thus gave life to notice pleading under the Federal Rules and made clear that this liberal pleading standard would be applicable to claims of employment discrimination.

2. *Swierkiewicz v. Sorema N.A.*

Though the liberal notice pleading standard clearly applies to civil rights cases, the Federal Rules and *Conley* decision predate much of the federal legislation prohibiting employment discrimination—most notably Title VII⁴⁹ and the Age Discrimination in Employment Act (ADEA).⁵⁰ Several decades after *Conley*, the Supreme Court addressed the appropriate pleading standard under these statutes.

In *Swierkiewicz*, the Supreme Court addressed the sufficiency of a complaint alleging discrimination on the basis of age and national origin.⁵¹ The plaintiff was a fifty-three-year-old native of Hungary who was employed at a reinsurance company.⁵² After serving almost six years as a senior vice president, the plaintiff was demoted to a marketing position and his prior responsibilities were transferred to a younger worker.⁵³ The younger worker had less experience than the plaintiff, who had worked in the industry for over two decades.⁵⁴ The plaintiff was subsequently left out of business meetings and decisions, and was eventually terminated after he refused to resign.⁵⁵ The plaintiff filed a complaint alleging national origin discrimination under Title VII and age discrimination under the ADEA.⁵⁶

The district court granted the defendant’s motion to dismiss the complaint because it failed to set forth a prima facie case by not “adequately alleg[ing] circumstances that support an inference of discrimination.”⁵⁷ The appellate court agreed, holding that the plaintiff had failed to establish all of the prima facie elements set forth by the Supreme Court’s decision in *McDonnell Douglas v. Green*.⁵⁸ Pursuant to *McDonnell Douglas*, to establish a prima facie case a plaintiff must show that he is a member of a protected class, that he is qualified for the position, that he suffered an adverse action, and that there are other circumstances that

48. *Id.* at 48.

49. 42 U.S.C. § 2000e–e-17 (2006).

50. 29 U.S.C. §§ 621–634 (2006).

51. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 509–10 (2002).

52. *Id.* at 508.

53. *Id.*

54. *Id.*

55. *Id.* at 509.

56. *Id.*

57. *Id.*

58. *Id.*

give rise to an inference of discrimination.⁵⁹ Because the allegations failed to satisfy this test, the appellate court held that the complaint was “insufficient as a matter of law to raise an inference of discrimination.”⁶⁰

The Supreme Court rejected the view of the lower court, holding that the *McDonnell Douglas* test is only “an evidentiary standard, not a pleading requirement.”⁶¹ The Court noted that Title VII claims are not subject to any special pleading requirements and that “the ordinary rules for assessing the sufficiency of a complaint apply.”⁶² The Court therefore emphasized that only notice pleading is required and that a plaintiff need not “*plead facts* establishing a *prima facie* case.”⁶³ The Court also looked specifically to the text of Rule 8(a) and its prior decision in *Conley*, noting that “only a short and plain statement of the claim showing that the pleader is entitled to relief” is required to provide the defendant with “fair notice” of the claim.⁶⁴ The Court further stated that “unmeritorious claims” could be addressed through “liberal discovery rules and summary judgment motions.”⁶⁵ The Court added that an incomplete complaint can also be addressed through Rule 12(e), which allows a defendant to move for a more definite statement from the plaintiff.⁶⁶ Thus, in the Supreme Court’s view, the battle in many employment discrimination claims would be fought during discovery and at the summary judgment stage of the proceedings, rather than at the nascent motion to dismiss stage.

Applying this standard to the case, the Court “easily” found that the plaintiff had satisfied the notice pleading requirements of Rule 8(a).⁶⁷ Looking to the complaint, the Court held that the plaintiff

alleged that he had been terminated on account of his national origin in violation of Title VII and on account of his age in violation of the ADEA. . . . His complaint detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination. . . . These allegations give respondent fair notice . . . [and] state claims upon which relief could be granted under Title VII and the ADEA.⁶⁸

The Court concluded by reemphasizing that a plaintiff alleging employment discrimination is not required to plead a *prima facie* case in the complaint.⁶⁹ Any requirement for a heightened pleading standard

59. *Id.* at 509–10 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973)).

60. *Id.* at 509 (quoting *Swierkiewicz v. Sorema N.A.*, 5 F. App’x 63, 65 (2d Cir. 2001)).

61. *Id.* at 510.

62. *Id.* at 511.

63. *Id.* (emphasis added).

64. *Id.* at 512 (citing *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

65. *Id.*

66. *Id.* at 514.

67. *Id.*

68. *Id.*

69. *Id.*

beyond this “must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.”⁷⁰

3. *Lessons from Conley and Swierkiewicz*

The lessons from *Conley* and *Swierkiewicz* are clear and map out an easy course for employment discrimination plaintiffs. Pursuant to the Federal Rules, a plaintiff need only engage in notice pleading under Rule 8(a) by setting forth “a short and plain statement of the claim showing that the pleader is entitled to relief.”⁷¹ Under *Conley*, “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”⁷² *Swierkiewicz* reaffirms these principles for plaintiffs proceeding under Title VII or the ADEA, and emphasizes that such plaintiffs need not “plead facts establishing a prima facie case.”⁷³

Thus, after *Conley* and *Swierkiewicz* it was fairly clear that an employment discrimination plaintiff need only provide a basic statement of the claim in order to proceed during the early stages of the case. There was still some ambiguity in the Court’s pronouncement of the proper standard, but, for the most part, it would cause difficulty only for those cases in the margins. The typical employment discrimination plaintiff knew what must be alleged to survive a motion to dismiss. That is, until the Supreme Court’s recent decision in *Twombly*.

III. *BELL ATLANTIC CORP. V. TWOMBLY*

It is somewhat peculiar that one of the Supreme Court’s most significant decisions for employment discrimination litigants would arise in a context having absolutely nothing to do with employment. Indeed, though most employment discrimination claims are relatively straightforward and revolve around battles over intent and causation,⁷⁴ *Twombly* arose at the complete opposite end of the spectrum—complex antitrust litigation.⁷⁵ The effects of *Twombly* have clearly been felt

70. *Id.* at 515.

71. FED. R. CIV. P. 8(a)(2).

72. *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

73. *Swierkiewicz*, 534 U.S. at 511. Indeed, though a short opinion, the *Swierkiewicz* decision still cites the *Conley* decision three times. *Id.* at 507, 512, 514.

74. See, e.g., Michelle Foster, *Causation in Context: Interpreting the Nexus Clause in the Refugee Convention*, 23 MICH. J. INT’L L. 265, 320 n.239 (2002) (“In the context of discrimination claims pursuant to Title VII of the Civil Rights Act of 1964, [intent] has long been the key requirement for a successful discrimination claim. In *Int’l Bd. of Teamsters v. United States*, the Supreme Court held that “[p]roof of discriminatory motive is critical.” (citation omitted)).

75. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1961–62 (2007).

beyond the sphere of antitrust, however, and the decision was cited over 13,000 times by its one year anniversary.⁷⁶

A. *The Majority Decision*

Twombly involved the break-up of AT&T in 1984, which resulted in a number of regional telephone monopolies and a long-distance market in which the regional monopolies (also known as “Incumbent Local Exchange Carriers” (ILECs)) could not compete.⁷⁷ In 1996, Congress withdrew the ILECs’ ability to engage in this monopoly structure and also allowed them to compete in the long-distance marketplace.⁷⁸ Under the new system, ILECs were required to share their networks with “competitive local exchange carriers” (CLECs).⁷⁹

A putative class of litigants who were “subscribers of local telephone and/or high speed internet services” from 1996 to present filed a complaint against a number of ILECs alleging violations of section 1 of the Sherman Act, which forbids a contract or conspiracy “in restraint of trade or commerce.”⁸⁰ The plaintiffs alleged that the ILECs conspired to restrain trade—resulting in higher telephone and Internet charges—through two different means.⁸¹ First, plaintiffs alleged that the ILECs participated in “parallel conduct” in their service regions to prohibit the emergence of CLECs.⁸² This activity included “making unfair agreements with the CLECs for access to ILEC networks” and attempting to “sabotage the CLECs’ relations with their own customers.”⁸³ The plaintiffs thus alleged that “the ILECs’ compelling common motivation to thwart the CLECs’ competitive efforts naturally led them to form a conspiracy.”⁸⁴ Second, the plaintiffs alleged that the ILECs formed agreements “to refrain from competing against one another.”⁸⁵ These agreements should be “inferred from the ILECs’ common failure meaningfully to pursue attractive business opportunities in contiguous markets where they possessed substantial competitive advantages.”⁸⁶

In summary, the plaintiffs alleged in the complaint that the ILECs’ failure to engage in “any meaningful competition” between themselves

76. Citations to *Twombly* were found by running a KeyCite search on Westlaw. See also Hanon, *supra* note 20, at 1826 n.113 (“The finding that *Twombly* has been cited widely outside of the antitrust context was amply supported by my study.”).

77. *Twombly*, 127 S. Ct. at 1961.

78. *Id.*

79. *Id.*

80. *Id.* at 1962; see also Sherman Act, 15 U.S.C. § 1 (2006).

81. *Twombly*, 127 S. Ct. at 1962.

82. *Id.*

83. *Id.*

84. *Id.* (internal quotation omitted).

85. *Id.*

86. *Id.* (internal quotation omitted).

and the “parallel course of conduct that each engaged in to prevent competition from CLECs” demonstrated a violation of the Sherman Act.⁸⁷ The district court dismissed the complaint, holding that plaintiffs had failed to state a claim.⁸⁸ The district court concluded that the allegations of parallel conduct alone were insufficient to support a Sherman Act violation and held that the “ILECs’ supposed agreement against competing with each other” was not sufficiently supported by facts demonstrating a conspiracy.⁸⁹ The appellate court reversed the district court, holding that “to rule that allegations of parallel anti-competitive conduct fail to support a plausible conspiracy claim, a court would have to conclude that *there is no set of facts* that would permit a plaintiff to demonstrate that the particular parallelism asserted was the product of collusion rather than coincidence.”⁹⁰

The Supreme Court began its analysis by reconsidering the proper pleading standards set forth by Rule 8(a)(2).⁹¹ The Court noted that the complaint “does not need detailed factual allegations” but that the allegations should contain “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”⁹² Thus, the allegations in the case must contain enough facts “to suggest that an agreement was made.”⁹³ The Court therefore required “*plausible* grounds to infer an agreement,” but made clear that it was not “impos[ing] a probability requirement at the pleading stage.”⁹⁴ Rather, the Court’s standard “simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.”⁹⁵ The Court emphasized that its standard was consistent with Rule 8(a)(2), and noted that “[t]he need at the pleading stage for allegations plausibly suggesting (not merely consistent with) agreement reflects” the Federal Rule requirement “that the ‘plain statement’ possess enough heft to ‘sho[w] that the pleader is entitled to relief.’”⁹⁶

After announcing the plausibility standard, the Court abrogated the “no set of facts”⁹⁷ language from the *Conley* decision, stating that this language has been “puzzling the profession for 50 years” and that the statement “has earned its retirement.”⁹⁸ Indeed, “[t]he phrase is best forgotten as an incomplete, negative gloss on an accepted pleading stan-

87. *Id.* at 1962–63 (internal quotation omitted).

88. *Id.* at 1963.

89. *Id.* (citing *Twombly v. Bell Atl. Corp.*, 313 F. Supp. 2d 174, 188 (S.D.N.Y. 2003)).

90. *Id.* (citing *Twombly v. Bell Atl. Corp.*, 425 F.3d 99, 114 (2d Cir. 2005)).

91. *Id.* at 1964.

92. *Id.* at 1964–65.

93. *Id.* at 1965.

94. *Id.* (emphasis added).

95. *Id.*

96. *Id.* at 1966.

97. *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

98. *Twombly*, 127 S. Ct. at 1969.

dard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint.”⁹⁹ Disregarding the language from *Conley* and applying the plausibility standard, the Court concluded that the complaint was deficient, holding that the allegations of agreement and conspiracy set forth in the complaint were insufficient to satisfy section 1 of the Sherman Act.¹⁰⁰

The Court also dismissed any concerns that its decision might be inconsistent with *Swierkiewicz*, and noted that the complaint in that case contained facts “detail[ing] the events leading to [the plaintiff’s] termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination.”¹⁰¹ Similarly, the Court noted that its decision was “not requir[ing] heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.”¹⁰² As the plaintiff failed to “nudge[] their claims across the line from conceivable to plausible, their complaint must be dismissed.”¹⁰³

B. *The Twombly Dissent*

The dissent by Justice Stevens characterized the majority’s opinion as a “dramatic departure from settled procedural law.”¹⁰⁴ The dissent called into question the abrogation of *Conley*’s “no set of facts” language, which “has been cited as authority in a dozen opinions of this Court.”¹⁰⁵ The dissent noted that over half the states “utilize as their standard for dismissal of a complaint the very language the majority repudiates.”¹⁰⁶ And, Justice Stevens argued that the plausibility framework announced by the Court “is irreconcilable with Rule 8 and with our governing precedents,” including the *Swierkiewicz* decision.¹⁰⁷ The dissent concluded by questioning whether the new standard will apply only to antitrust cases, “or whether [the new] test for the sufficiency of a complaint will inure to the benefit of *all* civil defendants.”¹⁰⁸

C. *Implications of Twombly for Employment Discrimination Law*

The final question posed by Justice Stevens—whether the *Twombly* decision applies only to antitrust cases or to all civil complaints—is per-

99. *Id.*

100. *Id.* at 1970–74.

101. *Id.* at 1973 (quoting *Conley*, 355 U.S. at 514).

102. *Id.* at 1974.

103. *Id.*

104. *Id.* at 1975 (Stevens, J., dissenting).

105. *Id.* at 1978.

106. *Id.*

107. *Id.* at 1983.

108. *Id.* at 1988 (emphasis added).

haps the most important question to arise out of the case. Unfortunately, there is no easy answer. The majority opinion does nothing to limit its decision to antitrust cases, strongly suggesting that its analysis applies to any motion to dismiss analyzed under Rule 8(a)(2)—including employment discrimination cases. Indeed, the majority goes out of its way to reconcile its decision with its discussion of pleading requirements in *Swierkiewicz*, thereby suggesting that the plausibility rubric carries over into the employment pleading context.¹⁰⁹

Another interesting question is whether the Supreme Court really announced a new standard at all in *Twombly*. The majority seemed to think not, maintaining that the decision does “not require heightened fact pleading of specifics.”¹¹⁰ Justice Stevens disagreed, emphatically stating that “the Court has announced a significant new rule that does not even purport to respond to any congressional command.”¹¹¹ The question becomes even more clouded by the per curiam Supreme Court decision issued two weeks later in *Erickson v. Pardus*,¹¹² a pro se prisoner case. In *Erickson*, the Court overturned the dismissal of a prisoner’s complaint brought under 42 U.S.C. § 1983, which alleged that prison officials had violated the plaintiff’s Eighth Amendment rights by discontinuing treatment for hepatitis C.¹¹³ Citing *Twombly*, *Conley*, and *Swierkiewicz*, the Court reversed the dismissal of the complaint, emphasizing the “liberal pleading standards” of the Federal Rules.¹¹⁴ The Court held that “[t]he case cannot . . . be dismissed on the ground that petitioner’s allegations of harm were too conclusory.”¹¹⁵

Erickson, then, seems to reaffirm the case law prior to *Twombly* and reemphasize the liberal pleading standard of the Federal Rules.¹¹⁶ It is not surprising, given the split within the Supreme Court itself over the import of the *Twombly* decision, that there would also be disagreement in the legal scholarship over the impact of the case. Like the justices themselves, legal scholars and commentators disagree as to whether *Twombly* fundamentally changed the legal requirements for pleading a

109. *Id.* at 1973–74 (majority opinion).

110. *Id.* at 1974.

111. *Id.* at 1988–89 (Stevens, J., dissenting).

112. 127 S. Ct. 2197 (2007).

113. *Id.* at 2198.

114. *Id.* at 2200.

115. *Id.*

116. See Allan Ides, *Bell Atlantic and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, in 243 FEDERAL RULES DECISIONS 604, 638–39 (2007) (“One gets the sense, given *Erickson*’s relative lack of ‘certworthiness,’ that the rapidly prepared and issued *Erickson* opinion was written as a reassurance that the *Bell Atlantic* decision had not altered Rule 8(a)(2) pleading principles.”).

federal claim, and some have argued that the decision simply has no impact at all outside of the antitrust area.¹¹⁷

The Supreme Court's heavy reliance on *Swierkiewicz* in the text of the *Twombly* decision suggests that the plausibility framework should extend to employment discrimination pleadings.¹¹⁸ A similar argument can be made that we should not extend the decision beyond the antitrust context, given the Court's statement within *Twombly* that it was not creating a new standard, combined with the Court's subsequent decision in *Erickson*.¹¹⁹ Whichever argument is correct, the end result is likely that we are in for substantially more litigation over what the proper pleading standard should be in a federal case—and given that the Supreme Court put *Swierkiewicz* front and center in this dispute, it is likely that much of this litigation will occur in the employment discrimination context.¹²⁰

Although the *Twombly* decision is still relatively new, enough time has passed to examine much of this litigation and to determine exactly what impact this case has had on the employment discrimination landscape. Specifically, two questions should be addressed. First, have the lower courts used *Twombly* to dismiss Title VII claims at a higher rate than before the decision? Second, what does plausibility mean in the employment discrimination context and how should this standard be applied? The first question is addressed in Part IV of this Article through an analysis of all federal court decisions issued the year before and the year after *Twombly*. The second question is answered in Part V, which proposes a new legal framework for considering motions to dismiss in all employment discrimination cases brought under Title VII.

IV. *TWOMBLY*'S IMPACT ON EMPLOYMENT DISCRIMINATION

There has been significant debate over the impact of *Twombly* on the pleading requirements in federal cases.¹²¹ An empirical analysis performed several months after the Supreme Court's decision suggested that the federal district courts were, for the most part, dismissing cases at

117. See Hannon, *supra* note 20, at 1824 (“On one end, a number of writers have concluded that *Twombly* is best understood as a decision extending only to pleading in antitrust contexts. At the other end, writers believe that *Twombly* signals a revolutionary overhaul of the entire concept of notice pleading.”).

118. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1973–74 (2007).

119. *Cf. Ides, supra* note 116, at 635–36 (arguing that “the ‘better’ reading of *Bell Atlantic* is that it did not change the law of pleading, but that it simply applied long-accepted pleading standards to a unique body of law under which the plaintiffs’ complaint failed to include any facts or plausible inferences supportive of a material element of the claim specifically asserted by the plaintiffs”); Hannon, *supra* note 20, at 1824.

120. See Hannon, *supra* note 20, at 1824 (“On one point the [various views] appear to be in agreement—*Twombly* means an increase in the litigation over pleadings before federal district courts.”).

121. See *id.* at 1824 (discussing the divergent views).

about the same rate as they were prior to the decision.¹²² This study suggested, though, that in civil rights cases, the *Twombly* decision was resulting in a higher dismissal rate in the district courts.¹²³ The published study did not, however, look specifically at the rate of dismissal for employment discrimination cases brought under Title VII, the ADEA, or the Americans with Disabilities Act (ADA).¹²⁴

The study set forth in this Article seeks to determine whether *Twombly* has had any impact on the dismissal rates in Title VII employment discrimination cases, and thus whether the decision has applied a “heightened pleading standard” to these particular cases. Regardless of whether there has been a change in dismissal rates, the *Twombly* decision gives cause to step back and reassess the proper pleading standard for employment law. However, an analysis of the case law will help reveal the urgency with which that reassessment should take place.

A. Methodology

The *Twombly* decision was issued on May 21, 2007.¹²⁵ For this study, I reviewed two sets of federal district court cases brought under Title VII. First, I looked at the decisions of the district courts on motions to dismiss brought for failure to state a claim in the year immediately prior to *Twombly* that relied on the Supreme Court’s decision in *Conley*. Second, I examined those district court opinions addressing motions to dismiss for failure to state a claim in the year immediately after *Twombly* (with several days built in to give the district courts time to process the decision) that relied on the *Twombly* decision. My goal was to compare whether there was any substantial differential between the two groups in the study, and thereby determine whether *Twombly* was having any impact on the likelihood that an employment discrimination case would be dismissed. This study was not concerned with absolute dismissal rates in the year before and the year following *Twombly* (and thus does not examine all 12(b)(6) motions); rather, my goal was to determine if those judges relying on *Twombly* were more or less likely to dismiss a Title VII case than those judges relying on *Conley*.¹²⁶ The searches were per-

122. See *id.* at 1837 (explaining the results of the study).

123. See *id.* at 1840–42 (discussing potential rationales for dismissal rates in civil rights cases).

124. See *id.* at 1836 n.161. Indeed, the most significant difference of my study is its emphasis on employment discrimination decisions.

125. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1955 (2007).

126. Cf. Hannon, *supra* note 20, at 1829 (similar empirical study noting that the goal was not to demonstrate “the absolute rates of dismissal in federal district courts; it is a comparison of the relative 12(b)(6) dismissal rates between pre-*Twombly* and post-*Twombly* reported district court cases”). Moreover, it is possible that a broader study of all 12(b)(6) motions to dismiss—irrespective of citation to *Twombly* or *Conley*—could obscure the impact of those courts actually relying on these Supreme Court decisions. Nonetheless, further research in this area would certainly be beneficial and provide additional insight into the dismissal rate of employment cases.

formed using the Westlaw database. As one of the most commonly used search engines, this database was an excellent source of information for this study, and is frequently used to gather data for legal scholarship.¹²⁷

The search for decisions on motions to dismiss in Title VII cases brought the year before *Twombly* revealed 264 opinions [hereinafter the pre-*Twombly* decisions].¹²⁸ The search for decisions on motions to dismiss in Title VII cases brought the year subsequent to *Twombly* revealed 268 opinions [hereinafter the post-*Twombly* decisions].¹²⁹ The similar size of the two data sets made it easier to perform a direct comparison of the dismissal rates between the two groups. Thus, a total of 532 decisions were analyzed as part of this study.¹³⁰ Though this is not an exhaustive search of all motions to dismiss brought in employment discrimination cases, the search was constructed to provide those cases most directly on point—those that rely on *Conley* or *Twombly* in the context of discussing a motion to dismiss.¹³¹

For each decision analyzed, I catalogued the following information: (1) the name of the case and the citation; (2) the jurisdiction where the case was filed; and (3) whether the motion to dismiss was granted, denied, or granted-in-part.¹³² A number of decisions revealed by these two searches were “disqualified” from the study for various reasons that made them inappropriate for analysis.¹³³ For example, a number of opi-

127. See generally Joseph A. Seiner, *The Failure of Punitive Damages in Employment Discrimination Cases: A Call for Change*, 50 WM. & MARY L. REV. 735 (2008) (conducting analysis using the Westlaw database); Hannon, *supra* note 20 (conducting an empirical analysis of the *Twombly* decision using the Westlaw database); cf. Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701 (2006) (conducting empirical research on an employment issue using the Lexis database).

128. The exact Westlaw search performed was “(Conley) /250 (“failure to state a claim” “12(b)(6)”) /250 “Title VII” & DA(after 5/14/2006) & DA(before 5/14/2007).” The study included a short period between the ending date for the search and the date on which the *Twombly* decision was issued.

129. The exact Westlaw search performed was “(Twombly) /250 (“failure to state a claim” “12(b)(6)”) /250 “Title VII” & DA(after 5/31/2007) & DA(before 6/1/2008).”

130. It is possible that these searches will reveal additional decisions over time, as Westlaw adds additional cases to its database on occasion. See Seiner, *supra* note 127, at 757 n.134. The size of the data sets was accurate as of the completion of this study on July 3, 2008. Additionally, where the above searches identified motions for judgment on the pleadings, these decisions were included in the data results, though they were not the primary focus of the study. Moreover, if a case involved multiple motions to dismiss that resulted in multiple opinions during the relevant time period, each opinion was treated as a separate case. To the extent that multiple motions to dismiss were analyzed by a district court in a single decision, they were treated as a single motion for purposes of this study.

131. See *supra* notes 128–29 (discussing the exact search terms used for the study). For example, the search I constructed limited the decisions to those that used the term “Conley” within 250 words of “failure to state a claim” or “12(b)(6).” A larger data set could have been achieved by eliminating the 250 word restriction, but many of the resulting additional cases would likely have been of more questionable relevance to the study.

132. To the extent that a particular decision was reconsidered in a later decision by a district court or appealed to an appellate court, such subsequent case history was not factored into the analysis.

133. Decisions were included in the study, however, where the district court made a determination on a motion to dismiss as to whether a particular form of relief should be restricted from the Title VII case. See, e.g., *EEOC v. Dave’s Detailing, Inc.*, No. 3:07-CV-516-5, 2008 WL 1968315, at *4 (W.D.

nions revealed by the search were brought under a statute other than Title VII, addressed a motion for summary judgment rather than a motion to dismiss, or involved only magistrate recommendations to a district court.¹³⁴ After eliminating these disqualified opinions from the study, I was left with 191 pre-*Twombly* decisions and 205 post-*Twombly* decisions.

Though I could have chosen to analyze a much larger group of pre-*Twombly* motion to dismiss opinions, I selected this particular search for a couple of different reasons.¹³⁵ First, by analyzing only those opinions issued the year prior to *Twombly*, the analysis provides the most accurate trend in this area immediately before the decision was issued. Second, by limiting the study with these time constraints, the resulting group of decisions was directly comparable to those decisions issued in the year following *Twombly*.

Similarly, by analyzing only those decisions issued the year after the *Twombly* decision, I was left with a substantive number of decisions that allowed me to engage in this comparative analysis. Because these post-*Twombly* decisions were analyzed shortly after the Supreme Court's opinion, many of the complaints would have been drafted prior to the opinion. Thus, as many litigants might not have amended their pleadings, the post-*Twombly* decisions will help reveal whether the district courts are in fact applying a heightened pleading standard in analyzing these claims.¹³⁶

B. Results of Analysis and Conclusions

The results of the analysis revealed a higher rate of dismissals in Title VII opinions issued after *Twombly*. In the year prior to the Supreme Court's decision, 54.5 percent of federal district court opinions granted (in whole) motions to dismiss when citing the *Conley* decision.¹³⁷ In the year immediately following *Twombly*, 57.1 percent of district court opinions citing the new Supreme Court decision granted (in whole) motions to dismiss.¹³⁸ Similarly, opinions issued in the year following

Ky. May 2, 2008) (“[T]he EEOC’s claims for monetary damages on behalf of [two individuals] are dismissed with prejudice.”).

134. A number of district court decisions involved pro se litigants. As these plaintiffs are still subject to the requirements of the Federal Rules, I kept these opinions as part of the study. As part of the analysis, however, I catalogued the cases where the plaintiff was not represented by counsel, so that these cases could be separated out as part of a future study. See, e.g., Hannon, *supra* note 20, at 1832 (not including pro se plaintiffs as part of the study).

135. See *id.* at 1830 (discussing the benefit of limiting an analysis of decisions issued before *Twombly*).

136. See *id.* at 1830–31 (noting two benefits of analyzing motions to dismiss issued immediately after the *Twombly* decision).

137. See Summaries of District Court Decisions on Title VII Motions to Dismiss in the Year Before and After *Twombly* (2008) [hereinafter Case Analysis] (on file with author).

138. *Id.*

Twombly that relied on the decision were more likely to either grant or grant-in-part a motion to dismiss (77.6 percent) than in the year prior to the decision where the court relied on *Conley* (75.4 percent).¹³⁹ These data are set forth in Table A below. Though these increases can be described as modest over the course of the year, the percentages have been increasing in recent months, as discussed in more detail below.

TABLE A

	Percentage of Motions Granted	Percentage of Motions Granted-in- Part	Percentage of Motions Granted or Granted- in-Part	Percentage of Motions Denied
Pre- <i>Twombly</i> Decisions (191 Total Decisions)	54.5% (104 deci- sions)	20.9% (40 deci- sions)	75.4% (144 deci- sions)	24.6% (47 deci- sions)
Post- <i>Twombly</i> Decisions (205 Total Decisions)	57.1% (117 deci- sions)	20.5% (42 deci- sions)	77.6% (159 deci- sions)	22.4% (46 deci- sions)

Interestingly, the rate at which district courts have been granting motions to dismiss in Title VII decisions has begun to rise when the court relies on *Twombly*. When the comparison is restricted to the most recent six months of the study, the percentages increase notably. Indeed, almost 81 percent of opinions issued by the district courts between six and twelve months after *Twombly* that cite the decision either grant or grant-in-part a motion to dismiss—as compared to approximately 75 percent of those opinions issued under *Conley*.¹⁴⁰ These data are set forth in Table B below.

139. *Id.*

140. *Id.* As discussed in the following Section, however, this differential is not statistically significant. *See infra* Part IV.C.

TABLE B

	Percentage of Motions Granted	Percentage of Motions Granted- in-Part	Percentage of Motions Granted or Granted- in-Part	Percentage of Motions Denied
Pre- <i>Twombly</i> Decisions (191 Total Decisions)	54.5% (104 deci- sions)	20.9% (40 deci- sions)	75.4% (144 deci- sions)	24.6% (47 deci- sions)
Decisions Issued Be- tween 6- 12 Months After <i>Twombly</i> (115 Total Decisions)	57.4% (66 deci- sions)	23.5% (27 deci- sions)	80.9% (93 deci- sions)	19.1% (22 deci- sions)

In the short time following *Twombly*, then, the data already demonstrate a higher percentage of decisions that grant a motion to dismiss in the Title VII context when the courts rely on the new decision. The limitations of this data, however, should be considered.

C. *Limitations of the Study*

It is worth acknowledging that the study presented above—though providing meaningful data in this area—does have some limitations. Initially, the study does not capture *every* motion to dismiss filed in a Title VII case in the year before and the year after *Twombly*. Rather, the study focuses only on those cases that appear in the Westlaw database. Thus, many decisions that did not result in a published opinion go undetected by this analysis. There may be some concern that utilizing this source will result in a skewed result as the study omits decisions not reported in Westlaw. Still, “the fact that any ‘reported case bias’ is equally present in both the pre- and post-*Twombly* case set allows for a meaningful comparison and analysis of any change.”¹⁴¹

Additionally, as already noted, the study was constructed to identify those decisions that discuss *Conley* or *Twombly* in the context of a Title VII motion to dismiss. A broader search could have been constructed by

141. Hannon, *supra* note 20, at 1829.

examining the outcome of these cases regardless of whether the district court actually cited the *Conley* or *Twombly* decisions. Though providing additional data, however, such a search would likely not have revealed whether the district courts were actually considering the Supreme Court cases when they rendered their decisions.

Finally, as the data are limited to the year following the *Twombly* decision, the limited number of decisions makes it difficult to draw any concrete conclusions from a purely mathematical perspective. Thus, for example, the almost 6 percent differential in motions to dismiss that were either granted or granted-in-part in the pre-*Twombly* and post-*Twombly* opinions (as set forth in Table B above) does not rise to the level of statistical significance.¹⁴² As more cases are decided after *Twombly*, additional study and observation will be needed to decipher the ultimate impact of the decision. Nonetheless, the data set forth above showing a higher rate of dismissal in post-*Twombly* decisions are substantiated through individual review of the case law (discussed in greater detail below), which demonstrates a number of individual district court opinions relying on the *Twombly* plausibility standard to dismiss Title VII claims.¹⁴³

D. Summary Judgment Analysis

Those cases that do survive a defendant's motion to dismiss under *Twombly* will likely proceed through discovery and be reassessed at the summary judgment stage of the proceedings. At summary judgment in a case brought pursuant to Title VII, the district court will decide whether there is sufficient evidence for a reasonable jury to determine that the plaintiff was the victim of discrimination.¹⁴⁴ At this stage of the case, the court must "construe the facts in the light most favorable to the non-moving party and must resolve all ambiguities and draw all reasonable inferences against the movant."¹⁴⁵ Through the help of the FJC, I was able to attain recent data on the likelihood of an employment discrimination plaintiff surviving a motion for summary judgment filed by the defendant.

142. See ROBERT R. SOKAL & F. JAMES ROHLF, *BIOMETRY: THE PRINCIPLES AND PRACTICE OF STATISTICS IN BIOLOGICAL RESEARCH* 730–36 (1995) (illustrating Fisher's Exact Test for Independence). The author would like to acknowledge the generous assistance provided by Timothy Mousseau with the statistical computations in this Article.

143. See *infra* Part V.A (discussing various district court cases that have used *Twombly* to raise the bar for Title VII complaints).

144. See, e.g., *Beyer v. County of Nassau*, 524 F.3d 160, 163 (2d Cir. 2008) ("A dispute about a 'genuine issue' exists for summary judgment purposes where the evidence is such that a reasonable jury could decide in the non-movant's favor.>").

145. See, e.g., *id.* (quoting *Dallas Aerospace, Inc. v. CIS Air Corp.*, 352 F.3d 775, 780 (2d Cir. 2003)).

1. *Methodology*

The FJC amassed a database of all summary judgment motions filed in cases terminated in the federal district courts during fiscal year 2006.¹⁴⁶ The cases were assembled through an inquiry into the federal district court electronic case filing system (commonly referred to as CM/ECF).¹⁴⁷ With a few limited exceptions, the data were collected from every federal district court, totaling 276,120 civil cases that were terminated during this time frame.¹⁴⁸ The study identified a total of 62,938 summary judgment motions and related court orders.¹⁴⁹ From this data set, the FJC agreed, at my request, to perform a search of all employment discrimination cases terminated during fiscal year 2006 where a summary judgment motion, including a motion for partial summary judgment, was filed by the defendant.¹⁵⁰ The search included all cases coded as “Civil Rights—Employment” or “Disability—Employment.”¹⁵¹

2. *Results of Analysis and Conclusions*

The FJC’s search of employment discrimination cases terminated in the federal district courts during fiscal year 2006 where a defendant filed a motion for summary judgment that was decided by the district court revealed a total of 3983 summary judgment orders.¹⁵² These decisions were then sorted on the basis of whether they were denied, granted, or granted-in-part.¹⁵³ The results are set forth in Table C below.

TABLE C

Result of Motion	Number of Motions	Percentage of Total Motions
Granted	2495	62.6%
Granted-in-Part	724	18.2%
Denied	764	19.2%
Total	3983	100%

146. See FED. JUDICIAL CTR., REPORT ON SUMMARY JUDGMENT PRACTICE ACROSS DISTRICTS WITH VARIATIONS IN LOCAL RULES 3 (Apr. 12, 2008 & Aug. 13, 2008) (on file with author). The author acknowledges the significant effort by Joe Cecil and the FJC in providing the summary judgment data set forth in this Article.

147. See *id.*

148. See *id.* at 3–4. Data could not be collected from the Western District of Wisconsin, the District of the Northern Marianas Islands, or the District of the Virgin Islands. *Id.*

149. *Id.* at 3.

150. See E-mail from Joe S. Cecil, Senior Research Associate, Federal Judicial Center, to author (May 19, 2008) (on file with author) [hereinafter FJC E-mail].

151. The nature of suit codes are 442 and 445, respectively. See *id.* Unfortunately, there was no way specifically to isolate Title VII cases.

152. See FJC Data Set Search Results of “civil rights—employment” and “disability—employment” Suit Codes (May 19, 2008) (on file with author).

153. See *id.*

The results uncovered by the FJC analysis are revealing. A plaintiff facing a summary judgment motion filed by a defendant faces over an 80 percent likelihood that the motion will be granted or granted-in-part if decided by the district court.¹⁵⁴ And given the frequency with which defendants file motions for summary judgment in employment discrimination cases, this means that a substantial number of these claims are never finding their way to trial.¹⁵⁵ Given the difficulty plaintiffs face in surviving a defendant's motion for summary judgment, the courts should be particularly hesitant to dismiss the case even earlier in the proceedings.¹⁵⁶ The courts should be flexible in their approach to a plaintiff's complaint and allow these litigants the opportunity to amend their complaints when they are found to be deficient. If *Twombly* is viewed through too narrow a lens, many otherwise meritorious claims may be dismissed before they even have a chance to get off the ground.¹⁵⁷ The data set forth in this Section suggest that summary judgment is acting as a sufficient filter in ferreting out frivolous or unfounded claims.¹⁵⁸ There is simply no reason,

154. *See id.* The results of this study did not include those cases where the summary judgment motion was not decided by the district court. *See* FJC E-mail, *supra* note 150. One limitation of the data provided by the FJC is that it is unclear whether the summary judgment motions in the data set ultimately resolved the case or even directly addressed a specific claim brought under Title VII. *See* E-mail from Joe S. Cecil, Senior Research Associate, Federal Judicial Center, to author (June 20, 2008) (on file with author).

155. *See, e.g.,* Vivian Berger, Michael Finkelstein & Kenneth Cheung, *Summary Judgment Benchmarks for Settling Employment Discrimination Lawsuits*, 23 HOFSTRA LAB. & EMP. L.J. 45, 48 (2005) ("In Professor Berger's experience, most employers' counsel say during mediation [in an employment case] that they intend to file a 'Rule 56' motion if the case does not settle; and at least in the Southern and Eastern Districts of New York, a large number of employers do so."); Lawrence D. Rosenthal, *Motions for Summary Judgment When Employers Offer Multiple Justifications for Adverse Employment Actions: Why the Exceptions Should Swallow the Rule*, 2002 UTAH L. REV. 335, 336 ("After the conclusion of discovery in most employment discrimination lawsuits, employers file motions for summary judgment to dispose of the litigation prior to trial."). A FJC study also revealed that "12.5% of employment discrimination cases (389 of 3,108 cases) are terminated by summary judgment." *See* E-mail from Joe S. Cecil, Senior Research Associate, Federal Judicial Center, to author, and accompanying attachments (Sept. 24, 2008) (on file with author).

156. *See generally* Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts* (Cornell Law Sch. Legal Studies Research Paper Series, Working Paper No. 08-022, 2008), available at <http://ssrn.com/abstract=1138373> (providing an excellent study of employment discrimination dismissal rates on summary judgment and an overview of the data set used by the FJC).

157. *See generally* Elaine M. Korb & Richard A. Bales, *A Permanent Stop Sign: Why Courts Should Yield to the Temptation to Impose Heightened Pleading Standards in §1983 Cases*, 41 BRANDEIS L.J. 267 (2002) (discussing the implications of imposing heightened pleading standards to civil rights claims).

158. It could be argued that judicial resources would be saved by weeding out meritless cases earlier in the proceedings. It is quite difficult, however, to assess the true merit of an employment discrimination case until discovery has taken place. *See id.* at 293-94; Spencer, *supra* note 15, at 159-61; *see also infra* text accompanying notes 294-95 (addressing the concern that the proposed approach set forth in this Article would cause "the employer to incur expensive litigation costs in defending against the claim").

then, to significantly raise the pleadings bar for Title VII litigants by making it more difficult to survive a motion to dismiss.¹⁵⁹

V. *TWOMBLY* IN FEDERAL COURT DECISIONS

A. District Court Views

The data discussed above¹⁶⁰ are better understood with an analysis of individual district court cases. A review of these decisions made one simple fact clear—the federal district courts are actively applying the *Twombly* plausibility standard to cases brought under Title VII. Indeed, the case review demonstrated that *multiple* federal district courts in *every* circuit have already cited *Twombly* in Title VII cases addressing defendants' motions to dismiss.¹⁶¹ Citing *Twombly* in the Title VII context, the district courts have concluded that “[f]actual allegations must be enough to raise a right to relief above the speculative level,”¹⁶² that the complaint must “plead enough facts to state a claim to relief that is plausible on its face,”¹⁶³ and that “the claims must be plausible and not merely conceiva-

159. See Spencer, *supra* note 15, at 159 (“[I]t is my view that a claim should not be discarded unless it has been demonstrated to lack merit. That is a determination that one may be able to make at the summary judgment stage but not truly at the motion to dismiss stage.”).

160. See *supra* Part IV (discussing the analysis of district court decisions following *Twombly*).

161. As organized by circuit, see, for example, Torres-Santiago v. Alcaraz-Emmanuelli, 553 F. Supp. 2d 75, 79–80 (D.P.R. 2008) (citing *Twombly* in a Title VII case); Perez v. Police Dep’t of P.R., No. 08-2184 (JAF), 2008 WL 382704, at *2 (D.P.R. Feb. 11, 2008) (same); Merhige-Murphy v. Vicon Indus., No. CV-07-1526 (SJF) (ARL), 2008 WL 111163, at *1–2 (E.D.N.Y. Jan. 7, 2008) (same); Falso v. Ablest Staffing Serv., 533 F. Supp. 2d 332, 335–37 (W.D.N.Y. 2008) (same); Grigsby v. Pratt & Whitney Amercon Inc., No. 1:CV-07-0785, 2008 WL 471549, at *5–6 (M.D. Pa. Feb. 19, 2008) (same); Deluzio v. Family Guidance Ctr., No. 06-6220 (FLW), 2007 WL 2990621, at *2 (D.N.J. Oct. 10, 2007) (same); Zampogna v. Gaston County Sch. Bd. of Educ., No. 3:07cv174, 2007 WL 4570869, at *2 (W.D.N.C. Dec. 26, 2007) (same); Lee v. Lacy, No. 7:07CV00488, 2008 WL 410127, at *2 (W.D. Va. Feb. 12, 2008) (same); Fassbender v. Treasure Chest Casino, No. 07-5265, 2008 WL 170071, at *2 (E.D. La. Jan. 16, 2008) (same); Jordan v. Miss. State Dep’t of Health, No. 3:06-cv-233-WHB-LRA, 2007 WL 2344963, at *1 (S.D. Miss. Aug. 14, 2007) (same); Berryman v. Supervalu Holdings, No. 3:05cv169, 2008 WL 696649, at *1 (S.D. Ohio Mar. 13, 2008) (same); Gex v. Toys ‘R’ Us, No. C-3-06-338, 2007 WL 2852351, at *2 (S.D. Ohio Oct. 2, 2007) (same); Hill v. Village of Franklin Park, No. 07 CV 4335, 2008 WL 686256, at *2 (N.D. Ill. Mar. 11, 2008) (same); O’Neal v. City of Chicago, No. 07 C 4788, 2007 WL 4197501, at *1 (N.D. Ill. Nov. 21, 2007) (same); Samuel v. HVM, LLC, No. 07CV2101 HEA, 2008 WL 906804, at *1–2 (E.D. Mo. Apr. 3, 2008) (same); Ewing v. Fresh Ideas Mgmt., No. 4:07CV1068 CEJ, 2007 WL 4210062, at *1 (E.D. Mo. Nov. 27, 2007) (same); Goethe v. California, Dep’t of Motor Vehicles, No. 2:07-CV-01945-MCE-GGH, 2008 WL 489554, at *2 (E.D. Cal. Feb. 20, 2008) (same); McDonald v. San Francisco Unified Sch. Dist., No. C07-4249 PJH, 2007 WL 3144832, at *2 (N.D. Cal. Oct. 24, 2007); Ashcraft v. Beicker, No. 07-cv-00860-WDM-KLM, 2008 WL 538919, at *1 (D. Colo. Feb. 21, 2008) (same); Johnson v. Denver Pub. Sch., No. 07-cv-01179-MSK-BNB, 2007 WL 3054984, at *3 (D. Colo. Oct. 18, 2007); Harris v. AGL Res., No. 1:07-CV-2838-TWT, 2008 WL 1902203, at *2 (N.D. Ga. Apr. 25, 2008) (same); Monsanto v. Fleming, No. 3:07-CV-105-J-33HTS, 2007 WL 3521724, at *2 (M.D. Fla. Nov. 15, 2007) (same); Vance v. Chao, 496 F. Supp. 2d 182, 184 (D.D.C. 2007) (same); Schroer v. Billington, 525 F. Supp. 2d 58, 62 (D.D.C. 2007) (same). For a complete list of all decisions citing *Twombly* by jurisdiction, see Case Analysis, *supra* note 137.

162. *Goethe*, 2008 WL 489554, at *2.

163. *Vance*, 496 F. Supp. 2d at 184 (quotations omitted).

ble.”¹⁶⁴ There can be little question, then, that *Twombly* is being extended beyond the antitrust context to employment discrimination cases.

But the question still remains as to whether the change in pleading standards is having any impact in the outcome of Title VII claims.¹⁶⁵ My research of the individual cases suggests that it is. Indeed, a few cases are particularly noteworthy in their application of the plausibility standard to employment discrimination claims. First, in *Mangum v. Town of Holly Springs*,¹⁶⁶ the plaintiff maintained that she had been subjected to a hostile working environment while employed by a city fire department.¹⁶⁷ The plaintiff alleged that she was told that male firefighters did not want to work with her because of her gender.¹⁶⁸ Over the course of her employment, the plaintiff complained about inappropriate language used by firefighters, including the words “mother f-ker,” “c-ksucker,” and “p-ssy.”¹⁶⁹ After one complaint, the plaintiff was told to “watch her back,” and she even observed that after complaining more firefighters were using vulgarities when she was present.¹⁷⁰ The plaintiff also expressed a concern over her personal safety if required to work with a particular employee.¹⁷¹ The district court dismissed the plaintiff’s Title VII harassment claim, concluding that although the environment was “perhaps unpleasant,” it was not objectively hostile or abusive.¹⁷² Relying on the language of *Twombly*, the court held that the plaintiff could not establish a hostile work environment claim “under any plausible reading of her complaint.”¹⁷³ Thus, despite presenting a chilling account of a working environment permeated with danger and sexually charged vulgarities, the plaintiff’s claim was not even allowed to proceed to discovery.¹⁷⁴

In *Urbanski v. Tech Data*, the plaintiff brought a Title VII race discrimination claim against her employer.¹⁷⁵ The plaintiff alleged in the complaint that she was African American and therefore a member of a protected class, that she applied for a job for which she was qualified, that the employer rejected her, and that the employer continued to take applications for the opening (or filled the job with someone outside of the class).¹⁷⁶ Relying heavily on *Twombly*, the district court concluded

164. *Congrove v. Plibrico Co.*, No. 2:07-CV-651, 2008 WL 203010, at *1 (S.D. Ohio Jan. 22, 2008).

165. See *supra* Parts IV.A–C (discussing the results of an analysis of district court dismissal rates before and after *Twombly* and setting forth limitations of the study).

166. See 551 F. Supp. 2d 439 (E.D.N.C. 2008).

167. *Id.* at 440.

168. *Id.* at 440–41.

169. *Id.* at 441.

170. *Id.* at 442.

171. *Id.* at 441.

172. *Id.* at 444.

173. *Id.*

174. Plaintiff’s disparate treatment and retaliation claims under Title VII were permitted to proceed. *Id.* at 446.

175. No. 3:07cv017, 2008 WL 141574, at *8–9 (N.D. Ind. Jan. 11, 2008).

176. *Id.*

that these allegations were insufficient to state a claim under Title VII.¹⁷⁷ The court held that the plaintiff's "claims of a general *prima facie* case do not suffice to show that she is entitled to relief (she does not claim that she was more qualified than her comparators)."¹⁷⁸ Thus, even though the plaintiff in the case set forth the basic *McDonnell Douglas* framework for establishing a Title VII case—thereby pleading more than that required by *Swierkiewicz*¹⁷⁹—the district court, rigidly applying *Twombly*, rejected the claim.¹⁸⁰

Similarly, in *Williams v. Ford Motor Co.*, the plaintiff alleged that he was fired because of his race.¹⁸¹ The plaintiff's complaint, in relevant part, stated that "the Defendant followed a policy and practice of discrimination against Plaintiff because of his . . . race (black) in violation of [Title VII]. The discriminatory practices and policies include, but are not limited to . . . [t]erminating plaintiff's employment on May 24, 2003 . . ."¹⁸² Relying on *Twombly*, the court rejected this complaint, concluding that the allegations were "insufficient to 'raise a right to relief above the speculative level.'"¹⁸³ The court's application of the new Supreme Court standard appears too rigid and requires more than that set forth in Rule 8. The plaintiff in this case sufficiently alleged the protected characteristic (race), the adverse action (termination), the causal link between the two, and the date of the discriminatory act.¹⁸⁴ It is difficult to understand how this complaint falls short of alleging a plausible Title VII claim or of giving the defendant sufficient notice.¹⁸⁵

The *Mangum*, *Urbanski*, and *Williams* decisions clearly illustrate that some district courts are not only applying the plausibility standard to Title VII claims, but that they are also raising the bar as to what an employment discrimination plaintiff must plead. It appears that *Twombly*

177. *Id.* at *9.

178. *Id.*

179. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002).

180. *Urbanski*, 2008 WL 141574, at *8–9. A significant part of the district court's error was its failure to recognize that the Seventh Circuit's standard—that "a plaintiff in a promotion or hiring case must show that the gap in credentials between the plaintiff and comparable non-protected employees 'must be so substantial as to slap you in the face,'" *id.* at *9 (quoting *Hudson v. Chi. Transit Auth.*, 375 F.3d 552, 562 (7th Cir. 2004))—was recently rejected by the Supreme Court. *Ash v. Tyson Foods, Inc.*, 546 U.S. 454, 457 (2006) ("The visual image of words jumping off the page to slap you (presumably a court) in the face is unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications.").

181. *Williams v. Ford Motor Co.*, No. 3:07-CV-2161-D, 2008 WL 659503, at *1 (N.D. Tex. Feb. 26, 2008).

182. *Id.*

183. *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007)).

184. *Id.*

185. The district court did give the plaintiff the opportunity to replead the case. *Id.* at *1–2. It is possible that the district court was troubled (perhaps correctly) by the plaintiff's failure to specify which adverse actions correlated with each particular legal theory, as the plaintiff also alleged violations of the ADA and the ADEA. *Id.* at *1. The court did not include this intermingling of claims as a reason for the dismissal, however. *Id.*

has already made the pleading requirements more difficult (and certainly more confusing) for Title VII litigants. And as the Supreme Court's decision is relatively new and untested, things may only get worse for employment discrimination plaintiffs as more defendants begin to use the case to their advantage.

B. *Uncertainty Among the Courts of Appeals*

Despite the fact that *Twombly* is a very recent decision, it has already generated significant confusion and conflicting decisions in the appellate courts. Only a few days after the Supreme Court's decision, one appellate judge questioned whether the decision left the circuit's law on pleadings intact in the employment discrimination context.¹⁸⁶ An excellent illustration of the differing interpretations of this decision is reflected in two recent circuit court opinions, *EEOC v. Concentra*¹⁸⁷ and *Wilkinson v. New Media Technology Charter School*.¹⁸⁸

1. *Seventh Circuit Approach*

In *Concentra*, an employee became aware of a sexual affair between his supervisor and another worker, and that the supervisor was giving the worker preferential treatment as a result of the relationship.¹⁸⁹ After reporting the situation to the company's "brass," the employee was terminated, and he subsequently filed a discrimination charge with the EEOC.¹⁹⁰ Suing on behalf of the terminated employee, the EEOC alleged that

[s]ince at least 2001, Defendant has engaged in unlawful employment practices at its Elk Grove location, in violation of Section 704(a) of Title VII . . . Such unlawful employment practices include, but are not limited to, retaliating against [the employee] after he opposed conduct in the workplace that he objectively and reasonably believed in good faith violated Title VII by reporting the conduct to Concentra's Director of Human Resources. Concentra's retaliation includes, but is not limited to, issuing [the employee] unwarranted negative evaluations and terminating him.¹⁹¹

186. See *supra* text accompanying note 1.

187. 496 F.3d 773 (7th Cir. 2007). The author served as lead counsel in the *Concentra* case on behalf of the Equal Employment Opportunity Commission (EEOC). The views expressed in this Article are those of the author and do not represent the views of the U.S. Equal Employment Opportunity Commission or of the United States.

188. 522 F.3d 315 (3d Cir. 2008).

189. *Concentra*, 496 F.3d at 775.

190. *Id.*

191. *Id.* at 776. The district court had dismissed an earlier complaint (without prejudice) because "it was clear at the time [the employee] reported the affair that favoring a subordinate because of a sexual relationship did not, without more, violate Title VII." *Id.* at 775. Thus, even if the employee

After the district court dismissed the EEOC's case, the Seventh Circuit considered the sufficiency of the complaint on appeal.¹⁹² The court initially noted that the *Twombly* decision would alter the circuit's jurisprudence, stating that its prior case law indicating that a complaint need only state a *possible* claim could not survive the Supreme Court's recent decision.¹⁹³ Thus, these prior cases

are no longer valid in light of the Supreme Court's recent rejection of the famous remark in [*Conley*] that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." . . . [I]t is not enough [after *Twombly*] for a complaint to avoid foreclosing possible bases for relief; it must actually suggest that the plaintiff has a right to relief by providing allegations that "raise a right to relief above the speculative level."¹⁹⁴

The Seventh Circuit therefore acknowledged up front that not only would it apply *Twombly* to Title VII cases, but that employment discrimination plaintiffs would now face a more rigid analysis of the sufficiency of their complaints. The court then affirmed the district court's dismissal of the complaint, holding that a plaintiff "alleging illegal retaliation on account of protected conduct must provide some specific description of that conduct beyond the mere fact that it is protected."¹⁹⁵ The court concluded that the EEOC's complaint must set forth the "conduct in the workplace" that the employee complained about, as this would consist of "easily provided, clearly important facts."¹⁹⁶ By failing to set forth these facts, the court held that the EEOC's complaint was properly dismissed.¹⁹⁷

The EEOC's complaint provided the location, timing, and nature of the retaliation and indicated to which company official the employee complained.¹⁹⁸ Nonetheless, the court found the complaint insufficient as it failed to set forth specific facts indicating what workplace conduct the employee was complaining about.¹⁹⁹ Interestingly, despite acknowledging earlier in the decision that *Twombly* abrogated much of its pleading jurisprudence, the court ended the opinion with a footnote stating that it

believed that the sexual relationship and preferential treatment were in violation of Title VII, this "belief was not reasonable." *Id.* at 775–76.

192. *Id.* at 776–77.

193. *Id.* at 777.

194. *Id.* (emphasis omitted) (citations omitted) (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965, 1980 (2007)).

195. *Id.* at 781.

196. *Id.* at 781–82. The court suggested that it might be enough to allege, for example, that the employee "complained that Concentra denied employees promotions because of their race." *Id.* at 781.

197. *Id.*

198. *Id.* at 775.

199. *Id.* at 781.

was “doubtful” that *Twombly* “changed the level of detail required by notice pleading.”²⁰⁰ Though *Concentra* certainly seems to raise the pleading requirement bar for Title VII litigants, its conflicting language thus leaves significant confusion as to the appropriate pleading standard for employment discrimination plaintiffs.²⁰¹

A separate concurrence by Judge Flaum only adds to this confusion. Judge Flaum makes clear that the EEOC’s complaint was sufficient prior to *Twombly* as it rose to the level of other “equally sparse pleadings that this Court previously approved.”²⁰² Judge Flaum found that the complaint was insufficient after *Twombly*, however, as the Supreme Court’s decision required the pleading of specific facts and altered the Seventh Circuit’s “pleading jurisprudence.”²⁰³ Thus, even after specifically analyzing *Twombly*’s impact on Title VII, the Seventh Circuit’s approach remains unclear, and there is disagreement within the circuit as to whether the case “changed the level of detail required by notice pleading.”²⁰⁴

2. *Third Circuit Approach*

In *Wilkerson*, the Third Circuit was much clearer about the impact of the *Twombly* decision on Title VII litigation.²⁰⁵ The court specifically held that “[t]he plausibility paradigm announced in *Twombly* applies with equal force to analyzing the adequacy of claims of employment discrimination.”²⁰⁶ The court still expressed some confusion over the Supreme Court’s decision, noting that “the exact parameters of the *Twombly* decision are not yet known.”²⁰⁷ However, after *Twombly*, the “[f]actual allegations must be enough to raise a right to relief above the speculative level.”²⁰⁸

Applying the new Supreme Court pleading precedent, the Third Circuit found that the plaintiff in the case had sufficiently alleged that she was unlawfully terminated because of her religion.²⁰⁹ The plaintiff

200. *Id.* at 782 n.4.

201. Notably, the decision even seems to acknowledge that the pleading standard may be unclear after *Twombly*, citing a Second Circuit decision stating that “[c]onsiderable uncertainty concerning the standard for assessing the adequacy of pleadings” remains after *Twombly*. *Concentra*, 496 F.3d at 783 n.4 (citing *Iqbal v. Hasty*, 490 F.3d 143, 154–58 (2d Cir. 2007), *rev’d*, *Ashcroft v. Iqbal*, No. 07-1015 (U.S. May 18, 2009), <http://www.supremecourtus.gov/opinions/08pdf/07-1015.pdf>). It should be noted that while this Article was in the process of going to print, the Supreme Court issued its decision in *Iqbal v. Ashcroft*, No. 07-1015 (U.S. May 18, 2009), <http://www.supremecourtus.gov/opinions/08pdf/07-1015.pdf>. See *supra* note 4 (discussing the *Iqbal* decision).

202. *Id.* at 783 (Flaum, J., concurring).

203. *Id.* at 784.

204. *Id.* at 783 n.4 (majority opinion).

205. *Wilkerson v. New Media Tech. Charter Sch.*, 522 F.3d 315 (3d Cir. 2008).

206. *Id.* at 322.

207. *Id.* at 321.

208. *Id.* at 321–22 (citation omitted).

209. *Id.* at 322.

had asserted that her termination was the result of her “‘Christian religious beliefs,’ ‘her refusal to engage in . . . [a particular] ceremony,’ and her ‘complaints related to the ceremony.’”²¹⁰ The plaintiff also alleged that the ceremony that she refused to engage in required participants to partake in “religious worship of their ancestors” and was in violation of her Christian beliefs.²¹¹ Because her complaints about the ceremony “were based on her religious beliefs,” the pleadings “could be read to allege that her termination was based on her religious beliefs, a violation of Title VII.”²¹²

The appellate court also addressed the plaintiff’s retaliation claim, which was “based on her complaints [to her employer] that she was required to attend the banquet at which there was allegedly ancestor worship in violation of her Christian beliefs.”²¹³ The court was not completely convinced that the plaintiff had a *reasonable* belief that the employer engaged in unlawful conduct, and noted that the plaintiff’s assertions of religious discrimination tended to “blend into each other.”²¹⁴ Nonetheless, given the early stage of the case, the court could not conclude that the retaliation claim was “implausible,” and permitted the claim to go to discovery, which it suggested should be limited.²¹⁵

As the *Concentra* and *Wilkerson* decisions make clear, there is already disagreement over how *Twombly* should apply to employment discrimination claims. Similarly, the courts have been unable to establish a definitive standard for evaluating employment discrimination complaints and remain uncertain as to the appropriate standard for evaluating a plaintiff’s pleadings under Title VII. The time is thus long overdue to establish a clear and concise requirement for satisfying Rule 8(a) of the Federal Rules of Civil Procedure when alleging an employment discrimination claim. I therefore propose below a theoretical construct to apply when determining the sufficiency of all claims of intentional employment discrimination brought under Title VII.

VI. A NEW PROPOSAL FOR EMPLOYMENT DISCRIMINATION PLEADING

The data set forth above demonstrate a higher percentage of decisions that grant a motion to dismiss in the Title VII context when the

210. *Id.*

211. *Id.*

212. *Id.* The court rejected the plaintiff’s accommodation claim, however, because the plaintiff did not notify her employer that the ceremony in question created a religious conflict until after it had taken place. Thus, because she failed to inform her employer of the conflict, “it did not have a duty to accommodate her.” *Id.* at 319.

213. *Id.* at 322.

214. *Id.*

215. *Id.* Judge Stapleton disagreed with the majority’s opinion with regard to the retaliation claim, and would have concluded that the plaintiff failed to sufficiently plead this allegation. *Id.* at 323–24 (Stapleton, J., concurring in part and dissenting in part).

courts rely on the new Supreme Court decision, and individual examination of the cases shows district courts using *Twombly* to dismiss Title VII claims.²¹⁶ Irrespective of this research—or how the data are interpreted—one thing remains certain: *Twombly* has created significant confusion over the proper pleading requirements in Title VII cases. The decision has left the courts guessing as to how the plausibility standard should be applied, even creating conflict within the Seventh Circuit as to whether the circuit's prior case law on employment discrimination pleading was left intact.²¹⁷ And though altering the playing field for employment discrimination litigants, *Twombly* provides no help in establishing what facts Title VII plaintiffs must plead, as the decision arose in the antitrust context.

Nonetheless, there are clear lessons to be taken from *Swierkiewicz* and *Twombly*. We know that a plaintiff need not set forth facts sufficient to create a prima facie case of discrimination.²¹⁸ And we also know that simply establishing that a claim is “conceivable” is not enough.²¹⁹ The Supreme Court has thus articulated the upper and lower thresholds for what a Title VII litigant must set forth in the complaint to state a claim for relief. The proper pleading standard for employment discrimination plaintiffs is therefore somewhere in the middle. And this exact “somewhere” has also been articulated by the Court—the claim must be *plausible*.²²⁰

A. A New Pleading Framework

Formulating a new approach and pleading standard for employment discrimination plaintiffs therefore means clearly articulating the definition of plausibility under Title VII. The statute is extremely clear in establishing what constitutes a “claim” of intentional discrimination. The statute makes it unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”²²¹

216. See *supra* Parts IV–V (discussing the results of an analysis of the *Twombly* decision in Title VII litigation and setting forth the limitations of the study).

217. See *supra* Part V.B.1 (discussing the Seventh Circuit’s decision in *Concentra*, 496 F.3d 773 (7th Cir. 2007)); A. Benjamin Spencer, *Deconstructing Pleading Doctrine* 11 (Wash. & Lee Legal Studies, Paper No. 2008-41, 2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1272074 (“The lack of clarity and precision we have described is problematic because claimants will be uncertain about what they must plead, defendants will be emboldened to challenge the sufficiency of claims, and courts may apply inconsistent standards that lead to divergent results in similar cases.”).

218. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002).

219. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007).

220. *Id.*

221. 42 U.S.C. § 2000e-2(a) (2006).

More simply stated, under the statute and *Twombly*, plaintiffs must allege sufficient facts to show that it is plausible that they were discriminated against because of their race, color, sex, national origin, or religion.²²² In an area of the law where one can imagine endless fact patterns that would constitute discriminatory behavior, clearly defining what facts would establish such a claim is not an easy task. Nonetheless, there are a number of common facts involved in all discrimination claims that would be necessary to establish a successful lawsuit under Title VII. This common information would be readily available to any victim of employment discrimination, and should therefore be required to be alleged in any Title VII complaint to give the defendant fair notice of the claim.

I set forth these common elements in more detail below in a five-part proposed pleading framework for all Title VII plaintiffs alleging intentional discrimination. This framework addresses the substantive elements of a claim of discrimination and does not focus on the jurisdictional requirements or necessary prerequisites to suit. The proposed pleading model will answer the question of what constitutes a plausible Title VII claim and will resolve the current confusion over what facts a Title VII plaintiff must plead to state a claim for relief. As explained in greater detail below, Title VII plaintiffs who adequately set forth the following facts will have established plausible claims of discrimination under the statute and will have provided sufficient notice to defendants of their claims.

1. *Identify the Victim(s)*

The defendant must have notice of who the alleged victims of discrimination are so that it is able to properly defend the case and respond to the complaint. This requirement seems relatively straightforward, as it should. Identifying the victim or victims of discrimination is the most basic element of any discrimination claim, and it is the most important piece of information in allowing the defendant to formulate a defense. Identifying victims in large class actions or systemic discrimination claims may be more difficult, but as noted below, the proposed pleading framework set forth here would be inapplicable to this type of complex litigation.²²³

2. *Identify the Protected Characteristic(s)*

The victims of employment discrimination should also be readily able to identify the protected characteristic or characteristics on which they believe the discrimination took place, and this fact should therefore

222. *Id.*; *Twombly*, 127 S. Ct. at 1974.

223. *See infra* Part VI.B (discussing application of the proposed theory).

be a requirement for any complaint. Title VII protects individuals from discrimination on the basis of race, color, sex, national origin, and religion,²²⁴ as well as retaliation.²²⁵ Thus, for example, if an individual believes she was terminated because she is a woman, she should clearly set forth in her allegations that “I was fired because of my female gender.” If an employee discovers during the course of litigation that she was discriminated against on the basis of an additional protected characteristic, the court should consider allowing the plaintiff to amend her complaint to reflect the additional basis for the claim.²²⁶

3. *Identify the Nature of the Discrimination Suffered*

A plaintiff must clearly set forth the nature of the discrimination suffered to properly allege a claim under Title VII. In a typical case of discrimination, this would mean setting forth the adverse action—the specific harm the victim suffered. The Supreme Court has never clearly articulated what constitutes an adverse action in a typical employment discrimination case, but it is fairly clear, based on other Supreme Court jurisprudence and the plain terms of the statute, that termination, failure to hire, failure to promote, and reassignment with significantly different job responsibilities all should constitute adverse actions.²²⁷ Outside of these specific adverse activities, the lower courts have applied varying standards for what constitutes an adverse action. For example, some courts require that the plaintiff demonstrate “an ultimate employment action,”²²⁸ whereas others require a showing of something “materially adverse.”²²⁹

224. 42 U.S.C. § 2000e-2(a).

225. *Id.* § 2000e-3(a).

226. This amendment would be subject, however, to the usual administrative exhaustion requirements. It is also worth noting that some jurisdictions have additional requirements for so-called reverse discrimination claims. Thus,

[w]here a white worker sues a predominately white institution . . . several circuits require different proof than would be required for an African American or a woman. A typical formulation is that, to establish a prima facie case, a reverse discrimination plaintiff must “present evidence of ‘background circumstances’ that establish that the defendant is ‘that unusual employer who discriminates against the majority.’”

Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L. REV. 1031, 1058–59 (2004) (quoting *Iadimarco v. Runyon*, 190 F.3d 151, 156 (3d Cir. 1999)). Though a plaintiff should not be *required* to plead these “background circumstances” in the complaint, a cautious litigant in one of these jurisdictions might still want to acknowledge that these circumstances exist or provide some factual information as to why the defendant is an “unusual” employer.

227. See *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) (“A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”); cf. *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2413 (2006) (“*Ellerth* did not discuss the scope of the general anti discrimination provision.”).

228. See, e.g., *Brockman v. Snow*, 217 Fed. App’x 201 (4th Cir. 2007) (“The standard for an adverse employment action in a disparate treatment case is different than in a retaliation case: in a discrimination case, our precedent mandates that the plaintiff has the higher burden of showing an ‘ulti-

In the context of a complaint, then, a plaintiff would be required to properly set forth the adverse action he or she suffered. Thus, for example, if a plaintiff believed she was improperly terminated because of her gender, she would be required to set forth in the complaint that the termination is the discriminatory act of which she is complaining. If the action alleged by the plaintiff does not rise to the level of being “sufficiently adverse” under either Supreme Court or circuit case law, the defendant could move to dismiss the complaint for failure to state a claim.²³⁰ This requirement should not be construed as being overly onerous, however, and the plaintiff should not be required to discuss any factual detail about the adverse action to satisfy this element. Rather, the adverse action must simply be set forth in the complaint.

4. *Identify the Timing of the Discrimination*

To give the defendant proper notice, the approximate date that the victim suffered the adverse action should also be set forth in the complaint. In a typical hiring or firing case, setting forth the specific date of the adverse action should be fairly straightforward. In other circumstances, such as a failure to promote or a wage discrimination case, it may be more difficult to pinpoint the exact date that the discrimination took place.²³¹ Again, identifying the timing should not be a burdensome process, and the plaintiff should simply be required to set forth the best estimate of the date or dates on which the discrimination occurred.

For discrete acts of discrimination, then, a sufficient complaint could state, “I was terminated on or about January 7, 2008, because of my gender.” To the extent discovery would shed additional light on these dates or alter the original date set forth in the allegations, the plain-

mate employment’ action that affects hiring, granting leave, discharging, promoting, and compensating.”) (internal quotation omitted); Rebecca Hanner White, *De Minimis Discrimination*, 47 EMORY L.J. 1121, 1140 (1998) (“A number of district courts around the country have followed suit, requiring an ‘ultimate employment decision’ before discrimination under either Section 703 or Section 704 will be actionable.”).

229. See, e.g., *Nichols v. S. Ill. Univ.-Edwardsville*, 510 F.3d 772, 780 (7th Cir. 2007) (stating that Title VII plaintiffs “must show that they suffered a materially adverse employment action”); cf. White, *supra* note 228, at 1145 (“Although the Seventh Circuit and its adherents purport to view a ‘materially adverse’ employment action only as an element of a prima facie case, the decisions are not always clear.”).

230. See, e.g., *Joseph v. LaCoste*, No. 00 C 5456, 2001 WL 527316, at *1 (N.D. Ill. May 15, 2001) (“[Plaintiff] . . . alleges [Defendant’s] failure to sign Plaintiff’s application for a grant and ‘disparagement’ of Plaintiff constituted racial discrimination in violation of Title VII. Neither act constitutes a ‘materially adverse change in the terms and conditions of employment’ so as to qualify as an adverse employment action, . . . [and therefore the] Motion to Dismiss [this count] is granted.”).

231. Cf. Deborah L. Brake, *Perceiving Subtle Sexism: Mapping the Social-Psychological Forces and Legal Narratives that Obscure Gender Bias*, 16 COLUM. J. GENDER & L. 679, 681 (2007) (“We live in a world where gender, race, and sexuality form a complex web of identity that subtly affects, in myriad ways, how people respond to us. As we know from life experience and the study of law, facts are messy and causation is tricky to pin down.”).

tiff should be permitted to amend the complaint to update this requirement. The timing requirement would also allow the defendant to determine whether the charge of discrimination was filed in a timely manner, as the charge must be filed with the EEOC within 180 or 300 days²³² of the alleged discrimination.²³³ If the charge is untimely, identifying this fact quickly and preventing the case from going further into the costly discovery process would save both the court and litigants significant resources.

The timing requirement might be particularly difficult in cases alleging a hostile work environment. These types of claims often involve multiple acts by a supervisor, co-worker, or customer over an extended period of time.²³⁴ A plaintiff alleging discriminatory harassment should be required to give only a generalized time frame of when the discrimination occurred (e.g., "I was harassed over the course of my employment because of my gender."). The specifics of pleading hostile work environment claims under the proposed pleading framework are discussed in greater detail below.²³⁵

5. *Discrimination by the Employer Was Because of the Plaintiff's Protected Characteristic*

The most difficult part of establishing most employment discrimination claims is demonstrating intent.²³⁶ The statute states that a victim of discrimination must demonstrate that an adverse action was taken "because of" a protected characteristic.²³⁷ Intentional discrimination is most often established through circumstantial evidence²³⁸ and the Supreme Court's multifactor test as set forth in *McDonnell Douglas v. Green*.²³⁹

232. See, e.g., *Jones v. AIRCO Carbide Chem. Co.*, 691 F.2d 1200, 1201 (6th Cir. 1982) ("In deferential states, a plaintiff has 300 days to file a charge of discrimination with the EEOC regardless of whether or not a charge has been filed within 180 days with the appropriate state agency.")

233. See, e.g., *Fields v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 301 F. Supp. 2d 259, 262 (S.D.N.Y. 2004) ("A party seeking to recover damages pursuant to Title VII must first comply with the prerequisite set forth in [the statute] by filing a Charge of Discrimination with the EEOC within 300 days of the last act of unlawful discrimination. If that charge is not timely filed, a Title VII claim must be dismissed.")

234. See *Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 116-17 (2002) (discussing hostile work environment claims and noting that such an action "is composed of a series of separate acts that collectively constitute one unlawful employment practice" (internal quotation omitted)).

235. See *infra* Part VI.C (discussing application of the proposed pleading framework to hostile work environment claims).

236. See D. Don Welch, *Removing Discriminatory Barriers: Basing Disparate Treatment Analysis on Motive Rather Than Intent*, 60 S. CAL. L. REV. 733, 773 (1987) ("The task of proving intentional discrimination is a difficult task indeed. Since purposefully discriminatory conduct is no longer generally acceptable in our society, it is often disguised through the use of rules or procedures which have some plausible relation to legitimate concerns.")

237. 42 U.S.C. § 2000e-2(a) (2006).

238. See, e.g., *Troupe v. May Dep't Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994) ("[C]ircumstantial evidence is admissible . . . to provide a basis for drawing an inference of intentional discrimination.")

239. 411 U.S. 792 (1973).

As a critical element of a Title VII claim, causation should be stated by the alleged victim of discrimination to provide notice to the employer that the action was taken intentionally.

Nonetheless, it should not be difficult for an individual to state a claim in this regard, which would most easily be accomplished by indicating that the adverse action was taken by the employer²⁴⁰ against the individual *because of* her membership in a protected group. Though the proposed pleading framework set forth here does not address potential claims for unintentional (or disparate impact) discrimination, a litigant believing that she was discriminated against on the basis of a facially neutral practice or policy²⁴¹ could similarly allege this type of discrimination in the complaint.

B. *New Pleading Framework Summary*

The proposed new pleading model for Title VII discrimination claims set forth above has five components. To be sure that the plaintiff has stated a plausible claim in light of *Twombly*, a Title VII litigant should make certain that the allegations clearly provide the following facts:

1. The victim or victims of the alleged discrimination;
2. The protected characteristic or characteristics of the plaintiff;
3. The nature of the discrimination suffered;
4. The approximate time that the discrimination occurred; and
5. That the discrimination by the employer was because of the plaintiff's protected characteristic.

240. The complaint should further link the discrimination to the employer by alleging that it was the employer that took the adverse action, an inquiry that is particularly critical in hostile work environment cases. See *infra* Part VI.C (discussing vicarious liability in hostile work environment cases). Additionally, by asserting that the "employer" took the adverse action, the plaintiff is also implicitly alleging that the defendant falls within the definition of "employer" under Title VII. See 42 U.S.C. § 2000e(b) ("The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . ."). To safely allege coverage, however, the plaintiff should also assert in the complaint the basis for the employer falling under Title VII's provisions. See *id.* Coverage, which should be sufficiently addressed by the plaintiff as a prerequisite to suit, is largely beyond the scope of this Article, which deals primarily with the sufficiency of the substantive allegations of discrimination.

241. See Kenneth R. Davis, *Age Discrimination and Disparate Impact: A New Look at an Age-Old Problem*, 70 BROOK. L. REV. 361, 362 (2004) ("Disparate impact theory makes facially neutral employment practices unlawful if they have a disproportionately adverse impact on a protected class. This theory outlaws unintentional discrimination unless the employer shows that business necessity justifies the challenged employment practice. To show business necessity, the employer ordinarily links the challenged employment practice to job performance.").

If a plaintiff has properly alleged these five facts, there can be little doubt that the plaintiff has stated a claim of discrimination under Title VII. Similarly, there can be no doubt that a defendant who is provided with this information will have notice of the claim and will be able to properly respond to or move to dismiss the complaint.²⁴² This five-part framework should be construed as a liberal pleading standard,²⁴³ and a plaintiff who improperly omits any of these facts should be given an opportunity to remedy the defect by filing an amended complaint.²⁴⁴ The proposed model is therefore not intended to create a trap for the unwary victim of discrimination.²⁴⁵ And, like all claims at this early stage of the pleadings, the facts should be taken as true and could be set forth in any order.²⁴⁶ Thus, this proposed framework does not create an onerous burden for the plaintiff, who should easily be able to provide these facts to the court and the defendant. And, again, the proposed framework addresses the substantive elements of a claim of discrimination and does not focus on the jurisdictional requirements or necessary prerequisites to suit.

The following example will help demonstrate the simplicity with which this proposed standard—and thus inherently the Supreme Court's *Twombly* and *Swierkiewicz* standards—would be satisfied. A sufficient claim of sex discrimination in violation of Title VII could state, "On January 18, 2007, I was terminated by my employer because I am a woman." Though simple, the claim complies with the proposed framework as it sets forth the victim ("I" or the signatory to the complaint), the protected characteristic (female gender), the adverse action (termination), the approximate time the discrimination occurred (January 18, 2007), and acknowledges causation (the termination was "by my employer" and "because" of the protected characteristic). This allegation not only states a

242. To the extent that the case is in some way unique and the defendant believes that more specificity should be required in the complaint, the defendant could move pursuant to Federal Rule of Civil Procedure 12(e) for a more definite statement. *See, e.g., Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) ("If a pleading fails to specify the allegations in a manner that provides sufficient notice, a defendant can move for a more definite statement under Rule 12(e) before responding."); *Aadil v. Shurtleff*, No. 2:07-CV-34 TS, 2008 WL 906760, at *6 (D. Utah Apr. 1, 2008) ("[A]s the Complaint is extremely vague regarding the positions for which Plaintiff was denied employment and the factual circumstances of such denials, the Court agrees that Plaintiff should be required to provide a more definite statement of his Title VII claims under Rule 12(e).").

243. *See, e.g., Matthews v. Marten Transp., Ltd.*, 354 F. Supp. 2d 899, 900–01 (W.D. Wis. 2005) (noting the "liberal pleading standard of Fed. R. Civ. P. 12(b)(6)").

244. *See, e.g., Todd v. Tennis*, No. 1:08-CV-00240, 2008 WL 2202012, at *1 (M.D. Pa. May 23, 2008) ("Under this liberal pleading standard, courts should generally grant plaintiffs leave to amend their claims before dismissing a complaint that is merely deficient.").

245. *Cf. United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Pilot Life Ins. Co.*, No. C-90-29-G, 1991 WL 210855, at *13 (M.D.N.C. Aug. 6, 1991) ("The requirements of Rule 8(a) are not designed to act as a trap for the unwary.").

246. *See, e.g., Rupnow v. TRC, Inc.*, 999 F. Supp. 1047, 1047–48 (N.D. Ohio 1998) ("When considering a motion to dismiss, a plaintiff's factual allegations are deemed true and any ambiguities are resolved in his or her favor.").

plausible violation of Title VII, it closely mirrors the statute itself, which requires a showing that the employer took an adverse action because of an individual's protected characteristic.²⁴⁷

Prior to *Twombly*, Judge Easterbrook eloquently stated that “‘I was turned down for a job because of my race’ is all a complaint has to say” to state a Title VII claim for racial discrimination.²⁴⁸ This statement satisfies the Federal Rules of Civil Procedure “because discrimination in employment is a claim upon which relief can be granted.”²⁴⁹ This statement of the pleading standard certainly demonstrates the relative simplicity with which a Title VII plaintiff should be able to allege a discrimination claim. Persuaded by Judge Easterbrook's formulation of the pleading requirements, the Court of Appeals for the District of Columbia adopted this standard.²⁵⁰

As *Twombly* likely raises the bar for employment discrimination plaintiffs, the proposed framework set forth here requires more than that set forth by Judge Easterbrook. But not much more. Judge Easterbrook's formulation would require that the plaintiff plead the victim, the protected characteristic, and the adverse action.²⁵¹ The proposed model set forth above simply requires adding the additional fact of the timing of the adverse action and more clearly requires an acknowledgment of causation.²⁵² These additional facts would certainly give the defendant notice of the claim against it and establish a plausible Title VII violation.²⁵³

247. See 42 U.S.C. § 2000e-2(a) (2006) (making it unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin”).

248. *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998).

249. *Id.* This standard may not survive *Twombly*, however, as Judge Easterbrook's opinion relies on another Seventh Circuit decision stating that “a complaint is not required to allege all, or any, of the facts logically entailed by the claim.” *Id.* (quoting *Am. Nurses' Ass'n v. Illinois*, 783 F.2d 716, 727 (7th Cir. 1986) (emphasis added by *Bennett* decision)). This statement is at least called into question by *Twombly*'s abrogation of *Conley*. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1969 (2007).

250. *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1115 (D.C. Cir. 2000). In adopting this standard, the court explicitly stated, “In sum, we agree with the conclusion reached by Judge Easterbrook in *Bennett* . . .” *Id.*

251. *Bennett*, 153 F.3d at 518.

252. In *Bennett*, Judge Easterbrook discussed the possibility of the plaintiff adding intent to the complaint, stating that

[b]ecause success on a disparate-treatment approach under Title VII of the Civil Rights Act of 1964, or under the equal protection clause of the fourteenth amendment, enforced via 42 U.S.C. § 1983, requires proof of intentional discrimination, a plaintiff might want to allege intent—although this is implied by a claim of racial “discrimination.”

Id.

253. It is worth noting that Title VII claims are different from many other civil causes of action in that the defendant typically will have received notice of the relevant allegation of discrimination long before a federal complaint is ever filed. Plaintiffs are required to file a charge of discrimination with the EEOC prior to bringing suit, and defendants receive notice of this charge. See 42 U.S.C. § 2000e-5(b) (2006) (“Whenever a charge is filed . . . the Commission shall serve a notice of the charge (including the date, place and circumstances of the alleged unlawful employment practice) on such employ-

The proposed model also comports with the example set forth in an appendix to the Federal Rules that explains what is necessary to state a claim. Pursuant to that sample pleading form, a claim of negligence can be stated by pleading that “[o]n *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff” resulting in physical injury.²⁵⁴

As this form demonstrates, setting forth the victim, the harm that occurred, the date and location of the occurrence, and acknowledging the causal link (in the above example, negligence) is sufficient to state a claim. There is no reason to believe that anything more would be required in the employment discrimination context under the Federal Rules, or under either *Twombly* or *Swierkiewicz*.²⁵⁵ Setting forth the similar factual elements discussed above for a Title VII claim should therefore establish that such a claim is plausible.

It is important to note that the proposed pleading model set forth above would be used primarily for Title VII claims²⁵⁶ and that the model would be inapplicable to complex or systemic employment litigation, where the sufficiency of the facts included in the complaint should be assessed on more of a case-by-case basis.²⁵⁷ Similarly, as the model set forth here addresses claims of intentional discrimination, the proposed formula would be inapplicable to claims of unintentional (disparate impact) discrimination—though it could be argued that both types of discrimination should be considered under a unified standard.²⁵⁸

er . . . within ten days . . .”). As a practical matter, then, the defendant has already received some notice of the claim or claims against it before the litigation begins.

254. Form 11, Complaint for Negligence, FED. R. CIV. P. Forms App. This form (which was recently revised and moved from Form 9) is discussed by the dissent in *Twombly* to demonstrate the minimal pleading requirements of the Federal Rules. *Twombly*, 127 S. Ct. at 1977 (Stevens, J., dissenting); see also *Am. Nurses’ Ass’n*, 783 F.2d at 723 (discussing previous Form 9); Mercer, *supra* note 26, at 1170 (discussing previous Form 9 and observing that “[t]he example pleadings attached to the Rules emphasized—and continue to emphasize—how brief and conclusory acceptable complaints can be”).

255. The only additional fact critical to a claim of discrimination is the plaintiff’s protected characteristic.

256. A unique pleading dilemma faces plaintiffs pursuing claims under the ADA. These claims often turn on whether the plaintiff has demonstrated that she is “disabled” under the statute. See, e.g., *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 486–89 (1999) (discussing whether plaintiffs are disabled under the statute). The extent to which plaintiffs must plead their disabilities after *Twombly* remains an open question. Similarly, the disability statute requires that an employer reasonably accommodate disabled individuals. See, e.g., *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 405–06 (2002) (discussing the accommodation requirement). There is now the further question of the extent to which a plaintiff must plead the facts surrounding an employer’s failure to accommodate.

257. Indeed, as *Twombly* involved complex litigation in the antitrust context, 127 S. Ct. 1955 (2007), class action employment discrimination plaintiffs should take special care to make certain that the facts set forth in the complaint state a plausible claim under Title VII.

258. See generally Joseph A. Seiner, *Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach*, 25 YALE L. & POL’Y REV. 95 (2006) (arguing that intentional and unintentional discrimination claims should be considered under a unified approach).

C. Special Cases—Retaliation and Hostile Work Environment

Though the proposed model would apply to all Title VII intentional discrimination claims outside of the class action context, retaliation and hostile work environment cases deserve particular consideration. Hostile work environment claims could properly be alleged using the five-part model set forth above. The one unique pleading difference in the hostile work environment context, however, would be properly setting forth the nature of the discrimination suffered in part three. Rather than the typical adverse actions such as hiring and firing that are alleged in most discrimination cases, the nature of the discrimination suffered here would be the hostile work environment itself.²⁵⁹ The Supreme Court has made clear that the hostile work environment must be both objectively and subjectively hostile,²⁶⁰ as well as unwelcome.²⁶¹ A proper complaint would therefore also include these facts.

A plaintiff should not be required to plead the specific acts that comprise the hostile work environment, as this would go well beyond the scope of notice pleading.²⁶² The Supreme Court has established that “no single factor is required” in hostile environment cases and that a court must assess “all the circumstances.”²⁶³ Nonetheless, the plaintiff would be free to include these facts, which the Supreme Court has stated include “frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”²⁶⁴ To illustrate, a properly alleged hostile work environment claim could be simply pleaded by stating, “Between August 27, 2006 and

259. In harassment claims that result in a tangible employment action (hiring, firing, failure to promote, or reassignment) rather than a hostile work environment, the specific tangible employment action should be stated in step three of the proposed model as the nature of the harm suffered. *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998) (setting forth tangible employment actions in harassment cases).

260. *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21–22 (1993) (“Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable person would find hostile or abusive—is beyond Title VII’s purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the conduct has not actually altered the conditions of the victim’s employment, and there is no Title VII violation.”).

261. *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 68 (1986) (“The correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary.”).

262. Indeed, it would be difficult, if not impossible to assess the sufficiency of the alleged facts at this early stage of the proceedings. *See Harris*, 510 U.S. at 23. It could be argued, however, that simply alleging harassment is itself a legal conclusion, and that the plaintiff should be required to set forth some facts relating to what comprised the harassment. Such a requirement, though, would go beyond the basic notice pleading requirements. And, as set forth above, the plaintiff will be required to provide the basic facts relating to the claim at issue.

263. *Id.*

264. *Id.*

January 18, 2007, my employer²⁶⁵ subjected me to an unwelcome and subjectively and objectively hostile working environment because of my female sex.”²⁶⁶ All of these facts should be well within the plaintiff’s knowledge at the time the complaint is filed and this standard should be relatively easy for the plaintiff to satisfy.

Retaliation claims also present a somewhat special case of discrimination, and pleading this type of Title VII claim involves setting forth different facts from a typical intentional discrimination case. A plaintiff can establish a retaliation claim by demonstrating that “(1) she engaged in activity protected by Title VII; (2) the employer took an adverse employment action against her; and (3) there was a causal connection between her participation in the protected activity and the adverse employment action.”²⁶⁷

As required by the new framework proposed above, a Title VII retaliation plaintiff should clearly set forth the victim or victims of the retaliation and identify the approximate time the retaliation occurred. Additionally, the plaintiff should provide the protected activity in which she engaged, such as filing a charge of discrimination with the EEOC, assisting in a government investigation of discrimination, or opposing conduct that is in violation of Title VII.²⁶⁸ If the protected activity involves opposing unlawful conduct, the employee should further specify the nature of the wrongful conduct.²⁶⁹

265. There is also a potential argument that plaintiffs should be required to plead a basis for vicarious liability and thus demonstrate why liability should be imputed to the employer. Though the plaintiff will ultimately be required to establish a basis for employer liability in the case, there is no reason to require litigants to make this showing at this early stage of the proceedings. See generally *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). Again, such a requirement would also go beyond the basic notice pleading requirements for a discrimination claim, and it should be enough to assert in the complaint that the “employer” caused the hostile work environment.

266. As hostile work environment claims often take place over a period of time that may be more difficult to pinpoint than cases involving discrete acts, plaintiffs should be required only to give their best estimate of the dates on which the discriminatory acts occurred. As discovery proceeds, the courts should permit these dates to be revised.

267. *Moore v. City of Philadelphia*, 461 F.3d 331, 340–41 (3d Cir. 2006); see also Lawrence D. Rosenthal, *To Report or Not to Report: The Case for Eliminating the Objectively Reasonable Requirement for Opposition Activities Under Title VII’s Anti-Retaliation Provision*, 39 ARIZ. ST. L.J. 1127, 1133–34 (2007) (discussing the prima facie case for retaliation under Title VII).

268. An employee’s activity can be protected by either the participation or opposition clause. See Lisa Cooney, *Understanding and Preventing Workplace Retaliation*, 88 MASS. L. REV. 3, 7 (2003) (“Employee protected activity generally falls into two categories: (1) participation, such as filing a claim or assisting in a sexual harassment investigation; or (2) opposition to unlawful employment practices. The participation category offers broader protection in allowing employees who have in any manner initiated or participated in a formal claim or investigation to proceed with and prevail on retaliation claims, even when the underlying claim has no merit. The opposition category, by contrast, protects only those employees who oppose unlawful practices or reasonably and in good faith believe an employer’s practices are unlawful.”).

269. See, e.g., *EEOC v. Concentra Health Servs., Inc.*, 496 F.3d 773, 781–82 (7th Cir. 2007) (requiring a retaliation complaint to set forth the “conduct in the workplace” that the employee complained about, as this would consist of “easily provided, clearly important facts”).

A retaliation plaintiff should also specify the adverse action. Unlike typical discrimination claims, the Supreme Court has clearly articulated the standard for establishing an adverse action in the retaliation context, holding that the defendant's conduct must be severe enough that it "might have dissuaded a reasonable worker from making or supporting a charge of discrimination."²⁷⁰ Thus, to determine whether the plaintiff has properly alleged an adverse action in a retaliation case, the court would evaluate the plaintiff's asserted adverse action against the Supreme Court's standard.

Finally, the retaliation plaintiff should acknowledge that the reason she was subjected to the adverse action was that she engaged in the protected activity. The framework for a retaliation claim would therefore be very similar to the proposed approach set forth above, and would include setting forth the victim, the timing, the adverse action, and causation—as well as the qualifying protected activity.

Again, this pleading requirement should not be considered an onerous burden, and the necessary information should all be in the plaintiff's possession at the time of the filing of the complaint. A plaintiff whose complaint is inadequate in some regard should be allowed to amend to come into compliance. Discussing the liberal nature of pleading a Title VII retaliation claim, the Court of Appeals for the District of Columbia stated that "in order to survive a motion to dismiss, 'all [the] complaint has to say, is the Government retaliated against me because I engaged in protected activity.'"²⁷¹ Though the formula set forth here requires slightly more in light of *Twombly*, the standard is still very minimal and should be construed liberally in favor of the plaintiff.

VII. IMPLICATIONS OF THE PROPOSAL

The proposed pleading framework for employment discrimination cases set forth above would have a number of implications for Title VII litigants and the courts. One significant benefit of the model is its simplicity. The proposal presents a very workable five-part test for plaintiffs to satisfy. To the extent a court finds a complaint inadequate under the model, the insufficiency is readily identified and the pleadings easily amended to come into compliance with the framework. The current pleading requirements under Rule 8 should be straightforward and simple to apply.²⁷² Unfortunately, their application by the courts has led to a

270. *Burlington N. & Santa Fe Ry. Co. v. White*, 126 S. Ct. 2405, 2415 (2006) (internal quotation and citation omitted).

271. *Rochon v. Gonzalez*, 438 F.3d 1211, 1220 (D.C. Cir. 2006) (internal quotation and citation omitted).

272. *See, e.g., Am. Nurses' Ass'n v. Illinois*, 783 F.2d 716, 723 (7th Cir. 1986) ("Our task would be easier if the complaint had been drafted with the brevity that the Federal Rules of Civil Procedure envisage though do not require:").

pleading “quagmire and resulting confusion.”²⁷³ The proposed framework advanced in this Article would be consistent with the simplicity intended by the federal rules and resolve the current confusion.²⁷⁴

Similarly, the confusion over the current standards and lack of a clear framework for pleading employment discrimination cases may encourage some courts to apply a heightened pleading standard to these claims.²⁷⁵ The analysis performed above suggests that district courts are already using the plausibility standard to dismiss Title VII claims.²⁷⁶ As civil rights cases comprise “up to seventeen percent of a court’s entire caseload,” a stringent pleading requirement would provide “federal courts an operative mechanism for filtering out meritless or baseless claims.”²⁷⁷ Nonetheless, this heightened pleading standard is clearly rejected by the Supreme Court and the Federal Rules.²⁷⁸ The proposed framework set forth above would therefore have the additional benefit of restricting the courts from applying too rigid a pleading standard to Title VII claims. In this way, the framework would focus the analysis of the courts on a narrow set of specific requirements for the complaint, rather than on the vague determination of whether the facts alleged state a plausible claim.

The proposed pleading framework would also bring uniformity to employment discrimination complaints. Such consistency is particularly important in light of the undefined plausibility standard announced by the Supreme Court in *Twombly*.²⁷⁹ The courts have been inconsistent in their analysis of the sufficiency of the facts set forth in Title VII complaints, and their conflicting approaches can leave plaintiffs in a quandary as to how to plead their claims.²⁸⁰ Indeed, even plaintiffs that act with an abundance of caution and set forth numerous facts in the com-

273. Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 592 (2002).

274. Korb & Bales, *supra* note 157, at 292 (“[H]eighted pleading requirements as they have been and are currently used and interpreted are textually unsupported and do not fit neatly into the present procedural system. The FRCP require simple notice pleading, intended to put the defendant [on notice].” (footnote omitted)).

275. *See id.*

276. *See supra* Parts IV–V (discussing the results of an analysis of Title VII district court decisions in the year after *Twombly* and setting forth the limitations of study).

277. Korb & Bales, *supra* note 157, at 291. For further discussion arguing against a heightened pleading standard for civil rights cases under Section 1983, *see id.* at 292–95.

278. *See, e.g.*, *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1974 (2007) (“[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.”); *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) (“[T]he Federal Rules do not contain a heightened pleading standard for employment discrimination suits.”).

279. *Twombly*, 127 S. Ct. at 1965.

280. *See* Phyllis Tropper Baumann, Judith Olans Brown & Stephen N. Subrin, *Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases*, 33 B.C. L. REV. 211, 250 (1992) (“Courts are not unanimous in advocating the revival of fact pleading in [T]itle VII cases. Some courts have criticized the specificity requirement and remained faithful to the Federal Rules.”). Interestingly, some jurisdictions may have pleading forms that assist plaintiffs in filing their employment claims. *See Johnson v. Hussmann Refrigeration, Inc.*, No. 4:06-CV-118 CEJ, 2006 WL 3103059, at *2 (E.D. Mo. Oct. 30, 2006) (“Plaintiff may use the ‘Employment Discrimination Complaint’ form provided by the Clerk of Court when submitting his amended complaint.”).

plaint can find these pleadings rebuffed by the courts for being overly “cumbersome” or “ridiculously long and rambling.”²⁸¹ Uniformity is therefore necessary to avoid courts’ varied approaches, and a single framework would provide consistency to the pleading requirements of Title VII.

The proposed model would also save judicial resources. Given the myriad of potential fact patterns that face the courts in employment discrimination cases, the uniformity of the proposed approach would assist plaintiffs in streamlining their complaints. Thus, courts would be less likely to face “aggravat[ion] by the length and complexity of the complaints.”²⁸² As Judge Posner properly noted in a sex discrimination case, “[o]ur task would be easier if the complaint had been drafted with the brevity that the Federal Rules of Civil Procedure envisage.”²⁸³ Additionally, greater certainty and uniformity in the complaint process would result in “reduced litigation costs,”²⁸⁴ as plaintiffs would not be required to engage in extensive pleadings and defendants would not have to respond to lengthy complaints. More clarity early on in the process would also increase the possibility of cases being settled before the expensive discovery process begins.²⁸⁵ The considerable savings in judicial resources for both the courts and litigants, as well as the increased potential for settling the case early in the process, would be significant benefits of implementing the proposed framework.

One additional benefit of the proposed approach is that it answers the question left after *Twombly*: what does plausible mean for a plaintiff pleading a case under Title VII?²⁸⁶ After the Supreme Court’s recent decisions on pleading requirements, we know that a plaintiff need not set forth facts sufficient to create a prima facie case of discrimination,²⁸⁷ but that simply establishing that a claim is “conceivable” is not enough.²⁸⁸ What is sufficient to establish a *plausible* Title VII claim in the gray area in between is likely to be a source of significant debate (and more problematically, litigation) in the upcoming months and years. If implemented, the proposed approach set forth here answers the plausibility

281. Hillary A. Sale, *Judging Heuristics*, 35 U.C. DAVIS L. REV. 903, 947 (2002) (citation omitted).

282. *Id.* at 946.

283. *Am. Nurses’ Ass’n v. Illinois*, 783 F.2d 716, 723 (7th Cir. 1986); *see also* Hannon, *supra* note 20, at 1839 (quoting and discussing Judge Posner’s opinion).

284. *See* Seiner, *supra* note 258, at 136 (“[A]ll parties should benefit in the long term as greater certainty in the legal process leads to reduced litigation costs.” (citation omitted)).

285. *See* Richard B. Stewart, *The Discontents of Legalism: Interest Group Relations in Administrative Regulation*, 1985 WIS. L. REV. 655, 662 (1985) (“The more certain the law—the less the variance in expected outcomes—the more likely the parties will predict the same outcome from litigation, and the less likely that litigation will occur because of differences in predicted outcomes.” (citation omitted)).

286. *See* *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007) (setting forth the plausibility requirement).

287. *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 511 (2002).

288. *Twombly*, 127 S. Ct. at 1974.

question in a way that balances the interests of both plaintiffs and litigants, and heads off this potential litigation.

Some might be concerned that although simple to apply, the approach is too onerous for plaintiffs and that the five-part framework requires too much of the plaintiff at this early stage of the proceedings. Though a fair concern, the proposed model is not overly demanding and can be satisfied through a simple statement or two that fairly give the defendant basic notice of the claim that is proceeding against it. More importantly, the framework complies with the Supreme Court's recent statement on pleading requirements in *Twombly* and *Swierkiewicz*, which when read together require that an employment discrimination litigant provide a factual basis for the claim.²⁸⁹ The proposed framework set forth here provides the bare minimum of facts necessary to state a plausible claim under Title VII and to permit the employer to have an understanding of the charges against it. And, all of these facts should be well within the plaintiff's knowledge at the time the complaint is filed, further suggesting that the proposed framework is not unduly burdensome.²⁹⁰

Some might also argue that the proposed approach does not go far enough and that the required facts do not provide sufficient information for the defendant to have a full understanding of the claim against it. Though defendants may feel that Title VII complaints do not provide adequate information to employers, the Federal Rules and Supreme Court case law do not require any more than the framework set forth here. Moreover, employers are provided with the basic underlying facts of the claims against them: a sufficient complaint must set forth the victim, the protected characteristic at issue, the nature of the discrimination, the time that it occurred, and the causal link.²⁹¹ These facts should be enough for an employer to begin an investigation of the charges against it. As already noted, Judge Easterbrook has stated "'I was turned down for a job because of my race' is all a complaint has to say" to state a Title VII claim for racial discrimination.²⁹² The proposed approach, guided by *Twombly*, requires even more than would Judge Easterbrook.²⁹³

289. See *supra* Part II.B.3 (discussing the implications of the Supreme Court decisions in *Conley* and *Swierkiewicz*); see also *supra* Part III.C (discussing the implications of the *Twombly* decision).

290. To the extent that some of the facts required by the proposed approach are not within the plaintiff's knowledge at the time the complaint is filed through no fault of the plaintiff, the claim should still be permitted to proceed. For example, the plaintiff may not be completely certain of the dates on which the discrimination occurred or when the discriminatory intent was actually formed by the employer. In these instances, the plaintiff should clearly state the basis for the lack of knowledge of a particular element. Similarly, the court may want to permit limited discovery in these circumstances before allowing the case to proceed to full discovery.

291. See *supra* Part VI (setting forth the proposed pleading framework for Title VII claims).

292. *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998).

293. Indeed, in setting forth the facts, plaintiffs must be cautious not to overplead their case and potentially plead themselves out of the litigation. See *Am. Nurses' Ass'n v. Illinois*, 783 F.2d 716, 724

Similarly, it could be argued that the proposed approach would permit baseless claims to proceed to the discovery stage of the case, causing the employer to incur expensive litigation costs in defending against the claim. Certainly, many meritless employment discrimination claims currently proceed through the early stages of the case, and the same would be true under the framework proposed here. However, this is unfortunately the cost that must be incurred by the judicial system to make certain that legitimate claims are not unfairly dismissed. As Professor Richard Bales has correctly argued, it is not possible to differentiate between “justiciable and frivolous claims” based on the pleadings alone,²⁹⁴ and although a more stringent pleading standard would help eliminate claims lacking in merit, “[t]he interests of all should not be sacrificed for the benefit of a few.”²⁹⁵

The proposed framework set forth above is consistent with the academic scholarship on pleading requirements after the *Twombly* decision and with the view of scholars on the role of the complaint in civil rights cases. Though a very recent decision, *Twombly* has already generated a significant amount of academic discussion.²⁹⁶ Perhaps most directly related to the pleading model proposed here, Professor A. Benjamin Spencer has suggested that *Twombly* has resulted in two different views of the validity of complaints in civil rights cases.²⁹⁷ Some courts continue to apply a liberal standard to civil rights claims and adhere to the pleading requirements as set forth in *Swierkiewicz*.²⁹⁸ Other courts, however, take a much more rigid approach after *Twombly* and require more substantiation of civil rights complaints.²⁹⁹

Of these two approaches, Professor Spencer “urge[s] courts to be more solicitous” of civil rights complaints and argues that an overly rigid approach to these claims may prevent meritorious cases from proceeding, transforming the civil rights statutes into “dogs with more bark than bite.”³⁰⁰ The model proposed here is consistent with Professor Spencer’s view—a uniform pleading standard would restrict courts from too aggressively applying *Twombly* and require plaintiffs to comply with the plausibility requirement enunciated by the Supreme Court.³⁰¹ Professor Spencer further notes that “[i]t will be interesting to see the results of future research aimed at studying the impact on civil rights cases once a

(7th Cir. 1986) (“A plaintiff who files a long and detailed complaint may plead himself out of court by including factual allegations which if true show that his legal rights were not invaded.”).

294. Korb & Bales, *supra* note 157, at 293.

295. *Id.* at 293–94.

296. *See, e.g.*, Spencer, *supra* note 15; Hannon, *supra* note 20.

297. *See* Spencer, *supra* note 15, at 126 (“The cases thus far seem to reveal at least two approaches to applying *Twombly* in the civil rights context.”).

298. *Id.*

299. *Id.*

300. *Id.* at 160–61.

301. *See supra* Part VII (discussing the implications of the proposed model).

larger body of post-*Twombly* case law is available.”³⁰² This Article attempts to provide the impact of *Twombly* on Title VII litigation in the year following the Supreme Court’s decision.³⁰³

More recently, Professor Spencer has noted the confusion left in the wake of *Twombly*, and argued that “[w]hat is needed . . . is a deconstruction of pleading doctrine post-*Twombly*, one that goes beyond court rhetoric and seeks to get at the heart of what the doctrine truly requires in the ordinary case.”³⁰⁴ Professor Spencer has further noted that “the type of factual detail needed [in a complaint] . . . varies depending upon the legal and factual context in which a claim is situated,”³⁰⁵ and has argued that “successfully stating a claim requires the presentation of a factual scenario that possesses a presumption of impropriety based on objective facts and supported implications.”³⁰⁶ This Article attempts to address the pleading requirements of one specific factual situation by providing the specific facts that must be alleged to state a claim for employment discrimination under Title VII.³⁰⁷

Similarly, Professor Scott Dodson has noted that *Twombly* has left some “lingering questions,” including how plausibility is defined.³⁰⁸ Professor Dodson suggests that *Twombly* will “spawn years of increased litigation” and that “sprawling, costly, and hugely time-consuming litigation” may be necessary before we finally know what the decision means.³⁰⁹ Professor Dodson’s concerns echo through employment discrimination law, where *Twombly* has already generated significant debate.³¹⁰ Through a proposed pleading framework, this Article attempts to define exactly what plausibility means in the employment discrimination context, and therefore assists in resolving the debate. Indeed, a unified model for pleading Title VII claims would bring consistency to the legal process and help avoid unnecessary, protracted litigation over the proper standards for pleading employment claims.

Considering *Twombly*, Professor Richard Epstein has suggested that plaintiffs should not be “entitled to make blank charges devoid of all

302. Spencer, *supra* note 15, at 159.

303. See *supra* Part IV.B (discussing the results of an analysis of decisions in the year before and the year after *Twombly*).

304. See Spencer, *supra* note 217, at 11.

305. *Id.* at 14.

306. *Id.* at 18.

307. Cf. *id.* at 36 (“[T]he facts surrounding the unadorned assertion of a discriminatory firing—the fact of the firing itself—does not have the same effect. [This] scenario is not presumptively wrongful but requires a supposition regarding the defendant’s motivation.”).

308. Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN BRIEF 135 (2007), <http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf>.

309. *Id.* at 142 (quoting *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1972–73 (2007)).

310. See *supra* Part V.B (discussing the approach of appellate courts to employment discrimination claims after *Twombly*).

factual content just to gain access to the discovery system.”³¹¹ Thus, Professor Epstein argues, “in antitrust cases and beyond,” the case should be dismissed where “the defendant has negated all inferences of culpability by using the same kinds of public evidence that the plaintiff has used to establish a factual underpinning to the underlying complaint.”³¹² Though not going quite as far as Professor Epstein would recommend,³¹³ the proposed pleading framework set forth in this Article does require the plaintiff to plead a number of facts critical to any employment discrimination claim.³¹⁴ The proposed model thus creates a threshold for Title VII plaintiffs to cross before they would be permitted to proceed to the discovery process. By requiring these plaintiffs to adequately plead the essential facts related to their claim, the proposed model would help avoid the likelihood of the “blank charges” that Professor Epstein addresses.³¹⁵ Given the analysis set forth in this Article highlighting the difficulty employment discrimination plaintiffs already face in overcoming both motions to dismiss and motions for summary judgment, no higher pleading standard should be required of these litigants.³¹⁶

VIII. CONCLUSION

The Supreme Court’s plausibility paradigm abrogated fifty years of pleading jurisprudence and left in its place a vague and undefined standard. Though arising in the context of an antitrust case, *Twombly* has already been applied to Title VII claims by many federal district courts. The plausibility standard is here to stay, and the analysis set forth in this Article suggests that plaintiffs may already be facing difficulties in preventing the dismissal of their claims. A unified pleading framework for Title VII claims would help reverse this trend by preventing district courts from applying *Twombly* too aggressively to employment claims. A unified approach—which clearly defines plausibility in the Title VII context—could help avoid years of unnecessary litigation over what the Supreme Court’s decision means for employment plaintiffs.

Judge Posner once observed in a case analyzing the sufficiency of a twenty-page employment discrimination complaint (accompanied by a

311. Richard Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL’Y 61, 99 (2007).

312. *Id.*

313. Indeed, Professor Epstein suggests that “when the full record at the time of the motion to dismiss does not support any plausible factual inference of guilt, then it is time to invoke a mini-summary judgment under the guise of a motion to dismiss.” *Id.*

314. *See supra* Part VI.B (providing a summary of the requirements of the proposed pleading framework).

315. Epstein, *supra* note 311, at 99.

316. *See supra* Parts IV–V (discussing the difficulties plaintiffs face in surviving motions to dismiss and motions for summary judgment in employment discrimination claims).

hundred-page appendix) that the “idea of a plain and short statement of the claim has not caught on.”³¹⁷ Hopefully, the proposed pleading framework set forth in this Article will help return Title VII complaints to the concise standards originally intended by the Federal Rules. Simplicity should prevail.

317. *Am. Nurses' Ass'n v. Illinois*, 783 F.2d 716, 723 (7th Cir. 1986).