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# COMMENTS

## THE HIDDEN COSTS OF PLEADING PLAUSIBILITY: EXAMINING THE IMPACT OF *TWOMBLY* AND *IQBAL* ON EMPLOYMENT DISCRIMINATION COMPLAINTS AND THE EEOC'S LITIGATION AND MEDIATION EFFORTS\*

### I. INTRODUCTION

*"The effect of the Court's actions will no doubt be to deny many plaintiffs with meritorious claims access to the federal courts and, with it, any legal redress for their injuries. . . . I think that is an especially unwelcome development at a time when, with the litigating resources of our executive-branch and administrative agencies stretched thin, the enforcement of federal antitrust, consumer protection, civil rights and other laws that benefit the public will fall increasingly to private litigants."*

- Senator Arlen Specter, July 22, 2009, commenting on the practical impact that *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* will have on the federal judicial process.<sup>1</sup>

The Supreme Court's decisions in *Ashcroft v. Iqbal*<sup>2</sup> and *Bell Atlantic Corp. v. Twombly*<sup>3</sup> have shaken the traditional understanding of federal pleading. Shortly after the Court's ruling in *Iqbal*, then-Senator Arlen Specter proposed the Notice Pleading Restoration Act of 2009<sup>4</sup> to revert the pleading standard under the Federal Rules of Civil Procedure (FRCP)<sup>5</sup> back to the baseline interpretation articulated by the Court in *Conley v. Gibson*.<sup>6</sup> Specter, and other backers of the Act, believed that the Court, in deciding *Twombly* and *Iqbal*, "effectively 'end-ran' the Rules Enabling Act" (REA), improperly bypassing the congressionally mandated process for amending the FRCP.<sup>7</sup>

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\* J. Scott Pritchard, J.D., Temple University Beasley School of Law, 2011. I'd like to thank the editors and staff of the *Temple Law Review* for all of their hard work, particularly Michael Connett, whose tireless effort and dedication helped bring out the best in both the Comment and my writing. I'd also like to thank Professors Craig Green and Jeremi Duru for their advice and guidance throughout the writing process. Finally, I'd like to thank my wife Gretchen for her patience and support, without which this Comment never would have been finished, let alone published.

1. David Ingram, *Specter Proposes Return to Prior Pleading Standard*, BLOG OF LEGAL TIMES (July 23, 2009, 11:43 AM) (internal quotation marks omitted), <http://legaltimes.typepad.com/blt/2009/07/specter-proposes-return-to-prior-pleading-standard.html>.

2. 129 S. Ct. 1937 (2009).

3. 550 U.S. 544 (2007).

4. Notice Pleading Restoration Act of 2009, S. 1504, 111th Cong. § 2 (2009).

5. FED. R. CIV. P. 8.

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

7. Joseph G. Falcone & Morghan Richardson, *Lowering the Raised Bar*, LAW.COM (Nov. 17, 2009),

*Twombly* and *Iqbal* have triggered a massive increase in satellite litigation over how to properly evaluate the sufficiency of a federal complaint when considering a 12(b)(6) motion to dismiss under the FRCP.<sup>8</sup> Since the Court decided *Iqbal* in May 2009, the decision has been cited an astonishing 64,595 times.<sup>9</sup> Specter's proposed bill, which would have effectively overruled the decision, was supported by trial lawyers and civil rights groups who cited the difficulty victims of discrimination often face in demonstrating a culpable state of mind at the pleading stage.<sup>10</sup> At a House Judiciary Committee hearing in October 2009, witnesses condemned the reinterpreted pleading standard as a mechanism that will block many legitimate lawsuits.<sup>11</sup>

Meanwhile, the Equal Employment Opportunity Commission (the "EEOC" or the "Commission"), a federal agency designated with the responsibility to investigate and enforce charges of employment discrimination under Title VII, has been struggling to process a record-breaking number of charges that came through the agency from 2008 to 2010.<sup>12</sup> During the eight years of the Bush administration, the agency suffered drastic budget cuts and a significant decrease in staffing.<sup>13</sup> Although the Obama administration has pledged to "fully fund and increase staffing," the EEOC's backlog of pending charges is at an historic high.<sup>14</sup> Many journalists have attributed the surge in filed discrimination charges to the economic recession; as more people have been laid off, the number of claims filed with the agency has spiked.<sup>15</sup>

Part II.A.1 provides a context to the Court's *Twombly* and *Iqbal* decisions by briefly addressing the historical development of federal notice pleading and the rules concerning a complaint's sufficiency. Part II.A.2 follows by examining the federal courts' interpretation of pre-*Twombly* pleading rules. Part II.A.3 then analyzes the *Bell Atlantic Corp. v. Twombly* decision and the "plausibility standard" for federal pleadings

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<http://www.law.com/jsp/article.jsp?id=1202435525918&rss=newswire>.

8. See Tony Mauro, *Plaintiffs Groups Mount Effort to Undo Supreme Court's 'Iqbal' Ruling*, NAT'L L.J., Sept. 21, 2009, <http://www.law.com/jsp/article.jsp?id=1202433931370> (discussing spike in litigation resulting from *Iqbal* and *Twombly*).

9. The data on citation references is from Westlaw's "Citing References" feature (accessed on September 17, 2011), and includes both primary and secondary sources.

10. Mauro, *supra* note 8.

11. Falcone & Richardson, *supra* note 7. Former Senator Specter's proposed bill died in the 111th Congress, but the district courts continue to grapple with the *Iqbal* and *Twombly*'s meaning in motion practice. See GOVTRACK.US, S. 1504: *Notice Pleading Restoration Act of 2009*, available at <http://www.govtrack.us/congress/bill.xpd?bill=s111-1504> (last visited Sept. 18, 2011).

12. Steve Vogel, *EEOC Confronts Growing Backlog, Diminished Staff*, WASH. POST, Feb. 3, 2009, at A13; see also EEOC, *Charge Statistics: FY 1997 Through FY 2010*, EEOC.GOV, <http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> (last visited Aug. 31, 2011) (listing charge statistics by year).

13. Vogel, *supra* note 12.

14. Melissa Turley, *Hiring the Disabled*, HUM. RESOURCE EXECUTIVE ONLINE (Jan. 21, 2009), <http://www.hreonline.com/HRE/story.jsp?storyId=166595132> (internal quotation marks omitted). The Obama Administration has since carried through on its pledge to increase the EEOC's budget. See Ronda Higgins, *Increased EEOC Budget Could Help Process Claims More Quickly*, EEO CONSULTATIONS LLC (Feb. 11, 2010) (reporting Obama Administration's approval of \$18 million increase for EEOC's 2011 fiscal budget).

15. Andrew M. Harris, *Employee Discrimination Claims Set Record, EEOC Says*, BLOOMBERG.COM, (Mar. 11, 2009), <http://www.bloomberg.com/apps/news?pid=20601103&sid=axWtn3ql72xI> (citing current recession as possible contributory factor to spike in employment discrimination claims).

that it created. Part II.A.4 discusses the standard's extension and affirmation in *Ashcroft v. Iqbal*. Part II.A.5 discusses recent empirical research on the impact the new pleading standard has had on the dismissal rate in federal court.

The Comment then changes course to provide an overview of the EEOC's policies and procedures. Part II.B.1 explains the Commission's charge processing procedure. Part II.B.2 examines the Commission's broader policies and administrative goals. Part II.B.3 briefly explores the Commission's mediation and conciliation process.

After this groundwork has been laid, Part III.A analyzes the implications of *Twombly* and *Iqbal* for employment discrimination complaints generally. Part III.B discusses the significance of the Court's emphasis on judicial efficiency over substantive justice. Part III.C explores the potential ramifications of this emphasis on the EEOC's litigation and mediation efforts, and suggests that *Twombly* and *Iqbal* may have unintended effects on the Commission.

## II. OVERVIEW

### A. Federal Pleading Standards

#### 1. History and Development of the Federal Pleading Standard

The Federal Rules of Civil Procedure (FRCP) are generally seen as an attempt to minimize technicality in order to emphasize substance over procedural formalities.<sup>16</sup> Minimizing procedural hurdles was largely a response to the burden litigants previously faced as a result of highly technical pleading requirements.<sup>17</sup> Prior to the FRCP, the Field Code<sup>18</sup> utilized a fact-based pleading system that imposed "virtually impossible drafting standards."<sup>19</sup> Because the Code's fact-based pleading system "hampered its implementation,"<sup>20</sup> the drafters of the FRCP elected to simplify the pleading requirement.<sup>21</sup> Rule 8(a) of the FRCP, therefore, only requires "a short and plain statement of the claim showing that the pleader is entitled to relief."<sup>22</sup>

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16. See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 944 (1987) (explaining how adoption of FRCP represented triumph of equity-based pleading system).

17. See Jack B. Weinstein & Daniel H. Distler, *Comments on Procedural Reform: Drafting Pleading Rules*, 57 COLUM. L. REV. 518, 520 (1957) (discussing how technicalities created "intolerable burden of procedural litigation [which] clogged the courts").

18. The Field Code was the first broadly accepted, systematic code of civil procedure in the United States. Prior to the FRCP, about half of the states, representing the majority of the U.S. population, had adopted the Code. Subrin, *supra* note 16, at 939. Moreover, pleading rules among the non-adopting states were often similar to the pleading rules in the Code. *Id.* at 939 n.170.

19. Weinstein & Distler, *supra* note 17, at 520–21.

20. *Id.* at 520.

21. See Charles B. Campbell, A "Plausible" Showing After *Bell Atlantic Corp. v. Twombly*, 9 NEV. L.J. 1, 11–13 (2008) (noting that FRCP Advisory Committee specifically decided to avoid requiring fact pleading when drawing up rules).

22. FED. R. CIV. P. 8(a)(2). Rule 8(a) states in full:

(a) Claims for Relief.

A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new

Historically, pleadings were designed to fulfill four major functions. These functions were: (1) to give notice of each party's claims or defenses, (2) to provide the facts as the parties believe them to be, (3) to narrow the issues to be litigated, and (4) to provide a mechanism for quickly disposing of "sham claims and insubstantial defenses."<sup>23</sup> Under the FRCP, the statement of facts and narrowing of issues, were functions to be largely fulfilled through rules pertaining to discovery.<sup>24</sup> This suggested, in turn, that the primary function of Rule 8's pleading standard was to provide notice.<sup>25</sup> Notice pleading differs from fact-based pleading "principally in the degree of generality with which the elements of the claim may be stated."<sup>26</sup> The FRCP's codification of fact-based pleading standards for particular types of claims and defenses (e.g., fraud and mistake),<sup>27</sup> is consistent with the premise that notice pleading was to be the general rule.

The drafters of the FRCP expressly emphasized the importance of eliminating fact pleading.<sup>28</sup> Charles Clark, the principal drafter of the FRCP, explained that:

'[t]he old requirement that a party must plead only facts, avoiding evidence on the one hand and law on the other, was logically indefensible, since the actual distinction is at most one of degree only and in actual practice it caused more confusion than any possible worth it might have as admonition.'<sup>29</sup>

Accordingly, Rule 8 reflects a conscious effort to forgo the words "facts," "conclusions," or "cause of action," as the drafters believed such terms reinforced the unnecessary confusion associated with pleading under the Code.<sup>30</sup> The drafters' understanding formed the foundation for subsequent interpretation of the rules, particularly with respect to the development of Rule 8.

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jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

*Id.* at 8(a).

23. 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1202 (3d ed. 2009). Although a detailed survey of the evolution of notice pleading is beyond the scope of this Comment, it must be briefly addressed in order to understand the underlying rationale behind the FRCP and its emphasis on notice pleading. For a detailed discussion of the development of pleading standards throughout history, see Subrin, *supra* note 16.

24. WRIGHT & MILLER, *supra* note 23, § 1202.

25. *Id.*

26. *Id.*

27. See FED. R. CIV. P. 9(b) (requiring more factual particularity when pleading fraud or mistake).

28. Campbell, *supra* note 21, at 11–13.

29. *Id.* at 12 (quoting Charles E. Clark, *The Proposed Federal Rules of Civil Procedure*, 22 A.B.A. J. 447, 450 (1936)).

30. Richard L. Marcus, *The Revival of Fact Pleading Under the Federal Rules of Civil Procedure*, 86 COLUM. L. REV. 433, 439 (1986); see also WRIGHT & MILLER, *supra* note 23, § 1216 (describing drafters' intention that Rule 8 eliminate confusing distinctions between evidentiary facts, ultimate facts, and conclusions).

## 2. The Federal Courts' Interpretation of Notice Pleading: From *Conley* to *Twombly*

Prior to *Bell Atlantic Corp. v. Twombly*,<sup>31</sup> the leading Supreme Court case to define and interpret the requirements of Rule 8 was *Conley v. Gibson*.<sup>32</sup> Decided in 1957, *Conley* squarely addressed any lingering confusion over how to interpret pleading standards<sup>33</sup> by strongly endorsing liberal notice pleading.<sup>34</sup> As the Court famously noted: “[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 . . . which would entitle him to relief.”<sup>35</sup>

*Conley*'s interpretation of federal notice pleading settled the question of what it takes for plaintiffs to sufficiently plead a case, and the Court's “no set of facts” language became the baseline standard for evaluating the sufficiency of federal complaints—that is, until *Twombly*.<sup>36</sup>

Despite the pointed clarity of *Conley*, federal courts adjudicating civil rights cases did not uniformly follow the liberal pleading standard articulated by the Court.<sup>37</sup> In the 1960s, lower federal courts began to carve out an exception to the notice-pleading standard mandated by the language of Rule 8.<sup>38</sup> By and large, the courts justified this exception on the basis that because civil rights claims are so numerous, potentially frivolous cases should be weeded out during the early stages of pleading.<sup>39</sup> Lower federal courts also felt that a heightened pleading standard was particularly appropriate in cases concerning the doctrine of qualified immunity,<sup>40</sup> a position the Supreme Court

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31. 550 U.S. 544 (2007).

32. 355 U.S. 41 (1957). Many scholars have examined *Conley*'s significance in depth, and a more detailed analysis is unnecessary for the purposes of this Comment. For a detailed discussion of *Conley v. Gibson*'s significance for the interpretation of pleadings and its effect on civil rights litigation, see generally Andrew I. Gavil, *Civil Rights and Civil Procedure: The Legacy of Conley v. Gibson*, 52 How. L.J. 1 (2008).

33. See WRIGHT & MILLER, *supra* note 23, § 1202 (explaining critiques of difficulty in understanding what notice pleading means.).

34. See *Conley*, 355 U.S. at 47–48 (discussing how simplified pleading does not require setting forth detailed facts).

35. *Id.* at 45–46.

36. See *Twombly*, 550 U.S. at 562–63 (abrogating *Conley*'s “no set of facts” language after fifty years of being relied upon to understand sufficiency of pleadings).

37. The first case to impose a heightened pleading standard on a civil rights action was *Valley v. Maule*, 297 F. Supp. 958, 960 (D. Conn. 1968). Over time, the Third Circuit also began to impose such a standard. See, e.g., *Rotolo v. Borough of Charleroi*, 532 F.2d 920, 921–23 (3d Cir. 1976) (upholding dismissal for failure to plead with specificity); *Kauffman v. Moss*, 420 F.2d 1270, 1272 (3d Cir. 1970) (dismissing § 1983 complaint on grounds of overly broad conclusory allegations); *Negrich v. Hohn*, 379 F.2d 213, 214–15 (3d Cir. 1967) (upholding dismissal of pro se § 1983 complaint).

38. For a detailed discussion of the erosion of notice pleading in civil rights cases in the aftermath of *Conley*, see Douglas A. Blaze, *Presumed Frivolous: Application of Stringent Pleading Requirements in Civil Rights Litigation*, 31 WM. & MARY L. REV. 935, 948–51 (1990); Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 577–82 (2002); Richard L. Marcus, *The Puzzling Persistence of Pleading Practice*, 76 TEX. L. REV. 1749 (1998); A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-Conley Era*, 52 How. L.J. 99, 111–18 (2008).

39. Spencer, *supra* note 38, at 112 (citing *Valley*, 297 F. Supp. at 960–61).

40. The doctrine of qualified immunity shields governmental actors from liability except when the official “knew or reasonably should have known that the action he took within his sphere of official

rejected in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*.<sup>41</sup>

The split among the lower federal courts<sup>42</sup> continued until the Supreme Court's decision in *Swierkiewicz v. Sorema N. A.*<sup>43</sup> In *Swierkiewicz*, the Court addressed the pleading standard in the context of an employment discrimination case and took the opportunity to (unanimously) reaffirm the traditional interpretation of liberal notice pleading.<sup>44</sup> In doing so, the Supreme Court resolved the then-existing circuit split in favor of the position that allegations of discriminatory motive or intent are enough to state a cognizable claim under Rule 8.<sup>45</sup> *Swierkiewicz*, therefore, successfully put an

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responsibility would violate the constitutional rights of the [plaintiff], or if he took the action with the malicious intention to cause a deprivation of constitutional rights or other injury." *Wood v. Strickland*, 420 U.S. 308, 322 (1975). In 1985, the Fifth Circuit held that, since the doctrine requires a subjective and fact-based inquiry, a heightened pleading standard is necessary in order to avoid significant discovery and litigation costs that detract from the efficient operation of government. *Elliott v. Perez*, 751 F.2d 1472, 1477–78 (5th Cir. 1985) (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 816–17 (1982)).

In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, the Supreme Court rejected the Fifth Circuit's standard as in conflict with the purpose of the notice pleading system developed by the FRCP and reaffirmed the holding of *Conley* as the benchmark for evaluating any federal claims outside of the 9(b) exception. 507 U.S. 163, 168 (1993). The Court recognized and may have even found merit in the policy concerns articulated by the Fifth Circuit with respect to the costs of expensive and time-consuming discovery and its effect on municipalities. *Id.* However, in the Court's view, this concern did not justify a judicial rewriting of the FRCP and the policy of liberal notice pleading that it represented. *Id.*

41. 507 U.S. 163, 168 (1993) (reaffirming *Conley* as benchmark for evaluating any federal claim not within 9(b) exception).

42. Although many did not, some circuits continued to apply a heightened pleading standard in discrimination cases despite the clear language of *Leatherman*. Compare *Tarshis v. Riese Org.*, 211 F.3d 30, 35–40 (2d Cir. 2000), *abrogated by Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002) (analyzing sufficiency of complaint by determining whether plaintiff established prima facie case of discrimination), *Jackson v. City of Columbus*, 194 F.3d 737, 751–52 (6th Cir. 1999) (same), and *Austin v. Ford Models, Inc.*, 149 F.3d 148, 152–53 (2d Cir. 1998) (same), with *Sparrow v. United Air Lines, Inc.*, 216 F.3d 1111, 1118 (D.C. Cir. 2000) (reversing lower court dismissal of civil rights claim under authority of *Leatherman*), *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998) (reversing lower court dismissal of discrimination complaint on basis that complainant is not required to plead facts), and *Ring v. First Interstate Mortg., Inc.*, 984 F.2d 924, 926–27 (8th Cir. 1993) (reversing lower court dismissal on basis that complainant need not allege prima facie case during pleadings stage).

43. 534 U.S. 506, 514 (2002).

44. *Swierkiewicz*, 534 U.S. at 515.

45. *Id.* at 509–10. At least three federal appellate courts had taken the position adopted by the Court. See *Sparrow*, 216 F.3d at 1118 (holding that alleging existence of discrimination is enough to survive motion to dismiss); *Bennett*, 153 F.3d at 518 (“‘I was turned down for a job because of my race’ is all a complaint has to say.”); *Ring*, 984 F.2d at 927–28 (holding that alleging existence of discrimination is enough to survive motion to dismiss); *Ferro v. Ry. Express Agency, Inc.*, 296 F.2d 847, 851 (2d Cir. 1961) (same). The Court's decision in *Swierkiewicz* may have also been influenced by the widely understood difficulty of conclusively establishing the existence of a subjective state of mind in discrimination claims. See *Fairman*, *supra* note 38, at 592 (acknowledging difficulty of pleading facts that suggest a particular subjective state of mind); *Matthew A. Josephson, Some Things Are Better Left Said: Pleading Practice After Bell Atlantic Corp. v. Twombly*, 42 GA. L. REV. 867, 895 (2008) (same).

end, at least temporarily, to the lower courts' use of a de-facto heightened pleading standard in discrimination cases.<sup>46</sup>

3. The Supreme Court Creates a New Federal Pleading Standard?: *Bell Atlantic Corp. v. Twombly*

In *Bell Atlantic Corp. v. Twombly*, the Supreme Court held that to survive a motion to dismiss, a complaint must set forth enough factual matter to plausibly suggest that the allegations giving rise to the cause of action are true.<sup>47</sup> *Twombly* was an antitrust case in which the plaintiffs alleged violations of section 1 of the Sherman Act.<sup>48</sup> Establishing a claim under section 1 requires showing that a contract or conspiracy existed to restrain trade or commerce.<sup>49</sup> The central issue in the case was whether allegations of parallel conduct, without additional factual support to suggest an agreement was made, were enough to withstand a motion to dismiss.<sup>50</sup> In affirming the dismissal, the Court decided that a claim under Rule 8 “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”<sup>51</sup>

In defining this new standard, the Court made repeated reference to “plausibility.”<sup>52</sup> To the extent that this “plausibility” requirement conflicted with *Conley*'s oft-cited observation that a complaint should not be dismissed “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,”<sup>53</sup> the Court rejected *Conley*'s formulation as having “earned its retirement.”<sup>54</sup> Believing that *Conley*'s language was being interpreted too literally, the Court offered an alternative explanation of its import: “[O]nce a claim has been stated adequately, it may be supported by showing any set of facts consistent with

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46. See *Ciralsky v. CIA*, 355 F.3d 661, 671 (D.C. Cir. 2004) (“[A]ll that a Title VII complaint has to say to survive dismissal under Rule 12(b)(6) is: ‘The plaintiff was terminated from his job because of his religion.’”); *Maduka v. Sunrise Hosp.*, 375 F.3d 909, 912 (9th Cir. 2004) (reversing lower court dismissal because *Swierkiewicz* allows lawsuits to go forward based on conclusory allegations of discrimination); *Phillip v. Univ. of Rochester*, 316 F.3d 291, 298–99 (2d Cir. 2003) (same); *Pointer v. Mo. Dep’t of Corrs.*, 46 F. App’x 385, 386 (8th Cir. 2002) (same); *Ray v. Kertes*, 285 F.3d 287, 297 (3d Cir. 2002) (same).

47. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

48. 15 U.S.C. § 1 (2006).

49. *Id.*

50. *Twombly*, 550 U.S. at 550–51. The complaint essentially alleged that AT&T’s regional service branches, called Incumbent Local Exchange Carriers (ILECs), were illegally restraining trade in two ways. First, the complaint alleged that the ILECs engaged in parallel conduct to restrict competitive local exchange carriers (CLECs) from gaining entry to the regional markets. *Id.* at 550. The plaintiffs believed that this parallel conduct was enough to suggest the existence of a conspiracy to restrain trade. *Id.* Second, the complaint alleged, again based on parallel conduct, the existence of agreements among the ILECs to refrain from competing against each other. *Id.* at 551.

51. *Id.* at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)).

52. *Id.* at 557–60, 564.

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

54. *Twombly*, 550 U.S. at 563.

the allegations in the complaint.”<sup>55</sup> The Court relied primarily upon a construction of Rule 8 where the word “showing,”<sup>56</sup> was inextricably linked with plausibility.<sup>57</sup>

While *Twombly* fiercely reinvigorated the historical debate over the functions that federal pleadings should serve,<sup>58</sup> it remained possible in the immediate aftermath of the decision that the plausibility standard might be narrowly applied. Indeed, within the same term, the Court issued other opinions that suggested *Twombly* was not intended to radically reinvent the formerly well-settled standard.<sup>59</sup> These Supreme Court affirmations of the liberal notice pleading regime in certain circumstances informed the Second Circuit’s interpretation of the standard in *Iqbal v. Hasty*.<sup>60</sup>

In *Hasty*, the Second Circuit adopted a flexible plausibility standard in upholding the sufficiency of many of the plaintiff’s claims.<sup>61</sup> By adopting a flexible plausibility standard, the Second Circuit tried to preserve some of the values associated with a

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55. *Id.*

56. See FED. R. CIV. P. 8(a)(2) (“A short and plain statement of the claim showing that the pleader is entitled to relief.”).

57. *Twombly*, 550 U.S. at 557 (finding Rule 8’s “threshold requirement” to be that the “‘plain statement’ possess enough heft to ‘sho[w] that the pleader is entitled to relief’” (alteration in original)).

58. In Lonny Hoffman’s analysis of the tension between the principles of judicial access and efficiency, he suggests that *Twombly* polarized academics into two camps: the Traditionalists and the Reformists. Lonny S. Hoffman, *Burn up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings*, 88 B.U. L. REV. 1217, 1224–25 (2008). According to Hoffman, the Traditionalists believe that *Twombly* was wrongly decided and inconsistent with the pleading standard envisioned by the drafters of the FRCP. *Id.* at 1225. Reformists, on the other hand, focus on the positive pragmatic results of encouraging greater judicial latitude to act as gatekeepers in the pleading stages, empowered with the purpose of addressing the inherent difficulties associated with discovery costs. *Id.* at 1225–26. Interestingly, Hoffman’s analysis notes that the Traditionalist viewpoint has difficulty directly addressing the Reformist’s pragmatic approach. *Id.* at 1224–26. Because the Traditionalist view is limited to upholding the historical value of notice as the most important pleading function, it may not be able to clearly engage with the suggestion that increasingly complex litigation and increasingly crowded dockets may now be a more prominent concern than the historical notice function. *Id.* For examples of the Reformist perspective on the plausibility standard, particularly with regard to principles of efficiency, see Richard A. Epstein, *Bell Atlantic Corp v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL’Y 61, 98 (2007) (concluding that FRCP’s emphasis on notice was byproduct of era with simpler litigation); Lee Reeves, *Pragmatism over Politics: Recent Trends in Lower Court Employment Discrimination Jurisprudence*, 73 MO. L. REV. 481, 547–51 (2008) (arguing *Twombly* has been used by certain circuits to dismiss discrimination claims due to increased workload resulting from influx of civil rights claims).

59. For instance, in *Jones v. Bock*, 549 U.S. 199, 212–13 (2007), the Court took the opportunity to reaffirm *Leatherman* and *Swierkiewicz* in no uncertain terms. *Jones* involved a prisoner complaint filed in federal court. *Id.* at 206–07. The claim fell under the authority of the Prison Litigation Reform Act of 1995 (PLRA), which requires prisoners to exhaust certain grievance procedures before bringing suit. *Id.* at 202. Despite acknowledging the practical concerns surrounding the high volume of prisoner complaints, many of which have no merit, *id.* at 203, the Court overturned the Sixth Circuit’s ruling that prisoners must plead and demonstrate exhaustion with particularity before complaints can proceed. *Id.* at 211–12. In doing so, the Court reaffirmed the liberal construction of notice pleading by referring to *Leatherman* and *Swierkiewicz* and noting that “courts should generally not depart from the usual practice under the Federal Rules on the basis of perceived policy concerns.” *Id.* at 212. In *Erickson v. Pardus*, 551 U.S. 89, 94 (2007), a case decided in the same term, the Court reached a similar conclusion in a case involving a pro se plaintiff.

60. 490 F.3d 143 (2d Cir. 2007).

61. *Hasty*, 490 F.3d at 157–58.



more liberal construction of pleadings.<sup>62</sup> Specifically, it attempted to balance the conflicting language in *Twombly*<sup>63</sup> by concluding that *Twombly* supported a liberal construction with respect to constitutional discrimination claims.<sup>64</sup> However, in 2009, the Supreme Court granted certiorari to examine the claims.<sup>65</sup> This provided the opportunity for the Court, in *Ashcroft v. Iqbal*,<sup>66</sup> to once again address the federal pleading standard.

4. *Twombly*'s "Plausibility Standard" Extends to Constitutional Discrimination Claims: *Ashcroft v. Iqbal*

The Court in *Iqbal* reaffirmed *Twombly*'s holding and principles as applied to a constitutional discrimination and civil rights claim under § 1983.<sup>67</sup> Interestingly, in the 5-4 decision, Justice Souter, the writer of the majority opinion in *Twombly*,<sup>68</sup> now wrote for the dissent.<sup>69</sup>

The complaint in *Iqbal* arose out of the events that transpired in the aftermath of the terrorist attacks of September 11, 2001.<sup>70</sup> The FBI and Justice Department commenced a major investigation to identify the perpetrators, which included questioning more than 1,000 people suspected of a link to the attacks or related terrorist organizations.<sup>71</sup> Seven hundred sixty-two people from this group were held on immigration charges and 184 were those whom the FBI deemed "high interest" suspects.<sup>72</sup> The "high interest" suspects were detained under restrictive conditions that reflected the highest level of maximum-security conditions allowable.<sup>73</sup> *Iqbal* was one of these detainees.<sup>74</sup>

*Iqbal* alleged that the defendants—Attorney General John Ashcroft and FBI Director Robert Mueller—were liable for orchestrating and approving a policy that subjected *Iqbal* to harsh confinement conditions on account of his race, religion, or national origin.<sup>75</sup> The Court began by examining the elements of the plaintiff's cause of action, which, as the Court noted, was "a claim of unconstitutional discrimination against officials entitled to assert the defense of qualified immunity."<sup>76</sup> Finding that vicarious liability did not apply, the Court held that the complaint needed to establish

62. *See id.* at 156–57 (noting Court's observation that *Twombly* did not intend to overrule *Swierkiewicz*).

63. *Id.* at 155–58.

64. *See id.* at 157 (concluding *Twombly* Court did not intend to create universal heightened pleading standard).

65. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1942 (2009).

66. 129 S. Ct. 1937 (2009).

67. *Iqbal*, 129 S. Ct. at 1953.

68. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007).

69. *Iqbal*, 129 S. Ct. at 1954 (Souter, J., dissenting). *See infra* Part III.A for a further examination of Justice Souter's dissent.

70. *Id.* at 1942–43.

71. *Id.* at 1943.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.* at 1942.

76. *Id.* at 1947.

that both defendants personally violated the Constitution through their own actions.<sup>77</sup> This required showing that the defendants acted with and were motivated by a discriminatory purpose when enforcing the policy of investigation and confinement.<sup>78</sup>

In assessing whether Iqbal's complaint was facially plausible, the Court used a "two-pronged approach."<sup>79</sup> Under the first prong, the Court determined which allegations were based on fact and which allegations were "mere conclusory statements."<sup>80</sup> The plausibility of a complaint, the Court explained, should be assessed solely on its factual allegations, not its legal conclusions.<sup>81</sup> Under the second prong, therefore, the Court assessed the plausibility of Iqbal's claim based strictly on the complaint's *factual* allegations.<sup>82</sup> A claim is plausible, the Court explained, when the pleaded facts create a "reasonable inference that the defendant is liable for the misconduct alleged."<sup>83</sup> A reasonable inference is one that permits a judge to infer more than the "mere possibility of misconduct."<sup>84</sup> Whether or not such an inference can be drawn is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense."<sup>85</sup>

After setting forth the two-pronged approach, the Court applied it to Iqbal's complaint. Under the first prong, the Court determined which of Iqbal's allegations were conclusions not entitled to an assumption of truth.<sup>86</sup> One allegation found to be a mere conclusion was Iqbal's averment that the defendants "'knew of, condoned, and willfully and maliciously agreed to subject [the plaintiff]' to harsh conditions of confinement 'as a matter of policy, solely on account of [his] religion, race, and/or national origin.'"<sup>87</sup> Similarly, the Court found as merely conclusory Iqbal's averment that the defendants specifically approved the challenged policy, since it was nothing more than a "formulaic recitation" of an element of the constitutional discrimination claim.<sup>88</sup> After identifying and excluding the conclusions from Iqbal's complaint, the Court conducted the second prong of the analysis and concluded that the factual allegations failed to create an inference of discrimination that was more plausible than alternative explanations for the defendants' conduct.<sup>89</sup> Accordingly, the Court held that

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77. *Id.* at 1948.

78. *Id.* at 1948–49.

79. *Id.* at 1950.

80. *Id.* at 1949–51.

81. *Id.*

82. *Id.* at 1951–52.

83. *Id.* at 1949.

84. *Id.* at 1950.

85. *Id.*

86. *Id.* at 1950–51.

87. *Id.* at 1951 (second alteration in original) (citing First Amended Complaint at ¶ 96, *Elmaghraby v. Ashcroft*, No. 04-CV-1809-JG-SMG, 2004 WL 3756442 (E.D.N.Y. Sept. 30, 2004)).

88. *Id.* (internal quotation mark omitted) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

89. The Court reasoned, for example, that although the allegations were consistent with discrimination, a more likely explanation was that the arrests were carried out to detain illegal aliens with potential connections to terrorism. *Id.*

Iqbal's factual allegations did not plausibly suggest that discrimination had taken place.<sup>90</sup>

##### 5. *Twombly* and *Iqbal*'s Impact on 12(b)(6) Motions to Dismiss

In October 2009, the Judicial Conference Advisory Committee on Civil Rules commissioned the Federal Judicial Center (FJC) to study the empirical impact of *Twombly* and *Iqbal* on Rule 12(b)(6) motions to dismiss.<sup>91</sup> The resulting study, which was released by the FJC in March 2011, found a general increase from 2006 to 2010 in the filing rates of motions to dismiss for failure to state a claim. It also found no statistically significant increase in the grant rate of motions to dismiss without leave to amend—with the possible exception of cases challenging financial instruments.<sup>92</sup>

The FJC's study, which is at odds with several earlier analyses,<sup>93</sup> has been critiqued. In the "first comprehensive assessment" of the FJC's results, Professor Lonny Hoffman examined the study's methodological limitations and questioned FJC's interpretation of the data.<sup>94</sup> Hoffman observed that dismissal grant rates increased—albeit not in a statistically significant manner—in every substantive legal category examined in the study.<sup>95</sup> Moreover, as the FJC report acknowledged, the study did not determine the percentage of dismissed complaints that were actually refilled.<sup>96</sup> In addition, the FJC report acknowledged that the study was unable to account for the possibility—supported by surveys of plaintiffs' attorneys—that pleading practice has changed to accommodate the plausibility standard.<sup>97</sup>

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90. *Id.*

91. JOE S. CECIL ET AL., MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES 21 (2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1878646](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1878646).

92. *Id.* at 21. The FJC attributed the increased dismissal rate in cases challenging financial instruments to changes in the economy during the last four years, particularly the downturn of the housing market and the resulting increase in actions challenging foreclosures and debt instruments. *Id.*

93. See Kendall W. Hannon, *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, 1815 (2008) (finding that dismissal of civil rights claims spiked in the four months following *Twombly*); Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 556 (2010) (finding steady increase in rate at which motions to dismiss have been granted after *Twombly* and *Iqbal*); Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. 95, 118 (2010) (finding increase in dismissal rate of disability cases after *Twombly*); Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1026–35 (finding increase in dismissal rate of Title VII cases after *Twombly*). The FJC differentiated its study from other empirical analyses on the basis that the data it compiled was based on docket sheet entries, not computerized legal databases such as Westlaw. CECIL ET AL., *supra* note 91, at 5. The FJC also differentiated its study on the basis that it distinguished motions to dismiss granted with leave to amend from those granted without. *Id.*

94. See Lonny Hoffman, *Twombly and Iqbal's Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss 1* (Univ. of Houston Law Center, No. 1904134, 2011) available at <http://ssrn.com/abstract=1904134>.

95. *Id.* at 31.

96. CECIL ET AL., *supra* note 91, at 14.

97. *Id.* at 22–23. According to a recent survey conducted by the FJC, seventy percent of plaintiffs' attorneys who have filed employment discrimination cases in the wake of *Twombly* have changed the way they structure their complaints. Moreover, seventy-five percent of the attorneys stated that they have had to respond

For now, however, the FJC's report will likely forestall imminent action by the Rules Committee to directly address *Iqbal* and *Twombly*'s impact on the FRCP. Nevertheless, the impact of the Court's new standard will undoubtedly be vigorously debated, closely watched, and reassessed over the coming years.

## B. *The Equal Employment Opportunity Commission*

### 1. EEOC Charge Processing

Before any individual can file an employment discrimination claim under Title VII in federal court, they must file a charge with the EEOC.<sup>98</sup> The Commission's guidelines indicate what information a charge should include.<sup>99</sup> After a charge is filed, the EEOC typically begins its investigation by requesting information from the employer, including interrogatories and requests for both documents and a position statement.<sup>100</sup> While the EEOC has been granted extensive investigatory power, including the ability to subpoena documents and witnesses,<sup>101</sup> it infrequently exercises this authority.<sup>102</sup> An empirical study, for example, found that "most cases receive little or no investigation beyond what is gathered at the charge-receipt interview and in response to [EEOC's] pro forma request [to employers] for information."<sup>103</sup>

While Title VII claims must be filed with the EEOC, a complainant receives the right to sue in federal court after 180 days has passed since the charge-filing date.<sup>104</sup> At the 180-day mark, a complainant is eligible to receive a right-to-sue letter from EEOC, regardless of the amount of attention or investigation his or her charge received.<sup>105</sup> Even where the Commission completes its investigation and finds a lack of probable cause to infer discrimination, the Commission must issue a notice to the complainant of

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to 12(b)(6) motions that may not have been filed prior to *Twombly* and *Iqbal*. Finally, seven percent of the attorneys admitted that they have cases dismissed for failure to state a claim under the *Iqbal* standard. *Id.* at 22–23 n.37.

98. 29 C.F.R. § 1601.6 (2010); *see also* 42 U.S.C. § 2000e-5(e)(1) (2006) (laying out procedural prerequisites to bringing Title VII claim).

99. 29 C.F.R. § 1601.12.

100. *See* Fred W. Alvarez & Eric S. Dreiband, *Dealing with the EEOC: Effective Techniques for Working with the Commission*, SN020 ALI-ABA 31, 35 (2008) (describing EEOC's preliminary investigation process); EEOC, *The Charge Handling Process*, EEOC.GOV, <http://www.eeoc.gov/employers/process.cfm> (last visited Aug. 31, 2011) (describing procedures EEOC uses to investigate employers).

101. Alvarez & Dreiband, *supra* note 100, at 36–38; *see also* 29 C.F.R. § 1601.16 (describing EEOC's authority to subpoena witnesses).

102. In 2008, for example, there were a combined total of just thirty-five subpoena and preliminary-relief actions. EEOC, *Litigation Statistics: FY 1997 Through FY 2010*, EEOC.GOV, <http://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm> (last visited Aug. 31, 2011). To put this figure in perspective, in 2008, the EEOC received 95,402 charges of discrimination in 2008. EEOC, *supra* note 12.

103. Kathryn Moss et al., *Unfunded Mandate: An Empirical Study of the Implementation of the Americans with Disabilities Act by the Equal Employment Opportunity Commission*, 50 U. KAN. L. REV. 1, 33–34 (2001).

104. EEOC, *After You Have Filed a Charge*, EEOC.GOV, <http://www.eeoc.gov/employees/afterfiling.cfm> (last visited Aug. 31, 2011).

105. EEOC, *Filing a Lawsuit*, EEOC.GOV, <http://www.eeoc.gov/employees/lawsuit.cfm> (last visited Aug. 31, 2011).

their right to sue in federal court within ninety days of the determination.<sup>106</sup> In 2010, the EEOC found no cause in 67,520 charges, equating to well more than half of the charges filed that year.<sup>107</sup>

In the minority of cases where EEOC determines that discrimination has occurred, it will notify the complainant and attempt to engage in conciliation with the employer.<sup>108</sup> In a typical year, EEOC finds cause in about four to five thousand cases, of which one to two thousand end in successful conciliation.<sup>109</sup> To put these figures in perspective, the EEOC received over 99,000 charges of discrimination in 2010.<sup>110</sup>

If EEOC finds cause and the case is successfully conciliated, the complainant is barred from pursuing the claim in federal court unless the agreement is not honored.<sup>111</sup> If the EEOC finds probable cause and cannot conciliate the claim, the Commission will then consider whether to litigate on behalf of the complainant in federal court.<sup>112</sup> If the EEOC decides not to litigate, it will again issue notice to the complainant of their right to bring suit individually within ninety days.<sup>113</sup> The percentage of claims actually litigated by the EEOC is very small. In 2010, for example, the EEOC filed 271 suits.<sup>114</sup> That same year, the EEOC received 99,922 total discrimination charges.<sup>115</sup>

## 2. The Purpose and Procedure of the EEOC

Since the EEOC is only able to devote significant investigatory resources to a very small number of charges, it has been forced to continually reassess its policies and procedures to ensure that it is allocating diminishing resources in a manner capable of effectuating its anti-discrimination mandate.<sup>116</sup> While Congress has expanded the scope of EEOC's responsibilities over the years,<sup>117</sup> and although there has been a significant increase in the number of claims filed,<sup>118</sup> EEOC's budget has not increased in a commensurate manner.<sup>119</sup> On several occasions, EEOC has actually had to decrease

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106. EEOC, *supra* note 100.

107. EEOC, *Enforcement and Litigation Statistics: All Statutes FY 1997—FY 2010*, EEOC.GOV, <http://www.eeoc.gov/eeoc/statistics/enforcement/all.cfm> (last visited Aug. 31, 2011).

108. EEOC, *supra* note 100.

109. Alvarez & Dreiband, *supra* note 100, at 41.

110. EEOC, *supra* note 12.

111. See 29 C.F.R. § 1601.24 (2010) (stating that, upon successful conciliation, parties are bound to terms of agreement).

112. EEOC, *supra* note 100.

113. *Id.*

114. EEOC, *supra* note 102. See also *infra* Part III.C.1 for an analysis of post-*Iqbal* cases litigated by the EEOC that have confronted Rule 12(b)(6) motions to dismiss.

115. EEOC, *supra* note 12.

116. See Moss et al., *supra* note 103, at 3–4 (discussing EEOC's attempts to effectively process and manage significant influxes in claims).

117. Congress, for example, has extended the EEOC's enforcement authority to the areas of disability discrimination under the Americans with Disabilities Act and age discrimination under the Age Discrimination in Employment Act. Anne Noel Occhialino & Daniel Vail, *Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 682, 686 (2005).

118. See Moss, *supra* note 103, at 6–24 (discussing backlog of charges in seventies, eighties, and nineties); Occhialino & Vail, *supra* note 117, at 673–92 (same).

119. See generally Moss et al., *supra* note 103, at 72–74.

staffing to stay within its budgetary limits,<sup>120</sup> thereby exacerbating the backlog of pending charges.

In the 1990s, a backlog of pending charges forced the Commission to significantly re-evaluate its priorities.<sup>121</sup> According to EEOC's former vice chair, "[t]he agency's goal of moving cases took precedence over all other enforcement goals."<sup>122</sup> In 1995, the EEOC adopted the National Enforcement Plan (NEP), which acknowledged that the Commission's focus on combating instances of individual discrimination was actually undermining its efforts to eradicate systemic workplace discrimination.<sup>123</sup> Since the EEOC concluded that it was no longer tenable to conduct a full investigation of every claim, the NEP reprioritized the Commission's litigation efforts to three areas.<sup>124</sup> The three priority areas listed by the NEP were "cases that affected the most people, that clarified or helped to develop the law, and that maintained the integrity of the law enforcement process."<sup>125</sup>

The Commission also developed a structure for prioritizing investigatory resources through the implementation of the Priority Charge Handling Procedure (PCHP).<sup>126</sup> Under the PCHP, charges are reviewed during intake and sorted into A, B, and C categories.<sup>127</sup> This categorization occurs upon initial review and typically lasts one to three hours.<sup>128</sup> If the Commission believes that discrimination has "more likely than not" occurred, or that the case may fall under one of the three priority areas identified by the NEP, the charge is grouped into category A.<sup>129</sup> A category A claim is

120. Occhialino & Vail, *supra* note 117, at 683.

121. Paul M. Igasaki, *Doing the Best with What We Had: Building a More Effective Equal Employment Opportunity Commission During the Clinton-Gore Administration*, 17 LAB. LAW. 261, 266-67 (2001).

122. *Id.* at 266.

123. See generally EEOC, *U.S. Equal Employment Opportunity Commission National Enforcement Plan*, EEOC.GOV, <http://www.eeoc.gov/eeoc/plan/nep.cfm> (last visited Aug. 31, 2011).

124. *Id.* The following is a more thorough articulation of the three priority areas:

[ (1) Cases . . . which . . . could have a potential significant impact beyond the parties to the particular dispute[;]

. . . .

[ (2) Cases having the potential of promoting the development of law supporting the antidiscrimination purposes of the statutes enforced by the Commission[;]

. . . .

[and] [ (3) Cases involving the integrity or effectiveness of the Commission's enforcement process, particularly the investigation and conciliation of charges.

*Id.*

125. Igasaki, *supra* note 121, at 268; cf. Robert A. Kearney, *Who's in Charge at the EEOC?*, 40 DRAKE L. REV. 1, 21 (2001) (arguing that EEOC's decision to forego investigating every claim "undermines Congress' direction that the agency devote itself to the conciliation and investigation of discrimination charges").

126. Moss et al., *supra* note 103, at 4. For an in-depth discussion of the charge-processing procedure, see *id.* at 30-32 & n.157.

127. Occhialino & Vail, *supra* note 117, at 694.

128. Moss et al., *supra* note 103, at 31.

129. EEOC, *supra* note 123. ("The top priority for charge processing (Category A), includes Enforcement Plan cases and, within resource constraints, other cases in which it appears more likely than not that discrimination has occurred.")

given priority treatment and investigated promptly.<sup>130</sup> If the EEOC's preliminary investigation of a category A claim reveals that further investigation is necessary to determine if a Title VII violation occurred, the claim will be placed in category B.<sup>131</sup> Once demoted to category B, a claim will only be investigated further if resources are available to make such an investigation feasible.<sup>132</sup> Category C is reserved for claims that upon initial review are perceived to have no merit.<sup>133</sup> Category C claims are promptly dismissed without any investigation.<sup>134</sup>

The PCHP accomplished the goal of reducing EEOC's backlog, at least temporarily. Within a few years of implementing PCHP, the EEOC reported that it had "substantially reduced its inventory from over 111,000 charges to slightly over 65,000 charges, a reduction of over 40%."<sup>135</sup> From the perspective, therefore, of improving administrative efficiency, the PCHP has been a success, although arguably at the expense of meritorious claims that may have slipped through the cracks.<sup>136</sup>

Since 2006, the Commission has once again reevaluated its broad foundational goals and policies.<sup>137</sup> Given the increasing rarity of overt forms of discrimination,<sup>138</sup> the EEOC has sought to address the subtler, more complex forms of discrimination that have a greater bearing on equal employment opportunities in today's workforce.<sup>139</sup>

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130. Occhialino & Vail, *supra* note 117, at 694.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. Paul M. Igasaki & Paul Steven Miller, *Priority Charge Handling Task Force, Litigation Task Force Report*, EEOC, pt. VI (Mar. 1998), [http://www.eeoc.gov/eeoc/task\\_reports/charge\\_handling.cfm](http://www.eeoc.gov/eeoc/task_reports/charge_handling.cfm).

136. *See* Moss et al., *supra* note 103, at 67–69 (arguing that discarding EEOC's commitment to full investigation of all charges has led to meritorious claims being dismissed without proper investigation).

137. *See generally* LESLIE E. SILVERMAN ET AL., SYSTEMIC TASK FORCE REPORT (2006), *available at* [http://www.eeoc.gov/eeoc/task\\_reports/upload/systemic.pdf](http://www.eeoc.gov/eeoc/task_reports/upload/systemic.pdf) (describing implementation of systemic discrimination initiatives).

138. *See* Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 459–60 (2001) ("The project of pursuing workplace equity has reached a new stage. Racial and gender inequality persists in many places of employment. However, the explanations and solutions for these conditions have become more complex and elusive. Smoking guns—the sign on the door that 'Irish need not apply' or the rejection explained by the comment that 'this is no job for a woman'—are largely things of the past. Many employers now have formal policies prohibiting race and sex discrimination, and procedures to enforce those policies. Cognitive bias, structures of decisionmaking, and patterns of interaction have replaced deliberate racism and sexism as the frontier of much continued inequality." (footnotes omitted)).

139. The EEOC has developed a new strategy for combating such discrimination entitled E-RACE. EEOC, *The E-RACE Initiative*, EEOC.GOV, <http://www.eeoc.gov/eeoc/initiatives/e-race/index.cfm> (last visited Aug. 3, 2011). E-RACE identifies five main goals to achieve over the five-year period from 2008–2013. They are:

1. Improve Data Collection and Data Analysis in order to Identify, Track, Investigate and Prosecute Allegations of Discrimination[;]
2. Improve Quality and Consistency in EEOC's Charge Processing and Litigation Program, and Improve Federal Sector System[;]
3. Develop Strategies, Legal Theories, and Training Modules to Address Emerging Issues of Race and Color Discrimination[;]

Toward this end, the EEOC has implemented a policy that prioritizes “systemic discrimination” claims.<sup>140</sup>

The emphasis on systemic discrimination litigation continues to move the EEOC in a direction away from its traditional policy of fully investigating every individual charge.<sup>141</sup> The EEOC justifies this new emphasis on the basis that, because of the large class-action nature of systemic discrimination cases, more individual relief will ultimately be obtained.<sup>142</sup> Under this policy, the identification, investigation, and litigation of systemic discrimination cases has become a top priority.<sup>143</sup> Since the vast majority of charges do not implicate systemic discrimination, such charges (assuming they are found to have cause) are generally addressed through EEOC’s mediation program, rather than through litigation.<sup>144</sup>

### 3. Mediation and Conciliation

In its NEP report, the EEOC endorsed the use of alternative dispute resolution and voluntary mediation efforts as ways of quickly and efficiently disposing of charges.<sup>145</sup> Following the NEP report, EEOC created a voluntary, private sector mediation program.<sup>146</sup> The program encourages confidential mediation, even before any

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4. Enhance Visibility of EEOC’s Enforcement Efforts in Eradicating Race and Color Discrimination[;]

5. Engage the Public, Employers, and Stakeholders to Promote Voluntary Compliance to Eradicate Race and Color Discrimination.

EEOC, *E-RACE Goals and Objectives*, EEOC.GOV, <http://www.eeoc.gov/eeoc/initiatives/e-race/goals.cfm> (last visited Aug. 31, 2011).

140. See Press Release, EEOC, EEOC Makes Fight Against Systemic Discrimination a Top Priority, (Apr. 4, 2006), available at <http://www.eeoc.gov/press/4-4-06.html> (defining “systemic cases as ‘pattern or practice, policy and/or class cases where the alleged discrimination has a broad impact on an industry, profession, company, or geographic location’” (quoting SILVERMAN ET AL., *supra* note 137)). See generally SILVERMAN ET AL., *supra* note 137.

141. Cf. Kearney, *supra* note 125, at 21–26 (arguing that EEOC’s shift away from investigating every claim violates its statutory mandate).

142. See SILVERMAN ET AL., *supra* note 137, at 36 (contending that shifting focus away from individual cases will enable more efficient use of limited resources).

143. See *id.* at 22–23 (noting that systemic plan requires results even at expense of other office goals). During the adoption of the systemic-discrimination initiative, the EEOC found that there had been no incentive to pursue such large complex cases because it tended to interfere with charge-inventory management. *Id.* at 18. Furthermore, many employees lacked the substantive expertise necessary to pursue and investigate complex claims, with their requisite evidentiary determinations and statistical analyses. *Id.* at 19. In order to deal with these issues, the Systemic Task Force Report recommended streamlining the process by encouraging partnership and collaboration among the Commission’s investigators and attorneys (particularly those with more systemic expertise). *Id.* at 23–24. It also recommended a significant shift of resources toward identifying and investigating systemic discrimination claims. *Id.* at 24. To effectively pursue these goals, the national headquarters recommended stopping litigation of individual cases. *Id.* at 25. The Task Report thus advocated a truly foundational shift in resources and priorities.

144. For general information concerning the EEOC’s mediation program, see EEOC, *Mediation*, EEOC.GOV, <http://www.eeoc.gov/eeoc/mediation/index.cfm> (last visited Aug. 31, 2011).

145. Occhialino & Vail, *supra* note 117, at 689 (noting that ADR and mediation has become central to EEOC’s efforts).

146. *Id.* at 689.



investigation begins,<sup>147</sup> and has been a highly successful way to reduce transactional costs.<sup>148</sup>

Initially, the program “proved extremely popular with employers and charging parties,” with “more than 35,000 charges” resolved through mediation in four years.<sup>149</sup> In recent years, however, employers have become less likely to participate in the mediation process.<sup>150</sup>

### III. DISCUSSION

The new pleading standard articulated by the Supreme Court in *Bell Atlantic Corp. v. Twombly*<sup>151</sup> and *Ashcroft v. Iqbal*<sup>152</sup> represents a clear break from the Court’s prior precedent and the plain meaning of the Federal Rules of Civil Procedure (FRCP). While the history,<sup>153</sup> language,<sup>154</sup> and prior interpretation<sup>155</sup> of the FRCP readily demonstrate that Rule 8 was intended to be a notice-based pleading standard, *Twombly* and *Iqbal* were not content to let precedent or statutory interpretation get in the way of the Court’s current policy concern with judicial efficiency.<sup>156</sup> Despite the Court’s insistence that the plausibility standard is distinct from the heightened pleading standard that both precedent and the FRCP forbid, the two-pronged analysis<sup>157</sup> set forth by the Court reintroduces the classic hallmarks of a fact-based pleading system that the drafters of the FRCP specifically sought to eliminate.<sup>158</sup> Although this new standard has been extended to cover all civil actions, its impact will be particularly severe on plaintiffs alleging employment discrimination and other civil rights violations where plausibly alleging a discriminatory state of mind—based on facts alone—can be difficult, and often impossible.<sup>159</sup>

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147. *Id.*

148. See Seth D. Harris, *Disabilities Accommodations, Transaction Costs, and Mediation: Evidence from the EEOC’S Mediation Program*, 13 HARV. NEGOT. L. REV. 1, 15–17 (2008) (examining transactional costs associated with mediation).

149. *Id.* at 689–90.

150. See generally *ABA Meeting Examines Why Companies Don’t Mediate at the EEOC*, ALTERNATIVES TO THE HIGH COST OF LITIG. (CPR Inst. for Dispute Resolution, New York, N.Y.), June 2004, at 83.

151. 550 U.S. 544 (2007).

152. 129 S. Ct. 1937 (2009).

153. See *supra* Part II.A.1 for a discussion of the FRCP’s historical context and the drafters’ intent to eliminate fact pleading.

154. Fed. R. Civ. P. 8(a) (requiring only a “short and plain statement of the claim”).

155. See *supra* Part II.A.2 for a discussion of the Court’s pre-*Twombly* interpretation of Rule 8 in *Conley v. Gibson*, 355 U.S. 41 (1957), *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), and *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506 (2002).

156. See *infra* Part III.B for a discussion of how the plausibility standard reflects the Court’s predominant concern with judicial efficiency.

157. See *supra* notes 79–85 and accompanying text for a discussion of the “two-pronged approach” used to assess the complaint in *Iqbal*.

158. See *supra* Part II.A.1 for a discussion of the drafters’ express rejection of fact-based pleading.

159. See *infra* Part III.A for an analysis of how *Iqbal*’s two-pronged standard creates a fact-based pleading system, one particularly detrimental to plaintiffs alleging discrimination.

In establishing the new fact-based plausibility standard, the Court disavowed itself of its earlier recognition that redefining the function of federal pleadings is the sole province of Congress, not the Court.<sup>160</sup> Since the Court is in an inferior position vis-à-vis Congress to assess the costs associated with redefining the federal pleading standard,<sup>161</sup> it should come as little surprise if the plausibility standard has unintended consequences. One potential unintended consequence—which has received scant attention to date—is the impact the plausibility standard could have on the litigation and mediation work of the Equal Employment Opportunity Commission (EEOC). While definitive conclusions cannot yet be drawn, there is ample reason to believe that, as with employment discrimination claims generally, EEOC's mission to eradicate workplace discrimination will suffer as a direct result of the plausibility standard.<sup>162</sup>

#### A. *Iqbal's Two-Pronged Attack on Employment Discrimination Claims*

The two-pronged pleading analysis set forth by the *Iqbal* Court reintroduces the classic hallmarks of a fact-based pleading system that the drafters of the FRCP specifically sought to eliminate. The impact of this new standard will be particularly severe on Title VII plaintiffs and any other plaintiffs alleging civil rights violations.

##### 1. Prong One: Distinguishing “Facts” from “Conclusions”

Although the *Twombly* majority insisted that the decision did not signify a heightened pleading standard,<sup>163</sup> this insistence does not easily co-exist with *Iqbal's* formalized two-pronged analysis.<sup>164</sup> The first prong requires the lower courts to analytically distinguish between allegations that are disguised legal conclusions not entitled to a presumption of truth, from factual allegations that presumably are.<sup>165</sup> *Iqbal* thus explicitly rejected the formerly well-settled rule that all allegations in a complaint are entitled to a presumption of truth. But the analytical problems remain: How does one decide between an allegation that is factual and an allegation that is conclusory? What is it that informs how these choices will be made?

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160. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007) (acknowledging that FRCP cannot be altered by judicial interpretation and must be amended pursuant to process laid out in REA); *Swierkiewicz*, 534 U.S. at 515 (same); *Leatherman*, 507 U.S. at 168 (same).

161. See *Twombly*, 550 U.S. at 579 (Stevens, J., dissenting) (“I would not rewrite the Nation's civil procedure textbooks and call into doubt the pleading rules of most of its States without far more informed deliberation as to the costs of doing so. Congress has established a process—a rulemaking process—for revisions of that order.”). See generally *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665–66 (1994) (stating that, with respect to complex issues, “Congress is far better equipped than the judiciary to ‘amass and evaluate the vast amounts of data’” necessary for making an informed decision).

162. See *infra* Part III.C for an analysis of how the plausibility standard could impact the EEOC's litigation and mediation programs.

163. *Twombly*, 550 U.S. at 569 n.14 (“In reaching this conclusion, we do not apply a ‘heightened’ pleading standard . . .”).

164. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–52 (2009) (laying out “two-pronged approach”). See *supra* notes 79–85 and accompanying text for a brief review of the two prongs.

165. See *id.* at 1949–50 (“[W]e are not bound to accept as true a legal conclusion couched as a factual allegation.” (internal quotation marks omitted)).

While attempting to distinguish factual allegations from legal conclusions may be “the stuff of a bygone era,”<sup>166</sup> *Iqbal* appears to reinstitute analytical features of code pleading that had been abandoned for the better part of a century. Almost all historical accounts of the development of the FRCP have emphasized that the drafters’ decision to word Rule 8 in a way that consciously avoided any requirement to plead facts or conclusions.<sup>167</sup> The drafters understood the inherent difficulty in distinguishing between facts and legal conclusions and the FRCP was specifically drafted to eliminate this unnecessary confusion.<sup>168</sup> The Court’s wholesale rejection of the historical context behind the development of the FRCP diminishes the ideas and theories that helped formally establish the language that still calls for nothing more than “a short and plain statement of the claim.”<sup>169</sup>

Notwithstanding Justice Souter’s *Iqbal* dissent, his majority opinion in *Twombly* opened a door that encouraged more exacting scrutiny and much wider latitude in determining whether particular allegations should be considered factual or legal in nature.<sup>170</sup> In *Iqbal*, Justice Souter wrote that the majority improperly ascribed a plausible non-discriminatory motivation that justified the designation of certain suspects as “high interest.”<sup>171</sup> But in *Twombly*, Souter himself ascribed a similarly plausible, alternative motivation to Bell Atlantic—that although the facts alleged were consistent with an illegal agreement, a more likely explanation was that “former Government-sanctioned monopolists were sitting tight, expecting their neighbors to do the same thing.”<sup>172</sup> Souter explained the difference between his choice to credit the alternative motivation in *Twombly* by noting that in *Iqbal*, the allegations in the complaint were not “naked legal conclusions” (as he interpreted them to be in *Twombly*), nor were they “consistent with legal conduct.”<sup>173</sup> But the majority disagreed, illustrating precisely the difficulty in applying such a discretionary, amorphous standard of interpretation.<sup>174</sup>

The difficulties in distinguishing facts from conclusions are particularly evident when analyzing the sufficiency of a discrimination complaint.<sup>175</sup> Often a plaintiff at the

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166. *Twombly*, 550 U.S. at 589 (Stevens, J., dissenting).

167. See WRIGHT & MILLER, *supra* note 23, § 1216 (describing drafters’ intention that Rule 8 eliminate confusing distinctions between evidentiary facts, ultimate facts, and conclusions).

168. See *supra* notes 28–30 and accompanying text for a discussion of the drafters’ rejection of the “logically indefensible” position that complaints should be based on facts, not conclusions. See *generally Twombly*, 550 U.S. at 574 (Stevens, J., dissenting) (discussing historical difficulty of logically distinguishing between facts, evidence, and conclusions).

169. FED. R. CIV. P. 8.

170. See *Iqbal*, 129 S. Ct. at 1949–50 (“[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.”).

171. *Id.* at 1958–60 (Souter, J., dissenting). The majority concluded that the arrests overseen by Mueller were likely lawful, and justified by the arrestees’ potential connections to terrorists. *Id.* at 1951 (majority opinion).

172. *Twombly*, 550 U.S. at 568.

173. *Iqbal*, 129 S. Ct. at 1960 (Souter, J., dissenting).

174. See *id.* at 1951 (majority opinion) (noting that complaint contained bare assertions and that defendants’ actions were likely consistent with legal conduct).

175. See, e.g., *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998) (“‘I was turned down for a job because of my race’ is all a complaint has to say.”).

initial pleading stage will not have the evidence necessary to plausibly suggest discrimination has taken place without relying on what a court may now freely designate a “legal conclusion.”<sup>176</sup> Because discrimination claims require proof of a subjective state of mind, an assertion of a culpable state of mind, without access to supporting evidence, cannot be anything other than a legal conclusion.<sup>177</sup> Yet *Iqbal* nevertheless affirmed that *Twombly* applied to all civil actions, including those based on discrimination.<sup>178</sup> Indeed, the specific allegations rejected in *Iqbal* were those that often arise in employment discrimination claims: that the defendant knew of or condoned a discriminatory policy or act.<sup>179</sup>

The clear message from *Swierkiewicz*, that liberal notice pleading allows conclusory allegations of discrimination,<sup>180</sup> is in direct tension with *Iqbal*'s rejection of conclusory allegations.<sup>181</sup> In *Swierkiewicz*, establishing the prima facie case of discrimination was considered an evidentiary standard, not a pleading requirement.<sup>182</sup> Demonstrating a prima facie case was specifically described as the burden of raising an “inference of discrimination.”<sup>183</sup> Per *Iqbal*, however, the facial plausibility standard is met when “the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”<sup>184</sup> How, after *Iqbal*, can a court reasonably draw a distinction between allegations that create an inference of discrimination (the improperly heightened standard placed on the complainant in *Swierkiewicz*)<sup>185</sup> and allegations that create a reasonable inference that discrimination occurred (the proper standard of evaluation under *Iqbal*)?<sup>186</sup> There is no discernable difference between these two constructions. Without pleading facts sufficient to make out a prima facie case, the plaintiff is dangerously close to pleading what *Iqbal* and *Twombly* rejected: legal conclusions or bare assertions.<sup>187</sup>

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176. The Supreme Court acknowledged as much in *Swierkiewicz v. Sorema N. A.*, stating, “[b]efore discovery has unearthed relevant facts and evidence, it may be difficult to define the precise formulation of the required prima facie case in a particular case.” 534 U.S. 506, 512 (2002).

177. See Fairman, *supra* note 38, at 592 (acknowledging difficulty of pleading facts that suggest a particular subjective state of mind); Josephson, *supra* note 45, at 895 (same).

178. *Iqbal*, 129 S. Ct. at 1952–53.

179. See *supra* notes 86–90 and accompanying text for the specific allegations in *Iqbal*.

180. *Swierkiewicz*, 534 U.S. at 514–15.

181. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (finding no need to presume the truth of any conclusory allegation).

182. *Swierkiewicz*, 534 U.S. at 510.

183. *Id.*

184. *Iqbal*, 129 S. Ct. at 1949.

185. *Swierkiewicz*, 534 U.S. at 514.

186. *Iqbal*, 129 S. Ct. at 1949.

187. *Id.* at 1952; *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

## 2. Prong Two: Assessing if Alleged Facts Create Reasonable Inference of Misconduct

Although the second prong of the Court's analysis appears analytically and methodologically separate from the first prong, assessing the plausibility of a complaint's factual allegations (prong two) is almost entirely dependent upon what a judge determines to be a fact (prong one). As should be clear from the previous section, the process of stripping a complaint of its legal conclusions is intimately connected to assessing the factual sufficiency of a particular allegation. Thus, the process of determining whether an allegation is (or is not) entitled to a presumption of truth will, in turn, define the entire claim's "plausibility."

This is a key distinction between *Twombly* and *Iqbal*, and it is the basis upon which Justice Souter believed that the majority had taken the plausibility framework too far.<sup>188</sup> It is only after deciding which allegations (divorced from the context of the complaint as a whole) are nothing more than legal conclusions unentitled to an assumption of truth, that the judge advances to prong two—whether enough factual allegations remain that, taken together, create a "plausible" claim for relief. Stripping the presumption of truth from certain allegations without viewing the complaint *as a whole*, effectively preordains whether or not the remaining allegations can create a plausible claim for relief.<sup>189</sup>

After *Iqbal*, granting the presumption of truth depends on the degree of particularity with which an allegation is made. This is the essence of the fact/conclusion distinction—a legal conclusion is too vague precisely because it is inadequately supported with enough particularized facts. The *Twombly* Court took pains to distinguish its plausibility standard from requiring heightened particularity, noting "our concern is not that the allegations in the complaint were insufficiently "particular[ized], rather, the complaint warranted dismissal because it failed *in toto* to render plaintiffs' entitlement to relief plausible."<sup>190</sup> But the complaint failed to raise the possibility of relief to a plausible level because the plaintiff's facts were not particular enough to "nudge[] their claims across the line from conceivable to plausible."<sup>191</sup> *Iqbal* merely formalized the method by which a court can require more particularized allegations; if an individual allegation is not sufficiently particular, it is no longer entitled to a presumption of truth.<sup>192</sup> As such, *Iqbal* definitively raised the bar for assessing the factual sufficiency of a pleading, but as explained in the prior section, the decision gave no guidance as to how courts should navigate the tricky and complicated process of distinguishing between facts and legal conclusions. One thing remains clear, whether or not an allegation should be considered a fact intimately depends on the degree of particularity with which it is pled.

Even after stripping a complaint of any allegations deemed to be legal conclusions, the amorphous nature of the plausibility analysis again invests too much

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188. *Iqbal*, 129 S. Ct. at 1960 (Souter, J., dissenting).

189. *Id.*

190. *Twombly*, 550 U.S. at 569 n.14.

191. *Id.* at 570.

192. *Iqbal*, 129 S. Ct. at 1951.

discretion in the judge. *Iqbal* specifically authorized this discretion when it invited judges to use their “common sense” and judicial experience to assess a claim’s plausibility.<sup>193</sup> Both *Leatherman* and *Swierkiewicz* specifically emphasized the impropriety of considering the probable success of a particular claim during the initial pleadings stage,<sup>194</sup> but how can a lower court be expected to articulate what is or is not plausible without resorting to a general analysis of the potential success of the case (based on the judge’s common sense and experience)?<sup>195</sup>

*Iqbal* also exacerbated another unclear distinction created in *Twombly*—a distinction between pleading facts merely consistent with liability (which will not satisfy the plausibility standard) and pleading facts suggesting liability (which will).<sup>196</sup> If a viable lawful explanation for the alleged facts exists, which presumably any judge is free to think up on his or her own, then the “plausibility” bar has not been met.<sup>197</sup> Ultimately, aside from direct evidence of discrimination, almost all facts presented by a plaintiff in a discrimination complaint could be characterized as merely consistent with liability. Indeed, even the establishment of a prima facie case is subject to the defendant’s rebuttal—that it had legitimate, nondiscriminatory reasons for taking the adverse employment action that it did.<sup>198</sup> Conjuring up a legitimate, non-discriminatory reason is not difficult, as there are often many plausible, lawful explanations for adverse employment actions, even where discrimination is the true or partial culprit.<sup>199</sup>

The impact of *Iqbal* is that more plaintiffs will no longer have the opportunity to utilize discovery to prove the falsity of conceivably legitimate, non-discriminatory explanations.<sup>200</sup> Post-*Iqbal*, a judge can dismiss a complaint if he or she believes anything other than unlawful discrimination motivated the defendant.<sup>201</sup> It follows, then, that the evidentiary burden normally reserved for summary judgment can and will be applied during the pleadings stage when considering a discrimination claim.<sup>202</sup>

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193. *Id.* at 1950.

194. *Twombly*, 550 U.S. at 584 (Stevens, J., dissenting).

195. *See id.* at 581 (relying on principle, established by precedent, that it is improper for judge to consider likely success of complaint during pleading stage).

196. *Id.* at 557 (majority opinion) (holding that allegations must suggest, not merely be consistent with, illegal conduct).

197. *See id.* (holding that facts which readily allow for plausible alternative explanation are insufficient for pleading conspiracy).

198. For a discussion of the standard burden-shifting framework of a Title VII discrimination claim, see generally *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

199. *See generally* Sumi Cho, “Unwise,” “Untimely” and “Extreme”: Redefining Collegial Culture in the Workplace and Revaluing the Role of Social Change, 39 U.C. DAVIS. L. REV. 805 (2006) (demonstrating relative ease of producing plausible, non-discriminatory bases for adverse employment actions).

200. *See Burdine*, 450 U.S. at 253 (stating plaintiff must prove defendant’s articulated nondiscriminatory reasons for adverse employment action were actually pretext for discrimination).

201. This is because under *Twombly* and *Iqbal* a pleading must establish factual allegations that are more than simply consistent with the occurrence of unlawful discrimination. *See supra* notes 196–99 and accompanying text for a discussion of the difference between facts consistent with unlawful action and facts suggesting unlawful action.

202. Justice Stevens observed in his *Twombly* dissent that the majority opinion confuses pleadings evaluation with summary judgment evaluation. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 586 (2007) (Stevens, J., dissenting).

In *Iqbal*, the plaintiff could not successfully assert the existence of a discriminatory state of mind, the Court seemed to require facts that would point to a “smoking gun” theory of intentional discrimination.<sup>203</sup> Providing such facts at the pleading stage creates considerable difficulty in bringing a discrimination claim.<sup>204</sup> It illustrates an implicit need to either provide direct evidence or plead a prima facie case if a plaintiff wants to survive a motion to dismiss; burdens that were explicitly rejected in both *Conley* and *Swierkiewicz*.<sup>205</sup> The Court in *Swierkiewicz* maintained that the “ordinary rules for assessing the sufficiency of a complaint [must] apply” to employment discrimination claims.<sup>206</sup> But after *Iqbal*, those ordinary rules have been called into question across all areas of law.<sup>207</sup> In this sense, the two cases conflict in ways that enable judges to choose whatever formulation they prefer.<sup>208</sup>

*B. The Plausibility Standard Created New Basis for Evaluating Pleading Standards*

Despite *Swierkiewicz*’s explicit observation that judicial re-interpretation of the FRCP cannot be justified solely on pragmatic policy concerns,<sup>209</sup> it seems that such concerns were precisely what fueled the Court’s decisions in *Twombly* and *Iqbal*. Indeed, *Iqbal* places considerable doubt on the proposition that Rule 8 continues to

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203. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1952 (2009) (concluding that plaintiff’s complaint did not “contain any factual allegation sufficient to plausibly suggest [the defendants’] discriminatory state of mind”). Since *Iqbal*’s primary allegations (that the defendants acted with a discriminatory state of mind) were not entitled to a presumption of truth, and since the Court believed that there were other plausible, lawful explanations for defendants’ conduct, it follows that the only factual allegations sufficient for *Iqbal*’s complaint to proceed would have been the existence of direct evidence (i.e., a “smoking gun”) that defendants acted with the intent to discriminate.

204. See *supra* note 45 for a discussion of the difficulty of pleading facts that tend to illuminate the defendants’ subjective state of mind.

205. See *Conley v. Gibson*, 335 U.S. 41, 45–46 (1957) (noting that allegations of discrimination provide legitimate cause of action); *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 515 (2002) (holding that plaintiff need not prove prima facie case during pleadings stage).

206. *Swierkiewicz*, 534 U.S. at 511.

207. See *Iqbal*, 129 S. Ct. at 1953 (noting plausibility standard applies to all civil actions).

208. This seems to be precisely what is happening. Even within the Third Circuit, there is disagreement between panels. Compare *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009) (“We have to conclude, therefore, that because *Conley* has been specifically repudiated by both *Twombly* and *Iqbal*, so too has *Swierkiewicz*, at least insofar as it concerns pleading requirements and relies on *Conley*.”), with *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 319 n.17 (3d Cir. 2010) (noting that although dicta in *Fowler* has “repudiated” *Swierkiewicz*, “we are not so sure”). Other circuits have taken a different approach. See *al-Kidd v. Ashcroft*, 580 F.3d 949, 974 (9th Cir. 2009) (noting in dictum that *Twombly* “reaffirmed the holding of *Swierkiewicz*”).

The discretion bestowed on lower courts has had the practical effect of officially authorizing the de facto heightened pleading standard previously developed by many lower courts considering discrimination claims. Spencer, *supra* note 38, at 162. Spencer’s survey of post-*Twombly* district and circuit court opinions indicates that lower courts continue to differ in the amount of particularity they require when assessing a particular claim. *Id.* With Title VII claims, Spencer suggests that *Swierkiewicz*, at least in some instances, may still have a significant impact on lower court interpretation of pleading standards, and that within this context, the former liberal notice pleading standard of *Conley* still prevails. *Id.* at 127–41. On the other hand, many district courts and some circuit courts have utilized the *Twombly* standard to examine similar claims with more scrutiny. *Id.* at 141–49.

209. *Swierkiewicz*, 534 U.S. at 514–15.

serve the primary function of notice and broad access to the courts,<sup>210</sup> and strongly suggests that the Court has identified a new direction for the pleading paradigm: that policy concerns regarding efficient case management, weeding out meritless claims, avoiding prohibitive costs of discovery abuse, and alleviating overcrowded dockets, are now the most important considerations when evaluating the sufficiency of a complaint under Rule 8.<sup>211</sup>

If the requisite level of plausibility is ultimately informed by an efficiency rationale, it is possible that in certain circumstances, pleadings will be interpreted by weighing the probability of relief against the potential cost of discovery—to conduct, in essence, a cost-benefit analysis of the complaint.<sup>212</sup> This type of analysis is inappropriate for multiple reasons. First, judges do not have access to the type of empirical data that will effectively inform such an analysis.<sup>213</sup> Considerations of potential litigation costs are outside the scope of the judiciary's knowledge and authority.<sup>214</sup> Second, a cost-benefit analysis also conflicts with the settled judicial maxim that a judge should not speculate as to the likelihood of a complaint's eventual success during the pleadings stage.<sup>215</sup> This type of ad hoc empirical analysis runs

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210. Despite the strong affirmation of the notice principle in *Leatherman* and *Swierkiewicz*, the Court paid only lip service to its value in *Twombly* and *Iqbal*. Some scholars have suggested that the notice function has become increasingly irrelevant in modern litigation. See Epstein, *supra* note 58, at 98 (concluding that emphasis on notice in FRCP was byproduct of era with simpler litigation); Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 10 (2010) (“[*Iqbal* and *Twombly*] should be seen as the latest steps in a long-term trend that has favored increasingly early case disposition in the name of efficiency, economy, and avoidance of abusive and meritless lawsuits. It also marks a continued retreat from the principles of citizen access, private enforcement of public policies, and equality of litigant treatment in favor of corporate interests and concentrated wealth.”). Whatever value notice has in the functional purpose of pleadings, it no longer contributes to any understanding of the factual detail necessary for analyzing sufficiency. See A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 20–21 (2009) (illustrating difficulties associated with solely emphasizing notice as purpose of pleadings).

211. The majority opinion in *Twombly* spent considerable time addressing the policy concern that antitrust discovery is very expensive, and many commentators have taken this as a signal that the function of pleadings has fundamentally shifted. See Josephson, *supra* note 45, at 889–91 (analyzing difference between notice deficiencies and substantive deficiencies and arguing that complaint in *Twombly* suffered from substantive rather than notice deficiencies); Reeves, *supra* note 58, at 512–55 (arguing that application of higher pleading standard to discrimination claims stems from increased workload necessitating efficient disposal of unmeritorious claims); Spencer, *supra* note 210, at 19 (finding notice irrelevant to understanding contemporary substantive pleading sufficiency).

212. See Epstein, *supra* note 58, at 81 (proposing courts conduct cost/benefit analysis during the pleadings stage when considering motions to dismiss).

213. See Spencer, *supra* note 210, at 25 n.121 (observing that these decisions should be left in hands of legislative agencies more equipped to make informed policy judgments); *The Supreme Court, 2006 Term—Leading Cases*, 121 HARV. L. REV. 185, 313–14 (2007) (noting that courts can only rely on facts of cases and their own intuition in accessing motions to dismiss).

214. *The Supreme Court, 2006 Term—Leading Cases*, *supra* note 213, at 313–14.

215. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 583 (2007) (Stevens, J., dissenting) (observing that consideration of likely success of allegations is not proper test to evaluate sufficiency of complaint).



counter to fundamental notions of procedural fairness and providing open access to the courts as a way to ensure justice.<sup>216</sup>

Additionally, it is fundamentally improper to prematurely block judicial access to the litigation process in situations where the evidence needed to fully establish a claim can only be obtained during discovery.<sup>217</sup> As discussed earlier, this point is of particular concern to employment discrimination plaintiffs. In resurrecting the de facto heightened pleading standard that lower courts have historically used for civil rights complaints,<sup>218</sup> some district courts have recently gone so far as to require factual pleadings that make out a prima facie case, despite the fact that *Swierkiewicz* has never been explicitly overruled.<sup>219</sup> In effect, *Twombly* and *Iqbal* have enabled lower courts to use their discretion for the purposes of efficiently dealing with overcrowded dockets at the expense of judicial access, particularly with discrimination and civil rights claims.<sup>220</sup>

Ironically, however, the plausibility standard has, in some ways, undermined the efficiency rationale it is predicated upon. Even if the importance of judicial efficiency is a goal that warrants a redefinition of pleadings, the indeterminacy of the Court's reasoning and language may undermine its goal. First, the standard has not been articulated clearly enough to avoid increased satellite litigation over motions to dismiss.<sup>221</sup> The FJC's study on the effect *Iqbal* has had on 12(b)(6) motions to dismiss bears this out.<sup>222</sup> According to the FJC study, plaintiffs have been twice as likely, in the wake of *Iqbal*, to face a motion to dismiss.<sup>223</sup> Second, the plausibility standard's incoherence and dependence on a judge's "common sense" and experience encourages unequal application by the lower courts. This unequal application almost assures continued satellite litigation via motions to dismiss that may ultimately offset whatever discovery costs are eliminated through higher dismissal rates.<sup>224</sup>

Whatever the merits of the policy concerns outlined as a rationale behind the plausibility standard, the Court has historically (and as recently as *Twombly*)

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216. See Spencer, *supra* note 210, at 25 ("The problem is simply that the standard is not sufficiently calibrated to perceive merit but rather is designed more for the purpose of protecting scarce economic and judicial resources from waste.").

217. See *id.* at 36 (concluding that plausibility doctrine is too unforgiving toward plaintiffs who cannot access information about subjective motivations until discovery).

218. See, e.g., *Gregory v. Dillard's, Inc.*, 565 F.3d 464, 473 (8th Cir. 2009) (noting that even before *Twombly*, a civil rights complaint was required to state facts which were not conclusory); *Guirguis v. Movers Specialty Servs., Inc.*, 346 Fed. App'x 774, 776 (3d Cir. 2009) (same).

219. See, e.g., *Fletcher v. Philip Morris USA, Inc.*, No. 3:09CV284-HEH, 2009 WL 2067807, at \*7 (E.D. Va. 2009) ("Plaintiff has failed to state a prima facie case supported by well-pleaded facts that Defendants acted with discriminatory intent.").

220. See Reeves, *supra* note 58, at 549–51 (arguing *Twombly* has been used by certain circuits to dismiss discrimination claims due to increased workload resulting from influx of civil rights claims).

221. See Hoffman, *supra* note 58, at 1235 (noting that *Twombly* appears to be authority on pleadings, but unclear how far it extends); Spencer, *supra* note 38, at 162 (concluding that until *Twombly* is clarified, lower courts will be split).

222. See *supra* Part II.A.5 for a discussion of the FJC study.

223. See CECIL ET AL., *supra* note 91, at 10 & tbl. 2; see also Hoffman, *supra* note 94, at 4.

224. Spencer, *supra* note 210, at 26.

acknowledged that the FRCP should only be altered pursuant to the REA.<sup>225</sup> Notably, *Iqbal* makes no mention of the necessity to amend pleading standards pursuant to the REA (nor does it make any reference to notice pleading at all). Moreover, while the *Twombly* Court appears to have been largely motivated by a concern with sprawling large-scale litigation, and while *Iqbal* may have been influenced by the unique concerns surrounding qualified immunity,<sup>226</sup> it is now clear that the plausibility standard is being applied in many other contexts.<sup>227</sup> The Fourth Circuit has ruled that even a complaint filed by a pro se plaintiff does not alter the standard set forth in *Twombly*.<sup>228</sup> It should, of course, be of no surprise that the standard is being broadly applied. Despite the unique concerns associated with the specific contexts of *Iqbal* and *Twombly*, *Iqbal*'s sweeping language speaks for itself: "Our decision in *Twombly* expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike."<sup>229</sup>

### C. *Impact of Twombly and Iqbal on the EEOC*

Whatever side one aligns oneself regarding the debate between access and efficiency, the Court is not properly equipped to assess the costs associated with altering previously well-settled pleading standards.<sup>230</sup> If it is true that the plausibility standard will be broadly applied to employment discrimination claims, increased costs will result, including for administrative agencies participating in litigation on behalf of aggrieved plaintiffs. This is particularly evident when considering the costs such a shift may have on the EEOC's litigation and mediation efforts.

Although it seems clear that the Court did not consider administrative costs (as opposed to judicial costs)<sup>231</sup> when establishing the plausibility standard, an analysis of

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225. See *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569 n.14 (2007) (acknowledging that FRCP cannot be altered by judicial interpretation and must be amended pursuant to process laid out in REA); *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 515 (2002) (same); *Leatherman v. Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (same).

226. See, e.g., *Smith v. Duffy*, 576 F.3d 336, 340 (7th Cir. 2009) (noting that complex litigation was *Twombly*'s primary concern, and even though *Iqbal* extended *Twombly*'s pleading standard to all civil actions, *Iqbal* was "special in its own way, because the defendants had pleaded a defense of official immunity").

227. Although invocation of *Twombly* as a basis for dismissal is not confined to civil rights claims, such claims provide a good illustration of the willingness of courts to utilize *Twombly* in cases that do not necessitate large-scale discovery and complex litigation. See, e.g., *Marrero-Gutierrez v. Molina*, 491 F.3d 1, 10 (1st Cir. 2007) (affirming dismissal on basis that allegation is merely consistent with illegal conduct, but other valid inferences exist); *Patane v. Clark*, 508 F.3d 106, 112 (2d Cir. 2007) (affirming dismissal of Title VII claim on basis that complaint failed to allege facts establishing connection between adverse action and discrimination).

228. See *Giarratano v. Johnson*, 521 F.3d 298, 304 n.5 (4th Cir. 2008) (affirming dismissal of pro se plaintiff's complaint as conclusory, and disregarding any potential qualification of *Twombly* plausibility standard articulated in Court's *Pardus* decision).

229. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009).

230. See *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 665-66 (1994) (stating that, with respect to complex issues, "Congress is far better equipped than the judiciary to 'amass and evaluate the vast amounts of data'" necessary for making an informed decision).

231. Neither *Twombly* nor *Iqbal* mention anything about how administrative agencies should incorporate and apply the new standard.

the standard's impact on the EEOC's litigation efforts illustrates that administrative costs do exist and may impair the Commission's capacity to fulfill its congressional mandate.

1. The Plausibility Standard May Provide Further Disincentive to Litigate Individual Claims

The Court's plausibility standard may provide an incentive for the EEOC to further reduce the percentage of its limited resources that go toward litigating claims on behalf of individual plaintiffs. In recent years, as part of its continuing reassessment of its priorities and policies,<sup>232</sup> the EEOC has determined that more individual relief can be obtained by litigating large-scale, systemic discrimination actions—where multiple plaintiffs stand to benefit and widespread employer practices can be directly challenged—than by litigating individual-based claims, which only stand to benefit one individual at a time.<sup>233</sup> With the increased costs posed by the plausibility standard, the cost-benefit calculus underpinning the EEOC's decision to prioritize systemic over individual claims has likely tipped further in favor of the Commission litigating fewer claims with greater impact (versus more claims with lesser impact).

While no definitive assessments can yet be made, the possibility that the Court's plausibility standard could further reduce the EEOC's litigation of individual claims gains support from the fact that several such claims have already succumbed to *Iqbal* challenges. In all of the recent 12(b)(6) motion to dismiss cases where the complaint was found to be deficient, the court has given the EEOC leave to amend.<sup>234</sup> This is consistent with the findings of the FJC study, which found that although the grant rate for motions to dismiss has been higher after *Iqbal* than before *Twombly*, the increase has been limited to dismissals with leave to amend.<sup>235</sup> The question this raises is whether the courts' willingness to grant leave to amend renders the plausibility standard insignificant. To answer this question, however, requires asking important follow-up questions that the FJC considered but did not resolve: Were the complaints actually amended, and if they were, were they subject to another motion to dismiss?<sup>236</sup> If so, what was the grant rate of these subsequent motions?<sup>237</sup>

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232. See *supra* notes 116–25 and accompanying text for a discussion of the budgetary woes that have forced the EEOC to reassess its organizational priorities.

233. See *supra* notes 137–44 and accompanying text for a discussion of the EEOC's systemic discrimination initiative.

234. *E.g.*, EEOC v. Wells Fargo Fin. Mich., Inc., No. 10–13517, 2011 WL 1690037, at \*1 (E.D. Mich. May 4, 2011); EEOC v. Am. Laser Centers, LLC, No. 1:09-CV-2247-AWI-DLB, 2010 WL 3220316, at \*4 (E.D. Cal. Aug. 13, 2010); EEOC v. Phil Vinar Furniture, Inc., No. 09-4052, 2010 WL 914775, at \*3 (C.D. Ill. Mar. 9, 2010); EEOC v. United Parcel Serv., Inc., No. 09-cv-5291, 2010 WL 3700704, at \*1 (N.D. Ill. Sept. 10, 2010); EEOC v. Supervalu, Inc., 674 F.Supp.2d 1007, 1008 (N.D. Ill. 2009); EEOC v. Tuscarora Yarns, Inc., No. 1:09-cv-217, 2010 WL 785376, at \*1 (M.D.N.C. March 3, 2010); EEOC v. Bimbo Bakeries USA, Inc., No. 1:09-CV-1872, 2010 WL 598641, at \*6 (M.D. Pa. Feb. 17, 2010).

235. See CECIL ET AL., *supra* note 91, at 13.

236. *Id.* at 14.

237. *Id.* The report indicates that the FJC is currently conducting a follow up study to address these important issues. *Id.*

Whatever the answers to these questions, the suggestion that an increased grant rate is unimportant if leave to amend is granted is problematic. Requiring amendments to a complaint to include minor additional factual details is both inefficient and costly—policy concerns that *Iqbal* was designed (but apparently failed) to address. Plaintiffs, including the EEOC, are still required to re-plead, and re-pleading costs time and money. Moreover, even if the plaintiff successfully survives a second motion to dismiss, both the plaintiff and the defendant have been forced to spend additional money litigating the sufficiency of the pleadings, and no one has benefited: the plaintiff, while his initial complaint was defective under *Iqbal*, had a strong enough case to proceed without the need to re-plead; the defendant is still going to be subject to discovery costs; and the judge still has the case on his or her docket. As such, the plausibility standard has accomplished nothing but incentivizing meaningless satellite litigation.

Furthermore, the fact that the EEOC—a government agency with *pre*-pleading discovery powers—could ever lose on a motion to dismiss is striking in and of itself. Unlike an individual plaintiff, the EEOC’s broad investigatory powers allow it to discover a wealth of information about any given case *before* filing the complaint.<sup>238</sup> The EEOC, therefore, does not suffer from the dilemma of having to plead facts “in the dark” before having an ability to know what those facts might be. Moreover, unlike an individual plaintiff, the EEOC has the luxury of cherry-picking the strongest, most promising claims that it receives. In 2010, for example, the EEOC received 99,922 charges, but filed only 271 cases—a charge-to-litigation ratio of 369-to-1.<sup>239</sup> It would seem inconceivable, therefore, that—after finishing an investigation and determining the case to be one of the 0.3% of cases strong enough to litigate—the EEOC could ever be incapable of pleading sufficient facts to make out a claim.

While it is possible that the EEOC has lost the post-*Iqbal* motions to dismiss as a result of poor tactical choices to “plead ‘just-enough-to-get-by,’”<sup>240</sup> it is also possible that the dismissals reflect precisely what critics of the plausibility standard have feared: that the amorphous standard enables judges to scrutinize the factual sufficiency of pleadings with almost unfettered discretion.<sup>241</sup> One thing that is clear is that the new plausibility standard is the reason why the EEOC is losing the motions. In *EEOC & Momsen v. United Parcel Service, Inc.*,<sup>242</sup> for example, the court dismissed the EEOC’s

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238. See *supra* notes 100–02 and accompanying text for a discussion of the EEOC’s investigatory powers, including the authority to subpoena witnesses.

239. EEOC, note 12; EEOC, *supra* note 102.

240. *EEOC v. Hobson Air Conditioning, Inc.*, No. 3:10-CV-818-L, 2010 WL 3835553, at \*2 (N.D. Tex. Sept. 28, 2010) (criticizing EEOC for failing to “take[] about twenty minutes to add a few sentences with more factual detail” and noting that “just-enough-to-get-by” approach wastes both “scare judicial resources” and exposes EEOC to “risk of being ordered to replead or having the action dismissed” (internal quotation marks omitted)).

241. See *supra* notes 170–74 and accompanying text for a discussion of how the plausibility standard encourages inconsistent interpretations and results.

242. No. 09-cv-5291, 2010 WL 3700704 (N.D. Ill. Sept. 10, 2010).

complaint despite acknowledging that it was virtually identical to an EEOC complaint that had survived a motion to dismiss prior to *Twombly*.<sup>243</sup>

For one of the more sobering examples of the unfettered discretion that *Iqbal*'s plausibility standard affords, consider *EEOC v. Bimbo Bakeries USA Inc.*,<sup>244</sup> a case litigated on behalf of three black employees alleging a hostile work environment and a constructive discharge claim. While the court upheld the sufficiency of the hostile work environment claim, it found the constructive discharge claim deficient.<sup>245</sup> The EEOC pled facts indicating that a white co-worker was regularly using racial epithets and making racially derogatory comments over a period of four months; the employee complained about each instance to management, and nothing was done.<sup>246</sup> Because no disciplinary action was taken, the employee felt the work environment had become intolerable, and he ultimately resigned.<sup>247</sup> The court, however, concluded that based on the alleged facts it could not reasonably infer that a reasonable person would have felt compelled to resign,<sup>248</sup> and thus dismissed the claim.<sup>249</sup>

It is difficult to understand how much more specificity would be required to establish constructive discharge under these circumstances. Based on the court's analysis, being repeatedly subjected to remarks such as "nothing against you, but there are cool black people and there are also niggers,"<sup>250</sup> without any disciplinary response from management, fails to demonstrate an intolerable work environment with the requisite level of specificity under the plausibility standard. In the complaint, the EEOC alleged that the work environment became so intolerable that it resulted in the employee's constructive discharge. Viewed in context with the rest of the factual allegations in the complaint (such as the one above), it is arguably a fact that the work environment became intolerable. Yet the court found this allegation to be the kind of conclusory allegation that is not entitled to a presumption of truth, which, under *Iqbal*, the judge is entitled to do.<sup>251</sup>

In the area of sex discrimination, one district court concluded that allegations that a male supervisor propositioned a female employee for sex, made unwelcome sexual comments to her, inappropriately touched her, and sexually assaulted her, were not enough to adequately state a plausible claim for a hostile work environment.<sup>252</sup> In *EEOC v. Tuscarora Yarns, Inc.*,<sup>253</sup> the court considered all of these allegations to be

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243. *Momsen*, 2010 WL 3700704, at \*3.

244. No. 1:09-CV-1872, 2010 WL 598641 (M.D. Pa. Feb. 17, 2010).

245. *Bimbo Bakeries*, 2010 WL 598641, at \*8.

246. *Id.* at \*1.

247. *Id.*

248. *Id.* at \*6.

249. *Id.* Establishing a claim for constructive discharge requires that the employer, "knowingly permitted a discriminatory condition to persist that was so intolerable that a reasonable person would have felt compelled to resign." *Id.* at \*5.

250. *Id.* at \*1.

251. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009) ("[W]e are not bound to accept as true a legal conclusion couched as a factual allegation." (internal quotation marks omitted)).

252. *EEOC v. Tuscarora Yarns, Inc.*, No. 1:09-cv-217, 2010 WL 785376, at \*1 (M.D.N.C. March 3, 2010).

253. No. 1:09-cv-217, 2010 WL 785376 (M.D.N.C. March 3, 2010).

substantially conclusory. The alleged inappropriate touching was considered conclusory because it did not indicate “how she was touched so that a determination can be made that the touching was plausibly unwelcome and based on gender.”<sup>254</sup> The alleged sexual assault was conclusory because it did not specifically indicate what conduct occurred that would constitute a “sexual assault.”<sup>255</sup> The allegation that her supervisor propositioned her for sex was also conclusory, apparently because it “lack[ed] any factual underpinning as to the nature of the alleged ‘proposition’ to permit an objective determination that it was serious and thus plausible.”<sup>256</sup> Ultimately, the court found that the “EEOC’s complaint, while flush with innuendo, lacks sufficient facts upon which to reach such a conclusion [that plaintiff was subjected to a hostile work environment].”<sup>257</sup>

In *EEOC v. American Laser Centers, LLC*,<sup>258</sup> the EEOC filed a complaint containing extensive fact-based allegations that the employer had created a hostile work environment.<sup>259</sup> The court, however, granted the employer’s motion to dismiss on the ground that the EEOC’s allegation that the employer had fifteen or more employees was merely a legal conclusion that lacked the requisite factual particularity to make out a plausible claim to relief.<sup>260</sup>

While it is impossible to know how much of these additional litigation costs the EEOC will be willing to absorb, it stands to reason that any increase in the cost of litigating low-impact, individual claims will add yet further grounds for the Commission to continue its organizational shift toward systemic litigation initiatives. This is especially true when considering that the nature of systemic discrimination claims may make them less susceptible, albeit not immune, to motions to dismiss. The Supreme Court, for example, has established that an inference of discrimination can be drawn based solely on statistical evidence,<sup>261</sup> and some lower courts have adopted “rule[s] of thumb” for when statistical disparities are sufficiently large to make out a prima facie case.<sup>262</sup> Accordingly, if the EEOC had the requisite statistical evidence (which they would presumably be able to obtain, at least in some cases, prior to the pleadings), it would be largely immune to *Iqbal* challenges.

Of course, not all systemic discrimination claims have the requisite statistical evidence to warrant an inference of discrimination. Moreover, systemic discrimination claims can lead to precisely the type of sprawling litigation that motivated the *Twombly*

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254. *Tuscarora*, 2010 WL 785376, at \*1.

255. *Id.*

256. *Id.*

257. *Id.*

258. No. 1:09-CV-2247-AWI-DLB, 2010 WL 3220316 (E.D. Cal. Aug. 13, 2010).

259. *Am. Laser Ctrs.*, 2010 WL 3220316, at \*1–2.

260. *Id.* at \*5.

261. See *Hazelwood School District v. United States*, 433 U.S. 299, 307–08 (1977) (“Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.”); *Castaneda v. Partida*, 430 U.S. 482, 496 (1977) (discussing “mathematical disparities that have been accepted by this Court as adequate for a prima facie case”).

262. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 995 n.3 (1988) (discussing standards lower courts have employed to assess whether statistical evidence is sufficient for inferring discrimination).

and *Iqbal* Courts to enact a tougher pleading standard. It is possible, therefore, that the EEOC's systemic discrimination claims could also prove vulnerable to *Iqbal* challenges.<sup>263</sup> Indeed, although the current case law is limited, some of the EEOC's multi-plaintiff discrimination claims have recently been dismissed for failing to state a claim.

In *Momsen*, for example, the court rejected the EEOC's attempt to file a disability-based discrimination complaint on behalf of a potential class of unnamed employees.<sup>264</sup> After the EEOC had conducted an investigation into the discrimination charges brought by Momsen, the Commission determined that there was reasonable cause to believe that UPS discriminated not only against Momsen, but also against a class of other disabled UPS employees.<sup>265</sup> According to the court, however, the EEOC's complaint failed to state a claim due to the EEOC's failure to allege "sufficient facts demonstrating that Momsen (or the potential class members) were qualified individuals."<sup>266</sup> The court observed that because disability can sometimes be a legitimate consideration in employment decisions (unlike race), a complaint alleging disability discrimination might require more factual specificity than a complaint alleging race discrimination.<sup>267</sup>

While Momsen filed a more detailed intervenor complaint that pled her qualifications with the requisite specificity, what of the potential class members? When the EEOC proceeds on behalf of a yet unnamed class of people, how can the agency "demonstrate" that these unknown people are otherwise qualified for the job? What would this demonstration require? Does the EEOC have to establish the qualifications and the disability of every single class member if it wishes to proceed with an ADA class action in federal court? How can the agency plead with the specificity that would be needed to withstand a motion to dismiss when it must "demonstrate" the qualifications of people that might only be identified during discovery? These are important questions, particularly for the type of major class actions that the EEOC has recently identified as a priority.

Furthermore, it does not appear as though the *Momsen* case can be easily written off or overlooked as an outlier. In fact, the reasoning employed in *Momsen* is similar to and informed by both *Mounts v. United Parcel Service of America*,<sup>268</sup> and *EEOC v. SuperValu, Inc.*,<sup>269</sup> two district court cases from the Seventh Circuit that found the

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263. See Miller, *supra* note 210, at 42 ("Recent decisions suggest that complex cases—such as those involving claims of discrimination, conspiracy, and antitrust violations—have been particularly vulnerable to the demands of *Twombly* and *Iqbal*.").

264. EEOC & Momsen v. United Parcel Serv., Inc., No. 09-cv-5291, 2010 WL 3700704, at \*3 (N.D. Ill. Sept. 10, 2010).

265. *Id.* at \*2.

266. *Id.*

267. *Id.* at \*5.

268. No. 09 C 1637, 2009 WL 2778004 (N.D. Ill. Aug. 31, 2009).

269. 674 F.Supp.2d 1007 (N.D. Ill. 2009).

complaint insufficient on the basis that the plaintiff failed to adequately plead the same “otherwise qualified” element of the ADA cause of action.<sup>270</sup>

To the extent that the plausibility standard creates additional litigation costs for EEOC’s systemic discrimination claims, it could have the effect of reducing the number of such claims that the EEOC brings. Since the EEOC has clearly prioritized such claims, however, it is possible that the extra costs will be absorbed by other EEOC programs (e.g., individual plaintiff litigation, charge processing, etc), thereby creating a further squeeze on the efficacy of those other programs within the agency.

## 2. The Plausibility Standard May Have Adverse Effect on the EEOC’s Mediation Program

In addition to impacting the EEOC’s litigation initiatives, the plausibility standard may also have consequences for its mediation program. As one commentator observed, the process of mediation is conducted “in the shadow of the court,” with mediation outcomes often highly influenced by the potential impact of litigation.<sup>271</sup> Although parties are free to agree on terms that differ from those imposed by court order, the negotiation is largely shaped by the future possibility of litigation.<sup>272</sup> To the extent, therefore, that employers believe they have a greater chance of prevailing on a motion to dismiss in court, they will be less likely to meaningfully engage in EEOC’s mediation process.

The possibility that employers may feel emboldened by *Iqbal* to forego mediation is made more likely by the category of complainants that are eligible for the mediation program. Complainants who are placed in category C, which the EEOC determines have no merit, are not eligible for mediation.<sup>273</sup> The vast majority of mediated claims are charges that the EEOC has classified as category B claimants,<sup>274</sup> and the mediation of these charges generally takes place before any significant investigation has begun.<sup>275</sup>

While category B claimants are initially determined to have meritorious claims by EEOC’s intake staff, their claims are later determined, upon a preliminary investigation, to need additional information. Since the EEOC will only further investigate category B claims if resources are available to do so, many category B claimants will not have the discovery benefits of a full EEOC investigation. Accordingly, category B claimants will be precisely the type of individual plaintiff vulnerable to an *Iqbal* challenge, as they will have less pre-pleading information upon

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270. *Mounts*, 2009 WL 2778004, at \*6; *SuperValu*, 674 F.Supp.2d at 1014. As with *Momsen*, both of these cases discussed the potentially different pleading requirements, or specificity levels, that may be necessary to successfully plead an ADA case as opposed to a Title VII case.

271. Harris, *supra* note 148, at 14 (internal quotation marks omitted) (stating that although parties can implement their own solution, “litigation looms as an option”).

272. *Id.*

273. See EEOC, *Questions and Answers About Mediation*, EEOC.GOV, <http://www.eeoc.gov/eeoc/mediation/qanda.cfm> (last visited Sept. 17, 2011) (“[C]harges that the EEOC has determined to be without merit are not eligible for mediation”).

274. *Id.* (noting that while all category B claimants are eligible for mediation, eligibility of category A claimants is subject to EEOC discretion).

275. *Id.*



which to make out a plausible claim of discrimination. It is inevitable that employers will take this fact into consideration when determining whether to mediate with a category B claimant.

Interestingly, the number of employers participating in the EEOC's mediation program has been declining in recent years. In 2009, for example, the amount of resolutions reached through mediation declined by 3.8% from the previous year.<sup>276</sup> It is also clear, as the EEOC itself has acknowledged, that employer participation "is considerably lower than that of charging parties."<sup>277</sup> It is also clear that the large majority of mediation breakdowns are due to the employer's refusal to participate.<sup>278</sup>

While several reasons have been proffered for why employers are less willing to engage in mediation than complainants,<sup>279</sup> it is quite possible that the plausibility standard will further tip the balance against mediation being in an employer's self-interest. Ironically, therefore, while the plausibility standard was based on the Court's interest in increasing judicial efficiency, its effect on the EEOC's mediation program may result in more cases being litigated that otherwise could have been amicably resolved.<sup>280</sup>

#### IV. CONCLUSION

Despite understandable concerns about the judicial inefficiencies that result when speculative claims are allowed to proceed to discovery, the fact remains that— notwithstanding the Court's reassurances—the plausibility standard represents a significant departure from the traditional understanding of the federal pleading standard.<sup>281</sup> Moreover, whatever costs may be saved by limiting discovery may well be offset by the increased satellite litigation to determine what the plausibility standard actually means.<sup>282</sup> This uncertainty has encouraged an inconsistent, unprincipled jurisprudence by lower courts seeking to apply an ambiguous standard to all civil

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276. EEOC, *FY 2009 Performance and Accountability Report*, EEOC.GOV, <http://www.eeoc.gov/eeoc/plan/2009par.cfm> (last visited Sept. 17, 2011).

277. EEOC, *Enforcement*, EEOC.GOV, <http://www.eeoc.gov/eeoc/enforcement/index.cfm> (last visited Sept. 17, 2011).

278. *ABA Meeting Examines Why Companies Don't Mediate at the EEOC*, *supra* note 150, at 84; E. Patrick McDermott et al., *An Investigation of the Reasons for a Lack of Employer Participation in the EEOC Mediation Program*, EEOC.GOV, § I, <http://www.eeoc.gov/eeoc/mediation/report/study3/index.html> (last modified Dec. 10, 2003).

279. See McDermott et al., *supra* note 278, § IV.D.1 (citing belief that EEOC will not fully investigate along with low likelihood of reasonable cause determination being issued as reasons respondents decline mediation). Moreover, the fact that employee discrimination claims are difficult to prove and thus often rejected by plaintiffs' attorneys, provides yet another reason for employers to reject mediation. *Id.*

280. In addition to reducing the number of successful mediations, the possibility of winning more dismissals under *Iqbal* will also give employers greater leverage to reduce the value of any settlements that might be reached.

281. See *supra* Part III.A for a discussion of the tension between the plausibility standard and the traditional conception of notice pleading.

282. See *supra* Part III.B for a discussion of the consequences that can result when the role of federal pleading standards is redefined.

actions, and has encouraged a heightened pleading standard for civil rights and employment discrimination claims in certain circumstances.<sup>283</sup>

Whatever refuge employment discrimination plaintiffs have taken in the unambiguous affirmation of broad notice pleading in *Swierkiewicz v. Sorema N. A.*<sup>284</sup> has been seriously undermined by the Court's decisions in *Bell Atlantic Corp. v. Twombly*<sup>285</sup> and *Ashcroft v. Iqbal*.<sup>286</sup> In fact, as the EEOC's recent litigation efforts have highlighted, even fully investigated, cherry-picked individual claims can prove vulnerable to an *Iqbal* challenge.<sup>287</sup> Furthermore, while the FJC's study of post-*Iqbal* dismissal rates found no statistically significant increase in the grant rate for employment discrimination claims (at least with respect to motions granted with prejudice), the report did acknowledge that it was unable to account for the possibility that pleading practice has significantly changed.<sup>288</sup>

The change in pleading practice generally, coupled with the EEOC's recent litigation efforts fending off (often unsuccessfully) 12(b)(6) motions, indicates that the plausibility standard could have unforeseen consequences on the EEOC.<sup>289</sup> One such consequence could be a further entrenchment of the EEOC's increased prioritization of high-impact, systemic discrimination claims over and above claims on behalf of individual employees.<sup>290</sup> This, in turn, would further increase the likelihood that individual Title VII plaintiffs will wind up in federal court without sufficient facts to plead a plausible case. While the EEOC's mediation program provides an alternative to litigation in federal court, the *Iqbal* standard is likely to further discourage emboldened employers from participating, creating the ironic possibility that federal courts could see an increase in claims that may have otherwise settled.

Many important questions concerning the balance of judicial access and efficiency have started to emerge in the public debate in recent years. These questions have tangible consequences and a measurable and quantifiable impact that extends well beyond the technical legal theory and insular disputes considered in both *Iqbal* and *Twombly*. While the nature and extent of the plausibility standard's impact on the EEOC remains to be determined through refined empirical research, the possibility that such a consequence could occur highlights the principle flaw of the Court's ad hoc redefinition of the FRCP's pleading standard: the Court's usurpation of Congress's sole

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283. See *supra* notes 208, 218–20, and accompanying text for a discussion of how the plausibility standard has helped lower courts resurrect a de facto heightened pleading standard for discrimination claims.

284. 534 U.S. 506 (2002).

285. 550 U.S. 544 (2007).

286. 129 S. Ct. 1937 (2009).

287. See *supra* note 238–39 and accompanying text for a discussion of how the EEOC can cherry-pick the strongest claims it receives, with the Commission only litigating about 0.3% of the complaints it receives.

288. See *supra* note 97 for a discussion of the FJC's survey of plaintiff's attorneys, where seventy percent of responding attorneys stated that they have changed their pleading practice in the wake of the Court's plausibility standard.

289. See *supra* Part III.C for a discussion of recent EEOC cases that have succumbed to 12(b)(6) motions to dismiss, and the potential impact this could have on the EEOC's litigation and mediation initiatives.

290. See *supra* Part III.C.1 for a discussion of how additional litigation costs from defending *Iqbal* challenges may provide a further incentive for the EEOC to prioritize its litigation efforts on high-impact, systemic discrimination claims.

authority to amend the FRCP pursuant to the REA. The Court should have heeded its own advice and exercised the judicial restraint necessary to avoid altering a rule that had been previously settled and relied upon for the greater part of a century.

