AFTER *IQBAL*

*Joseph A. Seiner**

> *From the viewpoint of absolute truth, what we feel and experience in our ordinary daily life is all delusion. Of all the various delusions, the sense of discrimination between oneself and others is the worst form, as it creates nothing but unpleasantness for both sides.*[1]
>
> —Dalai Lama

INTRODUCTION

Henry David Thoreau wrote in *Walden* that "[i]t is never too late to give up our prejudices."[2] The Supreme Court's decision late last term in *Ashcroft v. Iqbal*[3] may have made it easier for those prejudices to exist unchallenged. The decision extends the controversial holding of *Bell Atlantic Corp. v. Twombly*[4]—that a plaintiff's allegations must state a *plausible* claim to avoid dismissal[5]—to *all* civil cases, including "antitrust and discrimination suits alike."[6] The *Iqbal* decision thus resolves the debate as to whether the *Twombly* plausibility standard is limited to the antitrust context where it arose, making clear that the standard applies to all civil matters, including employment-discrimination cases.[7] Indeed, recent research suggests that the plausibility test is

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1. MATTHEW E. BUNSON, THE WISDOM TEACHINGS OF THE DALAI LAMA 31 (1997).

2. HENRY D. THOREAU, WALDEN 8 (J. Lyndon Shanley ed., Princeton Univ. Press 1971) (1854).

3. 129 S. Ct. 1937 (2009).

4. 550 U.S. 544 (2007).

5. *Id.* at 557.

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

7. *See* Kendall W. Hannon, Note, *Much Ado About* Twombly*? A Study on*

already being used by some lower courts to dismiss workplace claims.[8]

The plausibility standard announced in *Twombly* and confirmed by *Iqbal* replaces the more relaxed test from *Conley v. Gibson*,[9] 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."[10] This "no set of facts" language from *Conley* governed federal pleading for fifty years until the recent Supreme Court cases abrogated the decision and required plaintiffs to plead sufficient facts to state a *plausible* claim.[11] While *Twombly* and *Iqbal* have significantly changed the pleading rules for all civil cases, these recent decisions provide little guidance regarding what must be alleged to sufficiently state a claim of employment discrimination brought pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII").[12]

Nevertheless, *Iqbal* does help clarify *Twombly* on the question of *intent* and explains that discriminatory intent cannot be alleged "generally" but must instead be alleged in the proper factual context.[13] Similarly, *Iqbal* warns against making conclusory statements when attempting to allege that the defendant's discriminatory intent is plausible.[14] *Iqbal* provides that plausibility "is not akin to a *probability* requirement, but it asks for more than a sheer *possibility* that a defendant has acted unlawfully."[15] This Article attempts to pinpoint exactly where plausibility falls in that

the Impact of Bell Atlantic Corp. v. Twombly *on 12(b)(6) Motions*, 83 NOTRE DAME L. REV. 1811, 1814–15 (2008) (acknowledging the argument that *Twombly* only applies to antitrust cases, but noting that district courts have applied *Twombly* much more broadly).

8. Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1014, 1035–38 (2009) (discussing a study that "revealed that the lower courts are unquestionably using the new [*Twombly*] plausibility standard to dismiss Title VII claims") (copyright to the University of Illinois Law Review is held by the Board of Trustees of the University of Illinois).

9. 355 U.S. 41 (1957), *abrogated by Twombly*, 550 U.S. 544.

10. *Id.* at 45–46.

11. *See, e.g.*, *Iqbal*, 129 S. Ct. at 1949; *Twombly*, 550 U.S. at 557; Scott Dodson, *Pleading Standards After* Bell Atlantic Corp. v. Twombly, 93 VA. L. REV. IN BRIEF 135, 135 (2007), http://www.virginialawreview.org/inbrief.php ?s=inbrief&p=2007/07/09/dodson ("[*Twombly*] gutted the venerable language from *Conley v. Gibson* that every civil procedure professor and student can recite almost by heart: that 'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle[] him to relief.'").

12. 42 U.S.C. §§ 2000e to e-17 (2006).

13. *Iqbal*, 129 S. Ct. at 1954 ("[T]he Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context.").

14. *Id.*

15. *Id.* at 1949 (emphasis added) (internal quotation marks omitted) (citing *Twombly*, 550 U.S. at 556).

gray area between *possible* and *probable* when alleging discriminatory intent in an employment case brought pursuant to Title VII.

I was recently able to review substantial data suggesting that employment discrimination continues to flourish in our society.[16] The statistical data strongly suggest that an allegation of discriminatory intent in the employment context is far more plausible on its face than the relatively more dubious factual allegations set forth in *Twombly* and *Iqbal*. Simply put, it is far more plausible that an employer has intended to discriminate against one of its workers than that a high-level governmental conspiracy has been carried out or that major corporations have engaged in a complex antitrust scheme.[17] Thus, an allegation of discriminatory intent in the workplace setting, made with proper factual support that is distinct from the allegations of *Twombly* and *Iqbal*, states a plausible Title VII claim.

Based on the research reviewed, this Article formulates an analytical framework for alleging discriminatory intent in the Title VII context. My prior articles have argued for a unified pleading standard for Title VII[18] and disability cases[19] in light of *Twombly*. However, I am not aware of any article proposing a uniform pleading framework for alleging *discriminatory intent* in Title VII cases after *Iqbal*, and this Article attempts to fill that substantial void in the academic scholarship.[20] This Article navigates the nuances of the recent *Twombly* and *Iqbal* decisions and provides an analytical framework for asserting the essential facts of a Title VII claim. This Article should serve as a blueprint for courts and litigants when evaluating an employment-discrimination case and will hopefully prevent years of needless litigation over what

16. *See infra* Part IV.

17. *See infra* Part II.C–D (discussing the facts of the *Twombly* and *Iqbal* Supreme Court decisions).

18. *See generally* Seiner, *supra* note 8, at 1015 (arguing for a unified pleading standard for Title VII claims).

19. *See generally* Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. 95 (2010) (arguing for a uniform pleading standard for claims brought under the Americans with Disabilities Act ("ADA"), addressing the implications of the *Twombly* and *Iqbal* decisions on disability claims, and discussing the potential impact of *Iqbal* on pleading discriminatory intent in ADA cases).

20. It is worth noting that my prior scholarship has focused on the Title VII implications of the *Twombly* plausibility standard, and I proposed a Title VII pleading model following that decision. *See generally* Seiner, *supra* note 8. Similarly, I have explored the ADA implications of both *Twombly* and *Iqbal*, and proposed a pleading framework for disability-discrimination claims. *See generally* Seiner, *supra* note 19. This Article builds off of my prior work and analyzes pleading discriminatory intent following the *Iqbal* decision. While this Article performs an extensive analysis of various studies addressing workplace discrimination, I would refer the reader to my prior work for a more complete understanding of how the *Twombly* and *Iqbal* plausibility standards have changed the face of pleading employment-discrimination claims.

plausibility means when alleging discriminatory intent in the employment setting.

This Article begins by explaining the pleading requirements of the Federal Rules of Civil Procedure.[21] Next, this Article explores how Supreme Court case law has shaped those rules, emphasizing the Court's recent decisions in *Twombly* and *Iqbal*.[22] Then, this Article outlines the results of numerous research studies that examine the current state of employment discrimination in our society.[23] Building on this research, this Article proposes a unified analytical framework for pleading intent in employment-discrimination claims brought under Title VII.[24] The Article then explains how the proposed pleading model comports with the federal rules, as interpreted by *Twombly* and *Iqbal*. The Article concludes by examining the possible implications of adopting the proposed pleading framework.[25]

I. FEDERAL RULES OF CIVIL PROCEDURE

The pleading standards in federal employment-discrimination cases are governed by the same Federal Rules of Civil Procedure ("FRCP") that apply to other civil causes of action.[26] FRCP 12(b)(6) allows a defendant to move for the dismissal of a complaint for "failure to state a claim upon which relief can be granted."[27] To state a sufficient claim and avoid a 12(b)(6) dismissal, an employment-discrimination plaintiff must satisfy FRCP 8(a)(2), which requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief."[28]

The sample pleading forms attached to the federal rules help clarify the pleading requirements by providing an example of a sufficient complaint.[29] Form 11 thus provides the following example of an adequate allegation of negligence:

21. *See infra* Part I.
22. *See infra* Parts II–III.
23. *See infra* Parts IV–V.
24. *See infra* Part VI.
25. *See infra* Part VII.
26. *See, e.g.*, Susan K. Grebeldinger, *How Can a Plaintiff Prove Intentional Employment Discrimination if She Cannot Explore the Relevant Circumstances: The Need for Broad Workforce and Time Parameters in Discovery*, 74 DENV. U. L. REV. 159, 170 (1996) (noting that federal rules "govern the discovery process for employment discrimination cases brought in the federal courts"); Ronald A. Schmidt, Note, *The Plaintiff's Burden in Title VII Disparate Treatment Cases: Discrimination Vel Non*—St. Mary's Honor Center v. Hicks, *113 S. Ct. 2742 (1993)*, 73 NEB. L. REV. 953, 955 n.8 (1993) ("The Supreme Court has frequently stated its intention to subject civil rights litigation to the same procedural rules as all other civil litigation in the federal courts.").
27. FED. R. CIV. P. 12(b)(6).
28. *Id.* 8(a)(2).
29. *Id.* Form 11.

> On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff.[30]

These rules are therefore relatively straightforward. Pursuant to Rule 8, a complaint must provide a "short and plain statement of the claim."[31] According to the sample pleading form, this short and plain statement would include the date, place, and nature of the alleged violation, as well as the actor(s) involved.[32] If the complaint fails to allege these minimum requirements, the case is subject to dismissal.[33] Though the federal pleading rules are simple on their face, recent Supreme Court decisions have taken some of the certainty out of these seemingly clear-cut requirements.

II. SUPREME COURT CASES

A. Conley v. Gibson

One of the earliest cases addressing the federal pleading requirements, *Conley v. Gibson*,[34] provided a straightforward standard for litigants to follow.[35] In *Conley*, the Supreme Court addressed the sufficiency of a complaint alleging a civil-rights violation.[36] The Court noted that when considering a plaintiff's allegations, a court should apply "the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief."[37] In announcing this test, the Court emphasized that navigating the federal pleading rules was not meant to be "a game of skill in which one misstep by counsel may be decisive to the outcome" and emphasized that "the purpose of pleading is to facilitate a proper decision on the merits."[38]

Over the next five decades, the *Conley* "no set of facts" language became the relevant inquiry of any federal court addressing a 12(b)(6) motion to dismiss.[39] During that time, a plaintiff's civil

30. *Id*. It is worth noting that *Twombly* discusses the sample negligence form with approval (in its previous Form 9 version). *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 565 n.10 (2007).

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

32. *Id.* Form 11.

33. *Id.* 12(b)(6).

34. 355 U.S. 41 (1957), *abrogated by Twombly*, 550 U.S. at 544.

35. *See id.*; Charles B. Campbell, *A "Plausible" Showing After* Bell Atlantic Corp. v. Twombly, 9 NEV. L.J. 1, 21 (2008) ("*Conley*'s 'no set of facts' language, at least if read literally, represented an endorsement of 'notice' pleading in its least demanding form."); *see also* Seiner, *supra* note 19, at 99; Seiner, *supra* note 8, at 1017–19.

36. *See Conley*, 355 U.S. at 41.

37. *Id.* at 45–46 (emphasis added).

38. *Id.* at 48.

39. *See* Robert G. Bone, Twombly*, Pleading Rules, and the Regulation of Court Access*, 84 IOWA L. REV. 873, 880 (2009) ("Notice pleading proponents focus their concern on *Twombly*'s treatment of language in *Conley* quoted for

complaint was not subject to dismissal unless it was "beyond doubt" that the plaintiff would be unable to produce sufficient facts to support the viable allegations in the complaint.[40] This so-called notice-pleading standard placed a very minimal requirement on plaintiffs, who were only required to give the defendant basic notice of the claim.[41] This would all change, however, when the Supreme Court reassessed this standard fifty years later in *Bell Atlantic Corp. v. Twombly*.[42]

B. Swierkiewicz v. Sorema N.A.

Although it was decided prior to *Twombly*, *Swierkiewicz v. Sorema N.A.* provided the Supreme Court's best explanation of the pleading standards for employment-discrimination cases.[43] In *Swierkiewicz*, the Court considered a claim brought by a fifty-three-year-old native of Hungary who alleged that his employer had terminated him because of his race and age in violation of Title VII and the Age Discrimination in Employment Act of 1967 ("ADEA").[44] In upholding the plaintiff's complaint in the case, the Court concluded that an employment-discrimination litigant need not plead a prima facie case of discrimination to survive a motion to

fifty years as the key statement of the notice pleading standard: 'a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'").

40. *Conley*, 355 U.S. at 45–46; Paul Stancil, *Balancing the Pleading Equation*, 61 BAYLOR L. REV. 90, 111 (2009) ("Taken to its literal extreme, *Conley* thus seems to say that the mere pleading of a viable theory of recovery is sufficient to state a claim, so long as there is some possible set of facts that could be proved in support of that claim.").

41. *See* A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 435 (2008) ("*Conley* laid the foundation for pleading doctrine, affirming that the new regime imposed by the Federal Rules left only the notice-giving function intact. Although such notice had to include both the nature of the claim and the grounds upon which it rests, the Court definitively stated that 'the Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim.'"); *see also* Allan Ides, Bell Atlantic *and the Principle of Substantive Sufficiency Under Federal Rule of Civil Procedure 8(a)(2): Toward a Structured Approach to Federal Pleading Practice*, 243 F.R.D. 604, 604 (2007) ("In theory, pleading under Federal Rule of Civil Procedure 8 plays a minor part in the litigation process. The complaint opens the door to that process by crossing a relatively low bar and thereafter plays but a minimal role in the ultimate resolution of the controversy. But anyone who practices in federal court knows that the reality is somewhat different.").

42. 550 U.S. 544, 554–63 (2007).

43. Swierkiewicz v. Sorema N.A., 534 U.S. 506 (2002); Seiner, *supra* note 8, at 1019–21. *See generally* Christopher M. Fairman, *Heightened Pleading*, 81 TEX. L. REV. 551, 573 (2002) (discussing the *Swierkiewicz* holding and noting that "the Court focused on the law of Title VII, the Court's own precedent, and the Federal Rules rubric").

44. *Swierkiewicz*, 534 U.S. at 508–09.

dismiss.[45] Under *McDonnell Douglas Corp. v. Green*,[46] a prima facie case of employment discrimination is established by showing that the plaintiff is part of a protected class, that the plaintiff is qualified for the position, that the plaintiff suffered an adverse employment action, and that there is other evidence giving rise to an inference of discrimination.[47] The Court emphasized that the *McDonnell Douglas* test is only "an evidentiary standard" and does not represent a "pleading requirement."[48]

The *Swierkiewicz* Court stated that under the notice-pleading framework of the federal rules, it is too burdensome to require a plaintiff to plead all of the facts establishing a *McDonnell Douglas* prima facie case, particularly when the *McDonnell Douglas* test is not even applicable to every case involving discrimination.[49] And, as discovery often "unearth[s] relevant facts and evidence," the prima facie case should be flexible and "not . . . transposed into a rigid pleading standard for discrimination cases."[50] The Court emphasized that under *Conley*, the plaintiff need only give the opposing party "fair notice of what the plaintiff's claim is and the grounds upon which it rests."[51] The Court further pointed out that under a notice-pleading framework, "liberal discovery rules and summary judgment motions" must be used "to define disputed facts and issues and to dispose of unmeritorious claims."[52] This system allows the parties to "focus litigation on the merits of a claim," and vague or unmeritorious claims can be addressed by the defendant through a motion for a definite statement or a motion for summary judgment.[53] Thus, *Swierkiewicz* emphasized that the liberal pleading standard set forth in *Conley* applies to employment-discrimination claims and that such suits are not subject to a "heightened pleading standard."[54]

45. *Id.* at 510–11. In his complaint, the plaintiff alleged that he had been terminated on account of his national origin in violation of Title VII and on account of his age in violation of the ADEA. His complaint detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination. *Id.* at 514. This complaint gave the defendant "fair notice" of the claims against it. *Id.*

46. 411 U.S. 792 (1973).

47. *Id.* at 802; *see also* Fonseca v. Sysco Food Servs. of Ariz., Inc., 374 F.3d 840, 847 (9th Cir. 2004) (applying the *McDonnell Douglas* framework).

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

49. *Id.* at 511.

50. *Id.* at 512.

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

52. *Id.*

53. *Id.*

54. *Id.* at 514–15. *See* Julie C. Suk, *Procedural Path Dependence: Discrimination and the Civil-Criminal Divide*, 85 WASH. U. L.R. 1315, 1356 (2008) ("[T]he liberal approach to pleading under the Federal Rules of Civil Procedure, particularly as it has been applied to the civil rights and employment discrimination contexts, makes it possible for victims of

C. Bell Atlantic Corp. v. Twombly

In *Bell Atlantic Corp. v. Twombly*, the Court reassessed the federal pleading requirements in a complex antitrust case brought under section 1 of the Sherman Act.[55] In *Twombly*, the plaintiffs alleged that several regional telephone companies had "conspired to restrain trade" which resulted in "inflat[ed] charges for local telephone and high-speed Internet services."[56] The purported conspiracy between the phone companies allegedly consisted of both improper "parallel conduct" which prohibited the development of potential competitors and improper agreements by the companies not to compete with each other.[57]

In addressing the plaintiffs' allegations, the Court noted that the "no set of facts" standard from *Conley* had often "been questioned, criticized, and explained away."[58] Thus, as this language had been "puzzling the profession for 50 years, this famous observation has earned its retirement."[59] The *Conley* "no set of facts" language should therefore be "forgotten."[60] In place of the *Conley* standard, the Court imposed a "plausibility" requirement for pleading a federal claim.[61]

According to the Court, a plausible claim does "not require heightened fact pleading of specifics."[62] However, the plausibility standard "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do."[63] Therefore, to survive a motion to dismiss, the plaintiff must allege "enough facts to state a claim to relief that is plausible on its face."[64] In this regard, there must be sufficient facts set forth in the complaint "to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)."[65] In the case at issue, the plaintiffs had not sufficiently "nudged their claims across the line from conceivable to plausible," and the Court therefore dismissed the complaint.[66]

In *Twombly*, then, the Court moved away from the notice-pleading paradigm of *Conley* where the plaintiff was only required

discrimination to have access to discovery before specific facts giving rise to a claim of discrimination can be articulated.").

55. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).
56. *Id.* at 550.
57. *Id.* at 550–51.
58. *Id.* at 562.
59. *Id.* at 563.
60. *Id.*
61. *Id.* at 557.
62. *Id.* at 570.
63. *Id.* at 555.
64. *Id.* at 570.
65. *Id.*
66. *Id.*

to give the defendant basic notice of the claim.[67] In its place, the Court now specifically requires plaintiffs to *plead facts* in their complaints.[68] Plaintiffs must set forth sufficient facts to state a plausible claim or face dismissal of the case.[69]

Studies have already suggested that the *Twombly* plausibility standard has had a substantial impact in the civil-rights and employment settings.[70] A higher percentage of federal district court opinions relying on *Twombly* have granted a motion to dismiss in the employment-discrimination context than those earlier decisions that relied on *Conley*.[71] This is true for cases brought under Title VII, which prohibits discrimination on the basis of race, color, religion, sex, or national origin,[72] as well as the Americans with Disabilities Act of 1990 ("ADA"), which prohibits disability discrimination.[73]

Until recently, there was considerable debate as to whether the lower courts should even apply the *Twombly* standard to cases outside of the antitrust setting where the case arose.[74] In *Ashcroft v.*

67. *Cf.* Conley v. Gibson, 355 U.S. 41, 47 (1957); *see also* Saritha Komatireddy Tice, *Recent Developments: A "Plausible" Explanation of Pleading Standards:* Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955 (2007), 31 HARV. J.L. & PUB. POL'Y 827, 833 (2008) ("The Court's decision in *Twombly* reflects a growing hostility toward litigation and a definite shift away from *Conley*'s litigation-promoting mindset.").

68. *See Twombly*, 550 U.S. at 555–56.

69. *Id.* at 570.

70. *See* Hannon, *supra* note 7, at 1815 ("The rate of dismissal in civil rights cases has spiked in the four months since *Twombly*."); Seiner, *supra* note 8, at 1014, 1027–38 (discussing a study that "revealed that the lower courts are unquestionably using the new [*Twombly*] plausibility standard to dismiss Title VII claims"); *see also* Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1853 (2008) ("Now, courts can more easily dismiss any case upon a motion to dismiss."). *See generally* Patricia W. Hatamyar, *The Tao of Pleading: Do* Twombly *and* Iqbal *Matter Empirically*, 59 AM. U. L. REV. 553 (2010) (performing empirical analysis of dismissals after *Twombly* and *Iqbal* based on various claim types).

71. *See* Seiner, *supra* note 8, at 1014, 1027–38 (discussing the results of one study, noting the use of the *Twombly* plausibility standard to dismiss Title VII claims, and discussing case analysis of the issue); Seiner, *supra* note 19 at 117–26 (discussing a study of federal district court opinions in ADA cases). Both motion-to-dismiss studies compared district court opinions issued the year before *Twombly* that relied on *Conley* to district court opinions issued the year following *Twombly* that relied on *Twombly*.

72. 42 U.S.C. § 2000e-2(a)(1) (2006) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin.").

73. *See* Seiner, *supra* note 19, at 117–26; Seiner, *supra* note 8, at 1014; Nathan Koppel, *Job-Discrimination Cases Tend to Fare Poorly in Federal Court*, WALL ST. J., Feb. 19, 2009, at A16 ("[F]ederal judges also now routinely terminate employment-discrimination cases through motions to dismiss.").

74. *See* Hannon, *supra* note 7, at 1814–15 (discussing the breadth of the *Twombly* plausibility standard); *see also* Seiner *supra* note 19, at 101 n.54, 121–

Iqbal, the Supreme Court definitively resolved this debate and refused to limit the *Twombly* plausibility standard to Sherman Act cases.

D. Ashcroft v. Iqbal

In *Iqbal*, the Supreme Court reassessed the breadth of the plausibility standard that it had announced two years earlier in *Twombly*.[75] In the *Iqbal* case, Javaid Iqbal, a Muslim and Pakistani citizen, was arrested in the United States after September 11, 2001, on immigration-related charges.[76] Because he was deemed to be "of high interest" to the ongoing investigation of the events of September 11th, Iqbal was housed in a maximum-security environment where he was held in lockdown for twenty-three hours a day.[77] After pleading guilty to various criminal charges, Iqbal spent time in prison and was subsequently sent to Pakistan.[78] In light of perceived constitutional violations during his confinement,[79] Iqbal filed a *Bivens* action in federal court against various officials, including former Attorney General John Ashcroft and Robert Mueller, the Director of the FBI.[80] Iqbal alleged that Ashcroft and Mueller "adopted an unconstitutional policy" on the basis of race, religion, or national origin, which resulted in his being subjected to poor prison conditions.[81] Specifically, the complaint alleged

> that petitioners designated respondent a person of high interest on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments to the Constitution . . . . "[T]he [FBI], under the direction of Defendant Mueller, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11 . . . . [T]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants Ashcroft and Mueller in discussions in the weeks after September 11, 2001 . . . ." [P]etitioners "each knew of, condoned, and willfully and maliciously agreed to subject"

22; Seiner, *supra* note 8, at 1014.

75. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953 (2009). *See generally* Seiner, *supra* note 19 (discussing the *Iqbal* decision).

76. 129 S. Ct. at 1942–43.

77. *Id.* at 1943.

78. *Id.*

79. The Court noted that a number of the alleged violations were not before it on appeal, including that "jailors 'kicked [Iqbal] in the stomach, punched him in the face, and dragged him across' his cell without justification, . . . subjected him to serial strip and body-cavity searches when he posed no safety risk to himself or others, . . . and refused to let him and other Muslims pray because there would be '[n]o prayers for terrorists.'" *Id.* at 1943–44.

80. *Id.* at 1942–43.

81. *Id.* at 1942.

> respondent to harsh conditions of confinement "as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest."[82]

Quoting *Conley*'s "no set of facts" language, the federal district court denied the defendants' motion to dismiss the case for failure to state a claim.[83] While an appeal was pending, the Supreme Court issued its opinion in *Twombly* abrogating the *Conley* standard.[84] Applying *Twombly*'s plausibility standard, the U.S. Court of Appeals for the Second Circuit upheld the district court decision, finding that Iqbal's complaint sufficiently set forth the defendants' "personal involvement in discriminatory decisions which, if true, violated clearly established constitutional law."[85]

In considering the case, the Supreme Court initially determined that the district court properly had jurisdiction to consider the matter.[86] The Court then discussed the elements of a successful *Bivens* claim, which, under the First and Fifth Amendments, requires the plaintiff to plead "that the defendant acted with discriminatory purpose."[87] Thus, Iqbal had to establish that the defendants put the questioned policies in place "not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion or national origin."[88] Citing *Twombly*, the Court noted that the federal rules do not mandate "detailed factual allegations," but they do require "more than an unadorned, the-defendant-unlawfully-harmed-me accusation."[89] Therefore, a complaint will be held inadequate where it relies on "'naked assertion[s]'" that are "'devoid of further factual enhancement.'"[90] The Court also reiterated the plausibility standard announced in *Twombly*, noting that a complaint is plausible where it includes sufficient facts to permit the court to make a "reasonable inference" that the defendant is responsible for the unlawful conduct.[91]

In applying the *Twombly* standard to the case, the Court concluded that Iqbal's allegations had "'not nudged [his] claims' of invidious discrimination 'across the line from conceivable to plausible.'"[92] In particular, Iqbal's assertions regarding Mueller and

82. *Id.* at 1944 (quoting Complaint at ¶ 96).
83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 1946.
87. *Id.* at 1948–49.
88. *Id.* The Court rejected the plaintiff's supervisory-liability theory, concluding that "[a]bsent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." *Id.* at 1949.
89. *Id.* at 1949 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).
90. *Id.* (quoting *Twombly*, 550 U.S. at 557).
91. *Id.* The Court noted that plausibility "is not akin to a '*probability* requirement,' but it asks for more than a sheer *possibility* that a defendant has acted unlawfully." *Id*. (emphasis added) (citing *Twombly*, 550 U.S. at 556).
92. *Id.* at 1951 (quoting *Twombly*, 550 U.S. at 570).

Ashcroft's alleged involvement in the discriminatory policy were too "conclusory."[93] Thus, "the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature . . . disentitles them to the presumption of truth."[94] Additionally, as the Court found that there was a nondiscriminatory explanation for the government's policies that were put in place after September 11th that was "more likely" than Iqbal's assertions, the plaintiff failed to plausibly state a claim for discrimination.[95] In this regard, the arrests that the FBI director supervised were probably permissible and "justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts."[96] The Court further concluded that there was nothing in the complaint that established that the defendants "housed detainees . . . due to their race, religion, or national origin."[97] Rather, all the complaint suggested was that high-ranking officials, "in the aftermath of a devastating terrorist attack," attempted to house "suspected terrorists in the most secure conditions available."[98] Due to the inadequate and conclusory nature of his allegations, then, Iqbal's complaint failed to plausibly state a claim for discrimination and was rejected by the Court.[99]

After rejecting the sufficiency of Iqbal's factual assertions in the complaint, the Court also addressed—and rejected—Iqbal's legal arguments.[100] First, the Court refused to restrict the *Twombly* plausibility standard to antitrust claims.[101] Rather, the Court concluded that this standard should apply to "all civil actions," including "antitrust and discrimination suits alike."[102] This significant holding firmly resolved considerable controversy over the issue of the breadth of the *Twombly* standard, and it is now clear that the plausibility test should apply to all civil claims.[103]

Second, the Court rejected the plaintiff's argument that the FRCP 8 motion-to-dismiss standard should be "tempered" by a "careful case-management approach" to discovery utilized by the lower courts.[104] Thus, the plausibility standard should not be relaxed even where the lower courts assure the litigants "minimally

93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
97. *Id.* at 1952.
98. *Id.*
99. *Id.*
100. *Id.* at 1952–54.
101. *Id.* at 1953.
102. *Id.*
103. *See* Hannon, *supra* note 7, at 1814–15 (discussing the debate over how broadly the *Twombly* standard applies).
104. *Iqbal*, 129 S. Ct. at 1953.

intrusive discovery."[105] The Court found this particularly true in litigation involving government officials, as such officials must be able "to devote time to [their] duties," and litigation would present a "substantial diversion" from these efforts.[106]

Finally, the Court rejected Iqbal's argument that discriminatory intent can be alleged "generally."[107] The Court therefore found no merit in the argument that a complaint that alleges that a defendant discriminated against the plaintiff "on account of [his] religion, race, and/or national origin" is sufficient to survive a motion to dismiss.[108] In rejecting this argument, the Court noted that "the Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context."[109] The Court thus concluded that the FRCP did not permit Iqbal to allege the "bare elements" of his claim and still survive dismissal.[110] In sum, the Court rejected Iqbal's assertions that his complaint satisfied the pleading requirements of the federal rules, as it "fail[ed] to plead sufficient facts to state a claim for purposeful and unlawful discrimination."[111]

Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, dissented from the majority opinion.[112] The dissent noted that at this early stage of the litigation, the allegations in the complaint must be taken as true, regardless of whether the allegations make the Court "skeptical."[113] The dissent argued that if the allegations in the complaint were true, the defendants were at least "aware of the discriminatory policy being implemented and deliberately indifferent to it."[114] And, because Iqbal's complaint contained several "allegations linking Ashcroft and Mueller to the discriminatory practices of their subordinates," the complaint satisfied the *Twombly* standard.[115] The dissent therefore would have upheld the sufficiency of Iqbal's complaint, and these Justices found "no principled basis for the majority's disregard of the allegations linking Ashcroft and Mueller to their subordinates' discrimination."[116]

105. *Id.* at 1953–54.
106. *Id.* at 1953.
107. *Id.* at 1954.
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* (Souter, J., dissenting).
113. *Id.* at 1959.
114. *Id.*
115. *Id.* at 1960–61.
116. *Id.*

III. LESSONS FROM SUPREME COURT DECISIONS

The Supreme Court's recent decisions in *Twombly* and *Iqbal* have left the requirements for pleading intentional employment-discrimination claims in disarray, and the proposed pleading framework outlined in this Article attempts to provide some clarity to this area of the law.[117] The recent Supreme Court decisions took the clear, straightforward pleading standard set forth in *Conley* and replaced it with a much more amorphous plausibility requirement.[118] Despite the lack of clarity in its decisions, the Court's recent cases do provide some guidance that can be imported to employment-discrimination claims and the proposed pleading framework discussed in this Article.

A. Guidance from Decisions

From *Swierkiewicz*, we know that an employment-discrimination plaintiff need not plead all of the elements of a prima facie case of discrimination.[119] Thus, the plaintiff need not assert all of the components of the *McDonnell Douglas* framework in the complaint to sufficiently allege a claim of employment discrimination.[120] Therefore, if *Swierkiewicz* is still good law,[121] *something less* than a prima facie case of discrimination can be set forth in a Title VII complaint and still satisfy FRCP 8(a).[122] *Twombly* provides some clarity on what that "something less" is, specifically, a plaintiff must set forth sufficient facts in the complaint to state a *plausible* claim of discrimination.[123] Plausibility does not "require heightened fact pleading of specifics"; however,

117. *See infra* Part VI (offering a proposed pleading framework for alleging discriminatory intent pursuant to Title VII); *see also* Lee Goldman, *Trouble for Private Enforcement of the Sherman Act:* Twombly*, Pleading Standards, and the Oligopoly Problem*, 2008 BYU L. REV. 1057, 1066 (2008) ("Courts and commentators decried the *Twombly* opinion as creating substantial confusion."); A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-*Conley *Era*, 52 HOW. L.J. 99, 102 (2008) ("*Twombly* is a confusing opinion subject to multiple interpretations whose implications are still being worked out.").

118. Spencer, *supra* note 117, at 160 (referencing *Twombly*'s "amorphous concept of 'plausibility'").

119. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510–11 (2002).

120. *See id.* The *McDonnell Douglas* test requires the plaintiff to show that she is a member of a protected class, that she is qualified, that she suffered an adverse employment action, and that there is other evidence giving rise to an inference of discrimination. *Id.* at 510.

121. *See infra* Part III.B (discussing the viability of the *Swierkiewicz* decision).

122. *Swierkiewicz*, 534 U.S. at 510–11.

123. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557 (2007); *see also* Seiner, *supra* note 8, at 1042.

there must be sufficient facts set forth in a Title VII complaint to make it more than simply "speculative."[124] Thus, *Twombly* teaches us that an employment-discrimination plaintiff cannot rely on a conclusory, "formulaic recitation" of the basic components of a Title VII case.[125]

Twombly makes clear that a Title VII plaintiff must allege sufficient facts to state a plausible claim, and *Iqbal* confirms this standard.[126] Indeed, *Iqbal* resolves any doubt that the plausibility standard extends beyond Sherman Act cases, as the standard is applicable to "all civil actions," including "antitrust and discrimination suits alike."[127] *Iqbal* provides that conclusory, "naked assertion[s]" and "unadorned, the-defendant-unlawfully-harmed-me accusation[s]" must fail.[128] And, perhaps most importantly, *Iqbal* offers some guidance on pleading discriminatory intent, which cannot be alleged "generally."[129] Thus, conclusory statements regarding intent will not suffice, and an allegation of discriminatory intent must be considered with "reference to its factual context."[130] In sum, *Iqbal* confirms the validity of the plausibility standard announced in *Twombly*, clarifies that this standard applies to all civil cases, and explains what is necessary to allege discriminatory intent.[131]

B. The Fate of Swierkiewicz

It is worth considering that there may be serious concern following *Iqbal* as to the validity of the *Swierkiewicz* decision.[132] After all, *Swierkiewicz* cites to *Conley* three times and notes that "conclusory allegations of discrimination" can be permitted to proceed in an employment case.[133] *Iqbal*, which confirms the

124. *Twombly*, 550 U.S. at 555, 570.

125. *Id.* at 555.

126. *Id.*; *see* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950–51 (2009).

127. *Iqbal*, 129 S. Ct. at 1953; *see* Edward A. Hartnett, *Taming* Twombly, *Even After* Iqbal, 158 U. PA. L. REV. 473, 481 (2010) ("In light of *Iqbal*, and short of an amendment to the Federal Rules of Civil Procedure or legislative action, *Twombly* is here to stay across the broad range of federal civil actions.").

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

129. *Id.* at 1954.

130. *Id.*

131. *Id.*

132. *See, e.g.*, Scott Dodson to Civil Procedure & Federal Courts Blog, http://lawprofessors.typepad.com/civpro/2009/05/beyond-twombly-by-prof-scott-dodson.html (May 18, 2009) (noting that *Iqbal* "did not cite to *Swierkiewicz v. Sorema N. A.*, a discrimination case that may now be effectively overruled"); Seiner, *supra* note 19, at 103–04 (discussing confusion surrounding the *Swierkiewicz* decision after *Twombly* and *Iqbal*); Seiner, *supra* note 8 (discussing the *Swierkiewicz* decision in light of *Twombly*).

133. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512, 514–15 (2002).

abrogation of the *Conley* standard, specifically rejects the argument that "mere conclusory statements" may be used to support a complaint.[134] And, the *Iqbal* decision does not cite to *Swierkiewicz* a single time.[135] Thus, a strong argument can be made that *Iqbal* runs counter to (and implicitly overrules) *Swierkiewicz*,[136] and the lower courts have already taken varying approaches to this issue.[137]

While there may be some legitimate concern about the validity of *Swierkiewicz* generally, the decision should be considered good law at least as to cases brought under Title VII.[138] The decision plainly states the standard for pleading employment-discrimination cases and makes clear that a plaintiff need not allege a prima facie case to sufficiently state a Title VII claim.[139] And while *Iqbal* does not endorse the *Swierkiewicz* decision, it does not expressly overrule it—nor does it express any opinion about the decision whatsoever.[140] Moreover, even the recent *Twombly* decision cites to *Swierkiewicz* with approval.[141] Notably, the *Twombly* Court explains how its

134. *Iqbal*, 129 S. Ct. at 1940, 1944, 1949.

135. *See id.* at 1937; Posting of Scott Dodson, *supra* note 132.

136. *See* Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly, (Ill. Pub. L. Research Paper No. 09-16), *available at* http://ssrn.com/abstract=1494683 (questioning the viability of the *Swierkiewicz* decision following *Twombly* and *Iqbal*); *cf.* A. Benjamin Spencer, *Understanding Pleading Doctrine*, 108 MICH. L. REV. 1, 4 (2009) ("*Twombly* appeared to be a departure from the simple 'notice' pleading standard announced in *Conley* . . . and reaffirmed most notably in . . . *Swierkiewicz v. Sorema*.").

137. *Compare, e.g.*, *al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009) ("In *Twombly*, the Supreme Court . . . reaffirmed the holding of *Swierkiewicz* . . . rejecting a fact pleading requirement for Title VII employment discrimination"), *with* 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*.").

138. *See* Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. (forthcoming 2010), (manuscript at 57–58), *available at* http://ssrn.com/abstract=1442786 ("And courts must remain cognizant of their obligation to avoid conflicts with either binding positive law (such as the Federal Rules and their Forms) or precedent that has yet to be overruled (such as *Swierkiewicz*).").

139. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510–11 (2002).

140. *See Iqbal*, 129 S. Ct. 1937; Seiner, *supra* note 19, at 103 (discussing *Twombly*'s citation to *Swierkiewicz* and *Iqbal's* failure to cite the decision).

141. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555–56, 563, 569 n.14, 570 (2006). Similarly, in *Erickson v. Pardus*, 551 U.S. 89 (2007), a decision issued shortly after *Twombly*, the Supreme Court also cited to *Swierkiewicz* with approval. *Id.* at 93–94; *see also* Bone, *supra* note 39, at 886 n.68 ("The *Twombly* Court also approved its previous decision in *Swierkiewicz*."); Seiner, *supra* note 19, at 103 ("*Bell Atlantic* cites *Swierkiewicz* with approval."); Douglas G. Smith, *The* Twombly *Revolution?*, 36 PEPP. L. REV. 1063, 1087 (2009) ("[T]he majority in *Twombly* repeatedly relied upon *Swierkiewicz* in its opinion. The majority did not see anything inconsistent in its ruling and the *Swierkiewicz* decision. Nor did it indicate that *Swierkiewicz* imposed any limitations on the scope of its decision.").

decision is distinguishable from *Swierkiewicz* rather than choosing to overrule the decision.[142] Thus, it is somewhat premature to forecast the demise of *Swierkiewicz*, whose holding should continue to apply to Title VII cases. This is particularly true given the unique role of summary judgment in employment-discrimination matters, which is discussed in greater detail below.[143] Nonetheless, *Swierkiewicz* must now be viewed under the more restrictive lens of *Twombly* and *Iqbal*, and plaintiffs must make sure to plead sufficient (and plausible) facts to satisfy all three decisions.

IV. PLEADING DISCRIMINATORY INTENT AFTER *IQBAL*—STUDIES ON DISCRIMINATION

Swierkiewicz, *Twombly*, and *Iqbal* have clouded the pleading requirements for employment-discrimination claims. In my previous analyses, I have argued for a unified pleading standard for cases brought under Title VII and the ADA.[144] Such a unified standard would provide clarity to this area of the law and help litigants and the courts in assessing the validity of their cases. The recent *Iqbal* decision has muddied the waters, however, on the question of what a Title VII plaintiff must allege to *plausibly* plead intent in an employment-discrimination case. Notably, after *Iqbal*, intent cannot be alleged "generally" or with conclusory statements, and an allegation of discriminatory intent must be considered with "reference to its factual context."[145]

Proving intent in an employment-discrimination case is certainly a tricky endeavor,[146] and pleading intent after *Iqbal* may

142. In relevant part, *Twombly* states:

> Even though Swierkiewicz's pleadings "detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination," the Court of Appeals dismissed his complaint for failing to allege certain additional facts that Swierkiewicz would need at the trial stage to support his claim in the absence of direct evidence of discrimination. We reversed on the ground that the Court of Appeals had impermissibly applied what amounted to a heightened pleading requirement by insisting that Swierkiewicz allege "specific facts" beyond those necessary to state his claim and the grounds showing entitlement to relief.
>
> Here, in contrast, we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.

Twombly, 550 U.S. at 570 (citations omitted).

143. *See infra* Part V.B.

144. *See* Seiner, *supra* note 19; Seiner, *supra* note 8.

145. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1954 (2009).

146. *See, e.g.*, Ross v. Runyon, 859 F. Supp. 15, 21–22 (D.D.C. 1994) ("[D]iscriminatory intent and proof of disparate treatment are notoriously difficult to establish [in employment-discrimination cases]."); Seiner, *supra* note 19, at 136–37 ("Establishing an employer's discriminatory intent in a case can be the most difficult hurdle for the employee to overcome.").

be even trickier. What it means to plausibly plead discriminatory intent under Title VII remains an open question and will likely be a matter for the courts to resolve. This Article attempts to define what facts are necessary to plausibly plead discriminatory intent pursuant to Title VII through a proposed analytical framework.[147] Before undertaking this analysis, however, it is important to understand how establishing intent in a Title VII case is different from other areas of the law.

In particular, the facts of a typical employment-discrimination matter are quite distinct from those of either *Twombly* or *Iqbal*. Employment discrimination is an everyday occurrence in our society, with the Equal Employment Opportunity Commission ("EEOC") receiving over 95,000 charges of discrimination in fiscal year 2008 alone.[148] Over the past decade, the EEOC has found reasonable cause to believe that discrimination has occurred in thousands of charges brought pursuant to Title VII.[149] It is therefore much more plausible on its face that employment discrimination has occurred than that a high-level governmental conspiracy has been perpetrated or that a complex antitrust violation has been carried out.[150]

I was recently able to uncover substantial data which further support the conclusion that employment discrimination continues to thrive in our society, further differentiating a typical employment-discrimination case from the facts of *Twombly* and *Iqbal*. The statistical information provided below examines perhaps the two most critical components of Title VII litigation—the motion for summary judgment and the actual trial of the claims involved in the case.[151] The data are revealing and show that discriminatory attitudes are far from a vestige of the past. As these data demonstrate, alleging employment discrimination—at least in the proper factual context—is alleging a plausible claim in our society.

A. Federal Judicial Center Study—Summary-Judgment Data

Researchers at the Federal Judicial Center ("FJC") performed an analysis of the likelihood of an employment-discrimination claim

147. *See infra* Part VI.

148. U.S. Equal Employment Opportunity Comm'n, Charge Statistics FY 1997 Through FY 2009, http://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm (last visited Feb. 2, 2010). Interestingly, these charge numbers have increased dramatically from the prior fiscal year 2007, when approximately 83,000 charges were filed. *Id.*

149. U.S. Equal Employment Opportunity Comm'n, Title VII of the Civil Rights Act of 1964 Charges (Includes Concurrent Charges with ADEA, ADA and EPA) FY 1997–FY 2009, http://www.eeoc.gov/eeoc/statistics/enforcement/titlevii.cfm (last visited Feb. 2, 2010).

150. *See supra* Part II.C–D (discussing the facts of the *Twombly* and *Iqbal* Supreme Court decisions).

151. *See infra* Part IV.A–B.

surviving summary judgment.[152] In Title VII cases, the battles are often fought at the summary-judgment stage of the proceedings[153] when the defendant attempts to show that even if the facts are considered in the light most favorable to the opposing party, the plaintiff still cannot prevail in the case.[154] This stage of the proceedings often proves pivotal in many Title VII cases as the "increasing use of summary judgment" has resulted in the "gradual and continuing erosion of the factfinder's role in federal employment discrimination cases."[155]

The FJC maintains data on summary-judgment motions that were filed in federal district court cases terminated during the 2006 fiscal year.[156] The FJC collected this data from almost every federal district court, and the data includes 276,120 civil matters that were terminated during that year.[157] The study documented 62,938 summary-judgment motions (and related court orders) that were filed out of all of these civil cases.[158]

From this data the FJC performed a more limited search that was restricted exclusively to employment-discrimination cases, including civil-rights matters and disability cases brought in the employment context.[159] Thus, the FJC examined those employment cases terminated in fiscal year 2006 where a motion for summary

152. *See infra* notes 156–63 (discussing FJC data); *see also* Seiner, *supra* note 8, at 1032–35 (discussing the results of the FJC research). The author would like to thank Joe Cecil and the FJC for assisting with the study outlined in this Article.

153. *Cf.* Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203, 205–06 (1993) (arguing that "the increased inappropriate use of summary judgment" has "silently curtail[ed] workers' civil rights claims" and that the "misapplication of civil procedural rules to employment discrimination cases threatens substantive anti-discrimination law").

154. *See, e.g.*, Shira A. Scheindlin & John Elofson, *Judges, Juries, and Sexual Harassment*, 17 YALE L. & POL'Y REV. 813, 821 (1999) ("If there is any evidence in the record from which a reasonable juror could find in favor of the nonmovant, summary judgment is improper. In determining whether summary judgment should be granted, the court resolves all ambiguities and draws all reasonable inferences against the moving party.").

155. McGinley, *supra* note 153, at 206.

156. *See* Memorandum from Joe Cecil & George Cort, Research Div., Fed. Judicial Ctr., to Judge Michael Baylson, Advisory Comm. on Civil Rules 4 (Aug. 13, 2008) (on file with author) [hereinafter FJC Memorandum]; *see also* Seiner, *supra* note 8, at 1032–35.

157. *See* FJC Memorandum, *supra* note 156. This memorandum also lists the three federal district courts from which data could not be collected. *Id.*; *see also* Seiner, *supra* note 8, at 1032–35.

158. *See* FJC Memorandum, *supra* note 156; Seiner, *supra* note 8, at 1032–35.

159. *See* Seiner, *supra* note 8, at 1032–35; E-mail from Joe S. Cecil, Sr. Research Assoc., Fed. Judicial Ctr., to Joseph Seiner, Assistant Professor of Law, Univ. of S.C. (May 19, 2008, 22:07:36 EST) (on file with author). Title VII cases *could not* be specifically separated out as part of this analysis. *See id.*

judgment was filed by the defendant and subsequently decided by the federal court.[160] This search uncovered 3,983 summary-judgment orders issued by the federal district courts.[161] These summary-judgment decisions were then classified as to the number of decisions granting a defendant's motion, denying a defendant's motion, or denying in part a defendant's motion.[162] The results of this research are detailed in the table below:

TABLE 1: SUMMARY JUDGMENT RESULTS[163]

Motion Result	Number of Motions	Percentage of Total
Granted	2,495	62.6%
Denied-in-part	724	18.2%
Denied	764	19.2%
Total	3,983	100%

The data provided by the FJC research are instructive.[164] Despite the purported increasing use of summary judgment to eliminate Title VII claims,[165] employment-discrimination claims at least partially survive summary judgment 37.4% of the time *when a decision is issued by the court*.[166] While these numbers unquestionably represent a very strong likelihood that many Title

160. *See* Seiner, *supra* note 8 at 1032–35; E-mail from Joe S. Cecil to Joseph Seiner, *supra* note 159.

161. *See* Seiner, *supra* note 8 at 1032–35; E-mail from Joe S. Cecil to Joseph Seiner, *supra* note 159.

162. *See* Seiner, *supra* note 8 at 1032–35; E-mail from Joe S. Cecil to Joseph Seiner, *supra* note 159. It is unclear, however, the extent to which the summary-judgment motions in the study specifically addressed a Title VII claim in the case. *See* E-mail from Joe S. Cecil, Sr. Research Assoc., Fed. Judicial Ctr., to Joseph Seiner, Assistant Professor of Law, Univ. of S.C. (June 20, 2008, 16:24:17 EST) (on file with author). *See also* Seiner, *supra* note 8 at 1032–35.

163. Seiner, *supra* note 8, at 1032–35; E-mail from Joe S. Cecil, to Joseph Seiner, *supra* note 159.

164. For a superb analysis of summary judgment in employment-discrimination cases, see Theodore Eisenberg & Charlotte Lanvers, *Summary Judgment Rates over Time, Across Case Categories, and Across Districts: An Empirical Study of Three Large Federal Districts* (Cornell Law Sch., Research Paper No. 08-022, 2008*), available at* http://ssrn.com/abstract=1138373; *see also* Seiner, *supra* note 8, at 1032–35 (discussing the results of FJC research).

165. *See* McGinley, *supra* note 153, at 205–06 (discussing the use of summary judgment in employment-discrimination cases).

166. *See* E-mail from Joe S. Cecil to Joseph Seiner, *supra* note 159 (setting forth the results of the FJC study). And, not all cases result in a summary-judgment order being rendered by the district court. Indeed, according to further FJC research, only "12.5% of employment discrimination cases (389 of 3,108 cases) are terminated by summary judgment." E-mail from Joe S. Cecil, Sr. Research Assoc., Fed. Judicial Ctr., to Joseph Seiner, Assistant Professor of Law, Univ. of S.C. (Sept. 24, 2008, 10:07:00 EST) (on file with author); *see also* Seiner, *supra* note 8, at 1032–35 (discussing the results of the FJC research).

VII claims will be thrown out on summary judgment, they also represent the fact that that *many* claims are found to have enough merit to proceed past this stage of the proceedings.[167] With almost 1,500 employment-discrimination claims in the study at least partially surviving a motion for summary judgment, it becomes hard to deny that many plaintiffs have a substantial amount of evidence to support their claims of workplace discrimination.[168]

B. Jury Verdict Research Analysis—Trial Outcome Data

I was also able to obtain information on the likelihood that a Title VII plaintiff will prevail at trial.[169] Jury Verdict Research® — Palm Beach Gardens, Fl. ("JVR") has compiled a nationwide database of verdicts in employment cases.[170] Though the JVR database does not contain *all* jury verdicts rendered across the country, "it receives a sufficient sample . . . to produce descriptive statistics for [certain] areas of litigation."[171] The data thus provide an insightful sampling of jury verdicts in employment-discrimination cases.[172]

JVR was able to provide data on the likelihood of an employment-discrimination plaintiff recovering at trial during the years 2001 to 2007.[173] Interestingly, the data have remained fairly consistent over this time frame, never fluctuating more than 7% over the entire seven-year period and usually hovering at or near the 60% range.[174] For example, in 2001, a plaintiff had a 61%

167. *See* E-mail from Joe S. Cecil to Joseph Seiner *supra* note 159.

168. *See id.*

169. *See* E-mail from Managing Editor, Jury Verdict Research, to Joseph Seiner, Assistant Professor of Law, Univ. of S.C. (May 27, 2009, 08:55:00 EST) (on file with author); *see also* JURY VERDICT RESEARCH, EMPLOYMENT PRACTICE LIABILITY: JURY AWARD TRENDS AND STATISTICS (2008).

170. *See* E-mail from Managing Editor to Joseph Seiner, *supra* note 169. JVR receives information on verdicts "from every state in the nation." JURY VERDICT RESEARCH, *supra* note 169, at v. The data is gathered by researchers who review court files, as well as from reports "provided by plaintiff and defense attorneys, law clerks, legal reporters, publications, and media sources." *Id.*

171. JURY VERDICT RESEARCH, *supra* note 169, at v. According to JVR, its "cases are collected in an impartial manner, with an equal emphasis on the collection of plaintiff and defense verdicts and with no intentional bias toward extreme awards or geographic regions." *Id.*

172. *See* Joseph A. Seiner, *The Failure of Punitive Damages in Employment Discrimination Cases: A Call for Change*, 50 WM. & MARY L. REV. 735, 762–65 (2008) (reviewing JVR data provided on punitive damages in Title VII employment-discrimination cases).

173. *See* JURY VERDICT RESEARCH, *supra* note 169, at 42; E-mail from Managing Editor to Joseph Seiner, *supra* note 169. This aggregate data includes both federal and state employment-discrimination cases. E-mail from Managing Editor, Jury Verdict Research, to Joseph Seiner, Assistant Professor of Law, Univ. of S.C. (Sept. 21, 2009, 09:28:40 EST) (on file with author). The JVR data discussed in this Article excludes retaliation claims. *Id.*

174. JURY VERDICT RESEARCH, *supra* note 169, at 42.

probability of attaining a favorable jury verdict in an employment-discrimination case.[175] This number rose to 62% in 2007.[176] If a discrimination case goes to trial, plaintiffs have an excellent chance of prevailing, as juries side in their favor well over half (and close to two-thirds) of the time.[177] The probability of a favorable verdict varies depending upon the nature of the suit but was above 50% in most major areas of discrimination in 2007.[178] A prevailing plaintiff in a federal employment-discrimination trial can expect a median compensatory award of $175,000.[179] Plaintiffs in state employment-discrimination cases fare even better, as the median compensatory jury award in these matters was $250,000 for the years 2001 to 2007.[180]

Obviously, a large number of cases fail to make it to a jury.[181] However, when an employment-discrimination plaintiff is successful in advancing past the various hurdles that prohibit trial, she is likely to receive a favorable verdict.[182] And, that verdict is also likely to come with a sizable monetary award.[183] Based on the above FJC data indicating that hundreds of claims survive summary judgment, as well as the JVR results demonstrating that employment-discrimination plaintiffs prevail about 60% of the time at trial, it is reasonable to infer that an allegation of Title VII discrimination is, in many ways, plausible on its face.[184]

C. Other Studies

In addition to the two studies discussed above, there are various other recent studies confirming the persistence of employment discrimination, particularly in the hiring context. Some of this research is particularly insightful and worth further discussion. Most notably, a recent study conducted by researchers at Harvard University and the University of Chicago looked specifically at the existence of racial discrimination in hiring.[185] Racial discrimination

175. *Id.*
176. *Id.*
177. *See id.*
178. *Id.* at 38–41 (providing data on age-, disability-, sex-, and racial-discrimination claims).
179. *Id.* at 22.
180. *Id.* at 29.
181. *See* John Bronsteen, *Against Summary Judgment*, 75 GEO. WASH. L. REV. 522, 536 (2007) ("The rare civil lawsuit that actually goes to trial has surprisingly little left to it after the summary judgment motion has been denied."); Barry A. Macey, Response, *Response to Theodore J. St. Antoine and Michael C. Harper*, 76 IND. L.J. 135, 138 (2001) ("[M]any plaintiffs never enjoy whatever advantages the jury system provides because their claims are thrown out of court on summary judgment.").
182. JURY VERDICT RESEARCH, *supra* note 169, at 29, 38–43.
183. *See id.* at 22, 29.
184. *See id.* at 42; FJC Memorandum, *supra* note 156.
185. Marianne Bertrand & Sendhil Mullainathan, *Are Emily and Greg More*

continues to be one of the most overt forms of discrimination in our labor market, with African-Americans being twice as likely as white workers to suffer unemployment.[186] The study specifically examined whether this racial discrimination is present in the hiring context.[187]

To make this determination, the researchers responded to over 1300 help-wanted ads by sending four fictitious resumes to the prospective employers.[188] The resumes typically included one higher-quality and one lower-quality resume with a white-sounding name like "Emily Walsh or Greg Baker," as well as one higher-quality and one lower-quality resume with an African-American sounding name like "Lakisha Washington or Jamal Jones."[189] The results of the analysis were startling. The study found substantial differences in callback percentages on the basis of race.[190] The percentages, which rose to the level of statistical significance, revealed that African-American applicants needed to send about *five additional* resumes to receive a callback than applicants with white-sounding names.[191] A white-sounding name is a valuable credential, as it "yields as many more callbacks as an additional eight years of experience on a resume."[192] And the study found that white applicants are better rewarded for having a higher-quality resume.[193] Even the address on the resumes had an impact, as "living in a wealthier (or more educated or Whiter) neighborhood increases callback rates."[194] The study thus leaves little doubt as to the persistence of racial discrimination in our society, at least in the hiring context.

Another recent study confirms the existence of discrimination in

Employable than Lakisha and Jamal? A Field Experiment on Labor Market Discrimination, 94 AM. ECON. REV. 991 (2004).

186. *Id.* at 991. African-Americans also "earn nearly 25% less when they are employed." *Id.*

187. *Id*. at 991–92.

188. *Id*. The ads included prospective positions "in the sales, administrative support, clerical, and customer services job categories." *Id*. at 992. The resumes were sent to "a large spectrum of job quality, from cashier work at retail establishments and clerical work in a mail room, to office and sales management positions." *Id*.

189. *Id*.

190. *Id*.

191. *Id.* ("Applicants with White names need to send about 10 resumes to get one callback whereas applicants with African-American names need to send about 15 resumes.").

192. *Id*.

193. *Id.* ("Whites with higher-quality resumes receive nearly 30-percent more callbacks than Whites with lower-quality resumes. On the other hand, having a higher-quality resume has a smaller effect for African-Americans. In other words, the gap between Whites and African-Americans widens with resume quality.").

194. *Id*. "[I]nterestingly, African-Americans are not helped more than Whites by living in a 'better' neighborhood." *Id.*

hiring for older workers.[195] The study examined the impact of age on the likelihood of an individual to get an interview for an entry-level job (or close to entry-level position) by sending "functionally identical" resumes to employers with different ages listed.[196] The age differential was communicated to the employer by changing the date of the applicant's high-school graduation.[197] To help control for "perceived gaps in work history," the study only submitted applications from women, as "an employer is more likely to assume that a woman [would be] entering or reentering the labor market" after helping with family responsibilities "rather than returning from prison or a long spell of unemployment."[198] The study revealed that it is much more difficult for older workers to find employment, identifying "an upward trend for the interview response based on date of high school graduation."[199] For example, in one state that was studied, the average younger employment seeker had to submit nineteen job applications to receive one interview, while an older worker needed to submit twenty-seven applications.[200] The study concluded that age-based discrimination is quite similar to discrimination faced by women and African-Americans.[201]

Numerous other research studies have highlighted the presence of discrimination across various industries and protected categories, particularly in the hiring context. One study found that females had a more difficult time securing employment on the waitstaff of upscale restaurants, revealing "strong evidence of discrimination against women in high-price[d] restaurants."[202] Another paper analyzing the impact of race on hiring found a substantial impact, with African-American applicants "anywhere between 50 and 500 percent less likely to be considered by employers as an equally qualified white job applicant."[203] Yet another study focusing on women lawyers revealed that more female attorneys "experienced

195. *See* Joanna N. Lahey, *Age, Women, and Hiring: An Experimental Study*, J. HUM. RESOURCES, Winter 2008, at 30.

196. *Id*. at 30–33. "Additionally, ten firms were chosen in each city as 'call-ins'; company names and numbers were randomly selected from the Verizon Superpages." *Id*. at 33.

197. *Id.* at 33.

198. *Id.* at 34.

199. *Id.* at 36.

200. *Id.* at 37.

201. *Id.* at 46.

202. David Neumark, *Sex Discrimination in Restaurant Hiring: An Audit Study*, 111 Q.J. ECON. 915, 917–18 (1996). Interestingly, "customer discrimination" may play a role in the food industry, as "the proportion male among the waitstaff is significantly positively related to the proportion male among the clientele, both overall and (more so) within the high- and medium-price restaurant categories." *Id.* at 918–19.

203. Devah Pager, *The Use of Field Experiments for Studies of Employment Discrimination: Contributions, Critiques, and Directions for the Future*, ANNALS AM. ACAD. POL. & SOC. SCI., Jan. 2007, at 104, 114.

discrimination once on the job than in the recruiting and hiring process," and about a quarter of the women indicated that they had been subjected to sexual harassment.[204]

Whether on the basis of race, age, or sex, the above studies demonstrate continued and persistent discrimination in our society. Perhaps because it is much more easily measured, the studies tend to emphasize the disparity between groups in securing initial employment. There is little reason to believe, however, that this discrimination is any less present in the actual employment setting. Though significant strides have been made in eradicating employment discrimination since the passage of the Civil Rights Act of 1964, discriminatory behavior continues to thrive.[205]

V. DIFFERENT FACTUAL PLEADING REQUIREMENT FOR TITLE VII CLAIMS

The data outlined above, combined with the unique role of summary judgment in employment-discrimination cases, strongly suggest that the factual pleading requirement for Title VII cases should be significantly different from the requirements faced by the plaintiffs in *Twombly* and *Iqbal*.

A. Distinction Between Title VII Claims and Claims Like Those in Twombly *and* Iqbal

The data outlined above reflect that many Title VII claims survive the summary-judgment stage of the proceedings in federal court.[206] Similarly, when employment-discrimination cases are decided by a jury, the majority—about sixty percent—result in a favorable verdict for the plaintiff, with a large average monetary payout.[207] There can be little doubt that substantial numbers of employment claims have merit, as the federal agency charged with eradicating discrimination finds cause in thousands of cases each year, as federal judges continue to permit substantial percentages of

204. Janet Rosenberg et al., *Now that We Are Here: Discrimination, Disparagement, and Harassment at Work and the Experience of Women Lawyers*, 7 GENDER & SOC'Y 415, 422–23 (1993). Similarly, "the women in this study were continually exposed to more egregious, if subtle, forms of disparagement. Approximately two-thirds of our respondents reported being addressed as 'honey' or 'dear' and being the butt of remarks emphasizing gender and sexuality . . . in professional situations." *Id.* at 422.

205. *Cf.* Anne Noel Occhialino & Daniel Vail, *Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 702–03 (2005) ("[D]espite all of the EEOC's shortcomings, the agency continues to play an irreplaceable role in the battle to eradicate employment discrimination.").

206. *See supra* Part IV.A (discussing FJC summary-judgment data in employment-discrimination cases). Indeed, almost 1500 employment-discrimination claims at least partially survived a motion for summary judgment during the time frame of the study.

207. *See supra* Part IV.B (discussing JVR data on jury trials in employment-discrimination cases, which include both state and federal cases).

employment-discrimination claims to survive summary judgment, and as juries comprised of average members of our society continue to find discrimination in the majority of instances. In the aggregate, then, the research discussed in this Article strongly suggests that discrimination is not a remnant of the past and continues to plague the employment setting. Indeed, it has been argued that "discrimination is so firmly rooted in our society that it can *never* be completely eradicated."[208]

As the data discussed in this Article leaves little question regarding the persistence of employment discrimination, a strong argument can be made that an allegation of discriminatory intent in the employment context is on its face *plausible.* While *Iqbal* warns against making conclusory allegations about discriminatory intent without the proper factual support,[209] the decision (like *Twombly*) arises miles from the employment setting, where discrimination is a frequent occurrence.[210] Indeed, both *Twombly* and *Iqbal* involve allegations that on their face seem somewhat extraordinary. Alleging that the FBI director and the Attorney General of the United States undertook a policy to violate the civil rights of a particular group[211] or that major telephone companies engaged in a complex and unlawful conspiracy to prevent entry into the market[212] are somewhat fantastic claims. This did not mean that these allegations were untrue—but on their face the claims certainly raised doubts, and there were "obvious alternative [and lawful] explanation[s]" for the alleged conduct involved.[213] These conclusory allegations—without some factual detail supporting the claims—seemed hollow, unsubstantiated, and implausible.[214]

Based on the data set forth above, it is far more plausible to believe that an employer has intended to discriminate against one of its workers than it is to believe the unlikely factual scenarios

208. Michael Z. Green, *Proposing a New Paradigm for EEOC Enforcement After 35 Years: Outsourcing Charge Processing by Mandatory Mediation*, 105 DICK. L. REV. 305, 308 n.3 (2001) (emphasis added).

209. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1954 (2009).

210. *See supra* Part IV (discussing employment-discrimination studies); *see also* Max Huffman, *The Necessity of Pleading Elements in Private Antitrust Conspiracy Claims*, 10 U. PA. J. BUS. & EMP. L. 627, 638 (2008) ("Viewed more pragmatically, the Sherman One conspiracy claim is dramatically different from *Swierkiewicz*. The Title VII-type burden shifting analysis has no place in the context of Sherman One.").

211. *Iqbal*, 129 S. Ct. at 1942, 1944.

212. Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

213. *Iqbal,* 129 S. Ct. at 1951. As the *Iqbal* Court suggested, "the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts." *Id.*

214. However, the *Iqbal* Court noted that the allegations are not impossible or "nonsensical," and the claims were not rejected on the grounds that they were "unrealistic." *Id.* Rather, it was the "conclusory" nature of these ambitious allegations that caused them to fail.

presented by *Twombly* and *Iqbal*. Employment discrimination (which is likely to occur on a fairly regular basis) can easily be contrasted with these recent Supreme Court decisions, especially considering that the Court specifically noted the possible factual alternatives that are "more likely" than the facts alleged by the *Twombly* and *Iqbal* plaintiffs.[215]

This is not to say that a simple conclusory allegation of discriminatory intent in an employment case will sufficiently state a plausible claim. Indeed, *Iqbal* expressly states that this cannot be the case.[216] Rather, as *Iqbal* requires, a claim alleging improper discriminatory intent in the workplace *must be made in the proper factual context*.[217] However, the required factual support for an employment-discrimination claim, which often has merit, should be significantly different than it is for a complex antitrust or high-level governmental-conspiracy claim.[218] Allegations of discriminatory intent in the employment setting must be sufficiently supported with necessary facts, but this requirement should be considered a *somewhat lower* factual threshold than it was for the more unlikely scenarios presented by the plaintiffs in *Twombly* and *Iqbal*.[219]

A basic allegation of negligent driving—which occurs on a fairly routine basis—is expressly endorsed as acceptable by the sample forms attached to the federal rules.[220] Similarly, a basic allegation of employment discrimination (which, as demonstrated by this Article, also occurs on a regular basis) should also satisfy the federal pleading requirements when made with the proper factual support. This Article helps define the proper factual setting for a plausible Title VII claim and sets forth a proposed factual pleading framework that would support any individual case of intentional employment

215. *Id.* at 1950–51.

216. *See id.* at 1954 (rejecting Iqbal's argument that discriminatory intent can be alleged "generally").

217. *Id.* ("[T]he Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context.").

218. *See, e.g.*, *id.* at 1950–52; Bell Atl. Corp. v. Twombly, 550 U.S. 544, 569–70 (2007); *see also* Hartnett, *supra* note 127, at 496 ("A requirement of plausibility will, however, apply differently in different substantive areas of the law and in different factual situations—it will depend on what facts the substantive law makes material and on the appropriate inferential connections between facts.").

219. *See Iqbal*, 129 S. Ct. at 1950–51 (discussing factual scenarios that were "more likely" than those presented by the plaintiffs).

220. FED. R. CIV. P. Form 11 (providing the following as a sufficient negligence allegation: "On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff."). It should also be noted that Form 11 (previously Form 9) is discussed with approval in the *Twombly* decision. *Twombly*, 550 U.S. at 565 n.10 ("A defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to answer; a defendant seeking to respond to plaintiffs' conclusory allegations in the § 1 context would have little idea where to begin.").

discrimination.[221]

B. Unique Role of Summary Judgment in Title VII Cases

The Supreme Court's decision in *Swierkiewicz v. Sorema N.A.* further supports the argument that there should be a different factual threshold for pleading employment-discrimination claims.[222] In *Swierkiewicz*, the Court held that an employment-discrimination litigant need *not* plead a *McDonnell Douglas* prima facie case of discrimination to survive a motion to dismiss.[223] To establish a prima facie case of employment discrimination, a plaintiff must show that she is part of a protected class, that she is qualified, that she suffered an adverse employment action, and that there is other evidence giving rise to an inference of discrimination.[224] Thus, a plausible employment-discrimination allegation, which falls between the possible and probable thresholds,[225] requires a lower factual showing than this traditional prima facie case.[226]

In holding that a Title VII plaintiff need not plead a prima facie case, the *Swierkiewicz* Court emphasized the unique function of summary judgment in employment-discrimination cases, noting that "liberal discovery rules and summary judgment motions" must be used "to define disputed facts and issues and to dispose of unmeritorious claims."[227] This approach permits the parties to address vague or unmeritorious claims through a motion for summary judgment, which in turn allows the parties to "focus litigation on the merits of a claim."[228]

Indeed, summary judgment performs a distinctive role in Title VII cases. The sufficiency of the *McDonnell Douglas* prima facie case is typically evaluated at the summary-judgment stage of the proceedings.[229] Once the plaintiff makes the prima facie showing,

221. *See infra* Part VI.

222. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510–11 (2002).

223. *Id.*; *cf.* Huffman, *supra* note 210, at 638 ("The distinction [between Title VII and Sherman Act cases] is made clearer by noting Justice Thomas's admonition in *Swierkiewicz* that 'the *McDonnell Douglas* framework does not apply in every employment discrimination case.' That is much in contrast to the Sherman One standard. The requirement that a plaintiff plead and prove that conduct was the result of a conspiracy is immutable." (citing *Swierkiewicz*, 534 U.S. at 511)).

224. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The fourth element of the prima facie case is often established by showing that "similarly situated employees outside of the protected class received more favorable treatment." Lucas v. PyraMax Bank, FSB, 539 F.3d 661, 666 (7th Cir. 2008).

225. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (noting that plausibility "is not akin to a '*probability* requirement,' but it asks for more than a sheer *possibility* that a defendant has acted unlawfully") (emphasis added).

226. *Swierkiewicz*, 534 U.S. at 510–11.

227. *Id.* at 512.

228. *Id.* at 514.

229. *See* Deborah C. Malamud, *The Last Minuet: Disparate Treatment After*

the employer must assert a legitimate nondiscriminatory reason for the alleged unlawful employment action.[230] If this showing is sufficiently made, the plaintiff maintains the burden of production and persuasion of establishing that the employer's stated reason is pretext for discrimination.[231] Thus, at summary judgment, an employee must *refute* the employer's stated reason for taking the adverse action.[232]

In *Iqbal*, the Court found it problematic that there was a nondiscriminatory explanation for the government's policies that were put in place after September 11th that was "more likely" than the plaintiff's assertions of discrimination—a desire by high-ranking officials to prevent terrorism.[233] Because he had not refuted this explanation, Iqbal's complaint failed to state a plausible claim.[234] By contrast, in employment cases a mechanism has long existed to refute the employer's explanation for taking an adverse action against the employee. As set forth above, during summary judgment the plaintiff must show that the employer's explanation is a mere pretext for discrimination.[235] This unique function of summary judgment in employment-discrimination matters—refuting the employer's explanation for the adverse action—helps explain why a somewhat lower factual showing must be made at the

Hicks, 93 MICH. L. REV. 2229, 2298 (1995) ("In the conventional application of summary judgment principles to *McDonnell Douglas-Burdine* cases, the prima facie case is treated as a required 'element' of the case, and the plaintiff's failure to create a genuine issue of material fact as to the existence of a prima facie case entitles the defendant to summary judgment.").

230. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802–03 (1973) (discussing the "legitimate nondiscriminatory reason" requirement); Malamud, *supra* note 229, at 2301 ("In the *McDonnell Douglas-Burdine* proof structure, the 'rebuttal' or 'intermediate' stage of the case occurs after the plaintiff has proved a prima facie case. The employer must then 'articulate' a 'legitimate, nondiscriminatory reason' for the adverse employment action.").

231. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000) ("Although intermediate evidentiary burdens shift back and forth under this framework, 'the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" (quoting Tex. Dep't. of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981))); *McDonnell Douglas Corp.*, 411 U.S. at 804 ("On remand, respondent must, as the Court of Appeals recognized, be afforded a fair opportunity to show that petitioner's stated reason for respondent's rejection was in fact pretext.").

232. *Reeves*, 530 U.S. at 143.

233. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1951 (2009) ("[T]he arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts."). The *Iqbal* Court also noted that there was a "more likely" explanation for the Sherman Act violation alleged in *Twombly*, which could be "explained by, lawful, unchoreographed free-market behavior." *Id*. at 1950.

234. *Id*. at 1951–52.

235. *McDonnell Douglas Corp.*, 411 U.S. at 804.

complaint stage of the proceedings in Title VII cases and why *Swierkiewicz* is still good law as to these specific claims.[236]

After *Iqbal* and *Twombly*, then, most civil litigants should refute any obvious alternative explanations for the alleged unlawful conduct set forth in the complaint.[237] Employment-discrimination plaintiffs, however, are not expected to make this showing until summary judgment, and *Swierkiewicz* is clear that a heightened pleading standard must not be applied to workplace-discrimination claims.[238] Thus, the *Swierkiewicz* Court's emphasis on a relaxed pleading standard and liberal discovery is a direct result of the distinct function of summary judgment in Title VII cases and distinguishes these cases from other civil claims.[239]

In employment-discrimination matters summary judgment often acts as a broad filter in rejecting workplace claims that lack merit.[240] In *Swierkiewicz*, the Supreme Court made clear that this filtering process should not take place at the earlier motion-to-dismiss stage of the proceedings in Title VII matters.[241] And *Twombly* and *Iqbal* do not abrogate the basic holding of *Swierkiewicz* as applied to employment-discrimination cases—indeed, *Twombly* even cites to *Swierkiewicz* with approval.[242]

In summary, as a general matter it is far more plausible to believe that an employer has discriminated against one of its workers than it is to believe the somewhat doubtful factual allegations set forth in *Twombly* or *Iqbal*. The studies set forth in this Article fully support the argument that discrimination in employment continues to be a serious problem.[243] An allegation of discrimination made pursuant to Title VII is therefore distinct from (and far more plausible than) the assertions found in these recent Supreme Court decisions. The research set forth above, combined with the unique role of summary judgment in employment-discrimination cases, strongly suggests that there is a different (and somewhat lower) factual-pleading requirement for Title VII claims. Unfortunately, however, *Twombly* and *Iqbal* fail to provide any substantive guidance as to what facts are necessary to sufficiently plead a plausible employment-discrimination claim.

236. *See supra* Part III.B.

237. *See Iqbal*, 129 S. Ct. at 1951 (noting an alternative explanation for the alleged unlawful conduct).

238. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510–11 (2002) (concluding that employment-discrimination plaintiffs need not plead a prima facie case of discrimination).

239. *Id.* at 510–12.

240. *See generally* McGinley, *supra* note 153, at 206 (discussing the use of summary judgment in employment-discrimination cases).

241. *See Swierkiewicz*, 534 U.S. at 512–15; *cf.* Spencer, *supra* note 41, at 489–93 (discussing the "filtering function" of the complaint).

242. *See supra* Part III.B.

243. *See supra* Part IV.

In the following Part, I propose a new analytical framework for alleging discriminatory intent in Title VII cases. This three-part pleading model attempts to provide a framework for determining what facts are necessary to put discriminatory intent in the proper context and to sufficiently allege a plausible Title VII claim.

VI. NEW ANALYTICAL FRAMEWORK FOR ALLEGING DISCRIMINATORY INTENT

While *Twombly* and *Iqbal* have significantly changed the pleading rules for civil cases, these recent Supreme Court decisions provide little guidance on what must be alleged to sufficiently state discriminatory intent in a Title VII case. We do know from these cases that the overall allegation of employment discrimination must be plausible on its face.[244] Similarly, we learned from *Iqbal* that discriminatory intent cannot be alleged "generally" and must be made in the proper factual context.[245] Finally, from *Swierkiewicz*, we know that this proper factual context is something less than a prima facie showing for Title VII allegations.[246] As I have argued above, *Swierkiewicz* is still good law as to Title VII cases, and the lower factual threshold required by this decision is well supported by the various studies demonstrating the inherent plausibility of employment-discrimination allegations.[247]

Though *Twombly* and *Iqbal* require a civil claim to be plausible on its face, the decisions do not define what plausibility actually means or what factual components would comprise a plausible claim. The common dictionary definition of "plausible" provides that a plausible argument is one that "appear[s] worthy of belief."[248] And this definition seems to be how the Supreme Court generally uses the term. In *Iqbal*, for example, the Court provided that plausibility "is not akin to a '*probability* requirement,' but it asks for more than a sheer *possibility* that a defendant has acted unlawfully."[249] So the plausibility line falls somewhere in the gray area between possible and probable.[250] As many employment-discrimination claims *at*

244. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949–50 (2009); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007).

245. *Iqbal*, 129 S. Ct. at 1954 ("[T]he Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual context.").

246. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510–11 (2002).

247. *See supra* Part IV.

248. Merriam-Webster's Online Dictionary, http://www.merriam-webster.com/dictionary/plausible (last visited June 12, 2009); *see also* THE OXFORD AMERICAN DICTIONARY OF CURRENT ENGLISH 602 (1999) (defining plausible as "seeming reasonable or probable.").

249. *Iqbal*, 129 S. Ct. at 1949 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007) (emphasis added)).

250. *Id*.

least rise to the level of being possible and/or probable,[251] it is reasonable to expect that these allegations—with the proper factual support—should often survive the dismissal stage of the proceedings.[252]

I have attempted to formulate an analytical framework that answers the difficult question of what factual context must be asserted to sufficiently plead discriminatory intent in all individual cases of intentional discrimination brought under Title VII. This three-part framework pinpoints exactly where plausibility falls in the gray area between *possible* and *probable* that is discussed in the recent Supreme Court decisions.[253] It also provides the precise factual context that must be alleged for Title VII claims and establishes a clear road map for litigants to follow when asserting an employment-discrimination claim, and it navigates the *Twombly* and *Iqbal* decisions and clearly satisfies the pleading requirements of the federal rules. If adopted, this framework would streamline the pleading process in employment-discrimination cases and simplify this area of the law. I am aware of no pleading model for alleging discriminatory intent after *Iqbal* in Title VII cases, and this suggested model would fill that void in the scholarship. The analytical model advocated in this Article also comports with—and is patterned after—the pleading framework I have proposed previously for Title VII claims.[254] In light of *Iqbal*, however, the framework set forth in this Article emphasizes adequately pleading discriminatory intent.

The pleading model proposed by this Article is thus intended to satisfy the Supreme Court's standard for alleging discriminatory intent as articulated in *Iqbal*.[255] As a practical matter, however, pleading discriminatory intent and alleging an actual claim of Title VII discrimination cannot be easily separated out for analytical purposes. Thus, the proposed model, which emphasizes adequately asserting intent in a Title VII case, also provides a basic framework for alleging an overall employment-discrimination claim. To sufficiently plead discriminatory intent pursuant to Title VII (and to adequately state an overall Title VII claim), a plaintiff should thus allege the following three elements.

A. Factual Context

As the *Iqbal* Court noted, discriminatory intent must be alleged

251. *See supra* Part IV.
252. *See supra* Part IV.
253. *Iqbal*, 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 556).
254. *See* Seiner, *supra* note 19 (proposing a pleading standard for ADA cases); Seiner, *supra* note 8 (suggesting a unified model for alleging Title VII claims).
255. *See Iqbal*, 129 S. Ct. at 1949.

in the proper "factual context."[256] For Title VII claims, that factual context must be sufficient to support an allegation of employment discrimination on the basis of race, color, religion, sex, or national origin.[257] The statute prohibits an employer from taking an adverse action against an employee on the basis of any one of these protected characteristics.[258]

Thus, to state the proper factual context for a Title VII claim, the plaintiff must first assert the identity of the victim of the discrimination.[259] That is, the plaintiff should simply identify who it is that has suffered the adverse action in the employment setting.[260] In most cases, this will be easily accomplished by indicating that "*I* suffered an adverse employment action," though in some cases the government, rather than the aggrieved individual, will be bringing the suit.[261] Asserting the identity of the victim is the easiest and most straightforward fact that must be alleged in the complaint to provide the proper context for establishing discriminatory intent.

Next, the plaintiff should allege the protected characteristic that formed the basis of the employer's discriminatory intent and resulting unlawful actions.[262] As noted above, Title VII protects employees from being discriminated against on the basis of "race, color, religion, sex, or national origin."[263] The plaintiff should indicate in the complaint on which of these bases the employer has discriminated.[264] Certainly, the employee can allege that she was

256. *Id.* at 1954.

257. 42 U.S.C. § 2000e-2(a) (2006) ("It shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . because of such individual's race, color, religion, sex, or national origin.").

258. *Id.* § 2000e-2(a)(2).

259. *Cf.* Thompson v. Sawyer, 678 F.2d 257, 291 (D.C. Cir. 1982) ("Title VII relief is to be targeted to deter illegal discrimination and compensate its victims.").

260. *See* Seiner, *supra* note 19, at 131–32 (noting that the victim should be set forth in allegations of disability discrimination); Seiner, *supra* note 8, at 1043 (discussing the importance of pleading the victim's identity in an employment-discrimination complaint and noting that this requirement is straightforward).

261. For example, the EEOC often brings suit on behalf of individuals who have suffered employment discrimination. *See, e.g.*, EEOC v. Sunbelt Rentals, Inc., 521 F.3d 306, 310 (4th Cir. 2008) ("This case arises from a Title VII action brought by the United States Equal Employment Opportunity Commission on behalf of Clinton Ingram, a Muslim American, against Sunbelt Rentals, Inc.").

262. *See, e.g.*, Brown v. Henderson, 257 F.3d 246, 252 (2d Cir. 2001) ("It is axiomatic that mistreatment at work, whether through subjection to a hostile environment or through such concrete deprivations as being fired or being denied a promotion, is actionable under Title VII only when it occurs because of an employee's sex, or other protected characteristic."); *see also* Seiner, *supra* note 8, at 1043–44 (discussing the importance of pleading the relevant protected characteristic in an employment-discrimination complaint).

263. 42 U.S.C. § 2000e-2(a)(1) (2006).

264. When alleging the protected characteristic, the plaintiff should also be

discriminated against on the basis of multiple protected characteristics, if applicable to the situation (for example, "I was fired because I am an African-American and because I am a female.").[265] If, during the course of discovery, the plaintiff learns that the defendant discriminated against her on the basis of an additional protected characteristic not set forth in the complaint, the court should liberally consider allowing the plaintiff to amend the complaint to reflect this additional allegation.[266]

To place the employer's discriminatory intent in the proper factual context, the plaintiff must further allege the adverse action suffered by the victim.[267] Thus, the employee must assert what negative consequence she suffered as a result of the employer's discriminatory intent.[268] Title VII specifically states that an employer may not "fail or refuse to hire or to discharge any individual, or otherwise . . . discriminate against any individual" on the basis of a protected characteristic.[269] Failing to hire and firing an employee on the basis of a protected characteristic are therefore statutorily enumerated "adverse acts."[270] It is also likely, based on Supreme Court precedent, that failure to promote and reassignment with substantially different work duties also amount to adverse acts.[271] Aside from these clear adverse actions, whether a particular employment action rises to the level of being sufficiently adverse is

as specific as possible, particularly since providing this information to the employer should typically be relatively straightforward. Thus, for example, a plaintiff should allege that she was discriminated against because she is a *woman* and because she is *African-American*, rather than simply stating that the adverse action was taken because of *sex* and *race*.

265. *Cf.* D. Aaron Lacy, *The Most Endangered Title VII Plaintiff?: Exponential Discrimination Against Black Males*, 86 NEB. L. REV. 552, 554–55 (2008) (discussing the theory of intersectionality and noting that "[s]cholars have advocated for the creation of an intersectional claim for doubly burdened groups such as Black women, Latina women, and Asian women").

266. The plaintiff would still be required, however, to sufficiently exhaust all administrative requirements. *See*, *e.g.*, *McClain v. Lufkin Indus., Inc.*, 519 F.3d 264, 273 (5th Cir. 2008) ("Title VII requires employees to exhaust their administrative remedies before seeking judicial relief.") (citation omitted); Seiner, *supra* note 8, at 1044.

267. *See* Seiner, *supra* note 8, at 1044–45 (discussing the necessity of pleading the relevant adverse action in an employment-discrimination complaint); Seiner, *supra* note 19, at 134–36 (discussing the "adverse action" requirement for disability claims).

268. *See, e.g.*, Douglas v. Donovan, 559 F.3d 549, 551–52 (D.C. Cir. 2009) ("In order to present a viable claim of employment discrimination under Title VII, a plaintiff must show he suffered an adverse employment action.").

269. 42 U.S.C. § 2000e-2(a)(1).

270. *Id.* § 2000e-2(a).

271. *Cf.* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998) ("A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.").

often a question of jurisdiction, and the courts have applied varying tests.[272] Some jurisdictions impose a somewhat stringent standard for qualifying adverse acts, while other courts have a more relaxed requirement.[273] The plaintiff should therefore make sure to properly assert the adverse action she suffered based on the relevant case law, as failure to do so would subject the complaint to dismissal.[274]

Finally, the plaintiff must allege the approximate timing of the adverse action.[275] The plaintiff should thus assert her best estimate of when the specific negative action took place.[276] By providing the employer with the timing of the purported discrimination, it can much more easily begin an investigation into the allegations.[277] For discrete acts, such as failure to hire or termination, identifying this date should be relatively simple. For acts that are not as clear-cut, or for continuing violations (such as claims of sexual harassment), identifying the timing of the discrimination can be a more onerous

272. *See* Seiner, *supra* note 19, at 135 (noting "varying interpretations as to what constitutes an adverse action"); Seiner, *supra* note 8, at 1038–41 (discussing different circuit court approaches to evaluating the "adverse employment action" requirement).

273. *See* Seiner, *supra* note 19, at 134–36; Seiner, *supra* note 8, at 1038–41. Though beyond the scope of this article, the Supreme Court has specifically addressed what constitutes an adverse employment action in the *retaliation* context, holding that the retaliation "provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant." Burlington N. & Santa Fe Ry. Co. v. White, 548 U.S. 53, 57 (2006).

274. *See, e.g.*, Runkle v. Gonzales, 391 F. Supp. 2d 210, 221 (D.D.C. 2005) ("The defendants argue that none of these counts state a claim under Title VII because none of the discriminatory acts the plaintiff alleges within them amount to 'adverse actions.' The court agrees and accordingly grants the defendants' motion to dismiss.").

275. *Cf*. Stroud v. Delta Airlines, Inc., 392 F. Supp. 1184, 1189 n.2 (N.D. Ga. 1975) ("In order to be entitled to relief under Title VII, plaintiff must allege and prove that either an overt act of discrimination or a continuing pattern and practice of discrimination occurred within 180 days of the filing of her EEOC complaint."), *aff'd*, 544 F.2d 892 (5th Cir. 1977).

276. By providing the approximate date of the discrimination, the defendant and the court can also make certain that the plaintiff has adequately complied with the timing requirements of the EEOC charge-filing process. *See* Nat'l R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 109 (2002) ("An individual must file a charge within the statutory time period . . . . In a State that has an entity with the authority to grant or seek relief with respect to the alleged unlawful practice, an employee who initially files a grievance with that agency must file the charge with the EEOC within 300 days of the employment practice; in all other States, the charge must be filed within 180 days."); Deborah L. Brake & Joanna L. Grossman, *The Failure of Title VII as a Rights-Claiming System*, 86 N.C. L. REV. 859, 867 n.17 (2008) (noting the timing requirements for filing an EEOC charge); Seiner, *supra* note 19, at 135–36; Seiner, *supra* note 8, at 1046.

277. *See* Seiner, *supra* note 19, at 135–36 (noting that the plaintiff should allege the timing of the adverse action in ADA cases); Seiner, *supra* note 8, at 1045–46 (discussing the timing requirements for Title VII claims).

task.[278] The courts should take a flexible approach in permitting plaintiffs to amend a complaint in these circumstances, particularly where discovery has further clarified the exact timing of the discrimination involved.[279] The timing of the adverse action, then, helps clarify the nature of the discrimination asserted and provides a more developed factual context for the allegations in the complaint.

In summary, to provide a sufficient factual context for the allegations of discriminatory intent contained in a Title VII complaint, the plaintiff must set forth the victim of the discrimination, the protected characteristic that caused the employer to discriminate, the adverse action that the employee suffered, and the approximate time that the adverse action occurred. By asserting these essential facts, the employee puts the discriminatory intent in the proper setting and gives the employer sufficient notice of the claim.[280] All Title VII litigants should have this basic information at their disposal, and it should not be difficult to include these factual elements in the complaint. By providing this factual context, the employee avoids making the *general* or *conclusory* allegation of discriminatory intent against which *Iqbal* so strongly advises.[281]

B. Discriminatory Intent

In addition to pleading the factual elements discussed above, the employee must also allege causation to properly assert

278. *See Morgan*, 536 U.S. at 115–18 (discussing a continuing-violation allegation arising in the harassment context); Seiner, *supra* note 8, at 1045. However, harassment claims are beyond the scope of this Article. *See infra* Part VI.E (discussing the limitations of the proposed framework).

279. *See* Seiner, *supra* note 8, at 1045–46; *cf.* Brake & Grossman, *supra* note 276, at 866 ("Numerous doctrines under Title VII place pressure on employees to recognize and challenge discrimination quickly when they experience it. They include the short statute of limitations, strict rules defining the acts that trigger it, inadequate tolling and discovery rules, a special set of requirements for reporting harassment, and an all-but-mandatory extra layer of internal dispute resolution that does not extend the time for formally asserting rights.").

280. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512 (2002) (stating that the plaintiff need only give the opposing party "fair notice of what the plaintiff's claim is and the grounds upon which it rests" (citing Conley v. Gibson, 355 U.S. 41, 47 (1957))); Seiner, *supra* note 8, at 1043–47 (discussing the pleading requirements for a Title VII claim). It should also be considered that in contrast to many other civil actions, Title VII defendants frequently receive notice of the allegations before a federal lawsuit is brought. *Id.* at 1049 n.253 ("Title VII claims are different from many other civil causes of action in that the defendant typically will have received notice of the relevant allegation of discrimination long before a federal complaint is ever filed. Plaintiffs are required to file a charge of discrimination with the EEOC prior to bringing suit, and defendants receive notice of this charge.").

281. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1954 (2009).

discriminatory intent.[282] The plaintiff must allege that the adverse action was taken by the employer *because of* the employee's protected characteristic.[283] By making this assertion, the plaintiff satisfies the discriminatory-intent requirement of Title VII, which prohibits the employer from taking an unlawful action "*because of* such individual's race, color, religion, sex, or national origin."[284] The assertion of discriminatory intent therefore provides the causal link between the employer's prohibited actions and the characteristics protected by the statute.[285]

Thus, by asserting that the discrimination suffered was because of the individual's protected characteristic, the plaintiff has satisfied the discriminatory-intent requirement for all Title VII intentional-discrimination claims.[286] This allegation of discriminatory intent, made alongside the critical facts of the claim, which assert the victim's identity, the relevant protected characteristic, the adverse action, and the timing of the unlawful act, sufficiently states a claim of employment discrimination.[287] And this allegation of discriminatory intent easily complies with the federal rules.

The sufficiency of the factual allegations required by this proposed framework is best illustrated by the sample pleading form attached to the Federal Rules of Civil Procedure.[288] This form provides that an adequate allegation of negligence would state that "[o]n *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff."[289] Thus, an adequate allegation of a violation of federal civil law includes the timing and nature of the act as well as an assertion of causation (in the above example, negligent driving).[290] The proposed analytical framework for pleading Title VII claims easily satisfies these requirements, as it provides the basic factual components of the employment-discrimination claim coupled with an assertion of the causal link between the unlawful acts and the protected characteristic of the victim.[291] Just as an

282. *See, e.g.*, B. Glenn George, *Revenge*, 83 TUL. L. REV. 439, 457 (2008) (noting that "the fundamental question for most discrimination claims is that of intent"); Seiner, *supra* note 19, at 136–38; Seiner, *supra* note 8, at 1046–47.

283. 42 U.S.C. § 2000e-2(a)(1) (2006).

284. *Id.* (emphasis added).

285. *Id.*

286. *See* Seiner, *supra* note 19, at 136–38; Seiner, *supra* note 8, at 1047 ("As a critical element of a Title VII claim, causation should be stated by the alleged victim of discrimination to provide notice to the employer that the action was taken intentionally.").

287. *See supra* Part VI.A.

288. FED. R. CIV. P. Form 11.

289. *Id.*

290. *Id.*; *see also* Seiner, *supra* note 8, at 1050 (discussing Form 11).

291. It is worth noting that the sample pleading form identifies the "place" of the incident as a necessary component of a negligence claim. FED. R. CIV. P. Form 11. While a Title VII plaintiff could certainly include in the complaint the physical "place" where the discrimination occurred, this fact is already largely

assertion of negligence, with the proper factual support, establishes a sufficient claim under the federal rules,[292] so too does an allegation of discriminatory intent made in the appropriate factual context.

And, as already discussed, negligent driving and employment discrimination both occur on a fairly regular basis in our society.[293] As both claims are fairly common, they are distinguishable from the more complex (and unlikely) allegations set forth in *Twombly* and *Iqbal*.[294] The more routine nature of employment discrimination and negligent driving further explains why Form 11 and the *Swierkiewicz* decision were cited with approval by the *Twombly* Court and why a lower factual threshold likely applies to these specific claims.[295]

C. Plaintiff's Rebuttal of Employer's Reason for Adverse Action

In *Iqbal*, the Court found it problematic that there was an easily identifiable explanation for the allegedly unlawful policies that were put in place after September 11th that was "more likely" than Iqbal's assertions of discrimination—a desire by high-ranking officials to prevent terrorism.[296] For the Court, Iqbal's failure to refute this explanation seemed to undermine any argument that the plaintiff had plausibly stated a claim for discrimination.[297] As previously discussed, Title VII intentional-discrimination claims already have a mechanism for rebutting the employer's asserted "more likely" explanation for taking the adverse action. Under the framework set forth by the Supreme Court in *McDonnell Douglas*, the plaintiff must refute the employer's stated reason for taking the adverse action at summary judgment.[298] The *McDonnell Douglas* test, combined with the Supreme Court's holding in *Swierkiewicz*,[299] suggests that a Title VII plaintiff is not required to rebut any "more

integrated into the proposed analytical pleading framework. Thus, an individual asserting that she has been unlawfully terminated by her employer, for example, has implicitly alleged that the discrimination either has occurred at her place of work or is directly related to her workplace duties.

292. *See id.*

293. *See supra* note 219 and accompanying text.

294. *See supra* Part V (discussing why a lower factual threshold should apply when pleading Title VII claims).

295. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 563, 565 n.10, 569 n.14, 570 (2007). *Twombly* discusses the sample negligence form (Fed. R. Civ. P. Form 11) with approval in its previous Form 9 version. *Id*. at 565 n.10.

296. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1951 (2009).

297. *Id.* at 1951–52.

298. *See supra* Part V.B. *See generally* Lawrence D. Rosenthal, *Motions for Summary Judgment When Employers Offer Multiple Justifications for Adverse Employment Actions: Why the Exceptions Should Swallow the Rule*, 2002 UTAH L. REV. 335, 365–69 (discussing the legal importance of employers offering multiple legitimate explanations for the employment action in question).

299. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510–11 (2002) (holding that an employment-discrimination litigant need not plead a *McDonnell Douglas* prima facie case in the complaint).

likely"[300] explanations for the employer's adverse action in the context of the complaint. Indeed, it may even be the case that the employee is unaware of the employer's rationale for taking the adverse employment action at the time the complaint is filed.[301] This is particularly true in the hiring context, where the prospective employee may simply fail to hear anything after submitting an employment application to a potential employer.[302]

Nonetheless, employers often do provide employees with a reason for taking a particular adverse action.[303] When an employee is terminated, for example, that worker is typically given a reason for the discharge—such as poor performance, insubordination, or company cutbacks. When the employee learns of the employer's purported rationale for the adverse action prior to trial, the employee should strongly consider rebutting the employer's explanation in the complaint.[304] As already noted, an employee's opportunity to rebut the employer's legitimate nondiscriminatory reason for the adverse action usually occurs at summary judgment, rather than at the pleading stage of the proceedings.[305] Thus, rebutting the employer's stated reason in the complaint would be an *optional* component of the proposed analytical framework.

However, by including in the complaint an explanation as to why the employer's stated rationale is pretext for discrimination, the plaintiff bolsters her claim and strengthens the allegations. This pleading strategy also gives the plaintiff the first word as to the true reason for the adverse action and undercuts the defendant's subsequent response.[306] With *Iqbal* in mind, then, it would benefit

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

301. *See* Adam Liptak, *Case About 9/11 Could Lead to a Broad Shift on Civil Lawsuits*, N.Y. TIMES, July 21, 2009, at A10 ("Plaintiffs claiming they were the victims of employment discrimination . . . may not know exactly who harmed them and how before filing suit. But plaintiffs can learn valuable information during discovery.").

302. *See, e.g.*, Michael J. Yelnosky, *Salvaging the Opportunity: A Response to Professor Clark*, 28 U. MICH. J.L. REFORM 151, 156 (1994) ("Problems of proof, which are present in all hiring cases, may be worse with lower-skilled jobs because generally there exists little, if any, paper record.").

303. *See* James Leonard, *The Equality Trap: How Reliance on Traditional Civil Rights Concepts Has Rendered Title I of the ADA Ineffective*, 56 CASE W. RES. L. REV. 1, 48 (2005) ("Another difference between employees and applicants is that the former are usually aware of the process that has led to an adverse job action.").

304. Thus, for example, an employee who is told that she is being terminated for poor performance could state in the complaint that she is in fact a good performer and has received outstanding performance evaluations.

305. *See supra* Part V.B.

306. Indeed, it would not be unusual for an employer to give a *different* explanation in its summary-judgment motion for taking the adverse action than was given to the employee at the time the decision was made. *See, e.g.*, Abramson v. William Paterson Coll. of N.J., 260 F.3d 265, 284 (3d Cir. 2001) ("If a plaintiff demonstrates that the reasons given for her termination did not

an employee to rebut the employer's rationale for taking the disputed employment action—if the employee is aware of that rationale.[307] Rebutting the employer's reasoning should be relatively simple and straightforward. However, as an optional component of the framework, this rebuttal would only enhance the plaintiff's claim and should certainly never be *required* by a court.

D. Summary of Proposed Title VII Pleading Framework

In summary, the proposed analytical pleading framework for alleging discriminatory intent (and properly pleading a Title VII claim in general) includes providing the overall factual context of the claim, the causal link between the adverse action and the protected characteristic, and an optional statement rebutting the employer's rationale for its actions. This three-part pleading framework for intentional claims of employment discrimination brought pursuant to Title VII is summarized below:

> (1) Plaintiff asserts the victim of the discrimination, the protected characteristic of the individual, the adverse action that was taken by the employer, and the timing of the purported unlawful act;
>
> (2) Plaintiff alleges a causal link between the adverse action and the protected characteristic; and
>
> (3) If applicable, plaintiff may rebut the employer's stated reason for taking the adverse action.

The following example provides an illustration of a sufficient allegation of Title VII employment discrimination. This example easily comports with the above three-part analytical framework:

> On January 1, 2010, my employer failed to promote me to a position that I applied for because I am African-American. Despite my employer's assertion that I am not qualified for this position, I have the requisite background and experience for the job.

This example demonstrates the straightforward nature of the proposed framework and the ease with which it can be satisfied. The above example clearly provides the victim ("I" or the individual signing the complaint), the protected characteristic (African-American), the purported adverse action (failure to promote), the

remain consistent, beginning at the time they were proffered and continuing throughout the proceedings, this may be viewed as evidence tending to show pretext, though of course it should be considered in light of the entire record.").

307. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950–51 (2009) (noting a "more likely," nondiscriminatory explanation for the purported unlawful policy at issue in the case, as well as a "more likely" explanation for the alleged Sherman Act violation in *Twombly*).

timing of the alleged violation (January 1, 2010), and the causal connection (promotion denied *because* of protected status). Additionally, this sample fact pattern further rebuts the employer's stated reason for taking the adverse action. Such an allegation, though simple, states a sufficient Title VII claim and clearly establishes discriminatory intent.

Thus, the proposed pleading framework outlined above includes the critical components of any individual claim of intentional discrimination brought under Title VII. As already noted, this model framework is consistent with the federal rules, and it complies with the sample pleading form attached to the rules.[308] Similarly, the proposed framework adheres to both *Twombly* and *Iqbal*. Indeed, a Title VII plaintiff complying with this framework will have stated the factual nature of the discrimination suffered and provided a causal link between the adverse act and the protected characteristic, thereby stating a *plausible* claim for relief.[309] And, by providing the factual background of the discrimination in the first step of the model framework, the plaintiff will have avoided making a general and conclusory allegation of discriminatory intent.[310] Finally, in many instances (as in the above example), the plaintiff will also have rebutted the employer's stated reason for taking the adverse action, leaving little doubt that she has complied with *Iqbal*.[311]

The sufficiency of the proposed model framework can best be seen in Judge Easterbrook's statement in a Title VII case that "[b]ecause racial discrimination in employment is a claim upon which relief can be granted . . . *'I was turned down for a job because of my race'* is all a complaint has to say."[312] Though Judge Easterbrook's pleading standard pre-dates both *Twombly* and *Iqbal*, it demonstrates the relative ease with which a Title VII plaintiff can satisfy the federal rules.[313] The analytical pleading framework set forth above requires slightly more than Judge Easterbrook in light of the recent Supreme Court decisions, but the proposed model is still straightforward and can be easily satisfied by plaintiffs.[314]

308. FED. R. CIV. P. Form 11; *see also supra* Part I (discussing the sample pleading form attached to federal rules).

309. *See Iqbal*, 129 S. Ct. at 1949–50; Bell Atl. Corp. v. Twombly, 550 U.S. 544, 557–58 (2007). *See also* Seiner, *supra* note 8, at 1041–50 (discussing the pleading requirements of Title VII). *Cf.* Seiner, *supra* note 19, at 138–39, 144–45 (summarizing the pleading requirements for claims brought pursuant to ADA).

310. *See Iqbal*, 129 S. Ct. at 1951 (warning against conclusory allegations).

311. *See id.* (noting "more likely," nondiscriminatory explanations for the purported unlawful policy).

312. Bennett v. Schmidt, 153 F.3d 516, 518 (7th Cir. 1998) (Easterbrook, J.) (emphasis added).

313. *See id;* Seiner, *supra* note 8, at 1049 (discussing the Easterbrook standard).

314. Judge Easterbrook's statement includes the victim, adverse action,

Furthermore, the ease and simplicity of the proposed analytical pleading framework for Title VII claims is well supported by the *Swierkiewicz* holding that an employment-discrimination litigant need *not* plead a prima facie case of discrimination to survive a motion to dismiss.[315] Thus, the above framework does not require that a plaintiff plead a prima facie Title VII case, but it does call for the plaintiff to assert the essential factual elements of the claim. And the studies set forth in this Article leave little doubt that employment discrimination continues to pervade our society,[316] an allegation of discriminatory intent—combined with the factual elements required in the proposed framework—clearly establishes a *plausible* Title VII claim. Indeed, when put in the proper factual context outlined above, a claim of discrimination is far more plausible than the somewhat questionable factual allegations set forth in *Twombly* and *Iqbal*. Unlike the plaintiffs in these recent Supreme Court decisions, a plaintiff alleging all of the facts required by the proposed pleading framework will have provided the defendant with fair notice of the charges made against it, thereby allowing the employer to begin looking into the allegations.[317]

Finally, it should also be noted that in addition to setting forth the facts required by the proposed pleading framework, a Title VII plaintiff should make certain that she has also complied with the rules and case law of her particular jurisdiction. It is not unusual for the case law and procedural rules to vary among courts,[318] and a prudent plaintiff will make sure to satisfy any nuances in the local law.[319]

protected characteristic, and a link between the protected characteristic and the adverse act. The proposed framework set forth in this Article would also include adding the timing of the discrimination, as well as an optional statement rebutting the employer's reason for taking the adverse action. *Cf. Bennett*, 153 F.3d at 518. ("Because success on a disparate-treatment approach under Title VII . . . requires proof of intentional discrimination, a plaintiff might want to allege intent—although this is implied by a claim of racial 'discrimination.'"); Seiner, *supra* note 8, at 1049. Additionally, the model proposed in this Article suggests that the plaintiff should provide more specificity as to the victim's protected characteristic than what Judge Easterbrook would require. *See supra* note 264 (discussing the specificity to be used in alleging the relevant protected characteristic).

315. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 515 (2002).

316. *See supra* Part IV.

317. *See* Seiner, *supra* note 19, at 147; Seiner, *supra* note 8, at 1056 (discussing the facts necessary to provide a defendant with fair notice of a Title VII claim).

318. *See supra* notes 272–73 and accompanying text (discussing the differences in jurisdiction on the issue of what constitutes an adverse action).

319. For example, in so-called "reverse discrimination" claims, some jurisdictions require a plaintiff to provide "background circumstances" showing why the employer would discriminate against the majority. *See generally* Charles A. Sullivan, *Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof*, 46 WM. & MARY L.

E. Limitations of the Proposed Framework

The unified pleading framework proposed above provides a valuable tool for litigants and the courts in assessing whether a plaintiff has adequately stated a Title VII claim for relief. The proposed framework provides a straightforward, simple model for evaluating employment-discrimination claims. Nonetheless, like any framework, the proposed model does have certain limitations that are worth addressing.

Initially, it should be noted that the proposed model is intended to address the *substantive* elements of a Title VII claim (with an emphasis on adequately pleading discriminatory intent) and does not address any jurisdictional requirements or prerequisites to filing suit.[320] Thus, for example, a plaintiff will likely want to establish that the employer has the requisite number of employees to be covered by the statute,[321] though such an allegation is beyond the scope of this Article.

Additionally, the proposed framework applies primarily to *individual* claims of intentional employment discrimination. Thus, the model was not intended for systemic or class-action discrimination claims, which would require a more complex analysis of the pleadings.[322] Similarly, as the elements of a cause of action for harassment or retaliation in the employment context are substantially different from traditional Title VII disparate-treatment cases, these claims are also beyond the scope of this Article.[323] Moreover, the proposed model set forth above is intended

REV. 1031, 1065–71 (2004). A plaintiff bringing a reverse-discrimination claim in one of these jurisdictions may want to provide these background circumstances in the complaint, though doing so would likely not be *required* at this early stage of the proceedings. *See* Seiner, *supra* note 8 at 1044 n.226 (discussing reverse-discrimination claims); *cf.* Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (considering a discrimination claim brought by white firefighters).

320. *See* Seiner, *supra* note 8, at 1043; Seiner, *supra* note 19, at 131, 135 n.310.

321. *See* 42 U.S.C. § 2000e(b) (2006) ("The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person."); *see also* Seiner, *supra* note 19, at 135 n.310, 142 n.350 (discussing the issue of coverage under the ADA); Seiner, *supra* note 8, at 1047 n.240 (discussing the issue of coverage under Title VII).

322. *See generally* Melissa Hart, *Will Employment Discrimination Class Actions Survive?*, 37 AKRON L. REV. 813 (2004) (discussing Title VII class actions).

323. *See, e.g.*, Harsco Corp. v. Renner, 475 F.3d 1179, 1187 (10th Cir. 2007) ("To establish that a sexually hostile work environment existed, a plaintiff must prove the following elements: (1) she is a member of a protected group; (2) she was subject to unwelcome harassment; (3) the harassment was based on sex; and (4) due to the harassment's severity or pervasiveness, the harassment altered a term, condition, or privilege of the plaintiff's employment and created an abusive working environment." (internal brackets omitted) (quoting Dick v.

for intentional-discrimination claims and would not apply to a cause of action alleging a disparate-impact (unintentional) violation of Title VII.[324] And as the model addresses Title VII claims exclusively, it is not meant to apply to workplace claims brought under the ADA[325] or the ADEA.[326]

Finally, it is worth noting that the proposed framework applies a *minimum* standard to Title VII pleading. Thus, navigating *Twombly* and *Iqbal*, the proposed model examines the essential components of a plausible Title VII claim. Keeping this minimum standard in mind, however, there is nothing preventing a plaintiff from alleging additional facts or legal arguments that are above and beyond the scope of the proposed framework. Indeed, in certain circumstances and jurisdictions, alleging additional facts may enhance the plaintiff's overall Title VII case. Nonetheless, plaintiffs should still be careful not to *over* allege facts that might lead to the dismissal of their claims.[327] As Judge Posner has warned in a Title VII case, a litigant "who files a long and detailed complaint may plead himself out of court by including factual allegations which if true show that his legal rights were not invaded."[328]

F. The Swierkiewicz *Safe Harbor*

The proposed pleading framework set forth in this Article provides a minimum pleading standard for Title VII plaintiffs. Navigating *Twombly* and *Iqbal*—and relying on research

Phone Directories Co., 397 F.3d 1256, 1262 (10th Cir. 2005))); Velez v. Janssen Ortho, LLC, 467 F.3d 802, 806 (1st Cir. 2006) ("[C]laims of retaliatory discrimination under this provision [of Title VII] must begin with a prima facie showing of three elements: (1) protected opposition activity, (2) an adverse employment action, and (3) a causal connection between the protected conduct and the adverse action.").

324. *See, e.g.*, Griggs v. Duke Power Co., 401 U.S. 424, 429–30 (1971) (discussing the disparate-impact theory of discrimination under Title VII and holding that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices"); *see also* Seiner, *supra* note 19, at 130–31 (discussing the limitations of the ADA pleading model); Seiner, *supra* note 8, at 1047, 1050 (discussing the limitations of the Title VII pleading model). Similarly, the model proposed here is not intended to evaluate mixed-motive claims brought under Title VII.

325. 42 U.S.C. § 12111 (2006); *see* Seiner, *supra* note 19 (arguing for a unified pleading standard for disability-discrimination claims).

326. 29 U.S.C. § 621 (2006).

327. *See, e.g.*, Robin Kundis Craig, *Notice Letters and Notice Pleading: The Federal Rules of Civil Procedure and the Sufficiency of Environmental Citizen Suit Notice*, 78 OR. L. REV. 105, 168 (1999) ("Other courts have similarly held that over-zealous plaintiffs can plead themselves out of court.").

328. Am. Nurses' Ass'n v. Illinois, 783 F.2d 716, 724 (7th Cir. 1986); *see* Seiner, *supra* note 19, at 130 (noting that the proposed pleading standard for disability cases is a minimum threshold); Seiner, *supra* note 8, at 1056 (noting that the proposed pleading standard for Title VII cases requires only a "bare minimum of facts").

demonstrating the continued prevalence of discrimination—the proposed model establishes which factual elements are critical for alleging discriminatory intent when asserting a workplace claim. As already noted, however, plaintiffs are free to assert additional facts not required by this framework, and there may be some advantages to doing so.

In this regard, it should be noted that the *Swierkiewicz* decision likely provides a safe harbor for employment-discrimination plaintiffs. As discussed earlier, *Swierkiewicz* holds that a Title VII plaintiff need *not* plead a prima facie case of discrimination to survive a motion to dismiss.[329] If this decision remains good law as applied to Title VII cases (and I have argued throughout this Article that the decision is still viable), it follows that a plaintiff who does successfully plead the prima facie elements of an employment-discrimination claim should inherently survive a motion to dismiss. Under the reasoning of *Swierkiewicz*, any court that requires more than these prima facie elements at the motion-to-dismiss stage of the proceedings would be inappropriately applying a "heightened pleading standard" to the case.[330]

Under the *McDonnell Douglas* test discussed earlier, a Title VII plaintiff establishes a prima facie case of discrimination by showing that the plaintiff is part of a protected class, that the plaintiff is qualified, that the plaintiff suffered an adverse employment action, and that there is other evidence giving rise to an inference of discrimination.[331] A plaintiff sufficiently asserting all of these prima facie elements has alleged more than what is required by *Swierkiewicz*[332] (or by the proposed pleading model established in this Article), and that plaintiff's complaint should not be dismissed.

Swierkiewicz, therefore, creates a safe harbor for Title VII litigants by providing a pleading floor for workplace claims.[333] Plaintiffs who allege a prima facie case of employment discrimination have surpassed this floor and should be permitted to proceed with their case. Courts should not require plaintiffs to satisfy all of these prima facie elements, but those plaintiffs that do allege all of these factors should not find their claims subject to dismissal.[334]

329. Swierkiewicz v. Sorema N.A., 534 U.S. 506, 510–11 (2002).

330. *Id.* at 514–15.

331. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). As noted earlier, the fourth element of the prima facie case is often established by showing that "similarly situated employees outside of the protected class received more favorable treatment." Lucas v. PyraMax Bank, FSB, 539 F.3d 661, 666 (7th Cir. 2008).

332. *See Swierkiewicz*, 534 U.S. at 510–11.

333. *See id*.

334. As discussed above, the courts should only require that plaintiffs allege the facts set forth in the proposed analytical pleading framework discussed in detail in this Article.

VII. IMPLICATIONS OF THE PROPOSED PLEADING FRAMEWORK

The pleading framework set forth above would have many implications for employment-discrimination litigants.[335] The primary benefit of the proposed approach is that it would bring simplicity to a complex, confusing process.[336] After *Twombly* and *Iqbal*, plaintiffs are left guessing as to what factual content to include in a complaint, with the only clear guidance being that the alleged claim must have more than a possible chance of success but need not rise to the probability level.[337] The proposed framework defines exactly where that line of acceptability should be drawn for Title VII plaintiffs when pleading discriminatory intent and provides a simple model for litigants to follow.[338] Thus, the simple, streamlined approach of the pleading framework would end "the confusion already faced by the courts and litigants"[339] when applying the plausibility standard to employment-discrimination claims.[340]

Similarly, the approach offered in this Article would help prevent needless litigation over what plausibility means when alleging discriminatory intent.[341] The vagueness of the plausibility test provided by *Twombly* and *Iqbal* almost assures that this

335. *See* Seiner, *supra* note 19, at 145–49 (discussing the implications of proposed pleading model); Seiner, *supra* note 8, at 1053–59 (same).

336. *See, e.g.*, Kevin M. Clermont, *Litigation Realities Redux*, 84 NOTRE DAME L. REV. 1919, 1932–34 (2009) ("[*Twombly*], during its short life, has triggered tremendous confusion in case and commentary. What exactly it meant is clearly open to dispute, as is the wisdom of imposing, with no forewarning or public discussion, any sort of plausibility test on pleading."); Seiner, *supra* note 19, at 145–49; Seiner, *supra* note 8, at 1053–59.

337. Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2006)) (discussing the possibility/probability standard).

338. *See generally* Peter H. Schuck, *Legal Complexity: Some Causes, Consequences, and Cures*, 42 DUKE L.J. 1 (1992) (discussing simplicity and complexity in the legal setting).

339. Seiner, *supra* note 19, at 98; *see also* Tice, *supra* note 67, at 838 ("Ultimately, the Court's decision [in *Twombly*] creates uncertainty among lower courts and practitioners.").

340. *See* Ettie Ward, *The After-Shocks of* Twombly*: Will We "Notice" Pleading Changes?*, 82 ST. JOHN'S L. REV. 893, 918 (2008) ("Much work remains for the lower courts and, perhaps the Supreme Court, in fleshing out the contours of a post-*Twombly* pleading regime.").

341. *See* Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. (forthcoming Mar. 2010), *available at* http://ssrn.com/abstract=1448796 ("[W]e can expect a long period, perhaps a decade or more, of sorting and jostling before we have even a slightly clearer idea about what allegations must appear in complaints. Persistent confusion on such a determinative feature contributes to major destabilization of civil litigation—destabilization created by the Court's invention of a new and jarring test, exaggerated by its unclear delivery, and intensified by the poor legal process followed by the Court.") (manuscript at 32); Seiner, *supra* note 19, at 146–47; Seiner, *supra* note 8, at 1055–56.

standard "will spawn years of increased litigation."[342] By clearly defining what "plausible" means for discriminatory intent in the Title VII context, the proposed approach would avoid this unnecessary litigation through an easily applied three-part framework. Indeed, even if the courts ultimately altered the framework proposed here, a unified standard would help bring some definitiveness to the currently confused pleading process for employment-discrimination claims.[343]

One additional noteworthy benefit of the proposed approach is that it would save significant judicial resources. In addition to reducing litigation costs as discussed above, the simplicity of the proposed pleading model would assist courts in evaluating Title VII claims early in the case.[344] Thus, a court could quickly compare a plaintiff's complaint against the proposed framework and easily identify and notify the parties of any deficiencies. A complaint that is still inadequate (even after an opportunity to amend) could be quickly identified and removed from the court's docket. Similarly, a unified pleading framework would increase the likelihood that plaintiffs would file adequate complaints at the beginning of the case, as these litigants would have a clear standard to follow. As a result, courts would have to address fewer deficient complaints. Finally, judicial resources would likely be saved through an increased number of settlements. A unified standard would create "[m]ore clarity early on in the process," enhancing the probability of settling these matters "before the expensive discovery process begins."[345] And more settlements would certainly result in a reduced

342. Dodson, *supra* note 11, at 142; *see also* 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, 1239 (2008) ("[W]hile the lower courts may eventually settle on a more moderate interpretation of the case, it seems hard to dispute that the Court's pleading jurisprudence is anything but ambiguous.").

343. *Cf.* Asifa Quraishi, Comment, *From a Gasp to a Gamble: A Proposed Test for Unconscionability*, 25 U.C. DAVIS L. REV. 187, 205 (1991) ("Ultimately, litigants in the common law system, and perhaps any legal system, cannot have absolutely accurate predictability. Some measure of predictability, however, is desirable, and thus the law must provide some systematic method of analysis."). *See generally* Seiner, *supra* note 8, at 1053–59 (discussing the implications of the proposed pleading model for employment-discrimination cases).

344. *See* Schuck, *supra* note 338, at 34 ("As for judges, simple rules are easier to administer and generate fewer disputes, an important consideration for overwhelmed courts."). *See* also Seiner, *supra* note 19, at 145–46; Seiner, *supra* note 8, at 1055 (discussing how a unified model for pleading employment discrimination cases would "save judicial resources").

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

caseload for the judicial system.[346]

One potential concern over the plausibility standard endorsed by the Supreme Court is that lower courts can apply the standard subjectively.[347] Thus, the recent Supreme Court decisions can be seen as providing "a blank check for federal judges to get rid of cases they disfavor."[348] And, in the employment-discrimination context, recent research suggests that the plausibility test is already being used by some federal district courts to dismiss workplace claims.[349] A uniform pleading model would thus bring some predictability to pleading Title VII claims[350] and prevent courts from unnecessarily applying a heightened pleading standard to employment-discrimination cases that should be permitted to proceed.[351] A unified test would therefore provide a standard much more objective than the ambiguous plausibility test,[352] hopefully leading to more consistent results in Title VII cases.[353]

Some might argue that the proposed framework creates a standard too easy to satisfy and would therefore result in an increased amount of meritless litigation.[354] While the proposed standard does simplify the pleading process and may therefore encourage more individuals to bring suit, the framework does no more than quantify the *Twombly* and *Iqbal* decisions. Thus, to the

346. *See* Scott J. Connolly, Note, *Individual Liability of Supervisors for Sexual Harassment Under Title VII: Courts' Reliance on the Rules of Statutory Construction*, 42 B.C. L. REV. 421, 453 (2001) ("[I]n enacting Title VII, Congress's purpose was to eliminate discriminatory employment practices to the greatest extent possible using a limited commitment of federal judicial resources.").

347. *See, e.g.*, Spencer, *supra* note 136, at 11 ("[T]he *Twombly* pleading standard requiring plausibility might be too subjective to yield predictable and consistent results across cases. Developing a theory that describes the essence of what the *Twombly* Court was getting at would thus lend much-needed precision to the doctrine.").

348. Liptak, *supra* note 301 (quoting Professor Stephen B. Burbank).

349. *See* Seiner, *supra* note 8, at 1014, 1035–38 (discussing a study that "revealed that the lower courts are unquestionably using the new [*Twombly*] plausibility standard to dismiss Title VII claims").

350. *See* Spencer, *supra* note 136, at 4.

351. As the *Twombly* decision notes, "the Court is not requiring heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 547 (2007); *see* Seiner, *supra* note 8, at 1054 (noting that a uniform pleading model would help prevent "the courts from applying too rigid a pleading standard to Title VII claims").

352. *See* Spencer, *supra* note 117, at 160 (referencing *Twombly*'s "amorphous concept of 'plausibility.'").

353. *See* Spencer, *supra* note 136, at 6.

354. *See* Robert Brookins, *Mixed-Motives, Title VII, and Removing Sexism from Employment: The Reality and the Rhetoric*, 59 ALA. L. REV. 1, 51 (1995) ("Unsuccessful frivolous litigation is expensive for employers and society; successful frivolous litigation is even more expensive."); *see also* Seiner, *supra* note 19, at 147–49; Seiner, *supra* note 8, at 1056–57.

extent that the Supreme Court or federal rules have created a threshold that is too low for plaintiffs, it is that threshold that should be reevaluated.[355] This Article simply helps to decipher what the recent Supreme Court decisions mean for employment-discrimination plaintiffs and where those decisions draw the line for pleading a Title VII claim.[356] It should further be considered that a streamlined pleading process may also encourage individuals who have been *legitimately* discriminated against to bring suit and avail themselves of their rights under the statute.[357] This ease of access to the judicial system can certainly be viewed as a benefit, as it would assist individuals in vindicating their civil rights.[358]

Similarly, some might argue that the proposed framework is overly rigorous and proposes a standard that is too demanding for plaintiffs. While it is true that the pleading model suggested in this Article creates a higher standard than that demanded by *Conley v. Gibson*,[359] *Twombly* and *Iqbal* appear to have raised the pleading bar.[360] The proposed model simply navigates the recent Supreme Court decisions and offers a framework that comports with the recently announced plausibility standard. Moreover, this Article attempts to balance the interests of both parties by suggesting a framework that is easy for the plaintiff to comply with, while still providing the defendant with the pertinent information of the alleged claim. Finally, it should be considered that all of the information required by the proposed pleading framework should be within the plaintiff's knowledge when the complaint is filed. To the extent that some information is lacking, the plaintiff should clearly

355. Elaine M. Korb & Richard A. Bales, *A Permanent Stop Sign: Why Courts Should Yield to the Temptation to Impose Heightened Pleading Standards in § 1983 Cases*, 41 BRANDEIS L.J. 267, 293–94 (2002) ("[A]lthough heightened pleading accords courts an operative mechanism for filtering out unsubstantiated suits, plaintiffs with meritorious claims should not be deprived of their day in court. The interests of all should not be sacrificed for the benefit of a few.").

356. *See also* Steinman, *supra* note 138 ("it would be a mistake to construe this [proposed transactional approach] as requiring extensive details about the acts or events that are alleged to have occurred—e.g., exact dates, times, locations, or which particular employees or officers of an institutional or corporate party were involved.") (manuscript at 54).

357. The simplicity of the proposed pleading framework would also help some litigants recognize that their claims lack merit—thus discouraging these individuals from bringing a frivolous suit.

358. *See generally* Frank V. Williams, III, *Reinventing the Courts: The Frontiers of Judicial Activism in the State Courts*, 29 CAMPBELL L. REV. 591, 701–03 (2007) (discussing ease of access to the judicial system).

359. 355 U.S. 41, 47–48 (1957).

360. *See, e.g.*, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 561–63 (2007) (abrogating *Conley v. Gibson*); *see also* Spencer, *supra* note 41, at 494 ("Ultimately, *Twombly* raises the pleading bar to a point where it will inevitably screen out claims that could have been proven if given the chance."). *See generally* Seiner, *supra* note 19, at 148; Seiner, *supra* note 8, at 1056.

indicate this in the pleadings and a court should take a liberal approach to the missing information, perhaps even permitting limited discovery on the particular issue.[361]

In summary, the simplicity of the proposed pleading standard outlined in this Article offers a number of benefits for the entire judicial system. Though there are obvious concerns with implementing any new legal framework, a unified model would greatly assist the courts in evaluating Title VII claims and would prevent needless litigation by defining a previously vague plausibility standard.[362]

CONCLUSION

Twombly and *Iqbal* have replaced a relaxed pleading standard with a more complex and undefined plausibility test.[363] Employment-discrimination plaintiffs, who are already confronted with an uphill battle when attempting to establish intent, are now faced with an even more daunting task. *Iqbal* creates an arduous burden for Title VII plaintiffs by mandating that allegations of discriminatory intent cannot be general or conclusory and must be made with the proper factual support.[364] This Article attempts to ease the pleading burden for Title VII litigants by clarifying the recent Supreme Court decisions and by defining what plausibility means when alleging discriminatory intent. The analytical framework proposed by this Article will help ensure that Title VII plaintiffs frame their allegations in the proper factual context. As the studies outlined in this Article demonstrate, employment discrimination continues to be a very real threat in our society. A Title VII plaintiff should therefore be given a fair opportunity to have her discrimination claim heard, without the fear of making an inadvertent procedural misstep which would prematurely end the case.[365]

"If you judge people you have no time to love them."[366] A model pleading standard for Title VII claims will help prevent individuals

361. *See* Spencer, *supra* note 41, at 494 ("The new plausibility standard . . . bodes ill for plaintiffs who will now have to muster facts showing plausibility when such facts may be unavailable to them.").

362. *See* Clermont & Yeazell, *supra* note 341, at 50 ("Our point is simple: *Twombly* and *Iqbal* have introduced a wild card, a factor of substantial instability, at the threshold stage of civil process.").

363. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949–51 (2009); *Twombly*, 550 U.S. at 562–64.

364. *Iqbal*, 129 S. Ct. at 1949–50.

365. *See* Swierkiewicz v. Sorema N.A., 534 U.S. 506, 514 (2002) ("'The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.'" (quoting Conley v. Gibson, 355 U.S. 41, 48 (1957))).

366. Mary Beth Young, *Learning to Discern Rather Than Judge*, NAT'L CATH. REP., March 11, 2005, at 14.

from being inappropriately judged in the workplace on the basis of their gender, religion, and national origin, or by the color of their skin. The time for that model pleading standard is now—after *Iqbal*.