

UNTANGLING THE *TWOMBLY-MCDONNELL* KNOT: THE SUBSTANTIVE IMPACT OF PROCEDURAL RULES IN TITLE VII CASES

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Lower courts are still sorting out the consequences of the Supreme Court's decisions in Bell Atlantic Corp. v. Twombly and Ashcroft v. Iqbal, which together heralded a heightened factual pleading standard. Though many have focused on the impact of the new standard on plaintiffs facing significant information asymmetries, this Note focuses on the potential substantive impact on federal civil rights claims resulting from application of the Iqbal standard. Specifically, this Note argues that, when strict interpretations of the evidentiary standards used in claims based on the McDonnell Douglas framework clash with a stronger factual pleading standard, the effects can be distortive, closing out theories of discrimination for which there was relief before Iqbal.

Reviewing potential solutions, this Note concludes that the most significant source of the distortion is in the evidentiary standards themselves and argues that a more practical and less rule-oriented approach can keep the civil rights laws broad in reach while requiring a reasonable level of factual pleading.

INTRODUCTION

Though there is less overt discrimination in the American workplace today than at the genesis of Title VII of the Civil Rights Act of 1964,¹ employment discrimination remains problematic for historically marginalized groups such as racial and ethnic minorities, women, disabled individuals, and older individuals.² Under the test developed in *McDonnell Douglas Corp. v. Green*³ and related doctrines, the United States Supreme Court has devised a set of rules that allow plaintiffs

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¹ 42 U.S.C. § 2000e-2(a) (2006).

² See, e.g., Joseph A. Seiner, *After Iqbal*, 45 WAKE FOREST L. REV. 179, 195–205 (2010) (reviewing studies indicating that “discriminatory behavior continues to thrive”); see also Melissa Hart, *Subjective Decisionmaking and Unconscious Discrimination*, 56 ALA. L. REV. 741, 747–49 (2005) (discussing evidence of persistent unconscious racial stereotyping in employment decisions).

³ 411 U.S. 792, 802 (1973) (introducing a burden-shifting standard as it relates to making a prima facie case).

bringing claims of employment discrimination to prove their cases using circumstantial evidence of intent in the absence of more-difficult-to-obtain direct evidence. At various times since Title VII's passage, and most recently in the past decade, the Supreme Court and Congress have attempted to protect the effectiveness of Title VII. The Court has rejected lower court decisions that imposed heightened fact pleading burdens on plaintiffs,⁴ and Congress has amended statutes to reverse rulings that interpreted civil rights statutes so narrowly as to read out causes of action.⁵

Yet, beginning in the late 1980s, increased judicial discretion in pretrial adjudication via summary judgment was viewed by many as posing a threat to Title VII plaintiffs.⁶ Then, the Supreme Court shifted its pleading doctrine in *Bell Atlantic Corp. v. Twombly* in 2007,⁷ and *Ashcroft v. Iqbal*⁸ in 2009, replacing a broad notice pleading rule with an enhanced standard that focuses on whether a plaintiff has provided enough facts to make her claim "plausible." Countless scholars have criticized these decisions and the threat they pose to Title VII plaintiffs, who, without access to discovery, often cannot plead sufficient facts in their complaint to establish a "plausible" claim about defendants' intent to discriminate.⁹

This Note does not address the merits of *Twombly* and *Iqbal*. Rather, it assesses the substantive implications of the new Title VII pleading standard when it meets some courts' strict, rule-oriented approach to the evidentiary models that guide Title VII. The recent Supreme Court pleading jurisprudence has an undeniably legitimate goal: to reduce the burden of meritless cases at the pleading stage by weeding out claims with no possibility of success.¹⁰ Yet, in their efforts to dismiss conclusory and implausible claims under the mandates of the new rule, some lower courts have not only required heightened fact pleading of Title VII plaintiffs attempting to use circumstantial evidence, but these courts have also impliedly imposed standards regarding the *types* of facts that are acceptable. These judicially-imposed standards are not grounded in statute or in the foundational

⁴ See *infra* notes 58–63 and accompanying text (discussing Supreme Court's maintenance of notice pleading standard).

⁵ See *infra* notes 16–20 and accompanying text (describing instances of back and forth between courts and Congress as to the scope of civil rights laws).

⁶ See *infra* notes 90–94 and accompanying text (discussing criticism of the summary judgment standard as established in *Iqbal*).

⁷ 550 U.S. 544 (2007).

⁸ 129 S. Ct. 1937 (2009).

⁹ See *infra* notes 83–94 and accompanying text (describing criticisms of *Twombly* and *Iqbal* decisions).

¹⁰ *Twombly*, 550 U.S. 544, 557–58 (2007).

cases that set out the burden-of-proof structure in employment discrimination cases. Such developments reach beyond a discovery problem: The plausibility paradigm is closing off claims for which there was a remedy before *Iqbal* by telling plaintiffs not that they lack sufficient facts, but that they have the *wrong* facts. In the past, these standards appeared occasionally in the post-discovery context of summary judgment adjudications. Now, their appearance at the pleading phase gives them even more force as legal rules. This new gate, which blocks potentially meritorious plaintiffs, puts into dramatic relief the need for a revised approach to the proof structures on which courts rely to adjudicate these claims.

Part I of this Note outlines the substance and procedure of Title VII and related laws, with a focus on the circumstantial model of proof that has, at least until recent years, prevailed. Part II describes the recent changes to pleading doctrine catalyzed by *Twombly* and *Iqbal*. It then assesses the ways in which lower courts' application of the new standard to dismiss federal employment discrimination claims has wholly closed the door to some previously accepted theories of discrimination. Finally, in Part III, I assess the nature of these changes and argue that the types of dismissals identified in Part II are an inappropriate way to address frivolous suits. Thus, I conclude by calling upon courts to reset their approach to the Title VII proof structure by applying evidentiary standards with due flexibility, which would respect Congress's ambition to stop intentional discrimination in employment even when it is hard to prove.

I.

TITLE VII AND ITS CONNECTION TO PROCEDURE

A. *The Framework and Purpose of Title VII*

This Note focuses on two employment discrimination statutes: Title VII of the Civil Rights Act of 1964 (Title VII)¹¹ and the Age Discrimination in Employment Act (ADEA).¹² Title VII makes it

¹¹ 42 U.S.C. § 2000e-2(a) (2006).

¹² Pub. L. No. 90-202, § 4(a)(1), 81 Stat. 602, 603 (codified in scattered sections of 29 U.S.C.). Throughout this Note, for the sake of simplicity, I will often refer to "Title VII," though I discuss both Title VII and the ADEA. They are different in important ways, *see, e.g., infra* note 37 (discussing Court's decision not to apply mixed-motive analysis—which applies to Title VII claims—to ADEA claims), but for the purposes of this Note, they are largely parallel. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141–42 (2000) (noting that several circuits apply the evidentiary model developed for Title VII claims to ADEA). There are several other important employment discrimination statutes. The Americans with Disabilities Act, 42 U.S.C. § 12112(a) (2006), and the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2006), bar discrimination in employment on the basis of disability. The Equal Pay Act of 1963 amended the Fair Labor Standards Act to prohibit

unlawful “for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin”¹³ The ADEA similarly declares it unlawful for an employer to discriminate in employment against any person because of age.¹⁴

The principle underlying Title VII is equal employment opportunity for all. The law’s legislative history and underlying policy suggest that maintaining open access to the judicial system for claimants furthers Title VII’s purpose. Employment discrimination laws rely in part on a theory of market failure: The labor market, operating freely, had not and would not provide fair employment opportunities for women, racial, ethnic and religious minorities, and older and disabled individuals.¹⁵ The operative portions of the statutes are relatively simple and general, which has left much of the development of their substance and procedure to the courts. Congress has supervised the courts, repeatedly revising statutes to emphasize the broad principle of equality that motivates employment discrimination law. As the House Education and Labor Committee lamented in 1978, “the Supreme Court’s narrow interpretations of Title VII tend to erode our national policy of nondiscrimination in employment. We are left in a state of national confusion.”¹⁶ For example, the Supreme Court held in

unequal pay for equal work on the basis of sex. Pub. L. 88-38, 77 Stat. 56–57 (codified as amended at 29 U.S.C. § 206(d) (2006)). The Pregnancy Discrimination Act of 1978 made clear that pregnancy discrimination is sex discrimination. 42 U.S.C. § 2000e(k) (2006).

¹³ 42 U.S.C. § 2000e-2(a) (2006).

¹⁴ Pub. L. No. 90-202, § 4(a)(1), 81 Stat. 602, 603 (codified in scattered sections of 29 U.S.C.). However, only individuals over the age of 40 are protected. *Id.* § 12, 81 Stat. at 607.

¹⁵ See *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 386–87 (5th Cir. 1971) (recognizing Congress’s motivation to “achieve the optimum use of our labor resources” with Title VII); Richard H. McAdams, *Cooperation and Conflict: The Economics of Group Status Production and Race Discrimination*, 108 HARV. L. REV. 1003, 1074–78 (1995) (pointing to evidence that race discrimination is “a grossly inefficient market failure”); Jonathan Turley, *Transnational Discrimination and the Economics of Extraterritorial Regulation*, 70 B.U. L. REV. 339, 368–69 (1990) (noting that Title VII and ADEA “were written broadly to effectuate a societal solution to a long-standing problem in the market place”); Donald O. Johnson, Comment, *The Civil Rights Act of 1991 and Disparate Impact: The Response to Factionalism*, 47 U. MIAMI L. REV. 469, 480–81 (1992) (describing early Supreme Court interpretations of Title VII as reflecting the view that it was “public interest legislation designed to correct the market failure of a monopoly of employment power”). But see generally Richard A. Posner, *The Efficiency and Efficacy of Title VII*, 136 U. PA. L. REV. 513 (1987) (questioning whether Title VII is defensible on purely economic grounds).

¹⁶ H.R. REP. NO. 95-948, at 3 (1978). When the Supreme Court ruled that discrimination against pregnant women did not constitute gender discrimination under the meaning

Ledbetter v. Goodyear Tire & Rubber Co. that the 180-day window for bringing a charge with the Equal Employment Opportunity Commission (EEOC) for Title VII violations began to run upon the plaintiff's receipt of the first discriminatory paycheck, regardless of whether she knew, at the time, that she was being paid less for the same work.¹⁷ Since employees are unlikely to compare paychecks, and many workplaces even prohibit the practice, it is unlikely that victims of wage discrimination would immediately suspect unfair compensation.¹⁸ Congress responded with the Lilly Ledbetter Fair Pay Act of 2009, which established that every discriminatory paycheck starts the statute of limitations anew.¹⁹ Congressional findings in the statute note that the *Ledbetter* decision "significantly impairs statutory protections against discrimination in compensation that Congress established and that have been bedrock principles of American law for decades."²⁰

B. Evidentiary and Pleading Standards in Title VII Claims

To address the frequent unavailability of direct evidence in Title VII cases, courts have developed evidentiary standards by which plaintiffs can prove their claims circumstantially. This Section lays out those evidentiary standards and their interaction with federal dismissal standards prior to *Twombly* and *Iqbal*.

of Title VII in *General Electric Co. v. Gilbert*, 429 U.S. 125, 145–46 (1976), Congress responded with the Pregnancy Discrimination Act of 1978, which declared discrimination against pregnant women in hiring, insurance benefits, maternity leave, or fringe benefits to be unlawful sex discrimination. 42 U.S.C. § 2000e(k) (2006).

¹⁷ 550 U.S. 618, 621 (2007). *Ledbetter* "abandoned her claim under the Equal Pay Act" when it reached the Supreme Court, so that statute was not at issue. *Id.*

¹⁸ *See id.* at 649–50 & n.3 (Ginsburg, J., dissenting) (noting "[i]t is not unusual . . . for management to decline to publish employee pay levels, or for employees to keep private their own salaries" and that "one-third of private sector employers have adopted specific rules prohibiting employees from discussing their wages with co-workers" (citing Leonard Bierman & Rafael Gely, "Love, Sex and Politics? Sure. Salary? No Way": *Workplace Social Norms and the Law*, 25 BERKELEY J. EMP. & LAB. L. 167, 168, 171 (2004))).

¹⁹ Lilly Ledbetter Fair Pay Act of 2009, Pub. L. No. 111-2, § 3, 123 Stat. 5 (2009) (codified at 42 U.S.C. § 2000e-5 (Supp. III 2009) and in scattered sections of 29 U.S.C.) ("[A]n unlawful employment practice occurs . . . when a discriminatory compensation decision or other practice is adopted . . . including each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a decision or other practice." (emphasis added)).

²⁰ *Id.* § 2(1).

1. Title VII Evidentiary Standards Impacted by *Twombly* and *Iqbal*

a. The *McDonnell Douglas* Evidentiary Standard for Discrimination Claims

While plaintiffs may prove employment discrimination by direct evidence, in practice, a “smoking gun” often is not available to prove that discriminatory intent motivated a discharge, non-promotion, or other adverse employment action. Recognizing this problem, the Supreme Court in *McDonnell Douglas Corp. v. Green* set forth a three-step burden-shifting evidentiary model by which plaintiffs can prove cases through circumstantial evidence, since “Title VII tolerates no racial discrimination, subtle or otherwise.”²¹ Though *McDonnell Douglas* came to the Court on an appeal from a dismissal,²² the model supplied by the case is an evidentiary standard to be applied at trial.²³ The first step requires the plaintiff to establish a prima facie case, showing that she was a member of a protected class, was qualified for the position, and was subject to an adverse employment action²⁴ under circumstances giving rise to an inference of discrimination.²⁵

A common form of proof for the last element is a “comparator,” or a similarly situated employee not in the plaintiff’s protected class who has been treated more favorably than the plaintiff.²⁶ Courts, how-

²¹ 411 U.S. 792, 801 (1973).

²² *Id.* at 797–98 (recounting the procedural history of the case, including dismissal because of plaintiff’s alleged unlawful civil rights activities and dispute between district and circuit courts regarding jurisdictional issue relating to EEOC’s finding).

²³ *Id.* at 802 (setting forth prima facie case as the initial burden “in a Title VII trial”).

²⁴ Actionable conduct includes “hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits,” or, more generally, “materially adverse change in the terms and conditions of [a plaintiff’s] employment.” *Spees v. James Marine, Inc.*, 617 F.3d 380, 391 (6th Cir. 2010) (quoting *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 795, 798 (6th Cir. 2004) (en banc), *aff’d* 548 U.S. 53 (2006)) (internal quotation marks omitted). Additionally, harassment may be actionable. *See infra* notes 40–47 and accompanying text (describing elements of harassment claims).

²⁵ Under *McDonnell Douglas*, 411 U.S. at 802, the evidentiary model required plaintiff to show “(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job . . . (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.” This test that has been generalized beyond the non-hiring case in *McDonnell Douglas*. *See Valtchev v. City of New York*, 400 F. App’x 586, 591 (2d Cir. 2010) (explaining the general form of the *McDonnell Douglas* test as requiring a plaintiff to establish that “(1) he is a member of a protected class, (2) he has the qualifications for the position at issue, (3) he suffered an adverse employment action, (4) under circumstances giving rise to an inference of discrimination”).

²⁶ Courts may perform the same analysis without using the term “comparator,” instead adopting language such as “similarly situated” or asking in firing cases whether the plaintiff was replaced with someone of the same sex or race. *See Charles A. Sullivan, The Phoenix from the Ash: Proving Discrimination by Comparators*, 60 ALA. L. REV. 191, 193–94

ever, have emphasized that a prima facie case may be established with other forms of circumstantial proof. In a pregnancy discrimination case, for example, a district court found a prima facie case by looking to “ambiguous comments merely suggesting discrimination [that] do not furnish direct evidence,” a coworker’s testimony about rumored discrimination against pregnant women, and evidence that the defendant was not concerned about the policy that formed the alleged basis for termination until after the plaintiff’s pregnancy.²⁷ The Supreme Court has indicated that the requirements for a prima facie case set forth in *McDonnell Douglas* are not absolute and, in a nonhiring case, may merely require a showing that a position was available and that the plaintiff was qualified.²⁸

At the second step, after the plaintiff has established a prima facie case, the burden shifts to the defendant “to articulate some legitimate, nondiscriminatory reason” for its action.²⁹ If the defendant satisfies its burden at this step, the plaintiff may still prove her case at the third step with circumstantial evidence “show[ing] that [the employer’s] stated reason . . . was in fact pretext.”³⁰ The burden of proof, however, remains on the plaintiff at all times to show discrimi-

(2009). Comparator analysis appears to be of growing importance, with the term appearing over a thousand times in discrimination cases between 2000 and 2008. *Id.* at 193 n.1.

²⁷ *Hunter v. Mobis Ala., LLC*, 559 F. Supp. 2d 1247, 1257–58 (M.D. Ala. 2008). The court added, “[T]he lack of a similarly situated comparator should not defeat Hunter’s prima facie case when there is otherwise sufficient circumstantial evidence of discriminatory intent.” *Id.* at 1257; see also Suzanne B. Goldberg, *Discrimination by Comparison*, 120 *YALE L.J.* 728, 757–58 (2011) (arguing that comparator analysis poses difficulties for proving actual discrimination, particularly for “uniquely situated employees”); cf. *Huang v. Postmaster Gen.*, No. 01A01175, 2002 WL 599539, at *2 (E.E.O.C. Apr. 11, 2002) (“[W]hile . . . the failure to identify comparators is not necessarily fatal to the establishment of a prima facie case . . . complainant must point to other acts from which, if otherwise unexplained, an inference of discrimination can be drawn.”).

²⁸ See *Int’l Bhd. of Teamsters v. United States*, 431 U.S. 324, 358 n.44 (1977) (“*McDonnell Douglas* . . . demand[s] that the alleged discriminatee demonstrate at least that his rejection did not result from the two most common legitimate reasons on which an employer might rely to reject a job applicant: an absolute or relative lack of qualifications or the absence of a vacancy in the job sought.”); see also *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (reiterating “that the prima facie case operates as a flexible evidentiary standard” and cautioning against rigid application of such standard).

²⁹ *McDonnell Douglas*, 411 U.S. at 802. The defendant’s burden at this stage is one of production, not persuasion. See *St. Mary’s Honor Ctr. v. Hicks*, 509 U.S. 502, 515–18 (1993) (describing defendant’s burden as one of “production” and noting that “[t]he plaintiff retains the burden of persuasion” (quoting *Tex. Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255–56 (1981))).

³⁰ *McDonnell Douglas*, 411 U.S. at 804. Some circuits have recognized other methods of meeting the final burden with circumstantial evidence. See, e.g., *Lust v. Sealy, Inc.*, 277 F. Supp. 2d 973, 980 (W.D. Wis. 2003) (“Plaintiff could also prove her case by presenting other circumstantial evidence . . . such as ambiguous statements, suspicious timing or other bits and pieces from which an inference of discriminatory intent might be drawn.” (internal quotations omitted)).

nation.³¹ The Court held, in *St. Mary's Honor Center v. Hicks*, that discrediting the defendant's articulated legitimate motivation, without more, need not necessarily result in a verdict for the plaintiff.³² The law, after all, does not protect plaintiffs from all harms: Federal antidiscrimination legislation imposes only limited exceptions to the background rule of at-will employment,³³ and the statutes do not protect plaintiffs from sexual orientation discrimination,³⁴ favoritism,³⁵ or simply being the subject of a supervisor's irrational, personal animosity.³⁶

Though courts will not presume discrimination because most adverse employment actions are not illegal, circumstantial evidence has a central role in the employment discrimination context.³⁷ In the 2000 case of *Reeves v. Sanderson Plumbing Products, Inc.*, the Court held that "a prima facie case and sufficient evidence to reject the employer's explanation" can support the jury's verdict for the plaintiff.³⁸ In other words, if the plaintiff undermines the defendant's proffered nondiscriminatory reason, a factfinder properly may, but is not

³¹ *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 143 (2000) (citing *Burdine*, 450 U.S. at 253).

³² 509 U.S. at 511.

³³ See Joshua C. Polster, *Workplace Grievance Procedures: Signaling Fairness but Escalating Commitment*, 86 N.Y.U. L. REV. 638, 643 (2011) (noting that "[t]raditionally, employers had full discretion to terminate or discipline employees for any reason (or for no reason)" and describing antidiscrimination laws and other developments as exceptions to this baseline rule).

³⁴ See, e.g., *Argeropoulos v. Exide Techs.*, No. 08-CV-3760, 2009 WL 2132443, at *7 (E.D.N.Y. July 8, 2009) (dismissing plaintiff's claim for sexual orientation harassment).

³⁵ See, e.g., *Wilson v. Delta State Univ.*, 143 F. App'x 611, 613-14 (5th Cir. 2005) (holding that "paramour favoritism" does not violate Title VII).

³⁶ See *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006) (noting that Title VII does not insulate employees from personality conflicts and "snubbing").

³⁷ The Supreme Court recently reemphasized the importance of circumstantial evidence in Title VII cases, holding, in 2003, that courts should not require direct evidence to prove a mixed-motive case. *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 100-01 (2003) ("Title VII . . . does not incorporate a direct evidence requirement. . . . [N]o heightened showing is required under § 2000e-2(m)."). A mixed-motive case is one in which the defendant was motivated by both lawful and unlawful factors. In such a case, a plaintiff may prevail despite the partly lawful motivation. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989). The defendant may only avoid liability by proving that discrimination was not the but-for cause of its action. 42 U.S.C. § 2000e-5(g)(2)(B) (2006) (stating that if defendant would have taken the same action absent discriminatory motivation, a court may award injunctive and declaratory relief, but not damages). The Court has held, though, that there is no mixed-motive model in ADEA cases, and thus, that plaintiffs must show that age was the "but-for" motivation of defendants' acts. *Gross v. FBL Fin. Servs., Inc.*, 129 S. Ct. 2343, 2352 (2009). Scholars have criticized this ruling as a misstep that complicates the law unnecessarily. See, e.g., Martin J. Katz, *Gross Disunity*, 114 PENN ST. L. REV. 857 (2010) (arguing Court should not have rejected uniformity between Title VII and ADEA in *Gross*).

³⁸ 530 U.S. 133, 149 (2000).

required to, infer discrimination. *Reeves* thus emphasizes the extent to which circumstantial evidence can prove a discrimination case, which is crucial to most plaintiffs, who will rarely have a recorded admission indicating that an employer acted based on unlawful criterion. The Court noted that evidence disproving the employer's explanation is "simply one form of circumstantial evidence that is probative of intentional discrimination, and it may be quite persuasive," since "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation" ³⁹ This model empowers juries to determine when a defendant employer is lying and, sometimes, to determine that the most reasonable conclusion to draw from the evidence is that the defendant lied to mask discriminatory intent.

b. Harassment Claims Under Title VII

The model of proof for harassment claims is slightly different but also flexible. Though the statutory language does not provide specifically for such claims, the Supreme Court has long recognized that the language of Title VII "evinces a congressional intent to strike at the entire spectrum of disparate treatment of men and women in employment," ⁴⁰ and thus, "a plaintiff may establish a violation of Title VII by proving that discrimination based on sex has created a hostile or abusive work environment." ⁴¹ These claims can take the form of quid-pro-quo sexual harassment (conditioning a term of employment on sexual conduct or favors), or a hostile working environment that does not have any direct economic effect. ⁴² While the landmark cases that defined the evidentiary standard for hostile environment cases, discussed below, concern sexual harassment, the same framework applies to other kinds of harassment, such as that based on race. ⁴³

In order to establish hostile work environment harassment, conduct must be "sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive work environment"—a judgment that should be made based on all of the circumstances. ⁴⁴ This test contains both subjective and objective elements:

³⁹ *Id.* at 147.

⁴⁰ *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 63 (1986) (internal quotations omitted).

⁴¹ *Id.* at 66.

⁴² *See id.* at 65–66 (establishing the validity of a hostile environment claim and implicitly accepting a quid-pro-quo claim).

⁴³ *See, e.g., Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 105 (2002) (denying summary judgment for the defendant in a racial hostile work environment claim).

⁴⁴ *Harris v. Forklift Sys.*, 510 U.S. 17, 21, 23 (1993) (internal quotation marks omitted). Additionally, where a coworker, rather than a supervisor, is responsible for the harassing

The environment objectively must be one “that a reasonable person would find hostile or abusive,” and the plaintiff must subjectively perceive the environment to be hostile or abusive.⁴⁵ Additionally, as with other Title VII claims, it is essential that such harassment be “because of” the plaintiff’s protected characteristic.⁴⁶ While the paradigmatic harassment case involves pervasive sexual or racial speech that makes a workplace hostile, courts have recognized that *any* harassment that occurs because of the plaintiff’s race, gender, or other protected status is unlawful when discrimination can be inferred, even when the motivation is not explicit from the conduct.⁴⁷

2. *Pretrial Rulings in Title VII Prior to Twombly and Iqbal*

The relationship between the evidentiary models described above and the procedural steps contemplated by the Federal Rules of Civil Procedure is complicated. This Section describes how the *McDonnell Douglas* test interacted with federal standards for dismissal before *Twombly* and *Iqbal*, and focuses on both the standard for pre-discovery dismissal based on the plaintiff’s failure to state a claim for which relief can be granted under Federal Rule of Civil Procedure 12(b)(6) and the post-discovery summary judgment standard under Rule 56—both of which the Court has in the past viewed as a backstop for eliminating meritless claims.⁴⁸ Part II will then assess how this has changed under recent shifts in pleading and dismissal standards.

Under Rule 8(a), a complaint must contain “a short and plain statement of the claim showing that the pleader is entitled to relief,”⁴⁹

conduct, the employer is only liable if it was aware of the harassment and did nothing to stop it; though the plaintiff may show this element through circumstantial evidence. *Spicer v. Com. of Va., Dep’t of Corr.*, 66 F.3d 705, 710 (4th Cir. 1995) (holding that harassment must be imputable to an employer, and knowledge “may be imputed to an employer by circumstantial evidence”). “Individuals are not subject to liability under Title VII.” *Wrighten v. Glowinski*, 232 F.3d 119, 120 (2d Cir. 2000).

⁴⁵ *Harris*, 510 U.S. at 21.

⁴⁶ 42 U.S.C. § 2000e-2(a)(1) (2006).

⁴⁷ *See, e.g., Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485 (3d Cir. 1990) (“To the extent that the court ruled that overt sexual harassment is necessary to establish a sexually hostile environment, we are constrained to disagree.”); *Finley v. County of Martin*, No. C-07-5922 EMC, 2009 WL 5062326, at *18 (N.D. Cal. Dec. 23, 2009) (agreeing that unlawful conduct need not be explicitly racial but noting that there must be some basis from which a reasonable jury can infer discriminatory animus). In *Andrews*, for example, the Third Circuit instructed the trial court to consider not only expressly sexual conduct, such as the presence of pornography, “but also the recurrent disappearance of plaintiffs’ case files and work product, anonymous phone calls, and destruction of other property.” *Andrews*, 895 F.2d at 1486.

⁴⁸ *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514 (2002) (“[C]laims lacking merit may be dealt with through summary judgment under Rule 56.”).

⁴⁹ FED. R. CIV. P. 8(a)(2). This rule is transsubstantive with the exception of Rule 9(b), which requires that “circumstances constituting fraud or mistake” be stated “with particu-

without which it is subject to dismissal under Rule 12(b)(6) for failure to state a claim.⁵⁰ The Supreme Court explained in *Conley v. Gibson* that this notice pleading standard meant 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.”⁵¹ The Court has further asserted that remoteness of recovery “is not the test.”⁵² The *Conley* standard has been characterized as permitting a complaint that “is fact-free but gives notice of the basic elements of the claim.”⁵³ This simplified pleading standard, in contrast to its strict, technical predecessors,⁵⁴ reflected the belief that courts should decide cases based on the merits rather than technical mistakes.⁵⁵ In other words, a Rule 12(b)(6) motion to dismiss for failure to state a claim should only be granted if there is genuinely no legal claim, based only on the face of the complaint⁵⁶ and accepting all of the plaintiff’s allegations as true.⁵⁷

larity.” FED. R. CIV. P. 9(b). That same Rule limits its heightened standard, clarifying that the exception to Rule 8(a) should be construed narrowly, by stating that “other conditions of a person’s mind [such as intent or knowledge] may be alleged generally.” *Id.*

⁵⁰ See FED. R. CIV. P. 12(b)(6) (allowing a party to assert, as a defense, that the pleading “fail[s] to state a claim upon which relief can be granted”).

⁵¹ *Id.* at 45–47.

⁵² *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974) (reversing dismissal of civil rights claim under 42 U.S.C. § 1983).

⁵³ Richard A. Epstein, *Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL’Y 61, 64 (2007). Some minimal set of simple facts, however, including the date, place, parties, and conduct involved in the claim, are required to satisfy notice pleading requirements. FED. R. CIV. P. Form 11 (providing practical applications of Rule 8).

⁵⁴ Contemporary scholars have recognized that common law writ pleading was so complicated as to interfere with adjudication on the merits. See 5C CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE & RICHARD L. MARCUS, *FEDERAL PRACTICE & PROCEDURE* § 1374 (3d ed. 1998) (noting that motions challenging pleading at common law “were hypertechnical in character and by placing undue emphasis on the form and content of the pleading they often interfered with the resolution of disputes on their merits”). Reform efforts such as the 1848 Field Code, “an effort to simplify pleading and eliminate dismissals based on technical deficiencies,” *id.*, were likewise confusing and arguably hindered proper resolution of claims. See, e.g., Walter W. Cook, *Statements of Fact in Pleading Under the Codes*, 21 COLUM. L. REV. 416, 417 (1921) (criticizing code pleading and resulting confusion between what constitutes factual allegation versus “conclusions of law”).

⁵⁵ See *Dioguardi v. Durning*, 139 F.2d 774 (2d. Cir. 1944) (reversing dismissal of “inartistically” stated, very basic complaint based on permissive pleading requirements of still-new Federal Rule 8); see also A. Benjamin Spencer, *Plausibility Pleading*, 49 B.C. L. REV. 431, 434 (2008) (describing “liberal ethos” of strong preference for adjudication on the merits after trial as motivating federal pleading rules).

⁵⁶ See FED. R. CIV. P. 12(b) advisory committee’s note on 1946 amendments (asserting a preference that motions to dismiss based on anything other than the complaint should be converted to summary judgment motions, with accompanying procedural protections).

⁵⁷ See, e.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 572 (2007).

For fifty years after *Conley*, the Supreme Court rebuffed lower courts' attempts to raise the pleading standard in various substantive areas, including employment discrimination. The Court consistently reasserted the Rule 8 pleading standard set out in *Conley* and emphasized that meritless cases could be dealt with in other ways.⁵⁸ In 2002, in *Swierkiewicz v. Sorema N.A.*, the Court reaffirmed notice pleading in the context of employment discrimination, making clear that *McDonnell Douglas* is an evidentiary standard that applies *post*-discovery and that its application *pre*-discovery, at the pleading stage, is inappropriate.⁵⁹

The Second Circuit, below, held that *McDonnell Douglas* required an employment discrimination plaintiff to plead a *prima facie* case in order to survive dismissal for failure to state a claim under Rule 12(b)(6).⁶⁰ The Supreme Court unanimously reversed, rejecting a heightened pleading standard for employment discrimination claims and holding that “an employment discrimination plaintiff need not plead a *prima facie* case of discrimination”⁶¹ The Court noted that a plaintiff at the pleading stage may not know what kind of evidence (including, possibly, direct evidence) she will uncover, and thus, holding the plaintiff to the *McDonnell Douglas* evidentiary burden-shifting scheme at the pleading stage—that is, before discovery—makes no sense.⁶² A plaintiff may need discovery in order to find a proper comparator (through disciplinary or attendance records, for example) or direct evidence, such as internal memos that suggest dis-

⁵⁸ See Epstein, *supra* note 53, at 64 (“*Conley* has long been treated as an authoritative statement of the law that has been followed uniformly in the Supreme Court and elsewhere”); Spencer, *supra* note 55, at 436–38 (describing Supreme Court refusal to abandon *Conley* despite circuit court attempts to raise pleading standard). See generally Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1 (2010) (describing the Court’s emphasis on summary judgment and case management as proper tools to eliminate frivolous suits).

⁵⁹ 534 U.S. 506, 510–12 (2002).

⁶⁰ *Id.* at 509. This should not be read, though, to conclude that the Court required no facts. The plaintiff in *Swierkiewicz* included substantial factual detail that seemed to track the requirements of a *prima facie* case based on comparator analysis:

“Petitioner alleged that he had been terminated on account of his national origin in violation of Title VII and on account of his age in violation of the ADEA. His complaint detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination. These allegations give respondent fair notice of what petitioner’s claims are and the grounds upon which they rest.”

Id. at 514.

⁶¹ *Id.* at 515.

⁶² *Id.* at 511–12.

criminary animus. The Court added that “claims lacking merit may be dealt with through summary judgment under Rule 56.”⁶³

Under Rule 56, a party may move for summary judgment after discovery.⁶⁴ Thus, in contrast to the pleading standard under *Swierkiewicz*, a court may grant summary judgment in a Title VII case if the plaintiff has failed to establish a prima facie case of discrimination after discovery.⁶⁵ Rule 56 states that judgment should be granted before trial if “there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”⁶⁶ When a motion is made, the reviewing court must draw “all reasonable inferences in favor of the nonmoving party,” and must not determine the credibility of any witness or weight of any evidence.⁶⁷ Previously, the moving party bore the burden of “foreclos[ing] the possibility” of the nonmoving party’s success,⁶⁸ but in 1986 the Court relaxed the standard, requiring only that the moving party “‘show[]’—that is, point[] out to the district court—that there is an absence of evidence to support the nonmoving party’s case.”⁶⁹ Similar to recent developments in 12(b)(6) doctrine at the pleading stage, this relaxed standard has facilitated easier access to pretrial judgment.⁷⁰ The recent changes in pleading rules, then, must be understood in the context of a system of civil procedure transitioning away from its historical orientation against pretrial disposition of cases.⁷¹

⁶³ *Id.* at 514.

⁶⁴ FED. R. CIV. P. 56.

⁶⁵ *See, e.g.,* *Tysinger v. Police Dep’t of City of Zanesville*, 463 F.3d 569, 575–76 (6th Cir. 2006) (affirming grant of summary judgment to defendant based on plaintiff’s failure to establish a prima facie case of discrimination); *Grabovac v. Allstate Ins. Co.*, 426 F.3d 951, 955–66 (8th Cir. 2005) (same).

⁶⁶ FED. R. CIV. P. 56(a).

⁶⁷ *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

⁶⁸ *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970) (holding, in a civil rights case, that the defendant, the moving party, failed to foreclose the possibility of an unlawful conspiracy to interfere with the plaintiff’s civil rights).

⁶⁹ *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986); *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585–87 (1986) (“Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial.” (internal quotations marks omitted)); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986) (“[T]he requirement is that there be no *genuine* issue of material fact.”).

⁷⁰ *See Celotex*, 477 U.S. at 332 (Brennan, J., dissenting) (arguing that the increased use of summary judgment allows moving defendants merely to demand that plaintiffs provide affirmative evidence, rather than make some substantial showing as to why pretrial judgment is required). Justice Brennan opined that “a conclusory assertion that the nonmoving party has no evidence is insufficient” and that moving parties should meet the burden of production to demonstrate inadequacy of the nonmoving party’s evidence. *Id.*

⁷¹ *See Poller v. Columbia Broad. Sys.*, 368 U.S. 464, 473 (1962) (“Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of ‘even handed justice.’”); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability*

II.

THE IMPACT OF PLAUSIBILITY PLEADING ON TITLE VII

A. *Plausibility Pleading and Its Critics*

After fifty years of notice pleading under *Conley*, the Court changed course with *Bell Atlantic Corp. v. Twombly*,⁷² in which the Court held that a plaintiff must plead “enough facts to state a claim to relief that is plausible on its face.”⁷³ Pleading parallel behavior by telephone companies, according to the Court, did not state a plausible antitrust conspiracy claim because it was more plausible that the phone companies acted independently.⁷⁴ The Court indicated that *Swierkiewicz* was still good law and that it was not imposing a requirement that plaintiffs plead specific facts.⁷⁵

However, when the Court applied the *Twombly* standard in *Ashcroft v. Iqbal*,⁷⁶ a case based on a civil rights claim by a post-9/11 detainee, *Twombly* effectively replaced *Conley* in all cases.⁷⁷ *Twombly*, as the Court explained in *Iqbal*, reaffirmed the principle that when ruling on a Rule 12(b)(6) motion “a court must accept as true all of the allegations contained in a complaint,” as a matter of fact, but also required that the complaint state “a plausible claim for relief” as a matter of law.⁷⁸ *Iqbal* set forth a two-step approach for ruling on Rule 12(b)(6) motions: First, the court may “identify[] pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.”⁷⁹ Second, the court should assume the truth of the plaintiff’s “well-pleaded factual allegations” that remain and determine whether those allegations give rise to a

Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?, 78 N.Y.U. L. REV. 982, 1022 (2003) (“The Supreme Court [in *Poller*] seemed to adopt [the] philosophy of discouraging summary judgment by urging courts to apply it cautiously, keeping in mind the importance of jury trial, and calling for even greater restraint in lawsuits involving state-of-mind questions and complex issues.”).

⁷² 550 U.S. 544 (2007).

⁷³ *Id.* at 570.

⁷⁴ *Id.* at 566 (“[T]here is no reason to infer that the companies had agreed among themselves to do what was only natural anyway . . .”).

⁷⁵ *Id.* at 570.

⁷⁶ 129 S. Ct. 1937 (2009).

⁷⁷ Initially, when shortly after *Twombly*, the Court in *Erickson v. Pardus*, 551 U.S. 89, 94 (2007), criticized lower courts’ “departure from [] liberal pleading standards,” observers wondered how broadly *Twombly* would apply outside the antitrust context. *See, e.g.*, J. Douglas Richards, *Three Limitations of Twombly: Antitrust Conspiracy Inferences in a Context of Historical Monopoly*, 82 ST. JOHN’S L. REV. 849, 850–51 (2008) (arguing that *Erickson* “reaffirm[ed] key elements of historical pleading standards” and that *Twombly* raised pleading standards only in the context of antitrust cases attempting to create an inference of conspiracy).

⁷⁸ 129 S. Ct. at 1949–50.

⁷⁹ *Id.* at 1950.

plausible claim for relief.⁸⁰ The Court explained that a complaint is plausible when a court can draw a “reasonable inference” that the plaintiff is entitled to relief.⁸¹ This language echoes previous descriptions of the standard for ruling on a summary judgment motion *after* the record is formed: namely, that the court must draw all inferences from the record in favor of the nonmoving party.⁸²

Commentators have criticized *Twombly* and *Iqbal* on a variety of grounds,⁸³ characterizing the cases as merely the latest of the Court’s efforts to have more cases adjudicated pretrial⁸⁴ and granting “virtually unbridled discretion to district court judges.”⁸⁵ Under this new pleading doctrine, it is unclear whether even the bare allegation of negligence found in Form 11⁸⁶—the canonical model of a well-pleaded complaint under the Rules⁸⁷—would pass muster under plausibility pleading.⁸⁸ In explaining its determination in *Iqbal* that the plaintiff’s assertions were conclusory, the Court stated that the generous pleading standards under the Federal Rules did not entitle a plaintiff to “plead the bare elements of his cause of action [and] affix the label ‘general allegation.’”⁸⁹

⁸⁰ *Id.*

⁸¹ *Id.* at 1949.

⁸² *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587–88 (1986).

⁸³ *See, e.g., Spencer, supra* note 55, at 468 (noting that “[t]he Court offered nothing so compelling [as is usually used to justify reversing an established rule] to justify the overruling of *Conley*” and criticizing the *Twombly* Court for asserting that *Conley* had been disfavored and unworkable when the Court had in fact constantly returned to it for over 50 years). Additionally, both houses of Congress have introduced measures to undo the rulings. *See infra* note 178 and accompanying text (describing proposals).

⁸⁴ *See* Stephen B. Burbank, *Pleading and the Dilemmas of “General Rules,”* 2009 WIS. L. REV. 535, 561 (describing *Twombly* as “the most recent signal of a retreat from the goal of adjudication on the merits”).

⁸⁵ Miller, *supra* note 58, at 22; *see also id.* at 24–26 (describing expansive applications of “conclusion category” set out in *Iqbal* and arguing that the ruling permits judges to violate essential mandates of Rule 12(b)(6) adjudication by failing to construe a complaint in favor of the plaintiff and looking beyond a complaint to “judicial experience and common sense” (quoting *Iqbal*, 129 S. Ct. at 1950)). Scholars have leveled this criticism in the summary judgment realm as well. *See, e.g., Dan M. Kahan, David A. Hoffman & Donald Braman, Whose Eyes Are You Going to Believe? Scott v. Harris and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009) (warning that too much discretion at the summary judgment stage creates the risk of judge’s “cognitive illiberalism,” or belief that no reasonable person could view a set of facts differently than the judge does, though, in reality, many do).

⁸⁶ FED. R. CIV. P. Form 11 (“[T]he defendant negligently drove a motor vehicle against the plaintiff.”).

⁸⁷ *See supra* note 53 and accompanying text (describing Form 11).

⁸⁸ *See* Miller, *supra* note 58, at 40–41 (questioning whether courts will deem negligence to be a factual allegation or impermissible legal conclusion after *Twombly*).

⁸⁹ *Iqbal*, 129 S. Ct. at 1954.

Many *Iqbal* critics have focused on the impact of the new pleading standard on Title VII and other civil rights cases where plaintiffs face steep information asymmetries, arguing that such plaintiffs lack access to the specific facts that courts require to plausibly establish defendants' discriminatory intent.⁹⁰ Others have assessed the empirical impact of the new standard on Title VII cases, with the overall numbers showing little change in outcomes for employment discrimination claims,⁹¹ but one study finding that Black plaintiffs in discrimination cases fare worse under plausibility pleading than under notice pleading.⁹² The latter study bolsters concerns about excessive use of pretrial motions and judicial discretion in employment discrimination cases, where the jury's wisdom may be particularly valuable in fairly evaluating complicated workplace dynamics.⁹³ By shifting the

⁹⁰ See, e.g., Seiner, *supra* note 2 (arguing that the new paradigm creates great difficulty for employment discrimination plaintiffs, and proposing a more relaxed pleading standard to reflect the difficulties in pleading intent); A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-Conley Era*, 52 HOW. L.J. 99, 160–61 (2008) (arguing that “to the extent *Twombly* permits courts to dismiss claims for failing to be supported by factual allegations that the plaintiff is not in a position to know, that seems unfair,” and that pleading standards that screen out legitimate complaints “undermine[] the goals of civil rights legislation” by insufficiently deterring discriminatory conduct). *But see* Colin T. Reardon, Note, *Pleading in the Information Age*, 85 N.Y.U. L. REV. 2170, 2182–203 (2010) (arguing that many, though not all, plaintiffs face significantly lower information asymmetries due to the availability of information on the Internet, government-mandated disclosure, and the rise of inspectors general in federal government).

⁹¹ See JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *Iqbal* 14 (2011), available at [http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/\\$file/motioniqbal.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/motioniqbal.pdf/$file/motioniqbal.pdf) (showing a small increase in the rate of dismissals granted in employment discrimination claims post-*Twombly* but a small decrease in the rate of dismissals without leave to amend granted). Notably, the Federal Judicial Center study found an increase in the number of motions made in such cases and reports from plaintiffs' lawyers that they had changed their pleading strategies since *Twombly*. *Id.* at 9, 23 n.37.

⁹² See generally Victor D. Quintanilla, *Beyond Common Sense: A Social-Psychological Study of Iqbal's Effect on Claims of Race Discrimination*, 16 MICH. J. RACE & L. (forthcoming 2011), available at <http://ssrn.com/abstract=1783065> (analyzing dismissal rates for claims of race discrimination based on plaintiffs' race).

⁹³ See, e.g., *Gallagher v. Delaney*, 139 F.3d 338, 342, 347 (2d Cir. 1998) (“A federal judge is not in the best position to define the current sexual tenor of American cultures in their many manifestations. . . . The factual issues in this case cannot be effectively settled by a decision of an Article III judge on summary judgment.”); Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 133–34 (1999) (arguing that severity or pervasiveness in harassment cases is inherently fact-specific and granting summary judgment for lack thereof is inappropriate given the centrality of the reasonable person standard and need for juries to “establish appropriate workplace norms”); 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, 255–56 (1993) (noting that many courts have granted summary judgment inappropriately to draw inferences in favor of defendants in civil rights cases). See also generally Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59

reasonable inferences standard even earlier in the case, as *Iqbal* has done, many observers argue that the Court has enabled more opportunities for dismissal through the transformation of factual questions into legal ones⁹⁴—a concern that becomes stronger where information asymmetries are substantial.

Few, however, have focused on the ways in which application of the new pleading standard has shifted substantive, as opposed to procedural, law. As the next Section will show, some district courts have applied entirely reasonable readings of *Twombly* and *Iqbal* to dismiss Title VII cases in a manner that is inconsistent with previous understandings of the substantive guarantees of federal civil rights law. In other words, by characterizing as “implausible” and “conclusory” the kinds of factual allegations of discrimination that once were sufficient to survive dismissal and led to successful cases, these decisions hint at a potential transformation of the substantive landscape of what constitutes unlawful discrimination.

B. *Twombly’s Substantive Implications for Title VII Rulings*

A review of recent federal court cases reveals that, through two identifiably significant departures from previous law, applications of the plausibility pleading standard effect substantive modifications to Title VII. This Note makes no attempt to make empirical claims about what *all* district courts are doing in Title VII claims since *Twombly*;⁹⁵ rather, its aim is to identify what kinds of rulings are possible under the new pleading standard.⁹⁶ Though these are only early cases and it

RUTGERS L. REV. 705 (2007) (cataloguing and critiquing the use of Rule 56 motions in federal cases in which the plaintiff is a female with emphasis on discrimination claims). The parallel to the *Twombly-Iqbal* literature is strong, as this wave of scholarship followed the three landmark Supreme Court decisions in 1986 that shifted the standard for summary judgment under Rule 56. *See supra* notes 64–69 (setting forth summary judgment standard).

⁹⁴ *See, e.g., Access to Justice Denied: Hearing on Ashcroft v. Iqbal Before the H. Subcomm. on the Constitution, Civil Rights, and Civil Liberties of the H. Comm. on the Judiciary*, 111th Cong. 16 (2009) (arguing that federal judges are using *Iqbal* to “transform[] factual allegations into legal conclusions and draw[] inferences from them, . . . performing functions previously left to juries at trial”) (statement of Arthur K. Miller, Professor, N.Y.U. Sch. of Law).

⁹⁵ An effort to draw broad conclusions about the fallout of *Twombly* and *Iqbal* for Title VII plaintiffs would likely lead to the determination, as one scholar has, that “courts are left with great discretion,” and accordingly some district courts have required “a high level of specificity in complaints” while others “have not required that much detail in the complaint.” Tanvir Vahora, Note, *Working Through a Muddled Standard: Pleading Discrimination Cases after Iqbal*, 44 COLUM. J.L. & SOC. PROBS. 235, 257–59 (2010).

⁹⁶ It is important here to note two features of the cases analyzed herein. First, many are not officially reported, which is common for employment discrimination cases. *See generally* Peter Siegelman & John J. Donahue III, *Studying the Iceberg from Its Tip: A Comparison of Published and Unpublished Employment Discrimination Cases*, 24 LAW &

is unclear if they will become the norm, they are troubling in that they show that what seem to be reasonable applications of the new pleading standard are being combined with narrow interpretations of the evidentiary standards for Title VII claims.

The first development is that, contrary to the holding in *Swierkiewicz*,⁹⁷ some courts have adopted the evidentiary *McDonnell Douglas* standard at the pleading stage and required plaintiffs to state a prima facie case in the complaint in order to satisfy the plausibility standard.⁹⁸ These decisions create difficulties for plaintiffs who lack access to discovery that might support their claims and even render the *McDonnell Douglas* model irrelevant.⁹⁹ Though the *Twombly* court indicated that *Swierkiewicz* survived its holding,¹⁰⁰ lower courts disagree as to the relevance of the *Swierkiewicz* standard after *Iqbal*, with some asserting its continued vitality,¹⁰¹ and others declaring its

SOCY. REV. 1133 (1990) (demonstrating that 80 to 90 percent of federal employment discrimination cases are unpublished and that the selection published is not necessarily representative). Second, it is common for these cases to be decided on multiple grounds. For example, a dismissal may be predicated on failure to exhaust administrative remedies with the U.S. Equal Employment Opportunity Commission before filing suit, in addition to failure to state a claim, which itself may focus on multiple deficiencies in the complaint. See *Floyd v. U.S. Dep't of Homeland Security*, No. RDB-09-0735, 2009 WL 3614830, at *6 (D. Md. Oct. 27, 2009) (finding that plaintiff failed to exhaust administrative remedies, then moving on to Rule 12(b)(6) analysis as alternative grounds). Thus, it is often difficult to determine which failure was dispositive or most important to the court. Because of the relative obfuscation in cases arising out of these two features, the state of pleading for contemporary Title VII cases is not entirely clear or coherent. Nonetheless, the cases this Note focuses on are notable for their assessment of the elements of the prima facie case under the plausibility pleading standard, and represent very plausible—and indeed real—judicial outcomes, which need to be addressed.

⁹⁷ See *supra* note 59 and accompanying text (describing *Swierkiewicz* as holding that prima facie case for discrimination claims is an evidentiary standard and not a pleading standard).

⁹⁸ See Quintanilla, *supra* note 92, at 45–48 (noting that some courts have required plaintiffs to plead a prima facie case after *Twombly* and *Iqbal*).

⁹⁹ See *Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 511 (2002) (noting the incongruity of requiring a plaintiff to plead a prima facie case for a circumstantial model when he may uncover direct evidence during discovery, thus requiring him to “plead more facts than he may ultimately need to prove to succeed on the merits”).

¹⁰⁰ See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (declaring that “we do not require heightened fact pleading of specifics” and citing *Swierkiewicz*).

¹⁰¹ See, e.g., *Leibowitz v. Cornell Univ.*, 445 F.3d 586, 591 (2d Cir. 2006) (finding error in district court requiring the plaintiff to establish a prima facie case of discrimination to survive a motion to dismiss, and holding that the plaintiff’s allegation that the defendant broke from its informal policy of employment for life to discharge the plaintiff based on her gender was sufficient); *Reyes v. Fairfield Props.*, 661 F. Supp. 2d 249, 268 (E.D.N.Y. 2009) (“[T]here is no heightened pleading requirement for civil rights complaints [S]uch claims [are] sufficiently pleaded when the complaint stated simply that plaintiffs are African-Americans, describe[d] defendants’ actions in detail, and allege[d] that defendants selected [plaintiffs] for maltreatment solely because of their color. We have upheld the

“demise.”¹⁰² However, in a recent opinion the Court again cited *Swierkiewicz* as supplying the relevant “federal court’s threshold” for pleading in a prisoner’s civil rights claim.¹⁰³ Without citing *Twombly* or *Iqbal*, the Court noted that Rule 8(a) “requires only a *plausible* ‘short and plain’ statement of the plaintiff’s claim.”¹⁰⁴

Second, in an effort to permit only cases that appear “plausible” to survive the Rule 12(b)(6) dismissal stage, these courts have applied standards that they describe as part of the *prima facie* case but that actually represent a stricter conception of the evidentiary framework. Courts do so despite the Supreme Court’s assertions in *McDonnell Douglas* and subsequent pre-*Iqbal* opinions that its framework for the *prima facie* case was never meant to be mechanically and inflexibly applied.¹⁰⁵ Not only do such standards require plaintiffs to plead information that they do not *yet* possess, but they also require plaintiffs to plead information that often *does not exist* and has never been required. Though the exact construction of the *prima facie* case has long varied between different courts,¹⁰⁶ the plausibility standard, in particular, permits courts to impose substantive rules that are consonant with their conceptions of a “good” Title VII claim. Before *Twombly*, however, even plaintiffs whose claims did not adhere to a rigid conception of the prototypical good case might still have had success on the merits under Title VII.¹⁰⁷ Thus, the *Twombly-Iqbal*

vitality of this principle since *Twombly*.”) (quoting *Boylin v. KeyCorp*, 521 F.3d 202, 215 (2d Cir. 2008)) (citing *Swierkiewicz*, 534 U.S. at 510).

¹⁰² See, e.g., *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009) (“[B]ecause *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*.”); *Chamberlant v. A & P*, 247 F. App’x 237, 238 (2d Cir. 2007) (affirming dismissal in part because plaintiff failed to establish an inference of discrimination and, by extension, a *prima facie* case); *Grosz v. Lassen Community College Dist.*, No. 2:07-cv-0697, 2007 WL 4356624, at *1 n.7 (E.D. Cal. Dec. 11, 2007) (rejecting plaintiffs’ reliance on *Liebowitz* and noting that “[t]he Supreme Court’s decision in *Bell Atlantic* abrogated the Second Circuit’s decision and is binding on this court”). Commentators, too, have acknowledged that *Twombly* and *Iqbal* may overrule *Swierkiewicz* given its reliance on *Conley*. See Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 36 (2010) (“[W]hile *Iqbal* and *Twombly* did not expressly overrule *Swierkiewicz*, the differences between those cases and *Swierkiewicz* suggest that *Swierkiewicz* effectively is dead.”).

¹⁰³ *Skinner v. Switzer*, 131 S. Ct. 1289, 1296 (2011).

¹⁰⁴ *Id.* (emphasis added) (quoting 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE & PROCEDURE § 1219 (3d ed. 2004)).

¹⁰⁵ See *supra* note 28 and accompanying text (discussing the Supreme Court’s assertions as to the flexibility of the evidentiary standard under Title VII).

¹⁰⁶ See Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613, 1647–48 (2011) (noting confusion among lower courts as to the proper formulation of a *prima facie* case).

¹⁰⁷ See *infra* notes 134–38 and accompanying text (discussing two such pre-*Twombly* cases).

paradigm even more strongly illuminates the harm that has been inflicted on the law through applications of pleading standards to *McDonnell Douglas* and other evidentiary schemes. These two phenomena, particularly the latter, will form the basis of the analysis of recent cases in the following Section.

1. *Failure to Establish a Prima Facie Case in Disparate Treatment Cases*

The cumulative effects of these recent developments are the imposition of a rigid prima facie standard that must be met in the complaint, and the consequent addition of substantive requirements to federal employment discrimination laws that Congress did not enact. This phenomenon is not new—commentators have long pointed out that courts narrowed Title VII and *McDonnell Douglas* after the 1986 summary judgment changes¹⁰⁸—but these effects have intensified after *Twombly* and *Iqbal*. The effect has been most notable in the context of two elements of the prima facie case under *McDonnell Douglas*: establishing facts giving rise to an inference of discrimination through comparators, and the plaintiff's qualifications for the position.¹⁰⁹

a. Creating an Inference of Discrimination Through Comparators

Beyond merely requiring a prima facie case to be pled in the complaint, some courts have defined “similarly situated” so narrowly that plaintiffs who attempt to plead comparator analysis have their claims dismissed because the comparator did not have exactly the same job, or was not accused of exactly the same misconduct, as the plaintiff.¹¹⁰ While this appears, at first glance, to be merely a strict fact pleading standard consistent with *Twombly*, it actually represents a strict substantive standard: If the plaintiff does not have a near-identical comparator, as a legal matter, there is no discrimination.

¹⁰⁸ See, e.g., McGinley, *supra* note 93, at 239 n.175 (arguing that courts, applying the summary judgment standard, formulate the pretext requirement so narrowly as to “undermine[] the purpose of the *McDonnell Douglas* formula,” and have the effect of permitting courts to draw improper inferences in favor of defendants).

¹⁰⁹ These are not the only areas that have been affected by pleading standards. See, e.g., Quintanilla, *supra* note 92, at 51 (discussing courts that have narrowed the definition of “adverse action” after *Iqbal*).

¹¹⁰ See generally Sullivan, *supra* note 26 (arguing that narrowing of comparator analysis in lower courts is symptomatic of courts' hostility to discrimination claims); see also Quintanilla, *supra* note 92, at 48 (identifying this phenomenon, connecting it with social-psychological theory, and arguing that some believe racism exists only if Black employees are “treated blatantly worse than Whites”).

In *Distajo v. PNC Bank N.A.*, the Eastern District of Pennsylvania dismissed a case for failure to state a claim because the plaintiff—who was fired after an incident in which a coworker stole from their employer—failed to make allegations plausibly giving rise to a “reasonable inference” of discrimination.¹¹¹ The plaintiff, who was foreign-born, alleged that he failed to properly secure the items that were stolen because he was short-staffed on the night in question. The plaintiff alleged, however, that he was not given a chance to explain himself to a biased internal investigator.¹¹² He further alleged that non-foreign-born employees who had violated bank policies were not similarly disciplined.¹¹³ The district court, citing *Twombly* and *Iqbal*, dismissed and noted that the plaintiff had failed to plead facts giving rise to a reasonable inference of discrimination because his “allegations concerning other employees did not involve conduct that was similar to Plaintiff’s, i.e., dishonesty in the course of an investigation,” and there were no non-minorities involved in the specific incident with whom to compare.¹¹⁴ The court added that “mere disagreement with an employer’s disciplinary decision does not give rise to an inference of discriminat[ion].”¹¹⁵

Similarly, in *Wilkins v. Bozzuto & Associates, Inc.*, the plaintiff, an African-American male, sued under Title VII when he was terminated from his position.¹¹⁶ The plaintiff alleged that he had never received complaints about his work, but soon after a White supervisor replaced his former African-American supervisor, the defendant terminated him for vague reasons and replaced him with someone who, to the plaintiff’s knowledge, was not African-American.¹¹⁷ The same court dismissed the claim, noting that the plaintiff did “not record one incident in which employees of other races were treated differently,” and that his allegation that a non-African-American employee replaced him was insufficient to meet “the plausibility standard.”¹¹⁸ Once again, a court applied *Twombly* and *Iqbal* to impose a narrow construction of the prima facie case at the pleading stage—this time in

¹¹¹ No. 09-2712, 2009 WL 3467773, at *4 (E.D. Pa. Oct. 27, 2009). Though this case was unreported, it has been cited by another court in the Eastern District of Pennsylvania to support dismissal of a Title VII claim. See *Wilkins v. Bozzuto & Assoc.*, No. 09-2581, 2009 WL 4756381, at *3 (E.D. Pa. Dec. 10, 2009) (citing *Distajo* among “[d]istrict courts in the Third Circuit post-*Twombly* [that] have . . . dismissed cases with significantly more facts pleaded in the plaintiff’s favor” than the case at hand).

¹¹² *Id.* at *1.

¹¹³ *Id.* at *3.

¹¹⁴ *Id.* at *2.

¹¹⁵ *Id.*

¹¹⁶ No. 09-2581, 2009 WL 4756381, at *1 (E.D. Pa. Dec. 10, 2009).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at *2.

a manner inconsistent with Supreme Court precedent on the elements of the prima facie case.¹¹⁹

In both these cases, the plaintiffs' claims were dismissed because the court found that the plaintiffs failed to plead facts that the adverse action gave rise to an inference of discrimination, and, in both cases, the failure to find a suitable comparator proved dispositive.¹²⁰ Thus, according to these courts, a Title VII plaintiff must establish a prima facie case on the pleadings, and do so specifically by naming a comparator, who is not just comparable, but is *exactly* similarly situated—in *Distajo*, someone accused of committing an identical transgression as the plaintiff.

In addition to contravening *Swierkiewicz*, this standard conflicts with the Supreme Court's assertion that the elements of the prima facie case will shift depending on the specific facts of the case before the court, and effects a sharp narrowing of the protections afforded by the statute.¹²¹ Focus on comparator analysis is understandable because it is often the best and most persuasive circumstantial evidence of discrimination. However, it is not the sole form of circumstantial proof,¹²² nor must it always be applied with such strictness. The problematic nature of these courts' requirement of a "near twin" comparator is not rare,¹²³ but such strict comparator requirements are far afield from the *McDonnell Douglas* Court's broad suggestion that

¹¹⁹ Cf. *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 141 (2000) (applying *McDonnell Douglas* framework to ADEA claim and stating, "[i]t is undisputed that petitioner satisfied" prima facie case with evidence that he was in protected class under ADEA, was qualified, was terminated, and was replaced with employees under forty years old); *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 n.6 (1981) ("[I]t is not seriously contested that [plaintiff] has proved a prima facie case. She showed that she was a qualified woman who sought an available position, but the position was left open for several months before she finally was rejected in favor of a male . . .").

¹²⁰ *Distajo*, 2009 WL 3467773, at *4 ("While allegations of dissimilar treatment of non-minority employees who engaged in conduct similar to Plaintiff's could give rise to an inference of discrimination, Plaintiff's allegations concerning other employees did not involve conduct that was similar to Plaintiff's . . ."); *Wilkins*, 2009 WL 4756381, at *2 ("[T]aking Plaintiff's factual allegations as true, there are still insufficient facts to plausibly conclude that Defendant was motivated by racial animus. . . . Plaintiff does not record one incident in which employees of other races were treated differently, or an occasion in which his new supervisor expressed or displayed racial bias . . .").

¹²¹ See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 n.13 (1973) ("The facts necessarily will vary in Title VII cases, and the specification . . . of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations.").

¹²² See *supra* note 27 and accompanying text (describing other methods for establishing a prima facie case).

¹²³ See Sullivan, *supra* note 106, at 1660–61 (noting circuit courts' penchant for requiring comparators to be almost a twin to the plaintiff). See generally Sullivan, *supra* note 26 (reviewing circuit court decisions imposing various restrictions on what kinds of comparators are permissible to create an inference of discrimination).

evidence of “[W]hite employees involved in acts against petitioner of *comparable seriousness*” would be relevant.¹²⁴ Some courts have recognized the problem of this twin comparator in that, when the specificity of the comparator requirement is taken to its extreme, “any employee whose employer can for some reason or other classify him or her as ‘unique’ would no longer be allowed to demonstrate discrimination inferentially but would be in the oft-impossible situation of having to offer direct proof of discrimination.”¹²⁵ Yet a constrained version of the *prima facie* case, read in conjunction with the plausibility pleading standard, would lead to just this result.

b. The Plaintiff’s Qualifications for the Position

Some courts have held that, in contravention of the *McDonnell Douglas* test, when the plaintiff’s qualifications for the position are in question in the litigation, dismissal becomes likely. This is logical in terms of *Iqbal*’s goal of screening out claims that are simply not plausible: The more likely it is that the plaintiff is unqualified, the less plausible it becomes that she will be successful given *McDonnell Douglas*’s baseline requirement that plaintiffs be qualified for their position. On the other hand, such a determination is inconsistent with the demands of the circumstantial model and fails to recognize that a plaintiff may need discovery to establish that defendant’s nondiscriminatory justifications were fabricated or exaggerated—pretexts for discriminatory actions.

A pair of post-*Twombly* decisions from the District of Maryland illuminate this point. In *Prince-Garrison v. Maryland Department of Health & Mental Hygiene*,¹²⁶ both the district court and the Fourth Circuit focused on the plaintiff’s failure to establish a *prima facie* case based on her supposed admissions of subpar performance and consequent inability to establish qualifications for the job.¹²⁷ Prince-Garrison’s complaint, however, indicated that she believed her super-

¹²⁴ *McDonnell Douglas*, 411 U.S. at 804.

¹²⁵ *Marzano v. Computer Sci. Corp.* 91 F.3d 497, 511 (3d Cir. 1996) (reversing district court’s grant of summary judgment to employer).

¹²⁶ 526 F. Supp. 2d 550 (D. Md. 2007), *aff’d in part and vacated in part*, 317 F. App’x 351 (4th Cir. 2009) (affirming dismissal of discrimination, hostile work environment, and discriminatory discipline claims, and vacating dismissal of retaliation claim). Notably, the Fourth Circuit asserted that a plaintiff need not plead a *prima facie* case, but when looking to past precedent to lay out the facts needed to survive a Rule 12(b)(6) motion, the court cited a 2007 case describing the *prima facie* case for purposes of *summary judgment*. 317 F. App’x at 353 (citing *Holland v. Washington Homes*, 487 F.3d 208, 214 (4th Cir. 2007)).

¹²⁷ See *Prince-Garrison*, 526 F. Supp. at 554 (describing Prince-Garrison’s inability to prove satisfactory performance); 317 F. App’x at 353 (affirming dismissal of discrimination claim based on plaintiff’s “own description [that her] performance . . . was never satisfactory”).

visors fabricated her poor evaluations and charges of insubordination, and that they, possibly intentionally, did not give her the tools to succeed in her position.¹²⁸

Similarly, the District Court of Maryland, in *Floyd v. U.S. Department of Homeland Security*, dismissed the plaintiff's claim based, in part, on lack of qualifications given her reported absences from work.¹²⁹ In making its decision, the court noted that even if the plaintiff had established a prima facie case, she would lose on the second and third steps of *McDonnell Douglas* because the defendant had cited legitimate, nondiscriminatory reasons for its conduct—the plaintiff's alleged misconduct and absences—and she could not prove pretext.¹³⁰ Floyd claimed, however, that her absences were due to a work-related injury.¹³¹ Evidence of a work-related injury could conceivably undermine the employer's assertions of misconduct and excessive absence, even if it initially seems implausible. The alleged injury, however, was not discussed in the analysis, which looked beyond the pleadings and made judgments even beyond the prima facie case. By denying claimants like Floyd the opportunity to present such evidence, courts foreclose claims where the pleaded facts do not comport to the idealized prima facie case.

These claims concededly appear intuitively weak, but dismissal on the basis of the defendant's reports of the plaintiff's conduct is at odds with *Swierkiewicz* and *McDonnell Douglas*'s burden-shifting model in general. More fundamentally, some courts are not "accept[ing] the well-pleaded allegations of the complaint as true" when ruling on a motion to dismiss, as directed to by the Supreme Court.¹³² While Floyd and Prince-Garrison's contentions may seem implausible prior to discovery, granting a motion to dismiss forecloses the possibility that evidence supporting allegations that is unavailable at the pleading stage may be found after pleading. After all, if, at trial, the jury believes the plaintiff's story—that the employer has exagger-

¹²⁸ See Complaint ¶ 19, *Prince-Garrison v. Maryland Dep't of Health & Mental Hygiene*, 526 F. Supp. 2d 550 (D. Md. 2007) (No. 1:07CV01165) (alleging that plaintiff's supervisor failed "to provide her with necessary equipment and training and/or instructions to enable her to perform her job satisfactorily"); *id.* ¶ 26 (stating that termination was "allegedly based on her inability to perform satisfactorily").

¹²⁹ No. RDB-09-0735, 2009 WL 3614830, at *7 (D. Md. Oct. 27, 2009). It is notable that the case was dismissed for a variety of reasons, including the plaintiff's failure to exhaust her administrative remedies as required by statute. *Id.* at *3–4. However, the court analyzed all bases of dismissal, and though the motion was for either dismissal or, in the alternative, summary judgment, discussed only the standard for dismissal under *Twombly* and *Iqbal*. *Id.* at *2–3.

¹³⁰ *Id.* at *7.

¹³¹ See *id.* at *2.

¹³² *Albright v. Oliver*, 510 U.S. 266, 268 (1994).

ated or fabricated its account of the plaintiff's poor performance—that could lead to a finding of pretext under the *McDonnell Douglas* model, and may be enough to support a finding of liability for discrimination.¹³³

In fact, prior to *Twombly*, similar sets of facts had given rise to jury verdicts for plaintiffs that were upheld on motions for judgment as a matter of law under *Reeves*.¹³⁴ In 2001, in *McGrane v. Proffitt's, Inc.*, the plaintiff prevailed in her sex discrimination claim by showing that her employer fabricated records about her attendance and did not equally discipline male employees with similar attendance issues¹³⁵—information that would not necessarily be available pre-filing. Had the trial court, adjudicating a Rule 12(b)(6) motion, seized on her conceded attendance problem, the jury might never have had the opportunity to find that the employer merely used attendance as a pretext to discriminate against the plaintiff.

Similarly, in 2003, the Fifth Circuit upheld a jury verdict for the plaintiff in *Laxton v. Gap, Inc.*, a sex discrimination case in which the defendant attempted to meet its burden with countless allegations about the plaintiff's on-the-job misconduct. The plaintiff successfully rebutted each charge by showing either that it was fabricated or that the violation of company policy was justifiable and thus did not form a believable basis for her termination.¹³⁶ In *Laxton*, the plaintiff submitted a bare-bones complaint that alleged—in general terms—only that the defendant's reasons for firing her were pretextual.¹³⁷ It seems almost certain that such a complaint would not survive today under *Twombly* and *Iqbal*, as the plaintiff's allegations amount to a recitation of the *McDonnell Douglas* standard with little more detail.¹³⁸

¹³³ See *supra* notes 38–39 and accompanying text (discussing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133 (2000), and the importance of circumstantial evidence).

¹³⁴ It is notable that neither of the two cases discussed next come from the same circuit as those just discussed; however, they come from courts in the Fifth and Eighth Circuits, suggesting that such verdicts did not arise as a result of an outlier circuit.

¹³⁵ *McGrane v. Proffitt's, Inc.*, No. C 97-221-MJM, 2001 WL 34152087, at *4 (N.D. Iowa July 6, 2001).

¹³⁶ *Laxton v. Gap, Inc.*, 333 F.3d 572, 576–77 (5th Cir. 2003) (discussing plaintiff's argument, which jury apparently accepted, that plaintiff's order to her subordinates to wear company merchandise in violation of company policy was intended to facilitate sales and thus was acceptable).

¹³⁷ Complaint ¶ 12, *Laxton v. Gap, Inc.*, 333 F.3d 572 (5th Cir. 2003) (No. 6:00-cv-00605) (asserting in Statement of Facts, with little support, that defendant personnel's "course of conduct . . . had as its ultimate goal the termination of Plaintiff's employment" and "Defendant's reasons for terminating the Plaintiff are totally without foundation").

¹³⁸ See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) ("Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.").

Heightened pleading may not require every minute factual detail to be pled, but the Court's demands in *Twombly* and *Iqbal* for more factual support incentivizes plaintiffs to include as much detail as possible.¹³⁹ While doing so, they may run the risk of pleading themselves out of court if their lengthy complaints include something that the district judge may view as proof that the plaintiff's claim is implausible.¹⁴⁰ A plaintiff who claims her employer exaggerated her misconduct to mask discriminatory intent suffers from a strategic disadvantage and has two flawed choices at the pleading stage. She can simply allege that she was fired for no good reason and risk dismissal for vague and conclusory allegations under the *Iqbal* standard—as the plaintiff in *Laxton* did.¹⁴¹ Alternatively, she can admit her conduct but explain why she believes it is not a valid basis for her termination and risk the court seizing on the conceded infraction and determining that it is not plausible that she can establish a prima facie case in light of her concession—as in the aforementioned District of Maryland cases.¹⁴²

2. *Failure to Establish the Severity and “Because Of” Prongs of Harassment Claims*

Like disparate treatment claims, sexual and other harassment claims have been affected by lower court applications of *Twombly* and *Iqbal*. The two primary elements of a harassment claim—(1) that the alleged harassing conduct was sufficiently severe or pervasive to affect a term or condition of plaintiff's employment and (2) that the conduct was “because of” plaintiff's protected characteristic—appear to a casual observer to be factual questions for a jury to determine. What was arguably already a problem at the summary judgment stage—the use of discretion to rule against plaintiffs in close cases relating to the “because of” or severity prongs¹⁴³—appears to have moved up to the dismissal stage. Moreover, the determination of

¹³⁹ See *supra* notes 72–80 and accompanying text (describing the *Twombly* and *Iqbal* decisions' approach to conclusory factual pleading).

¹⁴⁰ See, e.g., *supra* notes 126–28 and accompanying text (discussing the *Prince-Garrison* decision's focus on plaintiff's concession that the defendant told her she performed poorly).

¹⁴¹ See *supra* note 137 (discussing simple allegations in *Laxton* complaint).

¹⁴² Of course, it is not clear in this counterfactual world whether Floyd and Prince-Garrison could ever persuade juries of their claims, or perhaps even survive summary judgment motions if the record turned up even more unfavorable information. Nonetheless, it is notable that the *types* of fact patterns that have in the past led to successful cases now are insufficient even to survive the Rule 12(b)(6) stage.

¹⁴³ See, e.g., *Baron v. Winthrop Univ. Hosp.*, 211 F. App'x 16, 17 (2d Cir. 2006) (affirming summary judgment for sex-based hostile environment claim because repeated derogatory comments about women were not sufficiently severe); see also *Schneider*, *supra*

whether the plaintiff has satisfied her evidentiary requirements may have changed more dramatically from a mixed fact-law question to an entirely legal one to be disposed of on the pleadings.

In a case in the Eastern District of New York, the plaintiff alleged that, because of her age, her employer engaged in a variety of harassing conduct with the goal of forcing her into retirement, including false accusations of abuse, demeaning conduct in a performance review meeting, and embarrassing dissemination of an e-mail.¹⁴⁴ The district court dismissed, citing *Twombly* and *Iqbal*, because the alleged conduct was not age-based.¹⁴⁵ In the Southern District, the court dismissed a complaint “replete” with allegations of harassment by coworkers because her harassment was insufficiently severe and not race-based.¹⁴⁶

These decisions raise the question whether a plaintiff who is a member of a protected group and is singled out for harassing conduct that is allegedly motivated by, but not explicitly focused on, her membership in that group still has any recourse under Title VII. Courts in the past have said that harassment because of membership in a particular group is unlawful regardless of whether or not the harassment explicitly references the membership in the particular group.¹⁴⁷ Even in infamous cases of workplace sex-based harassment, the harassing conduct has often exhibited both distinctly sexual as well as nonsexual characteristics.¹⁴⁸ Nevertheless, today, one is hard-pressed to determine what a plaintiff would be required—and able—to plead in her complaint in order to survive this post-*Twombly* standard.

In *Argeropoulos v. Exide Technologies*, the court dismissed the plaintiff’s claim of harassment because he cited a few incidents of anti-

note 93, at 748–49 (criticizing decision granting summary judgment to defendants on grounds that allegedly abusive conduct was not expressly sex-based).

¹⁴⁴ See *Fordham v. Islip Union Free Sch. Dist.*, 662 F. Supp. 2d 261, 268–69 (E.D.N.Y. 2009).

¹⁴⁵ *Id.* at 272. The court also noted that a common Second Circuit test was whether the harassment is severe enough that “a reasonable employee would find the conditions of her employment altered for the worse.” *Id.* (quoting *Terry v. Ashcroft*, 336 F.3d 128, 148 (2d Cir. 2003)).

¹⁴⁶ See *Maisonet v. Metro. Hosp. & Health Hosp. Corp.*, 640 F. Supp. 2d 345, 349 (S.D.N.Y. 2009). Also notable is the court’s first cited reason for dismissal: The plaintiff claimed racial discrimination but cited his race as “Puerto Rican,” which the court noted was a national origin and not a race. See *id.*

¹⁴⁷ See *supra* note 47 and accompanying text (explaining that harassing conduct need not be explicitly race- or sex-based to constitute unlawful harassment under Title VII).

¹⁴⁸ See, e.g., *TAKING THE HEAT: THE FIRST WOMEN FIREFIGHTERS OF NEW YORK CITY* (Anjali Films 2006), available at <http://www.pbs.org/independentlens/takingtheheat/film.html> (describing alleged harassment of female New York City firefighters, both overtly sexual and not overtly so, including violence, intimidation, sexual molestation, and leaking oxygen from female firefighters’ oxygen tanks).

Greek harassment and alleged that the conduct was constant.¹⁴⁹ The district judge stated that his claim was not plausible, adding that, while the plaintiff's claim may have passed muster under *Conley*, it could not survive *Twombly*.¹⁵⁰ One might argue that, if the allegedly harassing conduct had really been so severe, the plaintiff could have enumerated every act against him in order to survive the motion to dismiss. However, given other decisions in harassment cases since *Twombly*, one is left to wonder whether, by doing so, the plaintiff would risk pleading himself out of court were he to name some action that the court determined was not sufficiently based on whichever protected characteristic he alleged was the basis of the harassing conduct.¹⁵¹

Finally, even in cases where the facts seem to be in line, plaintiffs are sometimes caught in "pleading traps,"¹⁵² where because they failed to state particular words, all of the facts in the world could not help them establish a claim. In *Soliman v. George Washington University*, the Washington, D.C. District Court dismissed a gender-based hostile environment claim, in part, as "not plausible" because the plaintiff did not plead that the alleged harassing conduct was due to her sex.¹⁵³ Soliman's complaint, however, noted several examples in which she received different treatment than her (specifically named) male colleagues.¹⁵⁴ The court also dismissed Soliman's retaliation claim *sua sponte*, because her failure to invoke the phrase "because

¹⁴⁹ No. 08-cv-3760, 2009 WL 2132443, at *5-6 (E.D.N.Y. July 8, 2009).

¹⁵⁰ *Id.* at *5.

¹⁵¹ Indeed, Argeropolous also pled that coworkers harassed him based on perceived sexuality, by taunting him, saying that that all Greek people are homosexuals. The court seized on this fact and noted that the employment discrimination laws do not provide relief for sexual orientation discrimination. *Id.* at *3. It is possible that defendants might attack pleadings that are particularly long or full of shocking details with a Rule 12(f) motion to strike. See FED. R. CIV. P. 12(f) ("The court may strike from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter."). These motions are rarely granted because the moving party must prove that no evidence in support of the disputed allegation would be material. See, e.g., *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976). However, they pose an inconvenience and extra cost on plaintiffs. One Title VII practitioner said that increased filing of Rule 12(f) motions seemed possible in light of the factual detail required by *Iqbal*. Interview with Herbert Eisenberg, Partner, Eisenberg & Schnell, in N.Y., N.Y. (Nov. 22, 2009).

¹⁵² The term "pleading trap" refers, in various contexts, to formal pleading errors that can harm a potentially meritorious claim. See, e.g., Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of Twombly and Iqbal*, 33 HARV. J.L. & PUB. POL'Y 1107, 1116 (2010) (arguing Code pleading was improvement over common law pleading's formality in part by eliminating "pleading traps").

¹⁵³ 658 F. Supp. 2d 98, 102 (D.D.C. 2009).

¹⁵⁴ Complaint ¶ 25, *Soliman v. George Washington Univ.*, 658 F. Supp. 2d 98 (D.D.C. 2009) (No. 1:08-cv-01137).

of” meant that she could not have believed in good faith that she was discriminated against (a predicate for a retaliation claim) in the first place.¹⁵⁵ This phenomenon, which *Twombly* did not create—as it goes to legal rather than factual insufficiency—but likely exacerbated by establishing a heightened pleading rule that can be interpreted to leave little room for error, is arguably the opposite of what the drafters of the Federal Rules intended: By requiring plaintiffs to state the correct set of words rather than accepting facts that, when taken as true, constitute a recognized cause of action, courts revert to a pre-Rules conception of pleading.¹⁵⁶ Furthermore, there is a certain irony to dismissing a claim as implausible under *Iqbal* when the plaintiff provided specific facts but declined to “recit[e]” the elements of the cause of action—a pleading practice that the Court in *Iqbal* critiqued harshly and deemed insufficient.¹⁵⁷

III.

FIXING THE *MCDONNELL DOUGLAS* MESS

A. *The Sources and Implications of These “New” Rules*

If these rules, which some district courts have applied when adjudicating Rule 12(b)(6) motions under *Twombly* and *Iqbal*, have no basis in the language of Title VII, *McDonnell Douglas*, or other key formative decisions, then what is their origin? They are not entirely new, and prior scholarship has identified their use at the summary judgment stage.

In a 1995 article, Deborah Malamud predicted some of these problems when she identified “[t]he [p]ervasive [p]roblem of ‘[q]ualifications’” at the summary judgment stage for discrimination claims.¹⁵⁸ In reviewing cases, Malamud noted that some courts appeared to collapse the three-step *McDonnell Douglas* inquiry in cases where qualifications were at issue: She cites an example in which the plaintiff’s showing anticipated a purported defense of inadequate performance; in the same breath, the court concluded that the plaintiff

¹⁵⁵ See *Soliman*, 658 F. Supp. 2d at 103. A plaintiff in a retaliation claim need not prove the elements of the underlying discriminatory action that she opposed; instead, she must prove that “she reasonably believed in good faith that the practice she opposed violated Title VII.” *Alexander v. Gerhardt Enters., Inc.*, 40 F.3d 187, 195 (7th Cir. 1994).

¹⁵⁶ See *supra* note 54 (discussing pre-Rules pleading standards and their critics).

¹⁵⁷ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

¹⁵⁸ Deborah C. Malamud, *The Last Minuet: Disparate Treatment After Hicks*, 93 MICH. L. REV. 2229, 2282 (1995) (noting failure to standardize definition of “qualification” across courts).

failed to establish qualification.¹⁵⁹ In doing so, Malamud pointed out that “the court tailored the prima facie case standard in anticipation of the employer’s stated justification[,]” finding that the plaintiff failed the prima facie standard based on evidence more properly addressed in steps two and three, thereby defeating the purpose of a three-step inquiry.¹⁶⁰ Compounding this issue is the slippery nature of comparator evidence. Analyzing summary judgment rulings, Malamud found that some courts “have required close[] comparisons—often to the point of impossibility,” including exactly the same alleged misconduct and the same direct supervisor.¹⁶¹ Likewise, Charles Sullivan has pointed out that, on summary judgment motions, “courts seem to require the comparator to be the almost-twin of the plaintiff before the comparison is sufficiently probative.”¹⁶² Finally, as noted above, many scholars have criticized the courts for treating harassment claims too harshly at summary judgment, both in terms of the “sufficiently severe” inquiry and the question of whether the conduct was “because of” the plaintiff’s protected status.¹⁶³

The substantive legal “rules” being applied under *Twombly* and *Iqbal* are troubling despite not being entirely new. As discussed above, they lack any identifiable basis in Title VII or *McDonnell Douglas* and are inconsistent with the spirit of the law. Their appearance in decisions under the new plausibility pleading standard raises three concerns: First, while the problems this Note identifies in summary judgment cases are part of a broader confusion among the circuits as to the elements of a prima facie case, application of these requirements firmly asserts them as legal rules that determine whether a plaintiff can enter the courthouse in the first place. When a court applies a standard that allows it to dismiss claims that it finds implausible based on judicial experience and common sense, the rules are even more firmly not merely procedural but substantive. In doing so, courts imply that certain sets of facts that once gave rise to successful claims can now never give rise to a plausible discrimination claim. Second, judging the substance of a plaintiff’s qualifications before discovery is very troubling.¹⁶⁴ Third, moving these issues earlier in Title VII cases more thoroughly illuminates the fundamental problems

¹⁵⁹ See *id.* at 2286–87 (discussing *Mukherjee v. Sheraton Palace Hotel*, No. C-9302905 DLJ, 1994 WL 173889, at *4 (N.D. Cal. Apr. 18, 1994)).

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 2292.

¹⁶² Sullivan, *supra* note 26, at 216.

¹⁶³ See *supra* note 93 (describing criticism of summary judgment rulings in harassment cases).

¹⁶⁴ See *supra* notes 132–38 and accompanying text (describing potential of discovery to bolster plaintiffs’ claims).

plaguing the evidentiary structures of Title VII claims. Application of the evidentiary structures in this manner bears little relation to their potential and intended utility.

B. Addressing Frivolous or Baseless Claims

The rejoinder to this Note's critique of these new substantive standards is that discovery imposes substantial costs on defendants, which are unjustifiable when the underlying claims are meritless. The application of *Iqbal* to these cases is often compelling. For example, a plaintiff who cannot identify a comparator is concededly less likely to succeed than one who can.¹⁶⁵ Inevitably, some meritless cases exist and the strictest application of *Conley*'s "no set of facts" standard creates a risk that these claims will survive dismissal and impose discovery costs on defendants.¹⁶⁶ Some observers have thus argued that increasing costs of litigation, particularly in certain substantive areas, necessitate more pretrial adjudication because "[t]he same rules of discovery that generate one or two days worth of litigation in simple contract disputes open up just about every record of huge national companies over years if not decades."¹⁶⁷

However, discovery in most employment cases "is not comparable to the costs of a business litigation," and often may be less costly.¹⁶⁸ Further, the accepted justification for more pretrial disposition—that the federal court system is overwhelmed by an increasingly litigious American society—is disputed.¹⁶⁹ Moreover, trial courts possess many powerful tools to curb discovery abuse, frivolous claims, and other conduct that can harm innocent defendants. In *Twombly*,

¹⁶⁵ As explained, though, such an application is inconsistent with prior law. Additionally, despite the possibly lower chances of success, such sets of facts have indeed led to successful claims on the merits in the past. See *supra* notes 134–38 and accompanying text.

¹⁶⁶ Meritless Title VII claims likely come most frequently from unqualified employees who file in bad faith hoping to force a settlement and at-will employees who were let go for no reason at all (or at least no actionable reason) and are seeking a legal hook to explain their perceived ill-treatment. See, e.g., Nicole B. Porter, *The Perfect Compromise: Bridging the Gap Between At-Will Employment and Just Cause*, 87 NEB. L. REV. 62, 76–77 (2008) (noting that at-will employment contracts preclude most causes of action in cases of discharge, leading disgruntled terminated employees to "bring discrimination claims regardless of whether there is any indication that discrimination was the motivation behind the termination decision").

¹⁶⁷ Epstein, *supra* note 53, at 70.

¹⁶⁸ Suja A. Thomas, *Oddball Iqbal and Twombly and Employment Discrimination*, 2011 U. ILL. L. REV. 215, 221.

¹⁶⁹ Miller, *supra* note 71, at 985–96 (assessing supposed explosion of tort cases and attributing much of the increased litigation in federal courts to the recent federalization of crime); see also Miller, *supra* note 58, at 8 n.23 ("I do not believe . . . that the data support the notion that we have been struck by a 'litigation explosion.'") (quoting Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3, 3 (1987)).

the majority and Justice Stevens, in dissent, engaged in this debate: While the majority expressed concern about the costs of discovery in a large-scale antitrust claim, Justice Stevens argued that district judges were perfectly well equipped to manage trials.¹⁷⁰ Indeed, the power held by judges—in terms of Rule 16 case management,¹⁷¹ narrow discovery,¹⁷² the power to sanction frivolous or bad faith claims,¹⁷³ and tough summary judgment standards¹⁷⁴—had already led to placing serious obstacles before plaintiffs’ attempts to get into court. This development is at odds with the liberal model set forth by the drafters of the original Federal Rules of Civil Procedure.¹⁷⁵ Thus there may be little reason to fear abuse from cases that, in the past, would survive the *Swierkiewicz* standard—which is not itself fact-free—particularly when, as in the cases discussed in Part II, the plaintiffs have pled the types of facts from which juries had previously made findings of discrimination.

C. *The Need to “Reset” McDonnell Douglas*

The Supreme Court has made purportedly procedural law that has impacted substantive law, creating the potential to leave employment discrimination law in “a state of national confusion”¹⁷⁶ A

¹⁷⁰ See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 593 n.13 (2007) (Stevens, J., dissenting) (enumerating tools in “district court’s case-management arsenal”). The majority relied on an article that predated developments in judicial case management, *see id.* at 559 (citing Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 638 (1989)), and which many have argued was speculative and insufficient to justify such a sea change in pleading rules. *See, e.g.*, Miller, *supra* note 58, at 80 (“[T]here has been little research conducted that confirms [Easterbrook’s] conclusions Justice Souter’s reliance on that article simply is not persuasive”).

¹⁷¹ See FED. R. CIV. P. 16 (permitting courts to mandate pretrial conferences to “expedit[e] disposition of the action,” “discourag[e] wasteful pretrial activities,” and issue orders that “modify the extent of discovery”).

¹⁷² See FED. R. CIV. P. 26(b)(2)(B) (limiting electronic discovery and permitting court to “specify conditions for the discovery”); Miller *supra* note 58, at 58 & n.225 (identifying this and other provisions from 2006 amendments that “gave the district court extensive control and discretion in the context of e-discovery”).

¹⁷³ See FED. R. CIV. P. 11(c) (providing for sanctions for frivolous, abusive, or otherwise improper filings). A. Benjamin Spencer has questioned how much space remains between an insufficiently pled claim under pleading rules and one that is sanctionable under Rule 11. *See* Spencer, *supra* note 90, at 160–61 (“If the allegations are consistent with the possibility of liability, the court should be able to rely on counsel’s Rule 11 certification as the basis for having a reasonably founded hope that the discovery process will reveal relevant evidence.” (internal quotation marks omitted)).

¹⁷⁴ *See supra* notes 66–70 and accompanying text (discussing shifts in summary judgment doctrine that have favored the moving party, usually defendant).

¹⁷⁵ Spencer, *supra* note 55, at 433 (outlining the “judicial administration model” which “frustrate[s] the efforts of plaintiffs with valid claims to get into court”).

¹⁷⁶ H.R. REP. NO. 95-948, at 3 (1978) (criticizing impact of Supreme Court’s narrow interpretations of Title VII).

plaintiff who, despite having a potentially meritorious claim of discrimination under Title VII, cannot establish an idealized form of a prima facie case of discrimination or harassment may now face dismissal because the Rule 12(b)(6) standard permits dismissal of claims that appear implausible. Yet, this most recent set of shifts has arrived more subtly than the Court's dramatic decisions in *Gilbert* and *Ledbetter*.¹⁷⁷

Lawmakers are not oblivious to the negative consequences of *Twombly* and *Iqbal*. Both houses of Congress proposed legislative fixes that essentially would codify *Conley* as the applicable pleading standard, although neither ever made it out of committee.¹⁷⁸ Such a corrective, though, does not resolve the more fundamental trouble plaguing the *McDonnell Douglas* standard: Lower courts' decisions on motions to dismiss reflect not just an occasional insensitivity to pre-discovery evidentiary problems faced by plaintiffs in proving defendants' subjective intentions, but also a narrowing of the evidentiary and substantive standards in Title VII cases that rely on circumstantial evidence to only permit the most ideal plaintiffs and obvious cases through. These shifts are at odds with Congress's repeated insistence—through correctives of judicial narrowing of Title VII—that the statute is broad and flexible enough to cover a variety of plaintiffs and types of proof, as well as to change over time to reflect how discrimination actually takes place in the workplace.¹⁷⁹

Even if Congress were likely to take note of these changes as it did in response to *Ledbetter*, it is unclear what the legislative fix might look like. Redrafting Title VII with more specificity would undermine the flexibility that, while sometimes burdensome, can be a virtue. The nature of discrimination in society, and social and legal awareness thereof, is constantly changing. A rigid statutory definition might have made it impossible for the Supreme Court to read in a cause of action for hostile environment harassment decades after the passage of the

¹⁷⁷ See *supra* notes 16–20 and accompanying text (describing Court decisions reading Title VII narrowly and congressional responses).

¹⁷⁸ Notice Pleading Restoration Act, S. 1504, 111th Cong. (2009); Open Access to the Courts Act of 2009, H.R. 4115, 111th Cong. (2009) (“A court shall not dismiss a complaint under . . . [Rule 12(b)(6)] unless it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim which would entitle the plaintiff to relief. A court shall not dismiss a complaint . . . on the basis of a determination by the judge that the factual contents of the complaint do not show the plaintiff's claim to be plausible.”); see also Leslie A. Gordon, *Convolved in Court: For Federal Plaintiffs, Twombly and Iqbal Still Present a Catch-22*, 97 A.B.A. J. 16, 17 (2011), available at http://www.abajournal.com/magazine/article/for_federal_plaintiffs_twombly_and_iqbal_still_present_a_catch-22/ (“[T]he [Senate] bill has been with the Judiciary Committee for a year.”).

¹⁷⁹ See *supra* Part I.A (discussing the purpose of Title VII and congressional attempts to maintain such objectives).

Civil Rights Act of 1964.¹⁸⁰ Likewise, research is emerging on unconscious forms of discrimination.¹⁸¹ Leaving the statute flexible may allow future courts to again adapt the law to reach new frontiers of discrimination, fulfilling Title VII's promise.

An administrative solution is also likely to be insufficient. While the EEOC can and does issue guidelines suggesting how basic elements of discrimination claims should be treated,¹⁸² relying solely on existing and future EEOC guidance is problematic. Though it has looked to EEOC materials for guidance, the Supreme Court has hesitated to defer to them to the same degree that it does to other agency interpretations of statutes.¹⁸³ The fact that EEOC standards are in conflict with some current lower court applications of, for example, comparator analysis,¹⁸⁴ indicates that judicial deference on EEOC materials is not a reliable source of changes in the law. Thus, the best solution may be a judicial one.

D. A "Reset" Approach to Title VII Evidentiary Models

The best answer may be a simpler one: a judicial "reset" of Title VII doctrine that approaches *McDonnell Douglas* and the standard set out in early harassment cases as suggestive and flexible proof structures to be applied sensibly rather than rigidly.¹⁸⁵ In other words,

¹⁸⁰ See *supra* notes 40–45 and accompanying text (discussing Supreme Court's decisions recognizing sexual harassment claims).

¹⁸¹ See, e.g., Hart, *supra* note 2, at 747–49 (discussing social science research indicating the role of unconscious bias in hiring decisions). The question of whether Title VII can or should accommodate claims for unconscious discrimination is hotly contested and is beyond the scope of this Note.

¹⁸² Indeed, it already has a compliance memo and other policy statements in place for analysis of employment claims that contradict many of the standards described in Part II. See, e.g., EQUAL EMP'T OPPORTUNITY COMM'N, NOTICE NO. 915.002, ENFORCEMENT GUIDANCE ON *O'Connor v. Consolidated Coin Caterers Corp.* 15-14 (1996) ("[T]he characteristics of the comparator are not a necessary element of the prima facie case . . ."); EQUAL EMP'T OPPORTUNITY COMM'N, PUB. NO. 915.003, COMPLIANCE MANUAL § 15-V, EVALUATING EMPLOYMENT DECISIONS (2006) ("Identification of persons who are similarly situated to the claimant should be based on the nature of the allegations, the alleged nondiscriminatory reasons, and other important factors suggested by the context, but should not be based on unduly restrictive standards.").

¹⁸³ The Supreme Court criticized the EEOC's uneven application of its standards, but concluded that such "deficiencies . . . are not enough, however, to deprive the agency of all judicial deference." The Court found instead that EEOC materials "are not entitled to full *Chevron* deference," but acknowledged that "they are entitled to a 'measure of respect' under the less deferential *Skidmore* standard." *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 399–400 (2008).

¹⁸⁴ Compare *supra* note 182 (describing EEOC emphasis on less restrictive use of comparator analysis), with *supra* Part II.B.1 (analyzing recent cases using comparator analysis), and *supra* Part III.A (discussing recent trends in comparator analysis).

¹⁸⁵ Scholars have long debated the continuing relevance of the *McDonnell Douglas* model, with some calling for a complete elimination of its role in Title VII cases. For a

the judiciary should reconsider and recalibrate its approach to the Title VII evidentiary structures to make them more consistent with their original purpose and less subject to transformation through interactions with pleading doctrine. Courts can do this in disparate treatment cases by easing their approach to the comparator and qualifications prongs. In harassment cases, courts can return to a view of the “sufficiently severe or pervasive” prong as a factual standard.¹⁸⁶

Though the Court has indicated that its ruling in *Swierkiewicz* that a plaintiff need not plead a prima facie case of discrimination to survive a Rule 12(b)(6) motion remains in place,¹⁸⁷ it is inevitable that *McDonnell Douglas* will remain a background norm, particularly in light of the new pleading standard. First, plaintiffs naturally frame their evidence, and, thus, their pleadings around the standard, since it represents their ultimate burden of proof under the circumstantial model.¹⁸⁸ Second, judges “draw[ing] on . . . judicial experience and common sense”¹⁸⁹ will, quite reasonably, look to what the plaintiff must ultimately prove when assessing a complaint.¹⁹⁰ To the extent that this is the case, it is likely appropriate, as some scholars have argued, to mitigate discovery problems by permitting strictly circumscribed discovery to meet the new Rule 12(b)(6) standard.¹⁹¹

One important area where a “reset” is needed is comparator analysis, which is neither drafted into the letter of Title VII nor man-

general discussion of this debate, compare Malamud, *supra* note 158 (assessing the Court’s steps to weaken the *McDonnell Douglas* evidentiary model and calling for dismantling of that standard), with William R. Corbett, *Of Babies, Bathwater, and Throwing Out Proof Structures: It is Not Time to Jettison McDonnell Douglas*, 2 EMP. RTS. & EMP. POL’Y J. 361 (1998) (responding to Malamud and arguing for retention of *McDonnell Douglas* structure).

¹⁸⁶ Harris v. Forklift Sys., 510 U.S. 17, 21 (1993).

¹⁸⁷ See *supra* notes 103–04 and accompanying text (discussing the Supreme Court’s recent citation of *Swierkiewicz* as providing relevant standard for dismissal).

¹⁸⁸ As noted above, the plaintiff’s pleadings in *Swierkiewicz* strongly resembled the prima facie case. See *supra* note 60.

¹⁸⁹ Ashcroft v. Iqbal, 129 S. Ct. 1937, 1950 (2009) (“Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”).

¹⁹⁰ See, e.g., Apau v. Printpack Inc., 722 F. Supp. 2d 489, 492 (D. Del. 2010) (“While the prima facie standard for employment discrimination actions is not a requirement in evaluating a Motion to Dismiss, the standard can be a useful structure in determining whether the pleadings present a reasonable inference of liability.”).

¹⁹¹ See generally Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53 (2010) (proposing presuit or predissmissal discovery to counteract the negative impact of *Iqbal* on plaintiffs facing information asymmetries); Suzette M. Malveaux, *Front Loading and Heavy Lifting: How Pre-Dismissal Discovery Can Address the Detrimental Effect of Iqbal on Civil Rights Cases*, 14 LEWIS & CLARK L. REV. 65 (2010) (arguing that civil rights plaintiffs are particularly at risk under the new pleading standards and that courts should permit predissmissal discovery analogous to discovery used to determine class status, jurisdictional issues, and other issues).

dated by *McDonnell Douglas*. It is, instead, merely a useful tool. The relevant question is whether comparison to treatment of other employees or applicants gives force to the plaintiff's claim by creating an inference of discriminatory intent. In other words, a judge might ask whether the proof that the plaintiff has offered, be it a comparator or something else, makes it more likely that the alleged adverse employment action was discriminatory. A requirement that a comparator have exactly the same job responsibilities or be accused of exactly the same misconduct does little, in many circumstances, to reach that goal. It also artificially narrows the scope of relief under Title VII rather than utilizing *McDonnell Douglas* as a framework for adjudicating claims.

Likewise, courts should apply the "qualifications" prong of the *McDonnell Douglas* prima facie case in a manner that reflects its utility to adjudicating a discrimination claim, rather than as a tool to adjudicate factual issues early in the case and exclude plaintiffs with imperfect records from relief. There is a substantial difference between the minimum qualifications for a job and good performance of that job. *McDonnell Douglas* requires only the former,¹⁹² whereas the latter is an extremely nebulous—and unnecessary—standard.¹⁹³ Courts should follow the example set in *McDonnell Douglas* more closely in order to maintain the relevance of the three-step model of proof: Arguments about the plaintiff's alleged misconduct in a termination case are more appropriately assessed as a potential nondiscriminatory reason for the defendant's conduct. Further, the evidentiary problems that arise in separating the steps and allowing appropriate room for a plaintiff to rebut such allegations provides further support for the proposition that the *McDonnell Douglas* evidentiary standard is not an appropriate pleading standard. Nonetheless, since prima facie standards have persuasive force, courts must be cautious not to modify substantive standards when looking to them.

Finally, there is the difficult issue of sexual harassment. The key test of "sufficiently severe or pervasive" conduct is, by its reference to "reasonable person" standards, on its face a factual question that looks to community standards. Yet, if judges were not permitted to

¹⁹² See Malamud, *supra* note 158, at 2283 (noting that the Court, despite the plaintiff's protest activities in *McDonnell Douglas*, determined that he was qualified before determining that the activities could constitute legitimate reason for nonhiring).

¹⁹³ See *id.* at 2285–88 (describing confusion among courts as to the meaning of the "qualified" prong of the prima facie case and noting that "[b]eing 'qualified for the position you hold' may not have anything to do with your actual performance in the job" and many employees likely "do not meet their employer's 'minimal expectations,'" but are not fired (emphasis omitted)).

dismiss any complaints alleging conduct that appeared to fall far short of “severe” or “pervasive,” some inevitable number of meritless cases would likely be permitted to proceed to discovery, which would impose costs on defendants and the legal system. A literal treatment of the *McDonnell Douglas* test as a factual finding is thus likely untenable; at the same time, courts must seriously reassess the lines they have drawn to determine that, *as a matter of law*, the conduct alleged is insufficiently severe or pervasive. The “because of” prong likewise merits reassessment. It has long been recognized that *any* harassment in which discriminatory intent can be inferred—even if the conduct is not expressly based on a protected status—violates Title VII.¹⁹⁴ Accordingly, courts must resist the urge to dismiss any case in which the conduct described is not overtly bias-based and instead be open to circumstantial evidence that the plaintiff provides indicating discriminatory intent.

Even under the new *Twombly* and *Iqbal* pleading standard, the kinds of problematic applications that effect substantive changes can be avoided through a recalibration of judicial approaches to *McDonnell Douglas*. By identifying and rejecting these modified versions of the prima facie case, and avoiding applying plausibility pleading to an extent that permits imposition of narrow fact requirements, courts can demand a reasonable level of factual pleading—that is, a complaint that states more than merely “I was fired because I am a woman”—without fundamentally modifying Title VII. The “reset” may prevent courts from closing out plaintiffs, both at the Rule 12(b)(6) and Rule 56 stages, who possess once-recognized circumstantial proof of discrimination but do not fit within a narrow set of acceptable facts.

CONCLUSION

Procedure has a significant, but often difficult to isolate, impact on the substance of the law. Applications of procedural standards can have just as powerful an effect on which plaintiffs will have access to recovery under the law as courts’ direct assertions that there is no relief for the harm alleged by the plaintiffs before them. Such applications of procedural standards are perhaps nowhere more dramatic than in the context of Title VII of the Civil Rights Act of 1964 and related federal antidiscrimination laws, where claims rely on an intricate, judicially-created burden-shifting model on which procedural standards bear heavily at various steps. By dismissing as “conclusory” or “implausible” factual allegations that fail to meet narrow interpretations of evidentiary burdens, some courts have applied the new

¹⁹⁴ *Supra* note 47 and accompanying text.

pleading standards under *Twombly* and *Iqbal* in a way that alters the substance of Title VII. Yet, while this substantive alteration has taken place under the auspices of the new pleading standard, in reality it reflects a problem with courts' approaches to the evidentiary models for employment discrimination claims, which can be remedied with a new approach to the probative value of various kinds of circumstantial evidence. Accordingly, a revised approach to circumstantial evidence that reflects the purpose of the civil rights laws can balance the need for clear pleadings with the need for remedies for victims of employment discrimination.