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AFTER IQBAL

Joseph A. Seiner*

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

—Dalai Lama

INTRODUCTION

Henry David Thoreau wrote in Walden that “[i]t is never too late to give up our prejudices.”² The Supreme Court’s decision late last term in Ashcroft v. Iqbal³ may have made it easier for those prejudices to exist unchallenged. The decision extends the controversial holding of Bell Atlantic Corp. v. Twombly⁴—that a plaintiff’s allegations must state a plausible claim to avoid dismissal⁵—to all civil cases, including “antitrust and discrimination suits alike.”⁶ The Iqbal decision thus resolves the debate as to whether the Twombly plausibility standard is limited to the antitrust context where it arose, making clear that the standard applies to all civil matters, including employment-discrimination cases.⁷ Indeed, recent research suggests that the plausibility test is

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5. Id. at 557.
7. See Kendall W. Hannon, Note, Much Ado About Twombly? A Study on
already being used by some lower courts to dismiss workplace claims.8

The plausibility standard announced in Twombly and confirmed by Iqbal replaces the more relaxed test from Conley v. Gibson,9 that a complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."10 This "no set of facts" language from Conley governed federal pleading for fifty years until the recent Supreme Court cases abrogated the decision and required plaintiffs to plead sufficient facts to state a plausible claim.11 While Twombly and Iqbal have significantly changed the pleading rules for all civil cases, these recent decisions provide little guidance regarding what must be alleged to sufficiently state a claim of employment discrimination brought pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII").12

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

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


10. Id. at 45–46.

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


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

14. Id.

15. Id. at 1949 (emphasis added) (internal quotation marks omitted) (citing Twombly, 550 U.S. at 556).
gray area between possible and probable when alleging discriminatory intent in an employment case brought pursuant to Title VII.

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

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

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\(^{16}\) See infra Part IV.

\(^{17}\) See infra Part II.C–D (discussing the facts of the \textit{Twombly} and \textit{Iqbal} Supreme Court decisions).

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

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

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

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

I. FEDERAL RULES OF CIVIL PROCEDURE

The pleading standards in federal employment-discrimination cases are governed by the same Federal Rules of Civil Procedure ("FRCP") that apply to other civil causes of action. FRCP 12(b)(6) allows a defendant to move for the dismissal of a complaint for "failure to state a claim upon which relief can be granted." To state a sufficient claim and avoid a 12(b)(6) dismissal, an employment-discrimination plaintiff must satisfy FRCP 8(a)(2), which requires a complaint to include "a short and plain statement of the claim showing that the pleader is entitled to relief." The sample pleading forms attached to the federal rules help clarify the pleading requirements by providing an example of a sufficient complaint. Form 11 thus provides the following example of an adequate allegation of negligence:

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21. See infra Part I.
22. See infra Parts II-III.
23. See infra Parts IV-V.
24. See infra Part VI.
25. See infra Part VII.
27. FED. R. CIV. P. 12(b)(6).
28. Id. 8(a)(2).
29. Id. Form 11.
On *date*, at *place*, the defendant negligently drove a motor vehicle against the plaintiff.  

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

II. SUPREME COURT CASES

A. Conley v. Gibson

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

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

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


32. *Id.* Form 11.

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


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

37. *Id.* at 45–46 (emphasis added).

38. *Id.* at 48.

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

\subsection*{B. Swierkiewicz v. Sorema N.A.}

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

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

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

\textsuperscript{42} 550 U.S. 544, 554–63 (2007).


\textsuperscript{44} Swierkiewicz, 534 U.S. at 508–09.
dismiss. Under McDonnell Douglas Corp. v. Green, a prima facie case of employment discrimination is established by showing that the plaintiff is part of a protected class, that the plaintiff is qualified for the position, that the plaintiff suffered an adverse employment action, and that there is other evidence giving rise to an inference of discrimination. The Court emphasized that the McDonnell Douglas test is only "an evidentiary standard" and does not represent a "pleading requirement."

The Swierkiewicz Court stated that under the notice-pleading framework of the federal rules, it is too burdensome to require a plaintiff to plead all of the facts establishing a McDonnell Douglas prima facie case, particularly when the McDonnell Douglas test is not even applicable to every case involving discrimination. And, as discovery often "unearth[s] relevant facts and evidence," the prima facie case should be flexible and "not...transposed into a rigid pleading standard for discrimination cases."

The Court emphasized that under Conley, the plaintiff need only give the opposing party "fair notice of what the plaintiff's claim is and the grounds upon which it rests." The Court further pointed out that under a notice-pleading framework, "liberal discovery rules and summary judgment motions" must be used "to define disputed facts and issues and to dispose of unmeritorious claims." This system allows the parties to "focus litigation on the merits of a claim," and vague or unmeritorious claims can be addressed by the defendant through a motion for a definite statement or a motion for summary judgment. Thus, Swierkiewicz emphasized that the liberal pleading standard set forth in Conley applies to employment-discrimination claims and that such suits are not subject to a "heightened pleading standard."

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


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


49. Id. at 511.

50. Id. at 512.

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

52. Id.

53. Id.

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

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

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

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

In Twombly, then, the Court moved away from the notice-pleading paradigm of Conley where the plaintiff was only required discrimination to have access to discovery before specific facts giving rise to a claim of discrimination can be articulated.

56. Id. at 550.
57. Id. at 550–51.
58. Id. at 562.
59. Id. at 563.
60. Id.
61. Id. at 557.
62. Id. at 570.
63. Id. at 555.
64. Id. at 570.
65. Id.
66. Id.
to give the defendant basic notice of the claim. In its place, the Court now specifically requires plaintiffs to plead facts in their complaints. Plaintiffs must set forth sufficient facts to state a plausible claim or face dismissal of the case.

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

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


68. See Twombly, 550 U.S. at 555–56.

69. Id. at 570.

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

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

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

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

74. See Hannon, supra note 7, at 1814–15 (discussing the breadth of the Twombly plausibility standard); see also Seiner supra note 19, at 101 n.54, 121–
Iqbal, the Supreme Court definitively resolved this debate and refused to limit the Twombly plausibility standard to Sherman Act cases.

D. Ashcroft v. Iqbal

In Iqbal, the Supreme Court reassessed the breadth of the plausibility standard that it had announced two years earlier in Twombly. 75 In the Iqbal case, Javaid Iqbal, a Muslim and Pakistani citizen, was arrested in the United States after September 11, 2001, on immigration-related charges. 76 Because he was deemed to be "of high interest" to the ongoing investigation of the events of September 11th, Iqbal was housed in a maximum-security environment where he was held in lockdown for twenty-three hours a day. 77 After pleading guilty to various criminal charges, Iqbal spent time in prison and was subsequently sent to Pakistan. 78 In light of perceived constitutional violations during his confinement, Iqbal filed a Bivens action in federal court against various officials, including former Attorney General John Ashcroft and Robert Mueller, the Director of the FBI. 79 Iqbal alleged that Ashcroft and Mueller "adopted an unconstitutional policy" on the basis of race, religion, or national origin, which resulted in his being subjected to poor prison conditions. 80 Specifically, the complaint alleged that petitioners designated respondent a person of high interest on account of his race, religion, or national origin, in contravention of the First and Fifth Amendments to the Constitution . . . . "[T]he [FBI], under the direction of Defendant Mueller, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11 . . . . [T]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were 'cleared' by the FBI was approved by Defendants Ashcroft and Mueller in discussions in the weeks after September 11, 2001 . . . ." [P]etitioners "each knew of, condoned, and willfully and maliciously agreed to subject . . . ."

76. 129 S. Ct. at 1942–43.
77. Id. at 1943.
78. Id.
79. The Court noted that a number of the alleged violations were not before it on appeal, including that "jailors 'kicked [Iqbal] in the stomach, punched him in the face, and dragged him across' his cell without justification, . . . subjected him to serial strip and body-cavity searches when he posed no safety risk to himself or others, . . . and refused to let him and other Muslims pray because there would be '[n]o prayers for terrorists.'" Id. at 1943–44.
80. Id. at 1942–43.
81. Id. at 1942.
respondent to harsh conditions of confinement “as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.”

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

In considering the case, the Supreme Court initially determined that the district court properly had jurisdiction to consider the matter. The Court then discussed the elements of a successful Bivens claim, which, under the First and Fifth Amendments, requires the plaintiff to plead “that the defendant acted with discriminatory purpose.” Thus, Iqbal had to establish that the defendants put the questioned policies in place “not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion or national origin.” Citing Twombly, the Court noted that the federal rules do not mandate “detailed factual allegations,” but they do require “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” Therefore, a complaint will be held inadequate where it relies on “naked assertion[s]” that are “devoid of further factual enhancement.”

The Court also reiterated the plausibility standard announced in Twombly, noting that a complaint is plausible where it includes sufficient facts to permit the court to make a “reasonable inference” that the defendant is responsible for the unlawful conduct.

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

82. Id. at 1944 (quoting Complaint at ¶ 96).
83. Id.
84. Id.
85. Id.
86. Id. at 1946.
87. Id. at 1948–49.
88. Id. The Court rejected the plaintiff’s supervisory-liability theory, concluding that “[a]bsent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct.” Id. at 1949.
89. Id. at 1949 (citing Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).
90. Id. (quoting Twombly, 550 U.S. at 557).
91. Id. The Court noted that plausibility “is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” Id. (emphasis added) (citing Twombly, 550 U.S. at 556).
92. Id. at 1951 (quoting Twombly, 550 U.S. at 570).
Ashcroft’s alleged involvement in the discriminatory policy were too “conclusory.”93 Thus, “the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature... disentitles them to the presumption of truth.”94 Additionally, as the Court found that there was a nondiscriminatory explanation for the government's policies that were put in place after September 11th that was “more likely” than Iqbal’s assertions, the plaintiff failed to plausibly state a claim for discrimination.95 In this regard, the arrests that the FBI director supervised were probably permissible and “justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts.”96 The Court further concluded that there was nothing in the complaint that established that the defendants “housed detainees... due to their race, religion, or national origin.”97 Rather, all the complaint suggested was that high-ranking officials, “in the aftermath of a devastating terrorist attack,” attempted to house “suspected terrorists in the most secure conditions available.”98 Due to the inadequate and conclusory nature of his allegations, then, Iqbal’s complaint failed to plausibly state a claim for discrimination and was rejected by the Court.99

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

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

93. Id.
94. Id.
95. Id.
96. Id.
97. Id. at 1952.
98. Id.
99. Id.
100. Id. at 1952–54.
101. Id. at 1953.
102. Id.
103. See Hannon, supra note 7, at 1814–15 (discussing the debate over how broadly the Twombly standard applies).
104. Iqbal, 129 S. Ct. at 1953.
intrusive discovery." The Court found this particularly true in litigation involving government officials, as such officials must be able "to devote time to [their] duties," and litigation would present a "substantial diversion" from these efforts.06

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

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

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

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

A. Guidance from Decisions

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

117. See infra Part VI (offering a proposed pleading framework for alleging discriminatory intent pursuant to Title VII); see also Lee Goldman, Trouble for Private Enforcement of the Sherman Act: Twombly, Pleading Standards, and the Oligopoly Problem, 2008 BYU L. Rev. 1057, 1066 (2008) ("Courts and commentators decried the Twombly opinion as creating substantial confusion."); A. Benjamin Spencer, Pleading Civil Rights Claims in the Post-Conley Era, 52 How. L.J. 99, 102 (2008) ("Twombly is a confusing opinion subject to multiple interpretations whose implications are still being worked out.").
118. Spencer, supra note 117, at 160 (referencing Twombly's "amorphous concept of 'plausibility'").
120. See id. The McDonnell Douglas test requires the plaintiff to show that she is a member of a protected class, that she is qualified, that she suffered an adverse employment action, and that there is other evidence giving rise to an inference of discrimination. Id. at 510.
121. See infra Part III.B (discussing the viability of the Swierkiewicz decision).
122. Swierkiewicz, 534 U.S. at 510–11.
there must be sufficient facts set forth in a Title VII complaint to make it more than simply "speculative." Thus, *Twombly* teaches us that an employment-discrimination plaintiff cannot rely on a conclusory, "formulaic recitation" of the basic components of a Title VII case.

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

**B. The Fate of Swierckiewicz**

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

125. Id. at 555.
129. Id. at 1954.
130. Id.
131. Id.
abrogation of the Conley standard, specifically rejects the argument that "mere conclusory statements" may be used to support a complaint. And, the Iqbal decision does not cite to Swierkiewicz a single time. Thus, a strong argument can be made that Iqbal runs counter to (and implicitly overrules) Swierkiewicz, and the lower courts have already taken varying approaches to this issue.

While there may be some legitimate concern about the validity of Swierkiewicz generally, the decision should be considered good law at least as to cases brought under Title VII. The decision plainly states the standard for pleading employment-discrimination cases and makes clear that a plaintiff need not allege a prima facie case to sufficiently state a Title VII claim.

Moreover, even the recent Twombly decision cites to Swierkiewicz with approval. Notably, the Twombly Court explains how its

135. See id. at 1937; Posting of Scott Dodson, supra note 132.
137. Compare, e.g., al-Kidd v. Ashcroft, 580 F.3d 949 (9th Cir. 2009) ("In Twombly, the Supreme Court... reaffirmed the holding of Swierkiewicz... rejecting a fact pleading requirement for Title VII employment discrimination"), with Fowler v. UPMC Shadyside, 578 F.3d 203, 211 (3d Cir. 2009) ("We have to conclude, therefore, that because Conley has been specifically repudiated by both Twombly and Iqbal, so too has Swierkiewicz, at least insofar as it concerns pleading requirements and relies on Conley.").
138. See Adam N. Steinman, The Pleading Problem, 62 Stan. L. Rev. (forthcoming 2010), (manuscript at 57-58), available at http://ssrn.com/abstract=1442786 ("And courts must remain cognizant of their obligation to avoid conflicts with either binding positive law (such as the Federal Rules and their Forms) or precedent that has yet to be overruled (such as Swierkiewicz.").
140. See Iqbal, 129 S. Ct. 1937; Seiner, supra note 19, at 103 (discussing Twombly's citation to Swierkiewicz and Iqbal's failure to cite the decision).
141. Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555-56, 563, 569 n.14, 570 (2006). Similarly, in Erickson v. Pardus, 551 U.S. 89 (2007), a decision issued shortly after Twombly, the Supreme Court also cited to Swierkiewicz with approval. Id. at 93-94; see also Bone, supra note 39, at 886 n.68 ("The Twombly Court also approved its previous decision in Swierkiewicz."); Seiner, supra note 19, at 103 ("Bell Atlantic cites Swierkiewicz with approval."); Douglas G. Smith, The Twombly Revolution?, 36 Pepp. L. Rev. 1063, 1087 (2009) ("[T]he majority in Twombly repeatedly relied upon Swierkiewicz in its opinion. The majority did not see anything inconsistent in its ruling and the Swierkiewicz decision. Nor did it indicate that Swierkiewicz imposed any limitations on the scope of its decision.").
decision is distinguishable from *Swierkiewicz* rather than choosing to overrule the decision.\textsuperscript{142} Thus, it is somewhat premature to forecast the demise of *Swierkiewicz*, whose holding should continue to apply to Title VII cases. This is particularly true given the unique role of summary judgment in employment-discrimination matters, which is discussed in greater detail below.\textsuperscript{143} Nonetheless, *Swierkiewicz* must now be viewed under the more restrictive lens of *Twombly* and *Iqbal*, and plaintiffs must make sure to plead sufficient (and plausible) facts to satisfy all three decisions.

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

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

Proving intent in an employment-discrimination case is certainly a tricky endeavor,\textsuperscript{146} and pleading intent after *Iqbal* may

\textsuperscript{142.} In relevant part, *Twombly* states:

Even though Swierkiewicz's pleadings "detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination," the Court of Appeals dismissed his complaint for failing to allege certain additional facts that Swierkiewicz would need at the trial stage to support his claim in the absence of direct evidence of discrimination. We reversed on the ground that the Court of Appeals had impermissibly applied what amounted to a heightened pleading requirement by insisting that Swierkiewicz allege "specific facts" beyond those necessary to state his claim and the grounds showing entitlement to relief.

Here, in contrast, we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.

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

\textsuperscript{143.} See infra Part V.B.

\textsuperscript{144.} See Seiner, supra note 19; Seiner, supra note 8.


\textsuperscript{146.} See, e.g., *Ross v. Runyon*, 859 F. Supp. 15, 21–22 (D.D.C. 1994) ("[D]iscriminatory intent and proof of disparate treatment are notoriously difficult to establish [in employment-discrimination cases]."); Seiner, supra note 19, at 136–37 ("Establishing an employer's discriminatory intent in a case can be the most difficult hurdle for the employee to overcome.").
be even trickier. What it means to plausibly plead discriminatory intent under Title VII remains an open question and will likely be a matter for the courts to resolve. This Article attempts to define what facts are necessary to plausibly plead discriminatory intent pursuant to Title VII through a proposed analytical framework. Before undertaking this analysis, however, it is important to understand how establishing intent in a Title VII case is different from other areas of the law.

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

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

A. Federal Judicial Center Study—Summary-Judgment Data

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

147. See infra Part VI.
150. See supra Part II.C–D (discussing the facts of the Twombly and Iqbal Supreme Court decisions).
151. See infra Part IV.A–B.
surviving summary judgment.\footnote{152} In Title VII cases, the battles are often fought at the summary-judgment stage of the proceedings\footnote{153} when the defendant attempts to show that even if the facts are considered in the light most favorable to the opposing party, the plaintiff still cannot prevail in the case.\footnote{154} This stage of the proceedings often proves pivotal in many Title VII cases as the "increasing use of summary judgment" has resulted in the "gradual and continuing erosion of the factfinder's role in federal employment discrimination cases."\footnote{155}

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

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

\footnote{152. See infra notes 156–63 (discussing FJC data); see also Seiner, supra note 8, at 1032–35 (discussing the results of the FJC research). The author would like to thank Joe Cecil and the FJC for assisting with the study outlined in this Article.}
\footnote{153. Cf. Ann C. McGinley, Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases, 34 B.C. L. Rev. 203, 205–06 (1993) (arguing that "the increased inappropriate use of summary judgment" has "silently curtail[ed] workers' civil rights claims" and that the "misapplication of civil procedural rules to employment discrimination cases threatens substantive anti-discrimination law").}
\footnote{154. See, e.g., Shira A. Scheindlin & John Elofson, Judges, Juries, and Sexual Harassment, 17 Yale L. & Pol'y Rev. 813, 821 (1999) ("If there is any evidence in the record from which a reasonable juror could find in favor of the nonmovant, summary judgment is improper. In determining whether summary judgment should be granted, the court resolves all ambiguities and draws all reasonable inferences against the moving party.").}
\footnote{155. McGinley, supra note 153, at 206.}
\footnote{156. See Memorandum from Joe Cecil & George Cort, Research Div., Fed. Judicial Ctr., to Judge Michael Baylson, Advisory Comm. on Civil Rules 4 (Aug. 13, 2008) (on file with author) [hereinafter FJC Memorandum]; see also Seiner, supra note 8, at 1032–35.}
\footnote{157. See FJC Memorandum, supra note 156. This memorandum also lists the three federal district courts from which data could not be collected. Id.; see also Seiner, supra note 8, at 1032–35.}
\footnote{158. See FJC Memorandum, supra note 156; Seiner, supra note 8, at 1032–35.}
\footnote{159. See Seiner, supra note 8, at 1032–35; E-mail from Joe S. Cecil, Sr. Research Assoc., Fed. Judicial Ctr., to Joseph Seiner, Assistant Professor of Law, Univ. of S.C. (May 19, 2008, 22:07:36 EST) (on file with author). Title VII cases could not be specifically separated out as part of this analysis. See id.}
judgment was filed by the defendant and subsequently decided by the federal court. This search uncovered 3,983 summary-judgment orders issued by the federal district courts. These summary-judgment decisions were then classified as to the number of decisions granting a defendant's motion, denying a defendant's motion, or denying in part a defendant's motion. The results of this research are detailed in the table below:

**TABLE 1: SUMMARY JUDGMENT RESULTS**

<table>
<thead>
<tr>
<th>Motion Result</th>
<th>Number of Motions</th>
<th>Percentage of Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Granted</td>
<td>2,495</td>
<td>62.6%</td>
</tr>
<tr>
<td>Denied-in-part</td>
<td>724</td>
<td>18.2%</td>
</tr>
<tr>
<td>Denied</td>
<td>764</td>
<td>19.2%</td>
</tr>
<tr>
<td>Total</td>
<td>3,983</td>
<td>100%</td>
</tr>
</tbody>
</table>

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

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160. See Seiner, supra note 8 at 1032–35; E-mail from Joe S. Cecil to Joseph Seiner, supra note 159.
161. See Seiner, supra note 8 at 1032–35; E-mail from Joe S. Cecil to Joseph Seiner, supra note 159.
162. See Seiner, supra note 8 at 1032–35; E-mail from Joe S. Cecil to Joseph Seiner, supra note 159. It is unclear, however, the extent to which the summary-judgment motions in the study specifically addressed a Title VII claim in the case. See E-mail from Joe S. Cecil, Sr. Research Assoc., Fed. Judicial Ctr., to Joseph Seiner, Assistant Professor of Law, Univ. of S.C. (June 20, 2008, 16:24:17 EST) (on file with author). See also Seiner, supra note 8 at 1032–35.
163. Seiner, supra note 8, at 1032–35; E-mail from Joe S. Cecil, to Joseph Seiner, supra note 159.
165. See McGinley, supra note 153, at 205–06 (discussing the use of summary judgment in employment-discrimination cases).
166. See E-mail from Joe S. Cecil to Joseph Seiner, supra note 159 (setting forth the results of the FJC study). And, not all cases result in a summary-judgment order being rendered by the district court. Indeed, according to further FJC research, only “12.5% of employment discrimination cases (389 of 3,108 cases) are terminated by summary judgment.” E-mail from Joe S. Cecil, Sr. Research Assoc., Fed. Judicial Ctr., to Joseph Seiner, Assistant Professor of Law, Univ. of S.C. (Sept. 24, 2008, 10:07:00 EST) (on file with author); see also Seiner, supra note 8, at 1032–35 (discussing the results of the FJC research).
VII claims will be thrown out on summary judgment, they also represent the fact that many claims are found to have enough merit to proceed past this stage of the proceedings. With almost 1,500 employment-discrimination claims in the study at least partially surviving a motion for summary judgment, it becomes hard to deny that many plaintiffs have a substantial amount of evidence to support their claims of workplace discrimination.68

B. Jury Verdict Research Analysis—Trial Outcome Data

I was also able to obtain information on the likelihood that a Title VII plaintiff will prevail at trial.69 Jury Verdict Research®—Palm Beach Gardens, Fl. ("JVR") has compiled a nationwide database of verdicts in employment cases.70 Though the JVR database does not contain all jury verdicts rendered across the country, "it receives a sufficient sample...to produce descriptive statistics for [certain] areas of litigation."71 The data thus provide an insightful sampling of jury verdicts in employment-discrimination cases.72

JVR was able to provide data on the likelihood of an employment-discrimination plaintiff recovering at trial during the years 2001 to 2007.73 Interestingly, the data have remained fairly consistent over this time frame, never fluctuating more than 7% over the entire seven-year period and usually hovering at or near the 60% range.74 For example, in 2001, a plaintiff had a 61%
probability of attaining a favorable jury verdict in an employment-discrimination case. If a discrimination case goes to trial, plaintiffs have an excellent chance of prevailing, as juries side in their favor well over half (and close to two-thirds) of the time. The probability of a favorable verdict varies depending upon the nature of the suit but was above 50% in most major areas of discrimination in 2007. A prevailing plaintiff in a federal employment-discrimination trial can expect a median compensatory award of $175,000. Plaintiffs in state employment-discrimination cases fare even better, as the median compensatory jury award in these matters was $250,000 for the years 2001 to 2007.

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

C. Other Studies

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

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

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

Another recent study confirms the existence of discrimination in

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186. Id. at 991. African-Americans also "earn nearly 25% less when they are employed." Id.
187. Id. at 991-92.
188. Id. The ads included prospective positions "in the sales, administrative support, clerical, and customer services job categories." Id. at 992. The resumes were sent to "a large spectrum of job quality, from cashier work at retail establishments and clerical work in a mail room, to office and sales management positions." Id.
189. Id.
190. Id.
191. Id. ("Applicants with White names need to send about 10 resumes to get one callback whereas applicants with African-American names need to send about 15 resumes.").
192. Id.
193. Id. ("Whites with higher-quality resumes receive nearly 30-percent more callbacks than Whites with lower-quality resumes. On the other hand, having a higher-quality resume has a smaller effect for African-Americans. In other words, the gap between Whites and African-Americans widens with resume quality.").
194. Id. "[I]nterestingly, African-Americans are not helped more than Whites by living in a ‘better’ neighborhood." Id.
hiring for older workers. The study examined the impact of age on the likelihood of an individual to get an interview for an entry-level job (or close to entry-level position) by sending "functionally identical" resumes to employers with different ages listed. The age differential was communicated to the employer by changing the date of the applicant's high-school graduation. To help control for "perceived gaps in work history," the study only submitted applications from women, as "an employer is more likely to assume that a woman [would be] entering or reentering the labor market" after helping with family responsibilities "rather than returning from prison or a long spell of unemployment." The study revealed that it is much more difficult for older workers to find employment, identifying "an upward trend for the interview response based on date of high school graduation." For example, in one state that was studied, the average younger employment seeker had to submit nineteen job applications to receive one interview, while an older worker needed to submit twenty-seven applications. The study concluded that age-based discrimination is quite similar to discrimination faced by women and African-Americans.

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

196. Id. at 30–33. "Additionally, ten firms were chosen in each city as 'call-ins'; company names and numbers were randomly selected from the Verizon Superpages." Id. at 33.
197. Id. at 33.
198. Id. at 34.
199. Id. at 36.
200. Id. at 37.
201. Id. at 46.
202. David Neumark, Sex Discrimination in Restaurant Hiring: An Audit Study, 111 Q.J. Econ. 915, 917–18 (1996). Interestingly, "customer discrimination" may play a role in the food industry, as "the proportion male among the waitstaff is significantly positively related to the proportion male among the clientele, both overall and (more so) within the high- and medium-price restaurant categories." Id. at 918–19.
discrimination once on the job than in the recruiting and hiring process," and about a quarter of the women indicated that they had been subjected to sexual harassment.204

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

V. DIFFERENT FACTUAL PLEADING REQUIREMENT FOR TITLE VII CLAIMS

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

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

The data outlined above reflect that many Title VII claims survive the summary-judgment stage of the proceedings in federal court.206 Similarly, when employment-discrimination cases are decided by a jury, the majority—about sixty percent—result in a favorable verdict for the plaintiff, with a large average monetary payout.207 There can be little doubt that substantial numbers of employment claims have merit, as the federal agency charged with eradicating discrimination finds cause in thousands of cases each year, as federal judges continue to permit substantial percentages of
employment-discrimination claims to survive summary judgment, and as juries comprised of average members of our society continue to find discrimination in the majority of instances. In the aggregate, then, the research discussed in this Article strongly suggests that discrimination is not a remnant of the past and continues to plague the employment setting. Indeed, it has been argued that "discrimination is so firmly rooted in our society that it can never be completely eradicated."208

As the data discussed in this Article leaves little question regarding the persistence of employment discrimination, a strong argument can be made that an allegation of discriminatory intent in the employment context is on its face plausible. While Iqbal warns against making conclusory allegations about discriminatory intent without the proper factual support,209 the decision (like Twombly) arises miles from the employment setting, where discrimination is a frequent occurrence.210 Indeed, both Twombly and Iqbal involve allegations that on their face seem somewhat extraordinary. Alleging that the FBI director and the Attorney General of the United States undertook a policy to violate the civil rights of a particular group211 or that major telephone companies engaged in a complex and unlawful conspiracy to prevent entry into the market212 are somewhat fantastic claims. This did not mean that these allegations were untrue—but on their face the claims certainly raised doubts, and there were "obvious alternative [and lawful] explanation[s]" for the alleged conduct involved.213 These conclusory allegations—without some factual detail supporting the claims—seemed hollow, unsubstantiated, and implausible.214

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

210. See supra Part IV (discussing employment-discrimination studies); see also Max Huffman, The Necessity of Pleading Elements in Private Antitrust Conspiracy Claims, 10 U. PA. J. BUS. & EMP. L. 627, 638 (2008) ("Viewed more pragmatically, the Sherman One conspiracy claim is dramatically different from Swierkiewicz. The Title VII-type burden shifting analysis has no place in the context of Sherman One.").
211. Iqbal, 129 S. Ct. at 1942, 1944.
213. Iqbal, 129 S. Ct. at 1951. As the Iqbal Court suggested, "the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts." Id.
214. However, the Iqbal Court noted that the allegations are not impossible or "nonsensical," and the claims were not rejected on the grounds that they were "unrealistic." Id. Rather, it was the "conclusory" nature of these ambitious allegations that caused them to fail.
presented by Twombly and Iqbal. Employment discrimination (which is likely to occur on a fairly regular basis) can easily be contrasted with these recent Supreme Court decisions, especially considering that the Court specifically noted the possible factual alternatives that are “more likely” than the facts alleged by the Twombly and Iqbal plaintiffs.215

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

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

215. Id. at 1950–51.
216. See id. at 1954 (rejecting Iqbal’s argument that discriminatory intent can be alleged “generally”).
217. Id. (“[T]he Federal Rules do not require courts to credit a complaint’s conclusory statements without reference to its factual context.”).
218. See, e.g., id. at 1950–52; Bell Atl. Corp. v. Twombly, 550 U.S. 544, 569–70 (2007); see also Hartnett, supra note 127, at 496 (“A requirement of plausibility will, however, apply differently in different substantive areas of the law and in different factual situations—it will depend on what facts the substantive law makes material and on the appropriate inferential connections between facts.”).
219. See Iqbal, 129 S. Ct. at 1950–51 (discussing factual scenarios that were “more likely” than those presented by the plaintiffs).
220. FED. R. CIV. P. Form 11 (providing the following as a sufficient negligence allegation: “On date, at place, the defendant negligently drove a motor vehicle against the plaintiff.”). It should also be noted that Form 11 (previously Form 9) is discussed with approval in the Twombly decision. Twombly, 550 U.S. at 565 n.10 (“A defendant wishing to prepare an answer in the simple fact pattern laid out in Form 9 would know what to answer; a defendant seeking to respond to plaintiffs’ conclusory allegations in the § 1 context would have little idea where to begin.”).
discrimination.  

B. Unique Role of Summary Judgment in Title VII Cases

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

In holding that a Title VII plaintiff need not plead a prima facie case, the Swierkiewicz Court emphasized the unique function of summary judgment in employment-discrimination cases, noting that "liberal discovery rules and summary judgment motions" must be used "to define disputed facts and issues and to dispose of unmeritorious claims." This approach permits the parties to address vague or unmeritorious claims through a motion for summary judgment, which in turn allows the parties to "focus litigation on the merits of a claim." Indeed, summary judgment performs a distinctive role in Title VII cases. The sufficiency of the McDonnell Douglas prima facie case is typically evaluated at the summary-judgment stage of the proceedings. Once the plaintiff makes the prima facie showing,

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221. See infra Part VI.
223. Id.; cf. Huffman, supra note 210, at 638 ("The distinction [between Title VII and Sherman Act cases] is made clearer by noting Justice Thomas's admonition in Swierkiewicz that 'the McDonnell Douglas framework does not apply in every employment discrimination case.' That is much in contrast to the Sherman One standard. The requirement that a plaintiff plead and prove that conduct was the result of a conspiracy is immutable." (citing Swierkiewicz, 534 U.S. at 511)).
224. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The fourth element of the prima facie case is often established by showing that "similarly situated employees outside of the protected class received more favorable treatment." Lucas v. PyraMax Bank, FSB, 539 F.3d 661, 666 (7th Cir. 2008).
225. See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (noting that plausibility "is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully") (emphasis added).
227. Id. at 512.
228. Id. at 514.
229. See Deborah C. Malamud, The Last Minuet: Disparate Treatment After
the employer must assert a legitimate nondiscriminatory reason for the alleged unlawful employment action. If this showing is sufficiently made, the plaintiff maintains the burden of production and persuasion of establishing that the employer’s stated reason is pretext for discrimination. Thus, at summary judgment, an employee must refute the employer’s stated reason for taking the adverse action.

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

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

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

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

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

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

234. Id. at 1951–52.

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

After *Iqbal* and *Twombly*, then, most civil litigants should refute any obvious alternative explanations for the alleged unlawful conduct set forth in the complaint.  

Employment-discrimination plaintiffs, however, are not expected to make this showing until summary judgment, and *Swierkiewicz* is clear that a heightened pleading standard must not be applied to workplace-discrimination claims. Thus, the *Swierkiewicz* Court’s emphasis on a relaxed pleading standard and liberal discovery is a direct result of the distinct function of summary judgment in Title VII cases and distinguishes these cases from other civil claims.

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

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

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236. See supra Part III.B.

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


239. Id. at 510–12.

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


242. See supra Part III.B.

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

VI. NEW ANALYTICAL FRAMEWORK FOR ALLEGING DISCRIMINATORY INTENT

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

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


\(^{245}\) Iqbal, 129 S. Ct. at 1954 (“[T]he Federal Rules do not require courts to credit a complaint’s conclusory statements without reference to its factual context.”).


\(^{247}\) See supra Part IV.


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

\(^{250}\) Id.
least rise to the level of being possible and/or probable, it is reasonable to expect that these allegations—with the proper factual support—should often survive the dismissal stage of the proceedings.

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

In light of Iqbal, however, the framework set forth in this Article emphasizes adequately pleading discriminatory intent.

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

A. Factual Context

As the Iqbal Court noted, discriminatory intent must be alleged

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251. See supra Part IV.
252. See supra Part IV.
254. See Seiner, supra note 19 (proposing a pleading standard for ADA cases); Seiner, supra note 8 (suggesting a unified model for alleging Title VII claims).
in the proper "factual context." For Title VII claims, that factual context must be sufficient to support an allegation of employment discrimination on the basis of race, color, religion, sex, or national origin. The statute prohibits an employer from taking an adverse action against an employee on the basis of any one of these protected characteristics.

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

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

256. Id. at 1954.
257. 42 U.S.C. § 2000e-2(a) (2006) ("It shall be an unlawful employment practice for an employer ... to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual ... because of such individual's race, color, religion, sex, or national origin.").
258. Id. § 2000e-2(a)(2).
259. Cf. Thompson v. Sawyer, 678 F.2d 257, 291 (D.C. Cir. 1982) ("Title VII relief is to be targeted to deter illegal discrimination and compensate its victims.").
260. See Seiner, supra note 19, at 131–32 (noting that the victim should be set forth in allegations of disability discrimination); Seiner, supra note 8, at 1043 (discussing the importance of pleading the victim's identity in an employment-discrimination complaint and noting that this requirement is straightforward).
261. For example, the EEOC often brings suit on behalf of individuals who have suffered employment discrimination. See, e.g., EEOC v. Sunbelt Rentals, Inc., 521 F.3d 306, 310 (4th Cir. 2008) ("This case arises from a Title VII action brought by the United States Equal Employment Opportunity Commission on behalf of Clinton Ingram, a Muslim American, against Sunbelt Rentals, Inc.").
262. See, e.g., Brown v. Henderson, 257 F.3d 246, 252 (2d Cir. 2001) ("It is axiomatic that mistreatment at work, whether through subjectation to a hostile environment or through such concrete deprivations as being fired or being denied a promotion, is actionable under Title VII only when it occurs because of an employee's sex, or other protected characteristic."); see also Seiner, supra note 8, at 1043–44 (discussing the importance of pleading the relevant protected characteristic in an employment-discrimination complaint).
264. When alleging the protected characteristic, the plaintiff should also be
discriminated against on the basis of multiple protected characteristics, if applicable to the situation (for example, "I was fired because I am an African-American and because I am a female."). If, during the course of discovery, the plaintiff learns that the defendant discriminated against her on the basis of an additional protected characteristic not set forth in the complaint, the court should liberally consider allowing the plaintiff to amend the complaint to reflect this additional allegation.

To place the employer's discriminatory intent in the proper factual context, the plaintiff must further allege the adverse action suffered by the victim. Thus, the employee must assert what negative consequence she suffered as a result of the employer's discriminatory intent. Title VII specifically states that an employer may not "fail or refuse to hire or to discharge any individual, or otherwise . . . discriminate against any individual" on the basis of a protected characteristic. Failing to hire and firing an employee on the basis of a protected characteristic are therefore statutorily enumerated "adverse acts." It is also likely, based on Supreme Court precedent, that failure to promote and reassignment with substantially different work duties also amount to adverse acts. Aside from these clear adverse actions, whether a particular employment action rises to the level of being sufficiently adverse is as specific as possible, particularly since providing this information to the employer should typically be relatively straightforward. Thus, for example, a plaintiff should allege that she was discriminated against because she is a woman and because she is African-American, rather than simply stating that the adverse action was taken because of sex and race.


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

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

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


270. Id. § 2000e-2(a).

271. Cf. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 761 (1998) (“A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.”).
often a question of jurisdiction, and the courts have applied varying tests. Some jurisdictions impose a somewhat stringent standard for qualifying adverse acts, while other courts have a more relaxed requirement. The plaintiff should therefore make sure to properly assert the adverse action she suffered based on the relevant case law, as failure to do so would subject the complaint to dismissal.

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

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

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

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

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

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

277. See Seiner, supra note 19, at 135–36 (noting that the plaintiff should allege the timing of the adverse action in ADA cases); Seiner, supra note 8, at 1045–46 (discussing the timing requirements for Title VII claims).
The courts should take a flexible approach in permitting plaintiffs to amend a complaint in these circumstances, particularly where discovery has further clarified the exact timing of the discrimination involved. The timing of the adverse action, then, helps clarify the nature of the discrimination asserted and provides a more developed factual context for the allegations in the complaint.

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

B. Discriminatory Intent

In addition to pleading the factual elements discussed above, the employee must also allege causation to properly assert
The plaintiff must allege that the adverse action was taken by the employer because of the employee’s protected characteristic. By making this assertion, the plaintiff satisfies the discriminatory-intent requirement of Title VII, which prohibits the employer from taking an unlawful action “because of such individual’s race, color, religion, sex, or national origin.” The assertion of discriminatory intent therefore provides the causal link between the employer’s prohibited actions and the characteristics protected by the statute.

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

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

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282. See, e.g., B. Glenn George, Revenge, 83 Tul. L. Rev. 439, 457 (2008) (noting that “the fundamental question for most discrimination claims is that of intent”); Seiner, supra note 19, at 136–38; Seiner, supra note 8, at 1046–47.
284. Id. (emphasis added).
285. Id.
286. See Seiner, supra note 19, at 136–38; Seiner, supra note 8, at 1047 (“As a critical element of a Title VII claim, causation should be stated by the alleged victim of discrimination to provide notice to the employer that the action was taken intentionally.”).
287. See supra Part VI.A.
289. Id.
290. Id.; see also Seiner, supra note 8, at 1050 (discussing Form 11).
291. It is worth noting that the sample pleading form identifies the “place” of the incident as a necessary component of a negligence claim. Fed. R. Civ. P. Form 11. While a Title VII plaintiff could certainly include in the complaint the physical “place” where the discrimination occurred, this fact is already largely
assertion of negligence, with the proper factual support, establishes a sufficient claim under the federal rules, so too does an allegation of discriminatory intent made in the appropriate factual context.

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

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

In Iqbal, the Court found it problematic that there was an easily identifiable explanation for the allegedly unlawful policies that were put in place after September 11th that was “more likely” than Iqbal’s assertions of discrimination—a desire by high-ranking officials to prevent terrorism. For the Court, Iqbal’s failure to refute this explanation seemed to undermine any argument that the plaintiff had plausibly stated a claim for discrimination. As previously discussed, Title VII intentional-discrimination claims already have a mechanism for rebutting the employer’s asserted “more likely” explanation for taking the adverse action. Under the framework set forth by the Supreme Court in McDonnell Douglas, the plaintiff must refute the employer’s stated reason for taking the adverse action at summary judgment. The McDonnell Douglas test, combined with the Supreme Court’s holding in Swierkiewicz, suggests that a Title VII plaintiff is not required to rebut any “more
likely,” explanations for the employer’s adverse action in the context of the complaint. Indeed, it may even be the case that the employee is unaware of the employer’s rationale for taking the adverse employment action at the time the complaint is filed. This is particularly true in the hiring context, where the prospective employee may simply fail to hear anything after submitting an employment application to a potential employer.

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

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

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300. Iqbal, 129 S. Ct. at 1951.
301. See Adam Liptak, Case About 9/11 Could Lead to a Broad Shift on Civil Lawsuits, N.Y. TIMES, July 21, 2009, at A10 (“Plaintiffs claiming they were the victims of employment discrimination . . . may not know exactly who harmed them and how before filing suit. But plaintiffs can learn valuable information during discovery.”).
302. See, e.g., Michael J. Yelnosky, Salvaging the Opportunity: A Response to Professor Clark, 28 U. Mich. J.L. Reform 151, 156 (1994) (“Problems of proof, which are present in all hiring cases, may be worse with lower-skilled jobs because generally there exists little, if any, paper record.”).
303. See James Leonard, The Equality Trap: How Reliance on Traditional Civil Rights Concepts Has Rendered Title I of the ADA Ineffective, 56 Case W. Res. L. Rev. 1, 48 (2005) (“Another difference between employees and applicants is that the former are usually aware of the process that has led to an adverse job action.”).
304. Thus, for example, an employee who is told that she is being terminated for poor performance could state in the complaint that she is in fact a good performer and has received outstanding performance evaluations.
305. See supra Part V.B.
306. Indeed, it would not be unusual for an employer to give a different explanation in its summary-judgment motion for taking the adverse action than was given to the employee at the time the decision was made. See, e.g., Abramson v. William Paterson Coll. of N.J., 260 F.3d 265, 284 (3d Cir. 2001) (“If a plaintiff demonstrates that the reasons given for her termination did not
an employee to rebut the employer's rationale for taking the disputed employment action—if the employee is aware of that rationale. 307 Rebutting the employer's reasoning should be relatively simple and straightforward. However, as an optional component of the framework, this rebuttal would only enhance the plaintiff's claim and should certainly never be required by a court.

D. Summary of Proposed Title VII Pleading Framework

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

(1) Plaintiff asserts the victim of the discrimination, the protected characteristic of the individual, the adverse action that was taken by the employer, and the timing of the purported unlawful act;

(2) Plaintiff alleges a causal link between the adverse action and the protected characteristic; and

(3) If applicable, plaintiff may rebut the employer's stated reason for taking the adverse action.

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

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

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

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

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

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

308. Fed. R. Civ. P. Form 11; see also supra Part I (discussing the sample pleading form attached to federal rules).
310. See Iqbal, 129 S. Ct. at 1951 (warning against conclusory allegations).
311. See id. (noting “more likely,” nondiscriminatory explanations for the purported unlawful policy).
313. See id; Seiner, supra note 8, at 1049 (discussing the Easterbrook standard).
314. Judge Easterbrook’s statement includes the victim, adverse action,
Furthermore, the ease and simplicity of the proposed analytical pleading framework for Title VII claims is well supported by the Swierkiewicz holding that an employment-discrimination litigant need not plead a prima facie case of discrimination to survive a motion to dismiss.\textsuperscript{315} Thus, the above framework does not require that a plaintiff plead a prima facie Title VII case, but it does call for the plaintiff to assert the essential factual elements of the claim. And the studies set forth in this Article leave little doubt that employment discrimination continues to pervade our society,\textsuperscript{316} an allegation of discriminatory intent—combined with the factual elements required in the proposed framework—clearly establishes a plausible Title VII claim. Indeed, when put in the proper factual context outlined above, a claim of discrimination is far more plausible than the somewhat questionable factual allegations set forth in Twombly and Iqbal. Unlike the plaintiffs in these recent Supreme Court decisions, a plaintiff alleging all of the facts required by the proposed pleading framework will have provided the defendant with fair notice of the charges made against it, thereby allowing the employer to begin looking into the allegations.\textsuperscript{317}

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

\begin{footnotes}
\item[316] \textit{See supra} Part IV.
\item[317] \textit{See} Seiner, \textit{supra} note 8, at 1049. Additionally, the model proposed in this Article suggests that the plaintiff should provide more specificity as to the victim's protected characteristic than what Judge Easterbrook would require. \textit{See supra} note 264 (discussing the specificity to be used in alleging the relevant protected characteristic).
\item[318] \textit{See supra} notes 272–73 and accompanying text (discussing the differences in jurisdiction on the issue of what constitutes an adverse action).
\item[319] For example, in so-called "reverse discrimination" claims, some jurisdictions require a plaintiff to provide "background circumstances" showing why the employer would discriminate against the majority. \textit{See generally} Charles A. Sullivan, \textit{Circling Back to the Obvious: The Convergence of Traditional and Reverse Discrimination in Title VII Proof}, 46 WM. & MARY L.
\end{footnotes}
E. Limitations of the Proposed Framework

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

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

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

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

\[\text{320. See Seiner, supra note 8, at 1043; Seiner, supra note 19, at 131, 135 n.310.}\]

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


\[\text{323. See, e.g., Harsco Corp. v. Renner, 475 F.3d 1179, 1187 (10th Cir. 2007) ("To establish that a sexually hostile work environment existed, a plaintiff must prove the following elements: (1) she is a member of a protected group; (2) she was subject to unwelcome harassment; (3) the harassment was based on sex; and (4) due to the harassment's severity or pervasiveness, the harassment altered a term, condition, or privilege of the plaintiff's employment and created an abusive working environment." (internal brackets omitted) (quoting Dick v.}\]
for intentional-discrimination claims and would not apply to a cause of action alleging a disparate-impact (unintentional) violation of Title VII. And as the model addresses Title VII claims exclusively, it is not meant to apply to workplace claims brought under the ADA or the ADEA.

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

F. The Swierkiewicz Safe Harbor

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

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

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


328. Am. Nurses’ Ass’n v. Illinois, 783 F.2d 716, 724 (7th Cir. 1986); see Seiner, supra note 19, at 130 (noting that the proposed pleading standard for disability cases is a minimum threshold); Seiner, supra note 8, at 1056 (noting that the proposed pleading standard for Title VII cases requires only a “bare minimum of facts”).
demonstrating the continued prevalence of discrimination—the proposed model establishes which factual elements are critical for alleging discriminatory intent when asserting a workplace claim. As already noted, however, plaintiffs are free to assert additional facts not required by this framework, and there may be some advantages to doing so.

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

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

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

330. Id. at 514–15.
331. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). As noted earlier, the fourth element of the prima facie case is often established by showing that “similarly situated employees outside of the protected class received more favorable treatment.” Lucas v. PyraMax Bank, FSB, 539 F.3d 661, 666 (7th Cir. 2008).
332. See Swierkiewicz, 534 U.S. at 510–11.
333. See id.
334. As discussed above, the courts should only require that plaintiffs allege the facts set forth in the proposed analytical pleading framework discussed in detail in this Article.
VII. IMPLICATIONS OF THE PROPOSED PLEADING FRAMEWORK

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

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

335. See Seiner, supra note 19, at 145–49 (discussing the implications of proposed pleading model); Seiner, supra note 8, at 1053–59 (same).
336. See, e.g., Kevin M. Clermont, Litigation Realities Redux, 84 NOTRE DAME L. REV. 1919, 1932–34 (2009) (“[Twombly], during its short life, has triggered tremendous confusion in case and commentary. What exactly it meant is clearly open to dispute, as is the wisdom of imposing, with no forewarning or public discussion, any sort of plausibility test on pleading.”); Seiner, supra note 19, at 145–49; Seiner, supra note 8, at 1053–59.
339. Seiner, supra note 19, at 98; see also Tice, supra note 67, at 838 (“Ultimately, the Court’s decision [in Twombly] creates uncertainty among lower courts and practitioners.”).
341. See Kevin M. Clermont & Stephen C. Yeazell, Inventing Tests, Destabilizing Systems, 95 IOWA L. REV. (forthcoming Mar. 2010), available at http://ssrn.com/abstract=1448796 (“[W]e can expect a long period, perhaps a decade or more, of sorting and jostling before we have even a slightly clearer idea about what allegations must appear in complaints. Persistent confusion on such a determinative feature contributes to major destabilization of civil litigation—destabilization created by the Court’s invention of a new and jarring test, exaggerated by its unclear delivery, and intensified by the poor legal process followed by the Court.”) (manuscript at 32); Seiner, supra note 19, at 146–47; Seiner, supra note 8, at 1055–56.
standard “will spawn years of increased litigation.” By clearly defining what “plausible” means for discriminatory intent in the Title VII context, the proposed approach would avoid this unnecessary litigation through an easily applied three-part framework. Indeed, even if the courts ultimately altered the framework proposed here, a unified standard would help bring some definitiveness to the currently confused pleading process for employment-discrimination claims.

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

342. Dodson, supra note 11, at 142; see also Lonny S. Hoffman, Burn Up the Chaff with Unquenchable Fire: What Two Doctrinal Intersections Can Teach Us About Judicial Power over Pleadings, 88 B.U. L. Rev. 1217, 1239 (2008) (“While the lower courts may eventually settle on a more moderate interpretation of the case, it seems hard to dispute that the Court’s pleading jurisprudence is anything but ambiguous.”).

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

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

345. Richard B. Stewart, The Discontents of Legalism: Interest Group Relations in Administrative Regulation, 1985 Wis. L. Rev. 655, 662 (“The more certain the law—the less the variance in expected outcomes—the more likely the parties will predict the same outcome from litigation, and the less likely that litigation will occur because of differences in predicted outcomes.”).
caseload for the judicial system.\textsuperscript{346} 

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

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

\begin{footnotesize}
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\item \textsuperscript{346} See Scott J. Connolly, Note, \textit{Individual Liability of Supervisors for Sexual Harassment Under Title VII: Courts' Reliance on the Rules of Statutory Construction}, 42 B.C. L. Rev. 421, 453 (2001) ("[I]n enacting Title VII, Congress's purpose was to eliminate discriminatory employment practices to the greatest extent possible using a limited commitment of federal judicial resources.").
\item \textsuperscript{347} See, e.g., Spencer, supra note 136, at 11 ("[T]he \textit{Twombly} pleading standard requiring plausibility might be too subjective to yield predictable and consistent results across cases. Developing a theory that describes the essence of what the \textit{Twombly} Court was getting at would thus lend much-needed precision to the doctrine.").
\item \textsuperscript{348} Liptak, supra note 301 (quoting Professor Stephen B. Burbank).
\item \textsuperscript{349} See Seiner, supra note 8, at 1014, 1035–38 (discussing a study that "revealed that the lower courts are unquestionably using the new [\textit{Twombly}] plausibility standard to dismiss Title VII claims").
\item \textsuperscript{350} See Spencer, supra note 136, at 4.
\item \textsuperscript{351} As the \textit{Twombly} decision notes, "the Court is not requiring heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 547 (2007); see Seiner, supra note 8, at 1054 (noting that a uniform pleading model would help prevent "the courts from applying too rigid a pleading standard to Title VII claims").
\item \textsuperscript{352} See Spencer, supra note 117, at 160 (referencing \textit{Twombly}'s "amorphous concept of 'plausibility.'").
\item \textsuperscript{353} See Spencer, supra note 136, at 6.
\item \textsuperscript{354} See Robert Brookins, \textit{Mixed-Motives, Title VII, and Removing Sexism from Employment: The Reality and the Rhetoric}, 59 Ala. L. Rev. 1, 51 (1995) ("Unsuccessful frivolous litigation is expensive for employers and society; successful frivolous litigation is even more expensive."); see also Seiner, supra note 19, at 147–49; Seiner, supra note 8, at 1056–57.
\end{itemize}
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extent that the Supreme Court or federal rules have created a threshold that is too low for plaintiffs, it is that threshold that should be reevaluated. 355 This Article simply helps to decipher what the recent Supreme Court decisions mean for employment-discrimination plaintiffs and where those decisions draw the line for pleading a Title VII claim. 356 It should further be considered that a streamlined pleading process may also encourage individuals who have been legitiately discriminated against to bring suit and avail themselves of their rights under the statute. 357 This ease of access to the judicial system can certainly be viewed as a benefit, as it would assist individuals in vindicating their civil rights. 358

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

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

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

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


360. See, e.g., Bell Atl. Corp. v. Twombly, 550 U.S. 544, 561–63 (2007) (abrogating Conley v. Gibson); see also Spencer, supra note 41, at 494 ("Ultimately, Twombly raises the pleading bar to a point where it will inevitably screen out claims that could have been proven if given the chance."). See generally Seiner, supra note 19, at 148; Seiner, supra note 8, at 1056.
indicate this in the pleadings and a court should take a liberal approach to the missing information, perhaps even permitting limited discovery on the particular issue.\footnote{361}{See Spencer, \textit{supra} note 41, at 494 ("The new plausibility standard... bodes ill for plaintiffs who will now have to muster facts showing plausibility when such facts may be unavailable to them."}, 362. See Clermont \& Yeazell, \textit{supra} note 341, at 50 ("Our point is simple: \textit{Twombly} and \textit{Iqbal} have introduced a wild card, a factor of substantial instability, at the threshold stage of civil process.").}

In summary, the simplicity of the proposed pleading standard outlined in this Article offers a number of benefits for the entire judicial system. Though there are obvious concerns with implementing any new legal framework, a unified model would greatly assist the courts in evaluating Title VII claims and would prevent needless litigation by defining a previously vague plausibility standard.\footnote{362}{See Clermont \& Yeazell, \textit{supra} note 341, at 50 ("Our point is simple: \textit{Twombly} and \textit{Iqbal} have introduced a wild card, a factor of substantial instability, at the threshold stage of civil process.").}

\textbf{CONCLUSION}

\textit{Twombly} and \textit{Iqbal} have replaced a relaxed pleading standard with a more complex and undefined plausibility test.\footnote{363}{See Ashcroft v. \textit{Iqbal}, 129 S. Ct. 1937, 1949–51 (2009); \textit{Twombly}, 550 U.S. at 562–64.}\footnote{364}{\textit{Iqbal}, 129 S. Ct. at 1949–50.}\footnote{365}{See \textit{Świerkiewicz} v. Sorema N.A., 534 U.S. 506, 514 (2002) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." (quoting Conley v. Gibson, 355 U.S. 41, 48 (1957))).} Employment-discrimination plaintiffs, who are already confronted with an uphill battle when attempting to establish intent, are now faced with an even more daunting task. \textit{Iqbal} creates an arduous burden for Title VII plaintiffs by mandating that allegations of discriminatory intent cannot be general or conclusory and must be made with the proper factual support.\footnote{365}{See \textit{Świerkiewicz} v. Sorema N.A., 534 U.S. 506, 514 (2002) ("The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." (quoting Conley v. Gibson, 355 U.S. 41, 48 (1957))).} This Article attempts to ease the pleading burden for Title VII litigants by clarifying the recent Supreme Court decisions and by defining what plausibility means when alleging discriminatory intent. The analytical framework proposed by this Article will help ensure that Title VII plaintiffs frame their allegations in the proper factual context. As the studies outlined in this Article demonstrate, employment discrimination continues to be a very real threat in our society. A Title VII plaintiff should therefore be given a fair opportunity to have her discrimination claim heard, without the fear of making an inadvertent procedural misstep which would prematurely end the case.\footnote{366}{Mary Beth Young, \textit{Learning to Discern Rather Than Judge}, \textsc{Nat'L Cath. Rep.}, March 11, 2005, at 14.}

"If you judge people you have no time to love them."\footnote{366}{Mary Beth Young, \textit{Learning to Discern Rather Than Judge}, \textsc{Nat'L Cath. Rep.}, March 11, 2005, at 14.} A model pleading standard for Title VII claims will help prevent individuals...
from being inappropriately judged in the workplace on the basis of their gender, religion, and national origin, or by the color of their skin. The time for that model pleading standard is now—after *Iqbal*. 