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TWOMBLY AND IQBAL: EFFECTS ON HOSTILE WORK ENVIRONMENT CLAIMS

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Abstract: The Supreme Court decided two landmark cases, *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, that interpreted Federal Rule of Civil Procedure 8(b)'s pleading requirement. The Court shifted from a notice pleading standard to one that requires more factual substantiation of claims before allowing discovery. This has important ramifications in the area of employment discrimination, as courts dismiss these claims disproportionately. If the Supreme Court's new pleading standard is read to allow more judicial subjectivity, it could bar employment discrimination plaintiffs from access to courts. Lower courts often misconstrue the legal standard for a hostile work environment, thereby resulting in the disposition of meritorious claims. This Note explores two different interpretations of the new pleading standards, one where judicial discretion is unbridled and the other where strong limitations on discretion still exist. For the welfare of hostile work environment discrimination victims, lower courts should apply the latter interpretation.

INTRODUCTION

In 2002, the United States Supreme Court ended the controversy surrounding pleading requirements for employment discrimination plaintiffs.¹ Less than one decade later, however, the Court handed down two decisions—*Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*—that changed those standards and caused more confusion for aggrieved plaintiffs.²

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¹ See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 509–10 (2002); Elizabeth M. Schneider, *The Changing Shape of Federal Civil Pretrial Practice: The Disparate Impact on Civil Rights and Employment Discrimination Cases*, 158 U. PA. L. REV. 517, 527 (2010); A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-Conley Era*, 52 HOW. L.J. 99, 117 (2008). Starting in the 1960s, many courts began applying heightened pleading standards to civil rights claims. See Spencer, *supra*, at 111. Indeed, “[b]y the early 1990s, most circuits had embraced the rule that a heightened pleading standard—meaning a requirement to plead factual details in support of general allegations—applied to civil rights claims.” *Id.* at 113. In 2002, through its *Swierkiewicz* decision, the Court “unanimously rejected the particularized pleading requirement” that some circuits were imposing on such claims. *Id.* at 117.

² See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555–57 (2007); see also Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests*,

The Supreme Court enacted the Federal Rules of Civil Procedure in 1938 to create a receptive environment in the Federal Courts and to ensure equality of access among all potential litigants.³ Since its enactment, Rule 8 has spurred debate among circuit courts, the Supreme Court, and legal commentators alike as to what a plaintiff's complaint must assert.⁴ A plaintiff's initial hurdle is a motion to dismiss, filed by the defendant pursuant to Rule 12(b) of the Federal Rules.⁵ The debate continues as a result of the new standard that arguably creates stricter pleading requirements and results in dismissal of a higher percentage of claims.⁶

This standard disproportionately affects potential civil rights plaintiffs, more so than any other class of claimants.⁷ As a result, there is much scholarly debate surrounding the application of these new pleading standards to civil rights, and particularly to employment discrimina-

Destabilizing Systems, 95 IOWA L. REV. 821, 823, 846 (2010); Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1059 ("The Supreme Court's plausibility paradigm abrogated fifty years of pleading jurisprudence and left in its place a vague and undefined standard.").

³ See Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 5, 10 (2010) (arguing that *Twombly* and *Iqbal* mark "a continued retreat from the principles of citizen access, private enforcement of public policies, and equality of litigant treatment in favor of corporate interests and concentrated wealth"); Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 535 (2001) ("The 1938 Rules liberalized the rules of pleading[,] . . . making it easier for litigants, even those of modest means and limited expertise, to have their day in court."). Professor Arthur Miller cites a case overturning the dismissal of a pro se immigrant's complaint, written in broken English, as an illustration of the goals of the system under the new federal rules. See Miller, *supra*, at 6.

⁴ See FED. R. CIV. P. 8(b); *Swierkiewicz*, 535 U.S. at 509–10. Compare Miller, *supra* note 3, at 14 (arguing that, "until *Twombly* in 2007[,] the Supreme Court stood firm on its commitment to the rulemaking process and to the principle of access"), with Spencer, *supra* note 1, at 123–24 (arguing that even before *Twombly*, courts applied a stricter standard at the pleading stage). *Swierkiewicz* is an example of the Supreme Court resolving a circuit split over the appropriate interpretation of Rule 8. See *Swierkiewicz*, 535 U.S. at 509–10.

⁵ FED. R. CIV. P. 12(b)(6) (requiring the dismissal of complaints "for failure to state a claim upon which relief may be granted").

⁶ See Miller, *supra* note 3, at 23–24 (arguing that *Twombly* and *Iqbal* advance a new standard that is precisely what the drafters of the Federal Rules sought to avoid); Schneider, *supra* note 1, at 532 (citing empirical studies that show that cases citing *Twombly* are more likely to dismiss a civil rights claim than those cases that do not). But see Victor E. Schwartz & Christopher E. Appel, *Rational Pleading in the Modern World of Civil Litigation: The Lessons and Public Policy Benefits of Twombly and Iqbal*, 33 HARV. J.L. & PUB. POL'Y 1107, 1126 (2010) (arguing that "the vision of providing 'fair notice' of a claim remains very much intact in the Federal Rules after *Iqbal* and *Twombly*"); Spencer, *supra* note 1, at 123–24 (arguing that many courts already required substantially factual pleadings even before *Twombly*).

⁷ See Schneider, *supra* note 1, at 520.

tion claims.⁸ Critics argue that “given the often indirect and subtle nature of employment discrimination, heightened pleading requirements make it very difficult for plaintiffs to plead the factual specificity necessary to withstand a motion to dismiss.”⁹ Heightened pleading standards have a greater effect on these claims because the often dispositive issues of “motivation, state of mind, and insidious practices are hidden by agents and employees”¹⁰ Furthermore, the *Twombly* and *Iqbal* paradigm arguably introduced judicial subjectivity at the pleading stages, leaving lower courts unsure how to apply the standards.¹¹ The result is that judges, some of whom look unfavorably upon employment litigation, may decide cases based on personal views before the plaintiff has an opportunity to investigate.¹²

Scholars and courts have two divergent interpretations of the new pleading standards: one allows judges to dismiss claims and therefore restricts access to federal courts, and the other is more flexible, particularly in the context of employment cases.¹³ This Note outlines these two approaches and argues that adopting the latter approach is a start to remedying the unjust results that plaintiffs may face in discrimination suits.¹⁴ Because of the prevailing judicial attitude toward employment

⁸ See Joseph A. Seiner, *After Iqbal*, 45 WAKE FOREST L. REV. 179, 195–96 (2010) (proposing a pleading standard for Title VII claims in the wake of *Iqbal*); Seiner, *supra* note 2, at 1026–27 (proposing a pleading standard for Title VII claims after *Twombly*).

⁹ Schwartz & Appel, *supra* note 6, at 1143.

¹⁰ Miller, *supra* note 3 at 45–46.

¹¹ See Schwartz & Appel, *supra* note 6, at 1138; Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1312–13 (2010). Professor Steinman notes that under one interpretation of the cases, a judge is merely to read the complaint and then “draw on judicial experience and common sense” to determine whether a claim is sufficiently “plausible.” Steinman, *supra*, at 1313 (quoting *Iqbal*, 129 S. Ct. at 1950). Such a reading could have discriminatory effects. See Schneider, *supra* note 1, at 542.

¹² See Miller, *supra* note 3 at 16, 22; Schneider, *supra* note 1, at 519, 564; see also Lee Reeves, *Pragmatism over Politics: Recent Trends in Lower Court Employment Discrimination Jurisprudence*, 73 MO. L. REV. 481, 482–83 (2008). Professor Reeves notes that while many scholars argue that judicial aversion to such claims are ideological, a better indicator of judicial attitude toward employment claims is the overall workload of the judge’s district or circuit. See Reeves, *supra*, at 482–83.

¹³ See Seiner, *supra* note 2, at 1015; Spencer, *supra* note 1, at 126. Professor Spencer argues that two approaches stemmed from *Twombly*. See Spencer, *supra* note 1, at 126. The first approach was an adherence to the pre-*Twombly* notice pleading requirements, treating civil rights claims “with a wide degree of latitude.” *Id.* The second approach “takes its cues from *Twombly*’s strict language and abrogation of *Conley* as authorizing substantial threshold scrutiny, permitting insufficiently substantiated civil rights claims to be dismissed.” *Id.*

¹⁴ See Ranzi Kassem, *Implausible Realities: Iqbal’s Entrenchment of Majority Group Skepticism Towards Discrimination Claims*, 114 PENN. ST. L. REV. 1443, 1483 (2009); Seiner, *supra* note 8, at 228.

discrimination claims, treating *Twombly* and *Iqbal* as granting a license to dismiss would be particularly damaging to these plaintiffs.¹⁵

This Note looks at the possible pleading requirements of hostile work environment discrimination under the two interpretations.¹⁶ Reading judicial discretion into pleadings would negatively affect potential hostile work environment plaintiffs in numerous ways.¹⁷ First, judges are generally averse toward employment discrimination plaintiffs and their claims.¹⁸ Thus, hostile work environment claims, as a subset of employment discrimination claims, will receive this initial level of bias.¹⁹ Second, judges appear to be increasingly more likely to dispose of hostile work environment cases before they reach a jury, possibly because of bias toward women or the problematic nature of asserting these claims.²⁰ Third, the hostile work environment doctrine already incorporates an element of “common sense” in its analysis.²¹ Allowing a further injection of “judicial experience and common sense” at the pleading stages could theoretically grant judges increased discretion.²² This increased discretion could result in dismissal of meritorious cases, but will almost certainly result in inconsistent application of the law.²³ There-

¹⁵ See Schneider, *supra* note 1, at 519. Particularly in light of *Iqbal*'s assertion that “judicial experience and common sense” play a part in the judge’s pleading analysis, pleading an objectively hostile work environment will be increasingly difficult given the literature that evidences judicial opposition to such claims. See *Iqbal*, 129 S. Ct. at 1949–50; M. Isabel Medina, *Matter of Fact: Hostile Environments and Summary Judgments*, 8 S. CAL. L. & WOMEN’S STUD. 311, 312–13, 315 (1999); Reeves, *supra*, note 12, at 482.

¹⁶ See Stephen R. Brown, *Reconstructing Pleading: Twombly, Iqbal, and the Limited Role of the Plausibility Inquiry*, 43 AKRON L. REV. 1265, 1296 (2010); Kassem, *supra* note 14, at 1445–46, 1481; *infra* notes 209–58.

¹⁷ See Elisabeth A. Keller & Judith B. Tracy, *Hidden in Plain Sight: Achieving More Just Results in Hostile Work Environment Sexual Harassment Cases by Re-Examining Supreme Court Precedent*, 15 DUKE J. GENDER L. & POL’Y 247, 258 (2008); Schneider, *supra* note 1, at 542–43 (arguing that judicial discretion is a problem in areas where subtle issues of credibility and materiality of facts are frequently meshed with the law). Lower courts have had trouble determining how to evaluate the facts of hostile work environment cases. See Keller & Tracy, *supra*, at 258. Therefore, judicial discretion in this area is problematic. See Schneider, *supra* note 1, at 542–43.

¹⁸ See Schneider, *supra* note 1, at 532, 564.

¹⁹ See *id.*

²⁰ See Medina, *supra* note 15, at 330; Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation*, 59 RUTGERS L. REV. 705, 709–10 (2007).

²¹ See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998).

²² See Miller, *supra* note 3, at 22.

²³ See Steinman, *supra* note 11, at 1330. Compare *Langford v. Int’l Union of Operating Eng’rs*, No. 10 Civ. 1644(RJH), 2011 WL 672414, at *21 (S.D.N.Y. Feb. 23, 2011) (denying an employer’s motion to dismiss a hostile work environment claim where the employee’s allegations that a supervisor used derogatory terms and forced her to clean a locker containing lewd pictures were sufficient to state a claim), with *EEOC v. Tuscarora Yarns, Inc.*,

fore, courts must adopt and apply the more liberal reading, as the strict standard of pleading will lead to unjust results that more acutely affect victims of discrimination.²⁴

Part I of this Note explains the history and doctrine of Rule 8 and its pleading requirements. Part II sets forth the elements of a hostile work environment claim and highlights how pleading standard changes could directly affect potential hostile work environment claims. Part III then examines two divergent scholarly interpretations of the current pleading doctrine and applies them to hostile work environment cases that faced motions to dismiss at the trial level. Such application produces divergent results. Part IV argues for an interpretation of *Twombly* and *Iqbal* that confers less judicial discretion than many critics believe the Supreme Court granted. The lower courts' adoption of this interpretation will protect hostile work environment plaintiffs and others from heightened pleading standards, maintaining the federal courts as an avenue for claims to be heard.

I. PLEADING HISTORY AND DOCTRINE

The Supreme Court interpreted Rule 8(a) to prohibit dismissal for failure to state a claim unless the plaintiff fails to allege facts that would allow relief.²⁵ The Court established a plausibility requirement for complaints, and lower courts have applied the ruling to employment discrimination cases despite arguments that *Bell Atlantic Corp. v. Twombly* only applies in antitrust claims.²⁶ The requirement consists of a two-pronged approach, where incredible claims are ignored and the remainder is analyzed for plausibility.²⁷

A. *Pre-Twombly and Iqbal Pleading*

The Federal Rules of Civil Procedure, adopted in 1938, created a system premised on an open access model of the federal courts to “promote the ends of justice.”²⁸ The pleading standards set forth in

No. 1:09-CV-217, 2010 WL 785376, at *1 (M.D.N.C. March 3, 2010) (applying *Iqbal* and *Twombly* to grant a motion to dismiss hostile work environment claims—where allegations included sexual assault—based on the complaint’s lack of factual specificity).

²⁴ See Kassem, *supra* note 14, at 1446; Steinman, *supra* note 11, at 1295.

²⁵ See *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957).

²⁶ See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007); Seiner, *supra* note 2, at 1029; see also *Twombly*, 550 U.S. at 596 (Stevens, J., dissenting).

²⁷ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950–51 (2009).

²⁸ Miller, *supra* note 3, at 3, 5 (quoting 5 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 1029 (3d ed. 2002)); see Spencer, *supra* note 1, at 101.

Rule 8(a) are perhaps the most important part of this goal.²⁹ Rule 8 requires only that the plaintiff set forth a “short and plain statement of the claim showing that the pleader is entitled to relief.”³⁰ The drafters sought to rid the civil system of the burdensome writ-pleading regime, which had procedural and linguistic traps that kept plaintiffs out of federal court.³¹ The effort of the drafters resulted in a simplified pleading standard, dubbed notice pleading.³² Courts met the idea with some resistance, as many still required fact-specific pleadings to survive motions to dismiss.³³ In 1957, the Supreme Court first articulated the notice pleading standard in *Conley v. Gibson*.³⁴

Conley involved an employment action brought by African American workers pursuant to the Railway Labor Act.³⁵ A group of African American railway workers sued their union and alleged discriminatory practices by their employer in violation of the Act.³⁶ The complaint included allegations that the collective bargaining agreement gave employees protection from discharge, and that the railroad violated it by replacing forty-five black workers with white workers.³⁷ The plaintiffs alleged that the union failed to protect the black workers in the same manner as white workers, thus violating the Act’s guarantee of fair representation.³⁸ The defendants argued that the complaint set forth generalities and failed to provide specific facts.³⁹ The Court answered:

[T]he Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is ‘a short and plain statement of the claim’ that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests.⁴⁰

The Court further interpreted Rule 8(a) as prohibiting dismissal of complaints “for failure to state a claim unless it appears beyond a doubt

²⁹ Spencer, *supra* note 1, at 101.

³⁰ FED. R. CIV. P. 8(a)(2).

³¹ See Miller, *supra* note 3, at 3–5; Spencer, *supra* note 1, at 104.

³² See Spencer, *supra* note 1, at 104–05.

³³ See *id.* at 104.

³⁴ See *Conley*, 355 U.S. at 47; Spencer, *supra* note 1, at 104.

³⁵ *Conley*, 355 U.S. at 42.

³⁶ *Id.* at 42–43.

³⁷ *Id.*

³⁸ *Id.* at 43.

³⁹ *Id.* at 47.

⁴⁰ *Conley*, 355 U.S. at 47 (quoting FED. R. CIV. P. 8(a)(2)).

that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”⁴¹ Many civil rights reforms soon followed the Court’s decision in *Conley*, as it “stood as a guarantor that civil rights (and other) claimants would at least be able to get into court”⁴²

Conley, decided in 1957, pre-dated Title VII of the Civil Rights Act of 1964 (Title VII).⁴³ The combination of *Conley* with Title VII opened the door to lawsuits by discrimination plaintiffs.⁴⁴ As a result, many courts—particularly beginning in the 1960s and more persistently in the 1990s—began to impose higher burdens of pleading in civil rights cases, including employment discrimination.⁴⁵ Some commentators suggest that the reason for this movement was individual judges’ views of these cases.⁴⁶ The fact that the judiciary became more ideologically conservative during this time period is also a popular explanation.⁴⁷

The Supreme Court finally addressed this movement in 1992, granting certiorari in *Swierkiewicz v. Sorema N.A.*⁴⁸ In *Swierkiewicz*, a fifty-three year-old Hungarian employee filed suit after working for Sorema N.A., a re-insurance company in New York City.⁴⁹ The company hired Swierkiewicz in 1989 as a senior vice president and chief underwriting officer.⁵⁰ Six years later, Francois Chavel, Sorema’s CEO and a native of France, demoted Swierkiewicz and transferred his responsibilities to Nicholas Papadopoulo, a thirty-two year-old French national.⁵¹ Swierkiewicz had twenty-six years of experience compared to Papado-

⁴¹ *Id.* at 45–46.

⁴² Spencer, *supra* note 1, at 102, 105. Indeed, the ten years following *Conley* “happened to coincide with the core period of the American civil rights movement” *Id.* at 106.

⁴³ See Seiner, *supra* note 2 at 1019. Significantly, along with Title VII, *Conley* pre-dated other landmark employment legislation such as the Age Discrimination in Employment Act of 1967. *See id.*

⁴⁴ *See id.* at 1013; Spencer, *supra* note 1, at 102.

⁴⁵ *See* Spencer, *supra* note 1, at 111, 113. While Professor Spencer focuses mostly on lower court decisions dismissing civil rights claims, the Supreme Court chose to address this issue with an employment discrimination claim, thereby indicating that the problem exists in both areas of the law. *See id.* at 119.

⁴⁶ *See* Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 557 (2001) (describing the unusual difficulty of proving employment discrimination claims and arguing that it results largely from judicial bias).

⁴⁷ *See* Reeves, *supra* note 12, at 482–83.

⁴⁸ *See Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 509–10 (2002); Spencer, *supra* note 1, at 117. *Swierkiewicz* came out of the Second Circuit that, at the time, applied a heightened pleading standard to employment discrimination cases. *Swierkiewicz*, 534 U.S. at 509. The Supreme Court granted certiorari because some circuits had adopted the same approach but others had not. *Id.* at 509–10, 510 n.2.

⁴⁹ *Id.* at 508.

⁵⁰ *Id.*

⁵¹ *Id.*

poulos' one.⁵² Chavel's reason for the demotion was that he wanted to "energize" his underwriting department.⁵³ Swierkiewicz sent a grievance to Chavel and requested a severance package; Chavel responded by giving Swierkiewicz two options: he could resign with no severance or be dismissed.⁵⁴ He chose dismissal.⁵⁵

Swierkiewicz alleged these facts in his complaint and also that he had been terminated because of his national origin in violation of Title VII, and because of his age in violation of the Age Discrimination in Employment Act of 1967 (ADEA).⁵⁶ The District Court dismissed the complaint and the Second Circuit affirmed because Swierkiewicz failed to plead facts establishing a prima facie case of discrimination under the framework of *McDonnell Douglas Corp. v. Green*.⁵⁷

The issue in *McDonnell Douglas*, however, regarded allocation of proof in an employment discrimination case, and thus, established an evidentiary standard and not a pleading requirement.⁵⁸ Therefore, the Supreme Court held that Rule 8(a)'s simplified pleading standard does not require one to establish a prima facie case of discrimination to survive a motion to dismiss.⁵⁹ Notably, the unanimous decision did not quote *Conley's* "no set of facts" language, and instead based the decision on its notice pleading function.⁶⁰ The Court held that a complaint satisfies the pleading requirements when it gives "fair notice of the basis for petitioner's claims."⁶¹ The Court therefore ruled that the notice pleading standards apply to all civil actions, including employment discrimination claims and rejected the argument that Title VII complaints require greater particularity.⁶²

Applying the established notice pleading standard to the facts of the case, the *Swierkiewicz* Court ruled that the "petitioner's complaint easily

⁵² *Id.*

⁵³ *Swierkiewicz*, 534 U.S. at 508.

⁵⁴ *Id.* at 509.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)).

⁵⁸ *Swierkiewicz*, 534 U.S. at 510.

⁵⁹ *Id.* at 515.

⁶⁰ *Id.* at 514; Steinman, *supra* note 12, at 1322.

⁶¹ *Swierkiewicz*, 534 U.S. at 514. The Court does, however, use language similar to *Conley's* "no set of facts" standard, noting that "[a] court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Id.* at 514 (quoting *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)); see also Steinman, *supra* note 11, at 1322 (noting that *Swierkiewicz* did quote a case that paraphrased *Conley's* language).

⁶² *Swierkiewicz*, 534 U.S. at 512–13. There are limited exceptions where this form of notice pleading does not apply, such as Rule 9(b) cases dealing with fraud. *Id.*

satisfies the requirements of Rule 8(a).⁶³ The allegations of Title VII and ADEA violations, combined with a description of the termination, age difference, and actors' nationalities gave "the respondent fair notice of what petitioner's claims [are] and the grounds upon which they rest."⁶⁴ The defendants further argued that these pleading standards, applied to employment discrimination cases, would cause disgruntled employees to file meritless claims.⁶⁵ The Court dismissed this argument as irrelevant, noting that "Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits."⁶⁶

B. *Twombly and Iqbal*

After *Swierkiewicz*, potential employment discrimination plaintiffs knew what they must allege to survive a motion to dismiss.⁶⁷ The first explicit departure from the *Conley* "no set of facts" standard of Rule 8(a) pleadings, however, came in *Twombly*.⁶⁸

1. *Twombly*

Unlike *Conley* and *Swierkiewicz*, *Twombly* arose not from an employment discrimination dispute, but from a complex antitrust matter.⁶⁹ When AT&T broke up in 1984, Incumbent Local Exchange Carriers (ILECs) gained singular control over the local telephone market but could not lawfully compete in the long-distance market.⁷⁰ In 1996, Congress opened the market, taking away the ILEC's monopoly over the local market and allowing them to compete in the long distance market.⁷¹ Congress required the ILECs to share their network with rival Competitive Local Exchange Carriers (CLECs).⁷² The *Twombly* plaintiffs comprised a class of consumers alleging that the ILECs failed to allow the CLECs to compete.⁷³ Plaintiffs alleged violation of the

⁶³ *Id.* at 514.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 515.

⁶⁷ See Seiner, *supra* note 2, at 1021.

⁶⁸ See *Twombly*, 550 U.S. at 562–63; Seiner, *supra* note 2, at 1023.

⁶⁹ See *Twombly*, 550 U.S. at 548–49; Seiner, *supra* note 2, at 1021 ("It is somewhat peculiar that one of the Supreme Court's most significant decisions for employment discrimination litigants would arise in a context having absolutely nothing to do with employment.")

⁷⁰ *Twombly*, 550 U.S. at 549.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 550.

Sherman Act—which prohibits agreements and conspiracies in restraint of trade—because the ILECs did not meaningfully compete and continued anticompetitive parallel conduct.⁷⁴ This allegedly resulted in inflated prices for local telephone and internet services, and thus entitled plaintiffs to treble damages under relevant antitrust law.⁷⁵

The district court dismissed the complaint for failure to state a claim, holding that the plaintiffs did not sufficiently allege that the ILECs agreed not to compete, and it downplayed the ILECs independent, self-interested conduct.⁷⁶ The Second Circuit reversed, holding that the complaint should not be dismissed.⁷⁷ The Second Circuit held that “a court would have to conclude that there is no set of facts that would permit a plaintiff to demonstrate” illegal behavior.⁷⁸

The Supreme Court reversed and held that the plaintiffs’ allegations were insufficient to survive a Rule 12(b)(6) motion to dismiss.⁷⁹ The Court held that “a plaintiff’s obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.”⁸⁰ The Court went on to establish a plausibility requirement to complaints, requiring “plausible grounds to infer an agreement.”⁸¹ The Court further articulated the plausibility rule in applying it to the facts, holding that the conspiracy and parallel conduct allegations, without “further factual enhancement,” fell short “of the line between possibility and plausibility” and thus stated no claim for relief.⁸²

Furthermore the Court actually abrogated the language of *Conley*.⁸³ Justice Souter, writing for the majority, asserted that the “no set of facts” standard from *Conley* has been “questioned, criticized, and explained away long enough” and therefore has “earned its retirement” and is “best forgotten as an incomplete, negative gloss on an accepted pleading standard.”⁸⁴ Despite the majority’s view, at least one commentator argues that *Conley* and *Swierkiewicz*, “map[ped] out an easy course

⁷⁴ *Id.* at 550–51; Seiner, *supra* note 2, at 1022–23.

⁷⁵ *Twombly*, 550 U.S. at 550.

⁷⁶ *Id.* at 552.

⁷⁷ *Twombly*, 425 F.3d at 118–19.

⁷⁸ *Id.* at 106, 114.

⁷⁹ *Twombly*, 550 U.S. at 555–56, 564, 570.

⁸⁰ *Id.* at 555 (internal quotations omitted).

⁸¹ *Id.* at 556.

⁸² *Id.* at 557.

⁸³ *Id.* at 562–63; Spencer, *supra* note 1, at 126.

⁸⁴ *Twombly*, 550 U.S. at 562–63.

for employment discrimination” and the *Twombly* decision will be the one criticized and questioned.⁸⁵

Notably, however, *Twombly* cites *Swierkiewicz* favorably throughout the opinion.⁸⁶ Thus, while claiming to adhere to current pleading doctrine, the Court shocked the civil procedural system and made some commentators wonder if the pleading standard had been heightened.⁸⁷ *Twombly*'s favorable treatment of *Swierkiewicz* elicited yet another inconsistency regarding the decision's intended scope.⁸⁸ Even though the Court appeared not to limit its application to the antitrust context—even citing an employment case in support—the question remained as to whether the new standard is ubiquitous.⁸⁹ Lower courts, however, have applied the ruling to employment discrimination cases.⁹⁰

2. *Iqbal*

The Supreme Court quickly addressed these uncertainties, granting certiorari to hear *Ashcroft v. Iqbal* in 2008.⁹¹ There, U.S. officials arrested Javid Iqbal, a Pakistani Muslim, on criminal charges in the wake of the September 11, 2001 terrorist attacks.⁹² Authorities deemed Iqbal of “high interest” and held him under restrictive, isolated conditions in federal prison.⁹³ Iqbal brought a *Bivens* action because of his treatment, claiming that his confinement was the result of invidious discrimination in contravention of the First and Fifth Amendments.⁹⁴ The Court held

⁸⁵ See Seiner, *supra* note 2, at 1021, 1024–26. In particular, “*Twombly* has created significant confusion over the proper pleading requirements in Title VII cases.” *Id.* at 1042.

⁸⁶ See *Twombly*, 550 U.S. at 569–70 (noting that the analysis did not run counter to *Swierkiewicz*); Seiner, *supra* note 8, at 194.

⁸⁷ See Seiner, *supra* note 8, at 194 (noting legitimate concern about the enduring validity of *Swierkiewicz*); Steinman, *supra* note 11, at 1355. In less than three years, *Twombly* had been cited nearly 24,000 times, a possible reflection of the perception that it raised the bar for federal pleading standards. Steinman, *supra* note 11, at 1355. Thus, though the Court claimed that it was not imposing a higher pleading standard, it seemed—at least ostensibly—to have that effect. See *Twombly*, 555 U.S. at 547 (noting the Court is not requiring heightened fact pleading); Steinman, *supra* note 11, at 1355.

⁸⁸ See Seiner, *supra* note 2, at 1024–26.

⁸⁹ See *Twombly*, 550 U.S. at 596 (Stevens, J., dissenting.); Seiner, *supra* note 2, at 1026–27.

⁹⁰ See *Twombly*, 550 U.S. at 596 (Stevens, J., dissenting.); Seiner, *supra* note 2, at 1029.

⁹¹ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1945, 1949 (2009) (addressing the Rule 8 pleading requirements discussed in *Twombly*).

⁹² *Id.* at 1942.

⁹³ *Id.* at 1943.

⁹⁴ *Id.* at 1933–34; see *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 396–97 (1971). *Bivens* created a private cause of action for damages against the federal government in the case of a constitutional violation. 403 U.S. at 397.

two allegations at issue in the complaint.⁹⁵ First, the complaint alleged that defendants Attorney General John Ashcroft and FBI Director Robert Mueller “‘each knew of, condoned, and willfully and maliciously agreed to subject’ [Iqbal] to harsh conditions of confinement ‘as a matter of policy, solely on account of [his] religion, race, and/or national origin’”⁹⁶ Second, Iqbal alleged that Ashcroft was the “‘principle architect’ of the policy” that resulted in his harsh confinement and that Mueller was instrumental in its “‘adoption, promulgation, and implementation.’”⁹⁷ The petitioners moved to dismiss for failure to state a claim.⁹⁸

Relying on *Conley*, the district court denied the motion to dismiss because a plausible set of facts existed on which Iqbal would be entitled to relief.⁹⁹ Citing to the *Twombly* decision, the court of appeals affirmed the lower court, concluding that *Twombly* required only a flexible plausibility standard where substantiation is only necessary in some contexts.¹⁰⁰ The Supreme Court reversed, holding that the claims did not satisfy federal pleading standards.¹⁰¹

Iqbal had to “plead sufficient factual matter to show that petitioners adopted and implemented the detention policies at issue not for a neutral, investigative reason but for the purpose of discriminating on the account of race, religion, or national origin.”¹⁰² The Court then applied a two-pronged approach to examine the sufficiency of Iqbal’s allegations.¹⁰³ First, the Court ruled that it need not accept conclusory allegations in complaints as true.¹⁰⁴ “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice,” and Rule 8 requires “more than an unadorned the-

The *Iqbal* Court recognized the *Bivens* action as the federal analog to suits brought against state officials for constitutional violations under 42 U.S.C. § 1983. *Iqbal*, 129 S. Ct. at 1948.

⁹⁵ See Steinman, *supra* note 11, at 1308–09.

⁹⁶ *Iqbal*, 129 S. Ct. at 1944 (quoting First Amended Complaint at 172a–73a, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009) (No. 07-1015) (hereinafter *Complaint*)).

⁹⁷ *Id.* (quoting *Complaint* at 157a).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Iqbal*, 129 S. Ct. at 1945, 1950–51.

¹⁰² *Id.* “Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior* Because vicarious liability is inapplicable to *Bivens* and § 1983 suits, a plaintiff must plead that each Government-official defendant, through the official’s own individual actions, has violated the Constitution.” *Id.* at 1948 (internal citations omitted).

¹⁰³ *Id.* at 1951.

¹⁰⁴ *Id.* at 1949.

defendant-unlawfully-harmed-me-accusation.”¹⁰⁵ Applying that standard, the Court held conclusory the complaint’s allegations of conscious agreement between Ashcroft and Mueller to adopt a policy based on race, and thus disregarded it.¹⁰⁶ The Court ruled the same with respect to the allegation that Ashcroft designed the scheme and Mueller implemented it.¹⁰⁷ The assertions were too “conclusory” to receive a presumption of truth.¹⁰⁸

Second, courts must examine what is left in the complaint and decide whether it states a plausible claim for which relief can be granted.¹⁰⁹ This is to be a “context-specific task that requires the reviewing court to draw on its judicial experience and common sense.”¹¹⁰ Under this second prong, the Court held that Iqbal’s complaint did not sufficiently allege claims of invidious discrimination that crossed the line from conceivable to plausible.¹¹¹ The government proffered that the arrests were permissible attempts to “detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts.”¹¹² The Court held the policies nondiscriminatory and credited the government’s explanation as more likely than Iqbal’s assertions of discriminatory intent.¹¹³

¹⁰⁵ *Iqbal*, 129 S. Ct. at 1949.

¹⁰⁶ *See id.* at 1951; *see also* Steinman, *supra* note 11, at 1335–37. Professor Steinman argues, in part, that the Court dismissed the allegations as conclusory not because the complaint did not allege factual support for them, but because they were insufficient from a transactional standpoint. Steinman, *supra* note 11, at 1335–37.

¹⁰⁷ *Iqbal*, 129 S. Ct. at 1951.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1950.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 1950–51.

¹¹² *Iqbal*, 129 S. Ct. at 1951. Professor Kassem argues that there are problems with this logic. Kassem, *supra* note 14, at 1456.

¹¹³ *Iqbal*, 129 S. Ct. at 1951–52. The problem with the asserted alternative explanation in *Iqbal* is two-fold. *See* Kassem, *supra* note 14, at 1455–56; Steinman, *supra* note 11, at 1311–12. First, it asserts a “more plausible” explanation for the alleged discriminatory conduct from the viewpoint of the judges when, from the subjective viewpoint of the defendant, it is actually more plausible that the policy intentionally discriminated rather than having unintended discriminatory affects. *See* Kassem, *supra* note 14, at 1456. Indeed, for Muslim Americans, discrimination is a recurring reality. *Id.* Second, apart from these potential discriminatory effects, assuming that an agreement between Ashcroft and Mueller did in fact exist, there is no way the defendant could have pled specific facts to plausibly assert that allegation. *See* Steinman, *supra* note 11, at 1311–12. Without the benefit of discovery and the resulting access to hypothetical evidence proving such a discriminatory intent, it is impossible to plausibly establish that one existed. *Id.*

II. THE HOSTILE WORK ENVIRONMENT AND ITS APPLICATION TO FEDERAL PLEADING STANDARDS

The Supreme Court enunciated a totality test to determine if a hostile work environment claim merits recovery.¹¹⁴ Heightening pleading standards, however, could make federal judges more prone to dismiss employment discrimination and civil rights claims.¹¹⁵ Even those claims that might not pass the summary judgment should move beyond the pleading stage, thereby allowing for a more developed factual record.¹¹⁶ Hostile work environment plaintiffs should not be categorically barred from discovery because employers typically have otherwise unobtainable information.¹¹⁷

A. Background: The Hostile Work Environment Sexual Harassment Claim

Title VII of the Civil Rights Act of 1964 makes it an “unlawful employment practice . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin”¹¹⁸ In 1971, the Fifth Circuit recognized a cause of action based on the conditions of a work environment rather than a specific adverse action.¹¹⁹ In *Rogers v. EEOC*, the court validated a claimant’s allegation of segregationist practices as sufficient grounds to state a claim for relief under Title VII.¹²⁰

In *Meritor Savings Bank v. Vinson*, the Supreme Court officially recognized a hostile work environment as an actionable claim under Title VII.¹²¹ More specifically, it recognized the claim based upon a sexual harassment-created hostile work environment.¹²² The Court stated, however, that “not all workplace conduct that may be described as ‘harassment’ affects a ‘term, condition, or privilege’ of employment within

¹¹⁴ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 23 (1993).

¹¹⁵ See *Schneider*, *supra* note 1, at 564 (noting that many newer federal judges are “deeply skeptical of civil rights and employment cases”).

¹¹⁶ See *id.* at 549–50; *Schneider*, *supra* note 20, at 706.

¹¹⁷ See *Miller*, *supra* note 3, at 45–46.

¹¹⁸ Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (2006).

¹¹⁹ See *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971). In *Rogers*, the court held that the phrase “‘terms, conditions or privileges of employment’ . . . sweeps within its protective ambit the practice of creating a working environment heavily charged with ethnic or racial discrimination.” *Id.* The court recognized that working environments can be so discriminatory as to destroy the “emotional and psychological stability” of workers. *Id.*

¹²⁰ *Id.* at 236, 239–241.

¹²¹ 477 U.S. 57, 65 (1986).

¹²² *Id.* at 66.

the meaning of Title VII.”¹²³ The Court then ruled that for “sexual harassment to be actionable, it must be sufficiently severe or pervasive to alter the conditions of [the victim’s] employment and create an abusive working environment.”¹²⁴ A trier of fact must examine the totality of circumstances in determining whether the conduct is sufficiently “severe or pervasive.”¹²⁵ In *Meritor*, a supervisor’s request for sexual favors clearly created a hostile environment.¹²⁶ The mere utterance of an offensive ethnic or racial epithet, however, will not affect the conditions of employment enough to violate Title VII.¹²⁷

In *Harris v. Forklift Systems, Inc.*, the Court further defined the standard announced in *Meritor*, specifically adding two elements to the ruling.¹²⁸ First, the conduct need not cause psychological or physical injury to the victim.¹²⁹ The Court instead took a “middle path” between making only harmful conduct actionable and making all “merely offensive” conduct actionable.¹³⁰ Second, it held that the conduct must be hostile both objectively (to a reasonable person) and subjectively (to the victim) to show altered employment conditions.¹³¹ It then provided a list of facts that might enter into the totality test, including “the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee’s work performance.”¹³²

¹²³ *Id.* at 67.

¹²⁴ *Id.* (internal quotations omitted).

¹²⁵ *See id.* at 69.

¹²⁶ *Meritor*, 477 U.S. at 67. Indeed, the Court noted that the conduct in the instant case included “not only pervasive harassment, but also criminal conduct of the most serious nature.” *Id.* The defendant—plaintiff’s supervisor—requested sexual favors repeatedly. *Id.* at 60. The plaintiff agreed out of “fear of losing her job,” and they had intercourse some forty or fifty times over a period of several years, often at the bank and during business hours. *Id.* Also, the complaint alleged that the defendant fondled the plaintiff in front of other employees, exposed himself to her, and “even forcibly raped her on several occasions.” *Id.*

¹²⁷ *Id.* at 67 (citing *Rogers*, 454 F.2d at 238).

¹²⁸ *Harris*, 510 U.S. at 21–22. The allegations in *Harris* centered around a manager’s derogatory remarks about a female employee and females in general. *Id.* at 19. The district court did not find the work environment abusive. *Id.* at 19–20. The Sixth Circuit affirmed and the Supreme Court reversed. *Id.* at 20, 23.

¹²⁹ *See id.* at 22.

¹³⁰ *Id.* at 21.

¹³¹ *Id.* at 21–22.

¹³² *Harris*, 510 U.S. at 23. The Court, while trying to resolve ambiguity, instead may have created it. *See id.* at 20; Keller & Tracy, *supra* note 17, at 258. The Court explicitly granted certiorari to resolve a split among the circuit courts. *Harris*, 510 U.S. at 20. Justice Scalia concurred in the judgment of *Harris*, but stated his worry that the Court did not

Finally, in *Oncala v. Sundowner Offshore Services, Inc.*, the Court expanded on what could be considered severe, noting:

The real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed. Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing and roughhousing . . . and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.¹³³

Thus, common sense and judicial attitude, imputed outside of jury proceedings, will factor into these lawsuits' determinations.¹³⁴ Furthermore, the Court warned against turning Title VII into a "general civility code."¹³⁵

B. Lower Court Applications: Why Pleading Standards Could Have a Large Effect on Hostile Work Environment Claims

Federal judges generally view employment discrimination and civil rights claims with suspicion.¹³⁶ Many courts hearing these claims have misapplied or ignored the Supreme Court's enunciated standards.¹³⁷ This standard, however, should be uniform, allowing hostile work environment claims to move beyond the pleading stage and fully develop a factual record.¹³⁸ This is especially important for hostile work environment plaintiffs, as they must prove a different prima facie case than other typical Title VII disparate treatment plaintiffs.¹³⁹ Therefore, these

create a clear standard. *See id.* at 24 (Scalia, J., concurring). He noted that the list of factors provided by the majority "adds little certitude." *Id.* In actuality, it might cause more confusion. *See Keller & Tracy, supra* note 17, at 258 (noting that the courts have often misapplied the factors and treated them as necessary and sufficient to establish a hostile work environment when the Supreme Court only meant to provide guidance). Furthermore, the factors themselves are tautological, using "severity" as a factor in determining whether the conduct is sufficiently severe. *See Harris*, 510 U.S. at 23; *Keller & Tracy, supra* note 17, at 259.

¹³³ 523 U.S. 75, 81–82 (1998).

¹³⁴ *See id.*

¹³⁵ *Id.* at 81.

¹³⁶ *See Schneider, supra* note 1, at 564 (noting that many federal judges are "deeply skeptical of civil rights and employment cases").

¹³⁷ *See Keller & Tracy, supra* note 17, at 256–60.

¹³⁸ *See Schneider, supra* note 1, at 566.

¹³⁹ *See Seiner, supra* note 2, at 1051–52.

plaintiffs should not be categorically barred from discovery because proving their specific burden often requires information possessed only by the employer.¹⁴⁰

1. Judicial Aversion to Hostile Work Environment Claims

In general, federal judges are prone to treat employment discrimination and civil rights claims with suspicion.¹⁴¹ Some argue that this is due to a conservative judicial bench.¹⁴² Others argue that greater case loads cause district and circuit court judges to dismiss employment claims in greater number, as evidenced by the strong correlation between a court's workload and its dismissal rate.¹⁴³ More specifically, there appears to be a correlation between the number of employment cases on a federal judge's docket and the number of dismissals issued on such cases.¹⁴⁴

Different explanations can be logically drawn from that data.¹⁴⁵ First, because judges only have a certain amount of time, the busier circuits and districts may be less likely to fully consider employment discrimination cases.¹⁴⁶ Second, judges may become jaded toward the burdensome system or employment discrimination claims altogether, and thus, doubt their validity.¹⁴⁷ Third, discrimination may have become more covert or has simply declined.¹⁴⁸ While this may have resulted in judges becoming "numb" to these claims, it is "doubtlessly quickened to the extent a judge questions the validity of discrimination

¹⁴⁰ See Miller, *supra* note 3, at 45–46.

¹⁴¹ See Schneider, *supra* note 1, at 564.

¹⁴² See Jack M. Beermann, *The Unhappy History of Civil Rights Legislation, Fifty Years Later*, 34 CONN. L. REV. 981, 1028–29 (“[O]verall[,] the Court continues to be more conservative than Congress on civil rights, and applies statutory construction as a tool for combating Congress’s civil rights agenda.”).

¹⁴³ See Reeves, *supra* note 12, at 513.

¹⁴⁴ *Id.*

¹⁴⁵ See *id.* at 503, 518.

¹⁴⁶ *Id.* at 503.

¹⁴⁷ *Id.* at 519–20.

¹⁴⁸ See Reeves, *supra* note 12, at 482, 518. A view that more employment claims are being filed coupled with a view that less actionable discrimination is occurring is likely to lead to a higher rate of dismissal. *Id.* at 518.

claims in general.”¹⁴⁹ Finally, there just may always be an inherent skepticism regarding the validity of discrimination claims.¹⁵⁰

Plaintiffs alleging to be victims of employment discrimination face a difficult battle in gaining relief through the justice system.¹⁵¹ Alleged victims of hostile work environment sexual harassment are no different.¹⁵² Lower courts have inconsistently applied—or consistently misapplied—this doctrine to hostile work environment sexual harassment claims since *Meritor*.¹⁵³ As a result, lower courts have disposed of seemingly meritorious claims before allowing them to reach a jury.¹⁵⁴ They have largely cabined these Supreme Court holdings to their facts, failed to differentiate between the subjective and objective tests, misapplied the *Harris* factors, and even ignored the Supreme Court altogether by making their own standards.¹⁵⁵

2. Problems with Summary Judgment at the Motions to Dismiss Stage

Some may argue that heightened pleading standards are not as damaging to individual plaintiffs in hostile work environment cases as they are in other Title VII cases.¹⁵⁶ In the past, erroneous dismissals of meritorious claims have occurred at summary judgment.¹⁵⁷ *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, however, moved claim disposal, including claims alleging a hostile work environment, up to the motion

¹⁴⁹ *Id.* From this inference, one may argue that the Supreme Court, in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, effectively balanced the new standards’ rigorousness—thereby keeping claims out of court—with the openness of pleading standards. See Schwartz & Appel, *supra* note 6, at 1144.

¹⁵⁰ See Schneider, *supra* note 1, at 564; Spencer, *supra* note 1, at 112 (noting that the enduring rationale among the lower courts prior to *Conley v. Gibson* was that civil rights claims are more likely to be frivolous and are too “expensive and vexatious”).

¹⁵¹ See Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 103, 103 (2009).

¹⁵² See Keller & Tracy, *supra* note 17, at 256 (“The needless discomfort with how to evaluate conduct has also led to an unjustified number of summary dispositions for defendants and vacated jury determinations for plaintiffs.”).

¹⁵³ See *id.* at 249.

¹⁵⁴ See THERESA M. BEINER, GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW 20 (2005).

¹⁵⁵ See Keller & Tracy, *supra* note 17, at 256–60; see also Nicole Newman, Book Note, *The Reasonable Woman: Has She Made a Difference?*, 27 B.C. THIRD WORLD L.J. 529, 555 (reviewing ANN SCALES, LEGAL FEMINISM: ACTIVISM, LAWYERING AND LEGAL THEORY (2006)).

¹⁵⁶ See Miller, *supra* note 3, at 16, 46; Seiner, *supra* note 2, at 1051–52.

¹⁵⁷ See Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 72–73 (1999).

to dismiss stage.¹⁵⁸ Due to the relevance of the plaintiff's personal experience, discovery is not essential to hostile work environment claimants because they do not need access to a company's hiring records.¹⁵⁹ Some therefore argue that heightened pleading standards make no difference because, in any event, the claims would not advance past summary judgment.¹⁶⁰ The employer is less likely to have dispositive information, or even information relevant to the plausibility or conceivability of the hostile work environment plaintiff's claim.¹⁶¹

Beyond the access to discovery, however, there are other ways in which individual hostile work environment plaintiffs are harmed if their pleadings are dismissed at this early stage.¹⁶² Summary judgment decision-making at the district court level has regularly been problematic and controversial.¹⁶³ Particularly, this trouble exists in hostile work environment summary judgment rulings.¹⁶⁴ After *Twombly* and *Iqbal*, many of the cases decided on pleadings have raised the same problems that scholars identified with summary judgment decisions.¹⁶⁵ One of these problems is that hostile work environment plaintiffs—and indeed female plaintiffs in general—are subjected to a higher claim disposal rate at summary judgment.¹⁶⁶

¹⁵⁸ See Medina, *supra* note 15, at 315; Schneider, *supra* note 1 at 530–31 (“[T]he new heightened pleading standard seems to render summary judgment irrelevant because district judges can now simply dismiss cases on Rule 12(b)(6) motions and not wait for summary judgment.”).

¹⁵⁹ See Miller, *supra* note 3, at 46; Seiner, *supra* note 2, at 1051–52 (noting that, because the necessary facts should be well within the plaintiff's knowledge, the standard should be relatively easy to satisfy in hostile work environment cases).

¹⁶⁰ See Medina, *supra* note 15, at 313 (noting “the increased trend of courts to grant summary judgment to employers in sexual harassment cases”); Schneider, *supra* note 1 at 530–31. As Professor Medina argues, claim dismissal on summary judgment is common, so if the dismissal simply came earlier, the plaintiff would not appear to lose anything. See Medina, *supra* note 15, at 313; see also Schneider, *supra* note 1, at 530–31.

¹⁶¹ See Miller, *supra* note 3, at 16 (noting that the new pleading standards will keep out meritorious claims and “increase the burden on under-resourced plaintiffs who typically contest with industrial and governmental Goliaths in cases in which critical information is largely in the hands of defendants and is unobtainable without access to discovery”); Seiner, *supra* note 2, at 1051–52.

¹⁶² See Schneider, *supra* note 1, at 556.

¹⁶³ See Beiner, *supra* note 157, at 73–74; Schneider, *supra* note 1, at 549–50.

¹⁶⁴ See Beiner, *supra* note 157, at 74–75; Medina, *supra* note 15, at 315; Schneider, *supra* note 1, at 550.

¹⁶⁵ Schneider, *supra* note 1, at 544 (“What is now shocking is the degree to which the Supreme Court's decision in *Iqbal* has made the analytic problems that have been so deeply troubling in summary judgment jurisprudence explicit at the pleading stage.”).

¹⁶⁶ See Schneider, *supra* note 20, at 709–10 (citing evidence that summary judgment is granted more frequently in cases with female plaintiffs).

Despite the likelihood that a complaint dismissed at the 12(b)(6) stage would not pass summary judgment, there are three important reasons to let a claim move beyond the pleading stage to a more developed factual record.¹⁶⁷ First, “subtle issues of credibility, inferences, and close legal questions” are often involved, and “where issues concerning the ‘genuineness’ or ‘materiality’ of facts are frequently intertwined with the law,” a jury’s broader perspective may be preferable.¹⁶⁸ Second, hostile work environment plaintiffs and female plaintiffs in general, are less successful at the summary judgment stage.¹⁶⁹ Under *Twombly* and *Iqbal*, this discrepancy simply moves up to the pleading stage, where a judge’s subjective determination is based on a record even more sparse than that available at summary judgment.¹⁷⁰ Finally, disposition often results in private adjudication, which then takes place on a sparsely developed factual record.¹⁷¹ As a result, courts issue fewer public decisions and do not create precedent.¹⁷² Thus, novel claims are less likely to enter the public sphere “with the attendant legitimization of claims and public knowledge of new harms”¹⁷³

3. Problems Specific to Pleading Hostile Work Environment Claims

Hostile work environment plaintiffs must prove a prima facie case different from that of other typical Title VII disparate treatment plaintiffs.¹⁷⁴ The elements of a prima facie case for retaliatory discrimination, for example, are (1) protected opposition activity, (2) adverse employment action, and (3) a causal connection between the protected conduct and the adverse action.¹⁷⁵ Plaintiffs face problems in proving causal connections because employers typically have the information needed to provide evidentiary support, thus requiring discovery.¹⁷⁶ Proof of dis-

¹⁶⁷ See *id.* at 706.

¹⁶⁸ Schneider, *supra* note 1, at 542–43.

¹⁶⁹ See Schneider, *supra* note 20, at 709–10.

¹⁷⁰ See Schneider, *supra* note 1, at 544–45.

¹⁷¹ *Id.* at 544–45, 556.

¹⁷² *Id.* at 556.

¹⁷³ *Id.* As a result of the phenomenon, many alleged victims of employment discrimination are increasingly forced into state courts to adjudicate their claims. *Id.* at 550–51. This counteracts the vision the drafters of the Federal Rules of Civil Procedure had for the Federal Courts. See Miller, *supra* note 3, at 101. Moreover, because some state judges (at least in some states) are traditionally exposed to more political pressure than federal judges, the chance for bias in the state judicial system is just as great as it is in the federal system. See Schneider, *supra* note 1, at 567–68.

¹⁷⁴ See Seiner, *supra* note 2, at 1051–52.

¹⁷⁵ See, e.g., *Velez v. Janssen Ortho, LLC*, 467 F.3d 802, 806 (1st Cir. 2006).

¹⁷⁶ See Miller, *supra* note 3, at 45–46.

criminatorial intent prior to discovery has led to much scholarly debate regarding the plausibility standard announced in *Twombly* and *Iqbal*.¹⁷⁷

In contrast, the typical elements of a hostile work environment claim under Title VII require: (1) a plaintiff's membership in a protected class, (2) who is subject to unwelcome harassment, (3) based on the plaintiff's membership in that protected class, and (4) because of the harassment's severity or pervasiveness, the harassment created an abusive working environment by altering a term, condition, or privilege of the plaintiff's employment.¹⁷⁸ Because plaintiffs must demonstrate both objectively and subjectively hostile environments, complaints tend to simply allege the behavior that caused the environment.¹⁷⁹ Unlike disparate treatment cases, hostile work environment claims do not require inquiry into employment practices; the discriminatory intent is evidenced by an actor's behavior.¹⁸⁰

While discovery may not prove as pivotal, heightened pleading standards still negatively affect hostile work environment plaintiffs.¹⁸¹ Unlike claimants in typical Title VII cases, there is no simple, single allegation that sums up the employer's violation.¹⁸² For instance, employees that allege termination because of gender, may satisfy the adverse action prong by simply alleging gender bias.¹⁸³ In a hostile work environment claim, however, there need not be a specific adverse employment action; the environment itself is the adverse action.¹⁸⁴ This can lead to confusion as to the level of factual specificity required at the pleading stage.¹⁸⁵ Therefore, if complaints are not construed liberally, and instead are dismissed for a lack of factual specificity, the result could bar a meritorious claim.¹⁸⁶

¹⁷⁷ See Schwartz & Appel, *supra* note 6, at 1134; Seiner, *supra* note 8, at 195. In *Iqbal*, as a result of the Court's dismissal of the government's alleged discriminatory intent, the Court held that the complaint failed to state a claim. See *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951–52 (2009). This has led scholars to argue that the heightened pleading requirements for discriminatory intent should not be applied in the employment context. See Seiner, *supra* note 8, at 195, 203.

¹⁷⁸ See *Harsco Corp. v. Renner*, 475 F.3d 1179, 1186 (10th Cir. 2007).

¹⁷⁹ See Seiner, *supra* note 2, at 1051.

¹⁸⁰ See Medina, *supra* note 15, at 330; Seiner, *supra* note 2, at 1051. Since no tangible economic harm need be suffered, the employer's hiring and firing practices are not essential to the hostile work environment claim. See Seiner, *supra* note 2, at 1051.

¹⁸¹ See Medina, *supra* note 15, at 330; Schneider, *supra* note 1, at 556; Seiner, *supra* note 2, at 1051.

¹⁸² See Seiner, *supra* note 2, at 1044, 1051.

¹⁸³ See *id.* at 1045.

¹⁸⁴ See *id.* at 1051.

¹⁸⁵ See Schwartz & Appel, *supra* note 6, at 1143.

¹⁸⁶ See Miller, *supra* note 3, at 16; Schwartz & Appel, *supra* note 6, at 1143.

Furthermore, the introduction and heightened use of judicial subjectivity at the pleading stage creates another problem for hostile work environment claimants.¹⁸⁷ Common sense already has a substantial impact on the jurisprudence of hostile work environment sexual harassment cases.¹⁸⁸ To ascribe too much weight to the “judicial subjectivity and common sense” methodology could further compound this problem.¹⁸⁹ The effects could be disastrous for all potential minority and female plaintiffs, including victims of hostile work environment discrimination.¹⁹⁰

III. TWO INTERPRETATIONS OF *TWOMBLY* AND *IQBAL*

Bell Atlantic Corp. v. Twombly and *Ashcroft v. Iqbal* have generated a substantial amount of scholarship regarding the federal pleading standards.¹⁹¹ There are at least two different readings of how lower courts may approach the inquiry into a plaintiff’s complaint at the motion to dismiss stage.¹⁹²

¹⁸⁷ See Miller, *supra* note 3, at 22 (arguing that bringing “judicial experience and common sense” into the judicial determination of the plausibility of claims at the pleading stages grants “virtually unbridled discretion to district court judges” and “has sparked a concern that some judges will allow their own views on various substantive matters to intrude on their decisionmaking and no longer will feel bound by the four corners of the complaint”); Schneider, *supra* note 1, at 564 (noting that many judges appear to be skeptical of employment cases).

¹⁸⁸ See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998). Justice Scalia’s opinion in *Oncale* states that common sense will enable both courts and juries to distinguish between innocent and actionable conduct. *Id.* Judicial common sense, however, may differ from that of a jury, and often in the hostile work environment context, judges push to grant summary judgment in unjustified scenarios. See Beiner, *supra* note 157, at 74; Schneider, *supra* note 1, at 542–43 (noting juries have a more diverse perspective than judges).

¹⁸⁹ See Schneider, *supra* note 1, at 542–43 (noting that summary judgment dispositions, as well as dismissals of complaints for failure to state a claim, necessarily involve “a tremendous amount of discretion, and discretion can be the locus of hidden discrimination”).

¹⁹⁰ See Kassem, *supra* note 14, at 1445–46 (arguing *Iqbal* embraces subjective assessments under the guise of plausibility and common sense and, in doing so, raises concerns that a minority plaintiff’s claim is less likely to find agreement with a federal judiciary that “does not shine by its diversity”); Schneider, *supra* note 1, at 542–43.

¹⁹¹ See Steinman, *supra* note 11, at 1295–97. For an extensive list of scholarly pieces regarding *Twombly* and *Iqbal*, see *id.* at 1296 nn.10, 12.

¹⁹² Compare Brown, *supra* note 16, at 1296 (arguing that while some judicial subjectivity has been introduced, it is limited and not as problematic as critics have suggested), with Kassem, *supra* note 14, at 1445–46, 1481 (arguing that *Iqbal* has encouraged subjective judicial assessments of claims in a way that allows them to dismiss claims they personally believe cannot be true).

A. Case Examples

In *EEOC v. Tuscarora Yarns, Inc.*, an employee alleged that her plant manager sexually harassed her to such an extent that it caused a hostile work environment.¹⁹³ The complaint alleged that the male plant manager propositioned the plaintiff for sex, made unwelcome sexual comments to her, inappropriately touched her, and sexually assaulted her.¹⁹⁴ The complaint also alleged that the harassment was based on the plaintiff's sex and that "it was sufficiently severe or pervasive to alter the conditions of her employment by creating a sexually hostile work environment," and therefore violated Title VII.¹⁹⁵

In deciding the defendant's motion to dismiss, the district court cited *Swierkiewicz v. Sorema N.A.* to show that a Title VII plaintiff need not allege specific facts but still must plead facts relating to each claim element.¹⁹⁶ The court held that the complaint was "virtually devoid of any facts underlying the alleged sexual harassment," thereby dismissing it for failure to allege facts showing an objectively and subjectively severe or pervasive environment.¹⁹⁷

Likewise, in *Langford v. International Union of Operating Engineers*, an African American female plaintiff filed an action asserting race and gender discrimination claims under Title VII.¹⁹⁸ She worked as an apprentice in a program run by the International Union of Operating Engineers, Local 30.¹⁹⁹ She alleged that her supervisor and other white employees berated her, verbally abused her, and refused to train her.²⁰⁰ She also alleged that they used racially offensive terms such as calling a black engineer a "monkey" or a "gorilla," calling a black female a "black bitch," and commenting that "Oprah Winfrey should have died in a plane crash."²⁰¹ Finally, she alleged that she received a number of unenviable work tasks, such as cleaning up toxic chemicals, cleaning a

¹⁹³ No. 1:09-CV-217, 2010 WL 785376 at *1 (M.D.N.C. March 3, 2010).

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at *2.

¹⁹⁷ See *Tuscarora*, 2010 WL 785376, at *2-*3. The court seemed to rely mostly on the environment's lack of severity or pervasiveness, stating that the complaint lacked sufficient "facts upon which to reach such a conclusion." *Id.* at *3.

¹⁹⁸ No. 10 Civ. 1644(RJH), 2011 WL 672414 at *1 (Feb. 23, 2011).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.*

men's bathroom containing sexually suggestive pictures, and walking across a dangerous catwalk.²⁰²

The defendants argued in a motion to dismiss that the allegations were conclusory and did not meet the time and filing requirements of Title VII.²⁰³ The court interpreted defendant's argument as referring to the complaint's lack of concrete dates.²⁰⁴ Denying the motion, the court held that Title VII complaints need not plead specific dates of discriminatory actions.²⁰⁵ Though focusing mainly on timing and vicarious liability aspects, the court did not dismiss any allegations as conclusory or engage in a plausibility analysis—instead holding that the plaintiff had adequately stated a claim on which relief could be granted.²⁰⁶

B. *The First Prong: When Are Allegations Conclusory?*

In *Iqbal*, the Supreme Court solidified its two-pronged approach to evaluating the sufficiency of complaints on 12(b)(6) motions to dismiss.²⁰⁷ In deciding that *Iqbal* had failed to push his claims over the line from conceivable to plausible, the Court began by identifying and disregarding conclusory allegations that were not entitled to a presumption of truth.²⁰⁸ There are at least two divergent readings of what constitutes a conclusory claim and what the lower courts must consider in analyzing complaints.²⁰⁹

²⁰² *Id.* The male coworkers did not similarly have to clean the women's bathroom, in which the male workers vomited and urinated. *Id.* Furthermore, one of the female employee's coworkers told her later that she had no business traversing the catwalk because the task could have been performed safely from the control room. *Id.*

²⁰³ *Langford*, 2011 WL 672414, at *8.

²⁰⁴ *Id.* at *9.

²⁰⁵ *Id.* at *9, *21.

²⁰⁶ *See id.* at *9–*10, *14, *21.

²⁰⁷ *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949–50 (2009).

²⁰⁸ *Id.* at 1950–51. The *Iqbal* Court first disregarded the allegation that defendants Ashcroft and Mueller agreed to subject *Iqbal* to the harsh conditions he faced “as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.” *Id.* at 1951. The Court dismissed the allegations that Ashcroft was the principle architect of the policy and that Mueller was instrumental in adopting and executing it. *Id.*

²⁰⁹ Compare A. Benjamin Spencer, *Iqbal and the Slide Toward Restrictive Procedure*, 14 LEWIS & CLARK L. REV. 185, 196 (2010) (arguing that conclusory allegations are factual statements unexpected by judges and thus not believable), with Steinman, *supra* note 11, at 1324–25 (arguing that conclusory allegations are allegations that fail to provide fair notice, and thus, this step is not drastically different from notice pleading).

1. The Conclusory Allegation Requires More Evidence

One of the main criticisms of *Twombly* and *Iqbal*, especially as applied to employment discrimination claims, is that they require plaintiffs to plead information not obtainable without discovery.²¹⁰ One commentator calls this the Catch-22 effect.²¹¹ In hostile work environment claims, however, plaintiffs tend to have the necessary information to plead effectively and the Catch-22 effect does not necessarily apply.²¹²

Hostile work environment claims, though, tend to suffer from a court's definition of a conclusory allegation.²¹³ A conclusory allegation is one that forgoes the factual underpinnings of the claim and instead states the legal conclusions that would presumably attach to those underlying facts.²¹⁴ *Iqbal* alleged that Ashcroft and Mueller agreed on and carried out a discriminatory policy for discriminatory reasons.²¹⁵ The Court held *Iqbal*'s allegation conclusory because the alleged facts lacked the necessary corroborating evidence elsewhere in the complaint.²¹⁶

Therefore, a claim's context becomes relevant at this first stage of determining which allegations receive a presumption of truth.²¹⁷ The more an assertion is thought to be unrealistic, the more likely judges are to reject it as conclusory.²¹⁸ Discrimination in the workplace, however, is much more believable than a high-level government conspiracy.²¹⁹

²¹⁰ See Miller, *supra* note 3, at 15–16.

²¹¹ David L. Noll, *The Indeterminacy of Iqbal*, 99 GEO. L.J. 117, 120 (2010).

²¹² See Seiner, *supra* note 2, at 1051.

²¹³ See Beiner, *supra* note 157, at 74; Medina, *supra* note 15, at 315; Spencer, *supra* note 209, at 195–97; see e.g., *Tuscarora*, 2010 WL 785376 at *2–*3.

²¹⁴ See Edward A. Hartnett, *Taming Twombly, Even After Iqbal*, 158 U. PA. L. REV. 473, 491 (2010); Spencer, *supra* note 211, at 193.

²¹⁵ See *Iqbal*, 129 S. Ct. at 1944. As Professor Spencer argues, this allegation does not forgo the facts required to state a claim—namely that Mueller and Ashcroft had intent—and the complaint was not conclusory under the traditional definition. See Spencer, *supra* note 209, at 194–95. Professor Spencer compares two claims in the complaint. *Id.* at 194. The first stated that Ashcroft and Mueller approved the policy of holding the detainees, but the Court held this non-conclusory. *Id.* The second stated that Ashcroft and Mueller approved the policy solely based on race, religion, and/or national origin, which the Court held conclusory and not entitled to the presumption of truth. *Id.* He then concluded from this observation that “the conclusory label cannot credibly be applied to *Iqbal*'s rejected allegations as a valid rationale for discarding them, [and] something else must be at play.” *Id.* at 194–95.

²¹⁶ See Spencer, *supra* note 209, at 195.

²¹⁷ *Id.* at 195–96.

²¹⁸ See *id.* at 196.

²¹⁹ See Seiner, *supra* note 8, at 196.

Under this reading, however, judicial subjectivity may control in the first prong of the pleading standard and can damage hostile work environment cases.²²⁰ In *Tuscarora*, as in *Iqbal*, the plaintiff's claims were factual in nature and the United States District Court for the Middle District of North Carolina disregarded them as conclusory.²²¹ If *Twombly* and *Iqbal* indeed allow judges to disbelieve allegations they deem implausible, then the *Tuscarora* court followed precedent.²²² The judge may have been skeptical of the claim because the plaintiff did not recount the exact facts of the alleged assault, even though the complaint pled each claim element.²²³ In some ways, hostile work environment plaintiffs are more susceptible to this problem because they do not show physical injury, which may lead to judges lending them even less credibility.²²⁴ Thus, if the lower courts adopt this reading, hostile work environment plaintiffs will have more difficulty in passing the motion to dismiss stage.²²⁵

2. Inferences Welcome

The second reading of the sufficiency analysis's first prong dismisses the idea that *Iqbal* allows judges to simply examine the credibility of allegations and reject them if found implausible.²²⁶ Professor Adam Steinman, for example, maintains that the cases "cannot legitimately be read as allowing judges to reject allegations just because they perceive them to be implausible."²²⁷ Steinman argues that, in *Iqbal*, legitimate questions exist as to the allegation that Ashcroft and Mueller truly intended to discriminate.²²⁸ *Iqbal* had no personal knowledge of the al-

²²⁰ See Medina, *supra* note 15, at 315 (arguing that courts increasingly dispose of hostile work environment claims because of "judicial discomfort with the perceived lack of injury to the victim"); Spencer, *supra* note 209, at 197 (arguing that the skepticism of *Iqbal* gives voice to Justices' "institutional biases").

²²¹ See *Iqbal*, 129 S. Ct. at 1944; *Tuscarora*, 2010 WL 785376, at *1, *3. Just as the Court in *Iqbal*, under Professor Spencer's view, rejected the assertion as conclusory because it lacked corroboration, so too did the court in *Tuscarora* reject the plaintiff's claims as lacking factual substantiation even while acknowledging that the hostile work environment might have existed. See *Tuscarora*, 2010 WL 785376, at *2-*3; Spencer, *supra* note 209, at 195.

²²² See *Tuscarora*, 2010 WL 785376, at *2-*3; Spencer, *supra* note 209, at 195-96.

²²³ See *Tuscarora*, 2010 WL 785376, at *2-*3; Schneider, *supra* note 1, at 519, 564.

²²⁴ See Medina, *supra* note 15, at 315.

²²⁵ See Medina, *supra* note 15, at 315; Spencer, *supra* note 211, at 195-97; see e.g., *Tuscarora*, 2010 WL 785376 at *2-*3.

²²⁶ See Noll, *supra* note 211, at 127; Steinman, *supra* note 11, at 1340.

²²⁷ See Steinman, *supra* note 11, at 1340.

²²⁸ *Id.* at 1336-37. Professor Steinman argues that a complaint that establishes a "transactional narrative" could avoid this problem. See *id.* at 1334, 1337. Merely re-ordering the presentation of the allegations could have helped *Iqbal*'s case because he described all the

leged discriminatory intent.²²⁹ The same is true in *Twombly*, where the plaintiff asked the Court to infer an agreement based on parallel conduct.²³⁰ Therefore, argues Professor Steinman, where a plaintiff has no personal knowledge of a claim's essential element, the Court must look to the allegations to see if it may reasonably infer that element.²³¹

Under this reading of the first prong, the lower courts are granted less subjective discretion over which allegations to disregard.²³² Judicial discretion to dismiss allegations still exists, but only where the plaintiff lacks the personal knowledge of the events that give rise to the essential element.²³³ Interpreting the first prong in this manner, the *Tuscarora* court seems to have applied *Twombly* and *Iqbal* incorrectly.²³⁴ In *Tuscarora*, the court held that the allegations were conclusory not because the plaintiff lacked personal knowledge, but because they lacked sufficient facts.²³⁵ Indeed, the court acknowledged that the plaintiff may have reasonable grounds to make those allegations, but that the complaint was too "flush with innuendo . . . to reach such a conclusion."²³⁶ If the court merely required personal knowledge instead of plausible, factually substantiated allegations, then the complaint in *Tuscarora* may well have survived.²³⁷

conditions of his confinement before alleging that Ashcroft and Mueller approved them with discriminatory intent. *Id.* at 1337. Moreover, there are too many different interpretations of this allegation for a judge to simply accept its truth. *See id.*

²²⁹ *See* Noll, *supra* note 211, at 130. Under this interpretation the Court did not reject Iqbal's claim because of its believability, but because it concluded that he lacked "reasonable grounds" to make such an assertion. *Id.* The Court is not injecting its own bias into the conclusory analysis, but rather is policing the reasonableness of the inferences drawn from the plaintiff's actual knowledge. *Id.* at 128.

²³⁰ *See* Bell Atl. Corp. v. Twombly, 550 U.S. 544, 564 (2007); Steinman, *supra* note 11, at 1337 ("The *Twombly* complaint has similar problems.").

²³¹ *See* *Iqbal*, 129 S. Ct. at 1951; Steinman, *supra* note 11, at 1314.

²³² *See* Steinman, *supra* note 11, at 1340.

²³³ *See* Noll, *supra* note 211, at 130 (arguing that those claims are conclusory only if they are not reasonable inferences from the plaintiff's personal knowledge); Steinman, *supra* note 11, at 1298 ("[O]nly conclusoriness is a basis for refusing to accept the truth of an allegation; implausibility is not.").

²³⁴ *See* *Tuscarora*, 2010 WL 785376, at *2-*3; Noll, *supra* note 213, at 130.

²³⁵ *See* *Tuscarora*, 2010 WL 785376, at *3.

²³⁶ *Id.*

²³⁷ *See id.* at *2-*3; Noll, *supra* note 211, at 130. The court relied on the complaint's conclusory nature and not the objectively non-hostile work environment to dismiss the claim. *See* *Tuscarora*, 2010 WL 785376, at *2-*3. Professor Noll points out that in *Swierkiewicz*, the "allegations are somewhat sparse," but the plaintiff cited a fact from his personal knowledge where one could reasonably infer that he was a victim of intentional discrimination. Noll, *supra* note 211, at 145. Likewise, the complaint in *Tuscarora* alleged instances of sexual assault and inappropriate touching, which must have been from the alleged victim's personal knowledge. *See* *Tuscarora*, 2010 WL 785376, at *1.

C. *The Second Prong: When Is the Claim Plausible?*

After the Court in *Iqbal* decided that it needed to disregard two of the plaintiff's allegations, it considered what was left of the complaint to determine whether it plausibly "suggest[ed] entitlement to relief."²³⁸ The Court noted that determining whether the complaint states a plausible claim for relief is a "context-specific task" and that the reviewing court must "draw on its judicial experience and common sense."²³⁹ The majority went on to hold that although the plaintiff's non-conclusory assertions may be consistent with Ashcroft and Mueller's alleged discriminatory intent, they did not plausibly suggest it because a more likely explanation existed.²⁴⁰ Much like the first prong, scholars offer significantly divergent readings regarding this plausibility inquiry.²⁴¹

1. A License to Dismiss Grants Unfettered Discretion

Under the first reading of the sufficiency analysis's second prong, *Iqbal* has given lower courts a "[l]icense to [d]ismiss" complaints for subjective and arbitrary reasons.²⁴² Professor Miller, for example, argues that *Iqbal* and *Twombly* grant "unbridled" judicial discretion, and will allow them to import personal views on substantive matters into a complaint's sufficiency determination.²⁴³ Given the documented aversion that judges have toward employment litigation cases, this prong could be a powerful case management tool—granting judges the authority to dismiss cases outright at the pleadings stage.²⁴⁴

The courts in *Tuscarora* and *Langford* did not expressly address this prong of *Iqbal* and *Twombly*.²⁴⁵ If *Iqbal* and *Twombly* allow a judge's views

²³⁸ *Iqbal*, 129 S. Ct. at 1951.

²³⁹ *Id.* at 1950.

²⁴⁰ *Id.* at 1951–52.

²⁴¹ Compare Kassem, *supra* note 14, at 1450 ("By setting 'common sense' as a metric by which to determine plausibility, the Court specifically calls on judges to rely on views that will likely privilege mainstream over minority perspectives by virtue of their being 'common.'"), with Steinman, *supra* note 11, at 1319 (arguing that the plausibility inquiry in *Twombly* and *Iqbal* should not allow courts to dismiss a complaint solely because the judge finds it implausible).

²⁴² Robert L. Rothman, *Twombly and Iqbal: A License to Dismiss*, LITIG., Spring 2009, at 1, 1; see Miller, *supra* note 3, at 22; Noll, *supra* note 211, at 121.

²⁴³ See Miller, *supra* note 3, at 21–22.

²⁴⁴ See Schneider, *supra* note 1, at 519; Rakesh N. Kilaru, Comment, *The New Rule 12(b)(6): Twombly, Iqbal, and the Paradox of Pleading*, 62 STAN. L. REV. 905, 908 (2010).

²⁴⁵ See *Langford*, 2011 WL 672414, at *14 (holding that because the complaint was sufficient to alert the parties of a hostile work environment claim, it would not be dismissed); *Tuscarora*, 2010 WL 785376, at *1–*3 (basing its dismissal of the complaint on lack of factual substantiation).

to influence substantive matters, the *Tuscarora* and *Langford* courts could have decided the motions to dismiss based on individual views of hostile work environment claims.²⁴⁶ The *Tuscarora* Court, even if it had not rejected the allegations as conclusory, could have simply held the work environment not severely or pervasively hostile enough for relief under Title VII.²⁴⁷ The same could be true even with the more specific factual allegations in *Langford*.²⁴⁸ Because the standards of “severity” and “pervasiveness” in hostile work environment claims are already nebulous, granting more subjectivity at the pleading stage could erect a higher barrier to workplace discrimination victims.²⁴⁹

2. Limiting Readings

Alternative readings for this second prong attempt to place a limitation on the court’s discretion at the early stages of inquiry.²⁵⁰ They typically argue that the “judicial experience and common sense” with which a judge is to view the non-conclusory allegations is limited, at least by the substantive law from which the claim arises.²⁵¹ Professor Robertson argues that courts are not to make subjective judgments about facts, but should use the law “to determine whether the complaint meets a minimal level of plausibility.”²⁵² Professor Noll similarly

²⁴⁶ See Beiner, *supra* note 157, at 72 (noting that there is a “growing trend” of dismissing harassment cases where arguable issues of fact exist); Miller, *supra* note 3, at 22–23.

²⁴⁷ See *Tuscarora*, 2010 WL 785376, at *1–*3; Medina, *supra* note 15, at 313–14 (noting that courts disposing of cases on summary judgment are increasingly doing so by finding that the conduct “does not rise to the level of a hostile environment”).

²⁴⁸ See *Langford*, 2011 WL 672414, at *1, *14; Medina, *supra* note 15, at 313–14. In fact, the environment alleged in *Langford* is more benign than that alleged in *Tuscarora* because there the plaintiff did not allege touching or sexual assault. See *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 67 (1986) (noting that where the conduct has risen to a level of criminality, it is certainly actionable under Title VII); *Langford*, 2011 WL 672414, at *1; *Tuscarora*, 2010 WL 785376, at *1.

²⁴⁹ See Keller & Tracy, *supra* note 17, at 256 (“[D]iscomfort with how to evaluate conduct has also led to an unjustified number of summary dispositions for defendants and vacated jury determinations for plaintiffs.”); Schneider, *supra* note 1, at 530–31, 550. The standard for hostile work environment plaintiffs is that of an objective, reasonable person, and courts have “push[ed] the envelope” in granting defendants’ motions on these claims. See Beiner, *supra* note 157, at 74–75. To the extent that *Twombly* and *Iqbal* are just creating a new summary judgment stage earlier in the litigation, this phenomenon will take place at the pleading stage. See Schneider, *supra* note 1, at 530–31.

²⁵⁰ See Noll, *supra* note 211, at 121–22 (questioning the judicial discretion argument and stating that “there are reasonable arguments that *Iqbal* did not enact as radical a change in federal practice as critics have assumed”).

²⁵¹ See *id.* at 138–40; Daniel W. Robertson, *In Defense of Probability: Ashcroft v. Iqbal and What the Plausibility Standard Really Means*, 38 PEPP. L. REV. 111, 150–51 (2010).

²⁵² Robertson, *supra* note 251, at 150–51.

argues that, at most, the court may consider additional factors limited to “judgmental facts” arising from essentially legal sources.²⁵³

Indeed, Professor Steinman argues that the plausibility inquiry could potentially be more forgiving to plaintiffs.²⁵⁴ It allows courts to weigh a complaint that omits a claim element by examining surrounding allegations and determining if they plausibly suggest the existence of the omitted element.²⁵⁵ Applying such a reading to the *Tuscarora* and *Langford* cases, even if the complaints had not alleged an element of the claim, the plausibility inquiry could have saved them from dismissal.²⁵⁶

IV. MAKING A CHOICE: ARGUING FOR READING *TWOMBLY* AND *IQBAL* TO CONFER LESS JUDICIAL DISCRETION AND MORE SUBSTANTIVE RIGHT

Given that *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal* leave open interpretive issues, one may argue that lower courts should not use the new pleading standards with unreviewable discretion.²⁵⁷ The approaches taken in *Twombly* and *Iqbal* were specific to fact and context, so one may infer that the level of discretion—even if granted in those cases—need not be read into other areas of the law.²⁵⁸ Though the federal rules apply equally throughout the civil litigation system, *Twombly* and *Iqbal*'s narrow interpretation would not radically depart from notice pleading or empower judges with unbridled discretion.²⁵⁹ Therefore, lower courts should not interpret the standard as giving them free reign to dismiss claims in all areas of the law, and particularly not in the area of employment discrimination.²⁶⁰

²⁵³ Noll, *supra* note 211, at 139.

²⁵⁴ Steinman, *supra* note 11, at 1319 (“Properly understood, the plausibility aspect of *Twombly* and *Iqbal* makes the pleading standard *more* forgiving, not less.”).

²⁵⁵ *See id.* at 1319–20.

²⁵⁶ *See Langford*, 2011 WL 672414, at *1, *8–*9; *Tuscarora*, 2010 WL 785376, at *1–*3; Steinman, *supra* note 11, at 19–20.

²⁵⁷ *See* Noll, *supra* note 211, at 121–22.

²⁵⁸ *See id.* at 132.

²⁵⁹ *See* Hartnett, *supra* note 214, at 481; Miller, *supra* note 3, at 40; Noll, *supra* note 211, at 121. Furthermore, *Iqbal* dashed the hope that this standard only applies to certain areas through its explicit holding that it applies to all civil actions. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1953 (2009).

²⁶⁰ *See Iqbal* 129 S. Ct at 1950 (“determining whether a complaint states a plausible claim for relief” should be a “context-specific task”); Noll, *supra* note 211, at 121; Seiner *supra* note 8, at 195–96 (arguing that it is more plausible to allege employment discrimination than either of the claims asserted in *Twombly* or *Iqbal*).

A. *The Court's Analysis in Twombly and Iqbal Requires a Context-Specific Interpretation*

Lower courts should not interpret *Twombly* and *Iqbal* to allow unbridled discretion in evaluating motions to dismiss because the Supreme Court applied the standard contextually.²⁶¹ In *Twombly*, the Court held that a bare allegation of illegal conspiracy was not sufficient, “absent factual context suggesting agreement.”²⁶² *Iqbal* affirmed the contextual nature of the inquiry, noting that determining plausibility is a “context-specific” task.²⁶³ Thus, lower courts should be mindful of a case’s legal and factual context before dismissing a complaint.²⁶⁴ Given employment discrimination’s prevalence, courts should view those complaints with more deference than ones alleging antitrust or governmental conspiracies.²⁶⁵

Even proponents of this reading, however, acknowledge that the new pleading standard does allow for some judicial discretion.²⁶⁶ Taking into account the context-specific nature of *Twombly* and *Iqbal*, however, judicial discretion should rely on the area of law giving rise to the complaint and not personal views.²⁶⁷ In *Twombly*, for example, the majority relied on commentators to decide that parallel conduct is not indicative of an unlawful agreement.²⁶⁸ The majority also noted that the Court previously hedged against false inferences from identical behavior.²⁶⁹

Similarly, the *Iqbal* majority relied on “essentially legal sources” in dismissing the claim as implausible.²⁷⁰ First, the Court relied on the sub-

²⁶¹ See Miller, *supra* note 3, at 36–38. Professor Miller notes that it is a significant source of optimism that the concepts may be malleable enough to enable a judge to apply them in a manner “consistent with systemic values.” *Id.* at 36. Furthermore, “context may confine the [Court’s] seemingly unbridled grant of discretion.” *Id.* at 38.

²⁶² Bell Atl. Corp. v. Twombly, 550 U.S. 544, 548–49, (2007).

²⁶³ *Iqbal*, 129 S. Ct. at 1950. *Iqbal*, by its own language, was extraordinary and the Supreme Court might have upended pleading standards in a way that would not apply to other cases. See *id.* at 1945 (quoting Judge Cabranes who noted that these defendants were charged with responding to “a national and international security emergency unprecedented in the history of the American Republic”); Steinman, *supra* note 12, at 1326–27; see also Miller, *supra* note 3, at 32 (acknowledging that *Iqbal*’s sensitive nature may have had as much to do with the ruling than a desire to change the legal standards).

²⁶⁴ See *Iqbal*, 129 S. Ct. at 1948–49; *Twombly* 550 U.S. at 554 n. 4.

²⁶⁵ See Seiner, *supra* note 8, at 196.

²⁶⁶ See Hartnett, *supra* note 214, at 496, 499 (“Different judges with different life experiences can be expected to view plausibility differently because they have a different understanding of what is ordinary, commonplace, natural, or a matter of common sense.”).

²⁶⁷ See Noll, *supra* note 211, at 139–40; Robertson, *supra* note 251, at 150–51.

²⁶⁸ *Twombly*, 550 U.S. at 556 n.4.

²⁶⁹ *Id.* at 554.

²⁷⁰ See Noll, *supra* note 211, at 138–39.

stantive law of *Bivens* that requires purpose, and not merely knowledge, to establish a supervisor's liability for a subordinate's unconstitutional conduct.²⁷¹ Second, the Court invoked the common law presumption that official activity is lawful.²⁷² That presumption led the Court to start from a baseline that Ashcroft and Mueller likely acted legally.²⁷³

Under this reasoning, pleading standards in hostile work environment cases should incorporate hostile work environment doctrine in two ways.²⁷⁴ First, the allegations should not be rejected simply because the judge finds them unbelievable.²⁷⁵ Second, the complaints should not be rejected as implausible based on "judicial experience and common sense" without reference to the surrounding law.²⁷⁶ Thus, a judge's subjective assessment should be limited to precedent and commentators within that particular area of law, just as in *Twombly*.²⁷⁷

B. *Construing Twombly and Iqbal to Allow Such Discretion Would Overrule Established Law*

Lower courts should not interpret *Twombly* and *Iqbal* to grant unbridled discretion to dismiss cases because doing so would be inconsistent with the Federal Rules of Civil Procedure and Supreme Court precedent.²⁷⁸ The Supreme Court proclaimed that *Twombly* and *Iqbal* did not uproot the notice pleading standard, regardless of criticism to the contrary.²⁷⁹ The pre-*Twombly* regime is founded upon the Federal Rules of Civil Procedure and the Court has repeatedly stated that it may not amend the rules by judicial interpretation.²⁸⁰

For *Twombly* and *Iqbal* to establish a heightened pleading standard with respect to employment discrimination, they would have to be read

²⁷¹ See *id.* at 138.

²⁷² *Id.* at 138–39.

²⁷³ See *id.*

²⁷⁴ See Medina, *supra* note 15, at 315; Noll, *supra* note 211 at 139; Seiner, *supra* note 8, at 206. Professor Seiner argues that the unique role of summary judgment in all employment discrimination cases should play into a court's analysis at the pleading stage. Seiner, *supra* note 8, at 206.

²⁷⁵ See Steinman, *supra* note 11, at 1340.

²⁷⁶ See Noll, *supra* note 211, at 140–41.

²⁷⁷ See *Twombly*, 550 U.S. at 556 n.4; Hartnett, *supra* note 214, at 496; Noll, *supra* note 211, at 139–40. There might be a problem with lower courts following established Supreme Court doctrine on what constitutes a hostile work environment. See Keller & Tracy, *supra* note 17, at 249. Nevertheless, they should apply that doctrine before dismissal at the pleading stage. See Noll, *supra* note 211, at 139–41.

²⁷⁸ See Steinman, *supra* note 11, at 1299, 1340.

²⁷⁹ See *id.* at 1320–22.

²⁸⁰ See *id.* at 1320.

as overruling *Swierkiewicz v. Sorema N.A.*²⁸¹ The only element the *Twombly* and *Iqbal* decisions explicitly abrogated is the “no set of facts” language in *Conley v. Gibson*.²⁸² Some argue that this abrogation effectively overrules *Swierkiewicz*, but other commentators suggest that it remains good law.²⁸³ Therefore, lower courts should not disregard *Swierkiewicz* in the employment litigation context because it is still precedent, “even if later decisions undercut an earlier case’s reasoning.”²⁸⁴

More importantly, the complaint in *Swierkiewicz* probably suggests a claim to relief, even under *Iqbal*.²⁸⁵ *Swierkiewicz*’s complaint described the conditions surrounding his termination, including age, nationality, and subsequent replacement by a younger, less experienced employee from the same country as his supervisor.²⁸⁶ A court, however, may find any of those discriminatory intent allegations conclusory.²⁸⁷ Therefore, to find *Swierkiewicz*’s claim plausible, the Court would have to infer that element from the facts alleged.²⁸⁸ The very same inferences should apply to all employment claims, including hostile work environment claims.²⁸⁹

CONCLUSION

If *Twombly* and *Iqbal* are read to limit unbridled judicial discretion, they will not operate to exclude hostile work environment plaintiffs from court. If alternative readings are adopted, however, these cases could have that very effect, thereby raising additional barriers to victims of discrimination and giving already skeptical courts another docket-clearing tool. This could result in the dismissal of meritorious claims,

²⁸¹ See Noll, *supra* note 211, at 147 (arguing that *Swierkiewicz* still controls as a matter of law because it is a Supreme Court case and is clearly applicable to the evaluation of an employment discrimination complaint).

²⁸² See Steinman, *supra* note 11, at 1321.

²⁸³ See *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009); Noll, *supra* note 211, at 145; Steinman, *supra* note 11, at 1322.

²⁸⁴ Noll, *supra* note 211, at 145; see Steinman, *supra* note 11, at 1323.

²⁸⁵ Noll, *supra* note 211, at 145.

²⁸⁶ See *Swierkiewicz v. Sorema*, 534 U.S. 506, 508–09 (2002).

²⁸⁷ See *Iqbal*, 129 S. Ct. at 1951–52; Noll, *supra* note 211, at 145 (“[L]ike many employment discrimination plaintiffs, *Swierkiewicz* could not point to a smoking gun showing he was the victim of unlawful discrimination prior to discovery.”) *Iqbal* held that the allegations were conclusory because there were no facts in the complaint showing that Ashcroft and Mueller adopted the policy not in spite of its discriminatory effects, but because of its discriminatory effects. *Iqbal*, 129 S. Ct. at 1951–52. The same could be said of *Swierkiewicz*’s allegation that he was fired because of his age. See Noll, *supra* note 211, at 145.

²⁸⁸ See Noll, *supra* note 211, at 145.

²⁸⁹ See *id.* at 145–46.

leaving aggrieved parties with no relief in the federal courts. It is therefore imperative, for the benefit of hostile work environment plaintiffs, and indeed for all plaintiffs in employment discrimination cases, that judicial discretion in motions to dismiss is not unbridled.