

# NOTES

## MOTION TO DISMISS FOR FAILURE TO SUCCEED ON THE MERITS: THE EEOC AND RULE 12(b)(6)

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## INTRODUCTION

A group of female attorneys, living the reality of the gender wage gap in the United States,<sup>1</sup> sue their employer for discriminatory practices in compensation.<sup>2</sup> The United States Equal Employment Opportunity Commission (EEOC) launches a full-scale investigation into the claim,<sup>3</sup> issues a determination that the employer committed illegal acts of discrimination,<sup>4</sup> and engages in failed conciliation efforts with the employer.<sup>5</sup> Deeming the case a litigation priority, the EEOC chooses to expend limited administrative resources by filing suit on the plaintiffs' behalf.<sup>6</sup> Despite the EEOC's efforts, the United States District Court for the Southern District of New York dismisses the complaint for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6),<sup>7</sup> a decision that the United States Court of Appeals for the Second Circuit affirms.<sup>8</sup> The case is *EEOC v. Port Authority of New York & New Jersey*,<sup>9</sup> and, with thanks to the Supreme Court's "plausibility" pleading standard,<sup>10</sup> it represents the latest episode of the steep hurdle that employment discrimination plaintiffs must overcome when they face the now inevitable motion to dismiss under Rule 12(b)(6).<sup>11</sup>

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1. Women currently earn 83 percent as much as men in the United States. See Eileen Patten, *Racial, Gender Wage Gaps Persist in U.S. Despite Some Progress*, PEW RES. CTR. (July 1, 2016), <http://www.pewresearch.org/fact-tank/2016/07/01/racial-gender-wage-gaps-persist-in-u-s-despite-some-progress/> [<https://perma.cc/LX48-LY9L>].

2. See *EEOC v. Port Auth. of N.Y. & N.J.*, 768 F.3d 247, 248-49 (2d Cir. 2014).

3. See *id.*; see also Plaintiff EEOC's Memorandum of Law in Opposition to Defendant's Motion for Partial Summary Judgment and in Support of EEOC's Rule 56(d) Cross-Motion for Discovery at 3, *EEOC v. Port Auth. of N.Y. & N.J.*, No. 10 Civ. 7462(NRB), 2012 WL 1758128 (S.D.N.Y. May 17, 2012), *aff'd*, 768 F.3d 247 (2d Cir. 2014).

4. See *Port Auth. of N.Y. & N.J.*, 768 F.3d at 249.

5. See *id.*; Complaint at 3, *Port Auth. of N.Y. & N.J.*, 2012 WL 1758128.

6. See *Port Auth. of N.Y. & N.J.*, 768 F.3d at 248-49.

7. *Port Auth. of N.Y. & N.J.*, 2012 WL 1758128, at \*1; see FED. R. CIV. P. 12(b)(6) (permitting litigants to assert by motion the defense of "failure to state a claim upon which relief can be granted"). For a description of the factors that the EEOC considers when it determines whether to bring suit on a plain-tiff's behalf, see *infra* Part II.C.

8. See *Port Auth. of N.Y. & N.J.*, 768 F.3d at 249.

9. 768 F.3d 247 (2d Cir. 2014).

10. *Ashcroft v. Iqbal*, 556 U.S. 662, 670, 678, 680 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 577 (2007).

11. See *infra* Part I.B.

This Note takes issue with the dismissal of the EEOC's pleadings for failure to state a claim under Rule 12(b)(6)<sup>12</sup> and suggests that the policy rationale underlying plausibility pleading points against dismissal when the EEOC files suit on a plaintiff's behalf.<sup>13</sup> More specifically, this Note argues that the policy concerns that drove the establishment of plausibility pleading in *Bell Atlantic Corp. v. Twombly*<sup>14</sup> and its reaffirmation in *Ashcroft v. Iqbal*<sup>15</sup>—concerns about dragging defendants into expensive and frivolous litigation<sup>16</sup>—lack particular force when the EEOC files suit on a plaintiff's behalf. Plaintiffs alleging employment discrimination pursuant to Title VII of the Civil Rights Act of 1964 and other statutory schemes must exhaust their administrative remedies with the EEOC before filing suit in federal court.<sup>17</sup> By choosing to expend limited administrative resources in pursuing litigation, the EEOC operates as an effective gatekeeper.<sup>18</sup> Not only will such employment discrimination plaintiffs have exhausted their administrative remedies with the EEOC, but also the EEOC will have issued a determination of fault regarding the alleged unlawful employment action and will have made the affirmative decision to represent the plaintiff in federal court.<sup>19</sup> In those cases, the risk of dragging

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12. This Note is not the first effort to criticize the dismissal of the EEOC's pleadings for failure to state a claim. See Julie A. Totten & Michael W. Disotell, *Between the Possible and the Plausible: Employment Litigation in the Wake of Twombly and Iqbal*, 31 A.B.A. J. LAB. & EMP. L. 109, 120 n.112 (2015) ("That the EEOC, a government agency with pre-pleading discovery authority, could even lose a motion to dismiss is surprising and illustrates the quixotic standards resulting from *Twombly* and *Iqbal*."); J. Scott Pritchard, Comment, *The Hidden Costs of Pleading Plausibility: Examining the Impact of Twombly and Iqbal on Employment Discrimination Complaints and the EEOC's Litigation and Mediation Efforts*, 83 TEMP. L. REV. 757, 784 (2011) ("[T]he fact that the EEOC—a government agency with pre-pleading discovery powers—could ever lose on a motion to dismiss is striking in and of itself."). This Note specifically argues that the policy rationale underlying the plausibility standard has much less force when the EEOC brings suit on behalf of a plaintiff because the EEOC is extremely unlikely to expend limited administrative resources on completely baseless matters. See *infra* Part III.B.

13. See *infra* Part III.B.

14. 550 U.S. 544 (2007).

15. 556 U.S. 662 (2009).

16. Cf. *Twombly*, 550 U.S. at 573 (Stevens, J., dissenting) (arguing that one of the two "practical concerns [that] presumably explain[s] the Court's dramatic departure from settled procedural law" is that "[p]rivate antitrust litigation can be enormously expensive").

17. See *infra* Part II.B.

18. See *infra* Part III.B.

19. See *infra* Part II.B.

defendant employers into frivolous lawsuits should be significantly diminished.<sup>20</sup> The fact that the EEOC has decided to file on a plaintiff's behalf should weigh strongly in favor of plausibility when courts consider whether the EEOC's pleadings survive a motion to dismiss under Rule 12(b)(6).<sup>21</sup> Accordingly, this Note suggests that the EEOC's pleadings are entitled to deferential review at the 12(b)(6) stage when it files on a plaintiff's behalf.

This Note proceeds in three main Parts. Part I discusses the plausibility standard generally. It then surveys the current split among the circuit courts of appeals regarding the status of pre-*Twombly* precedent governing pleadings in employment discrimination cases. Part II overviews the procedural role of the EEOC in employment discrimination suits. Part III explains why the motion to dismiss for failure to state a claim under Rule 12(b)(6) in employment discrimination actions has become inevitable, and revisits the policy rationale underlying the plausibility standard. Part III then suggests that the motion to dismiss has improperly replaced the motion for summary judgment in the employment discrimination context, allowing courts to evaluate the merits of a plaintiff's lawsuit before a plaintiff is able to obtain key facts in his or her favor through discovery. Finally, it argues that the policy rationale behind plausibility pleading points strongly against granting an employer's motion to dismiss when the EEOC files suit on behalf of a plaintiff because the EEOC's function as a gatekeeper prevents meritless suits from being filed in the first place.

## I. THE PLEADING STANDARD

This Part details the establishment of the plausibility standard in *Twombly*<sup>22</sup> and its application to all civil cases in *Iqbal*,<sup>23</sup> with a particular focus on the policy rationale that motivated the Supreme Court in those cases. It then discusses the applicability of plausibility pleading in employment discrimination cases and reviews the status of pre-*Twombly* precedent governing the pleading standard

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20. See *infra* Part III.B.

21. See *infra* Part III.B.

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

23. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

in employment discrimination cases in a post-*Twombly* world. Finally, Part I introduces the facts in *Port Authority*, this Note's illustrative case.<sup>24</sup>

### A. *Plausibility Pleading Under Twombly and Iqbal*

Perhaps no two decisions in the past decade have had a greater effect on the mechanics of federal pretrial civil litigation than *Twombly* and *Iqbal*.<sup>25</sup> In *Twombly*, the Court established a heightened pleading standard, requiring that a plaintiff plead sufficient facts to make his or her claim *plausible*—not merely possible or conceivable.<sup>26</sup> The Court affirmed the plausibility standard in *Iqbal*, “transform[ing] civil litigation in federal courts” by permitting courts to dismiss lawsuits with relative ease for failure to state a claim under Rule 12(b)(6).<sup>27</sup>

Before the Court announced the plausibility standard in *Twombly* and confirmed its application to all civil cases in *Iqbal*, federal courts dismissed complaints for failure to state a claim under Rule 12(b)(6) under the “no set of facts” standard set forth in *Conley v. Gibson*.<sup>28</sup> In *Conley*, the Court held that a plaintiff need only plead a “short and plain statement of the claim” under Rule 8(a)(2) to put the defendant on notice of the lawsuit to survive a motion to dismiss under Rule 12(b)(6).<sup>29</sup>

Citing concern with overloaded federal dockets and the increased filing of frivolous lawsuits,<sup>30</sup> the Court in *Twombly* and *Iqbal* all but

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24. See *EEOC v. Port Auth. of N.Y. & N.J.*, 768 F.3d 247, 249-50 (2d Cir. 2014).

25. 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, 9-10 (2010).

26. See 550 U.S. at 555 (“[A] plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” (alteration in original) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986))).

27. Adam Liptak, *Supreme Court Ruling Altered Civil Suits, to Detriment of Individuals*, N.Y. TIMES (May 18, 2015), <http://www.nytimes.com/2015/05/19/us/9-11-ruling-by-supreme-court-has-transformed-civil-lawsuits.html> [https://perma.cc/9UCM-ST5G]; see *Iqbal*, 556 U.S. at 684 (declining to narrow *Twombly* “to pleadings made in the context of an antitrust dispute”).

28. 355 U.S. 41, 45-46 (1957), *abrogated by Twombly*, 550 U.S. 554 (2007).

29. *Id.* at 47 (quoting FED. R. CIV. P. 8(a)(2)).

30. See *Iqbal*, 556 U.S. at 685-86; *Twombly*, 550 U.S. at 558.

abandoned the liberal “notice pleading” standard.<sup>31</sup> Holding that a plaintiff’s complaint must state a claim that is “plausible on its face,” the Court set a high bar for plaintiffs seeking relief in federal court.<sup>32</sup> The plausibility standard proves particularly cumbersome in the employment discrimination context, in which plaintiffs are very rarely able to cite detailed facts to support their claims for relief.<sup>33</sup> Since *Twombly* and *Iqbal*, it has become a regular—and often successful—practice for defendants charged with employment discrimination to file motions to dismiss for failure to state a claim under Rule 12(b)(6).<sup>34</sup>

Some courts have held that *Twombly* and *Iqbal* implicitly overruled *Swierkiewicz v. Sorema N.A.*, the unanimous ruling in which the Court held that plaintiffs need not plead a prima facie case of discrimination to survive a motion to dismiss.<sup>35</sup> The holding in *Swierkiewicz* had the effect of permitting a plaintiff to proceed to discovery to bolster his or her claim for discrimination, so long as the plaintiff’s complaint passed the relatively low bar under *Conley*.<sup>36</sup> Reasoning that the Court decided *Swierkiewicz* before it established the more stringent plausibility standard, those courts have held that a plausible employment discrimination complaint must be one that states a prima facie case<sup>37</sup> under the burden-shifting scheme set forth in *McDonnell Douglas Corp. v. Green*.<sup>38</sup>

In announcing the plausibility standard, the Court in *Twombly* was particularly concerned that the “notice pleading” standard under *Conley* had led to overcrowded federal dockets.<sup>39</sup> Under the Court’s rationale, the *Conley* standard permitted plaintiffs to file

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31. See *Iqbal*, 556 U.S. at 678-79; *Twombly*, 550 U.S. at 554-56.

32. *Twombly*, 550 U.S. at 570.

33. See *infra* Part III.B.

34. See *infra* Part III.A.

35. 534 U.S. 506, 508 (2002); see also Lucas F. Tesoriero, Note, *Pre-Twombly Precedent: Have Leatherman and Swierkiewicz Earned Retirement Too?*, 65 DUKE L.J., 1521, 1537-39 (2016).

36. See *Swierkiewicz*, 534 U.S. at 511 (“This Court has never indicated that the requirements for establishing a prima facie case under *McDonnell Douglas* also apply to the pleading standard that plaintiffs must satisfy in order to survive a motion to dismiss.”).

37. See *infra* Part I.B.1.

38. 411 U.S. 792, 802 (1973).

39. Cf. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (“[I]t is one thing to be cautious before dismissing a[] ... complaint in advance of discovery ... but quite another to forget that proceeding to ... discovery can be expensive.” (internal citations omitted)).

frivolous lawsuits in federal court, allowing plaintiffs to drag defendants into expensive litigation, opening the discovery floodgates and forcing defendants to settle weak cases.<sup>40</sup> The *Twombly* Court took great pains to criticize the practical effect of *Conley*: “On such a focused and literal reading of *Conley*’s ‘no set of facts,’ a wholly conclusory statement of the claim would survive a motion to dismiss whenever the pleadings left open the possibility that a plaintiff might later establish some ‘set of [undisclosed] facts’ to support recovery.”<sup>41</sup>

The Court in *Iqbal* explicitly declined to narrow the holding in *Twombly* to apply only in antitrust actions, announcing that the plausibility standard “expounded the pleading standard for ‘all civil actions,’ and it applies to antitrust and discrimination suits alike.”<sup>42</sup> Justice David Souter, the author of the majority opinion in *Twombly*, dissented in *Iqbal*, arguing that the *Iqbal* majority misread the holding in *Twombly* and incorrectly applied the plausibility standard.<sup>43</sup> Justice Stephen Breyer also authored a vigorous dissent in *Iqbal*, criticizing the Court’s rationale for expanding plausibility pleading to all civil actions.<sup>44</sup> In particular, Justice Breyer foresaw the difficulty that the plausibility standard would present to plaintiffs whose claims depend on greater fact-finding through the discovery process, and argued that district courts have internal mechanisms at their disposal to prevent frivolous suits from proceeding to discovery.<sup>45</sup>

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40. *See id.* at 559 (“[T]he threat of discovery expense will push cost-conscious defendants to settle even anemic cases.”).

41. *Id.* at 561 (alteration in original).

42. *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009) (quoting FED. R. CIV. P. 1).

43. *See id.* at 688, 696 (Souter, J., dissenting) (“*Twombly* does not require a court at the motion-to-dismiss stage to consider whether the factual allegations are probably true.”). For further discussion on the distinction between *Twombly* and *Iqbal*, see generally Luke Meier, *Why Twombly Is Good Law (but Poorly Drafted) and Iqbal Will Be Overturned*, 87 IND. L.J. 709, 710-11 (2012) (arguing that *Twombly* and *Iqbal* “have dissimilar analytical foundations”).

44. *See Iqbal*, 556 U.S. at 699-700 (Breyer, J., dissenting).

45. *See id.* at 700 (“The law, after all, provides trial courts with other legal weapons designed to prevent unwarranted interference.”). Justice John Paul Stevens voiced similar concerns in *Twombly*, writing in dissent that the majority’s concerns about overeager plaintiffs dragging defendants into expensive litigation

merit careful case management, including strict control of discovery, careful scrutiny of evidence at the summary judgment stage, and lucid instructions to juries; they do not, however, justify the dismissal of an adequately pleaded complaint without even requiring the defendants to file answers denying a

### *B. Pleading Employment Discrimination*

Discerning the specific requirements for satisfying the plausibility standard in employment discrimination cases has generated much confusion in the federal courts and has garnered a significant amount of scholarly criticism.<sup>46</sup> Generally speaking, when a charging plaintiff files suit for employment discrimination,<sup>47</sup> she includes facts in her complaint containing either direct or indirect evidence of discrimination.<sup>48</sup> Because modern plaintiffs rarely have direct evidence of discrimination, however, most charging plaintiffs allege facts that serve as indirect evidence of discriminatory employment practices under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*.<sup>49</sup>

In *McDonnell Douglas*, the Supreme Court set forth an evidentiary burden-shifting scheme<sup>50</sup> for plaintiffs charging indirect evidence of discrimination under Title VII of the Civil Rights Act of 1964.<sup>51</sup> Under the *McDonnell Douglas* standard, the plaintiff has the

charge that they in fact engaged in collective decisionmaking.  
550 U.S. at 573 (Stevens, J., dissenting).

46. For example, Professor Suja Thomas has argued that plausibility pleading is unconstitutional because it imposes an insurmountable barrier for plaintiffs, and that, in effect, it violates the right to a jury trial under the Seventh Amendment. See Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851, 1890 (2008) (“[A] complaint may be dismissed without a violation of the Seventh Amendment, but the court must accept as true the facts and corresponding inferences pled by the complainant, however probable or not.”).

47. The procedural requirements and enforcement mechanisms differ slightly when the defendant is a private employer as opposed to a public one. See *Enforcement*, EEOC, <https://www.eeoc.gov/eeoc/enforcement/index.cfm> [<https://perma.cc/Y7BD-JVGR>]. The vast majority of charges that the EEOC handles involve private employers. See *id.*

48. See 42 U.S.C. § 2000e-5(e) (2012).

49. 411 U.S. 792, 802 (1973).

50. See *id.* In that case, a unanimous Court held that a plaintiff may establish a prima facie case of discrimination

by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant’s qualifications.

*Id.* Although the *McDonnell Douglas* holding referenced a racial discrimination suit under Title VII, courts extended the burden-shifting scheme to govern most employment discrimination claims. See Kenneth R. Davis, *The Stumbling Three-Step, Burden-Shifting Approach in Employment Discrimination Cases*, 61 BROOK. L. REV. 703, 709 (1995).

51. 42 U.S.C. § 2000e-2.

burden to establish a prima facie case of discrimination.<sup>52</sup> If the plaintiff is successful, then the burden shifts to the defendant employer “to articulate some legitimate, nondiscriminatory reason” for the adverse employment action.<sup>53</sup>

### 1. *Did Twombly and Iqbal Overrule Swierkiewicz?*

Since the Court announced the plausibility standard, the status of pre-*Twombly* precedent governing pleadings remains unclear in many contexts. In particular, legal scholars and courts cannot agree on the appropriate legal standard governing pleadings in employment discrimination suits in a post-*Twombly* world.<sup>54</sup> In *Swierkiewicz v. Sorema N.A.*<sup>55</sup>—a case the Court decided years before it reformulated the pleadings standard in *Twombly* and *Iqbal*<sup>56</sup>—the Court unanimously held that plaintiffs need not plead sufficient facts meeting each element of the prima facie case in employment discrimination suits. *Swierkiewicz*, in effect, relaxed the barrier that employment discrimination plaintiffs must surpass to survive a motion to dismiss for failure to state a claim.<sup>57</sup>

Because the Court eased the pleadings standard in employment discrimination suits in *Swierkiewicz*<sup>58</sup> before it heightened the pleadings standard for federal lawsuits generally in *Twombly* and *Iqbal*,<sup>59</sup> legal scholars and lower courts have questioned whether *Swierkiewicz* remains good law.<sup>60</sup> For a complaint to be plausible, must it allege sufficient facts meeting each element of the corre-

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52. See 411 U.S. at 802.

53. *Id.*

54. See generally Joseph A. Seiner, *The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases*, 2009 U. ILL. L. REV. 1011, 1013-14; Charles M. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613, 1618-20 (2011); Suja A. Thomas, *Oddball Iqbal and Twombly and Employment Discrimination*, 2011 U. ILL. L. REV. 215, 216-17, 219; Tesoriero, *supra* note 35, at 1522.

55. See *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002).

56. See *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79, 684 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555-57 (2007).

57. *Cf. Swierkiewicz*, 534 U.S. at 508, 513-14 (holding that employment discrimination complaints “must satisfy only the simple requirements of Rule 8(a)” to survive a motion to dismiss under FED. R. CIV. P. 12(b)(6)).

58. See *id.*

59. See *Iqbal*, 556 U.S. at 684; *Twombly*, 550 U.S. at 555.

60. See *infra* notes 64-66 and accompanying text.

sponding prima facie case under *McDonnell Douglas*,<sup>61</sup> or is it sufficient for plaintiffs merely to state enough facts to “nudge[] their claims across the line from conceivable to plausible”?<sup>62</sup>

The courts of appeals have been unable to arrive at a consensus response to that question. Generally speaking, at least four schools of thought have emerged regarding the status of *Swierkiewicz* after plausibility pleading<sup>63</sup>: (1) *Twombly* implicitly overruled *Swierkiewicz*,<sup>64</sup> (2) *Twombly* did not overrule *Swierkiewicz*, and it continues to be workable under the plausibility standard,<sup>65</sup> (3) the correct pleading standard remains “an open question” after *Twombly* and *Iqbal*,<sup>66</sup> and (4) *Twombly* did not overrule *Swierkiewicz*, but *Swierkiewicz* cannot be reconciled with the plausibility standard.<sup>67</sup>

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61. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

62. *Twombly*, 550 U.S. at 570.

63. Aside from the following attempts to reconcile *Swierkiewicz* with *Twombly* and *Iqbal*, Professor Adam Steinman has argued that pre-*Twombly* precedent is irreconcilable with the plausibility standard, and that plausibility pleading should be replaced with “plain pleading.” See Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1300-02, 1305, 1328, 1356 (2010) (arguing that the “plain pleading” standard “reconciles prior authority, fits with the text of the Federal Rules, and accomplishes the purposes that pleadings ought to serve in the broader context of civil adjudication”).

64. See, e.g., *McCone v. Pitney Bowes, Inc.*, 582 F. App’x 798, 800 (11th Cir. 2014) (*per curiam*) (holding that the plaintiff failed to state a claim “because he failed to allege that he suffered an adverse employment action,” which is an element of the *McDonnell Douglas* prima facie case for gender discrimination); *Fowler v. UPMC Shadyside*, 578 F.3d 203, 211 (3d Cir. 2009) (“[B]ecause *Conley* has been specifically repudiated ... so too has *Swierkiewicz*, at least insofar as it concerns pleading requirements and relies on *Conley*.”).

65. See, e.g., *McCleary-Evans v. Md. Dep’t of Transp.*, 780 F.3d 582, 586 (4th Cir. 2015) (holding that *Twombly* and *Iqbal* “did not overrule *Swierkiewicz*’s holding that a plaintiff need not plead the *evidentiary* standard for proving a Title VII claim”); *Rodríguez-Reyes v. Molina-Rodríguez*, 711 F.3d 49, 54 (1st Cir. 2013) (holding that “the *Swierkiewicz* holding remains good law” in part because “the *Twombly* Court ... cited *Swierkiewicz* with approval”). Professor Charles Sullivan has offered a more radical approach in his efforts to preserve *Swierkiewicz* post-*Twombly*. See Sullivan, *supra* note 54, at 1623. In Professor Sullivan’s view, employment discrimination plaintiffs lacking direct evidence of discrimination should be permitted to plead social science research showing the “pervasiveness of discrimination” to reach the plausibility standard. *Id.* at 1662.

66. *Hedges v. Town of Madison*, 456 F. App’x 22, 23 (2d Cir. 2012); accord *Starr v. Baca*, 652 F.3d 1202, 1215 (9th Cir. 2011) (“Even though the Court stated ... that it was applying Rule 8(a), it is hard to avoid the conclusion that, in fact, the Court applied a higher pleading standard.”).

67. See Meier, *supra* note 43, at 752 (“The best interpretation of the *Iqbal* opinion is not that the Court intended to overrule cases such as *Swierkiewicz*, but rather that the Court was bewildered by the nebulous *Twombly* opinion.”).

The plausibility standard has proved equally unworkable in the district courts, even within circuits that have adopted a clear stance on the status of *Swierkiewicz* in a post-*Twombly* world.<sup>68</sup> District court decisions within the Fourth Circuit—a circuit that has adopted the view that *Twombly* did not overrule *Swierkiewicz*, and that *Swierkiewicz* remains good law<sup>69</sup>—illustrate the general confusion regarding the appropriate pleading standard in employment discrimination cases.

In *McCleary-Evans v. Maryland Department of Transportation*, a divided panel of the Fourth Circuit held that the plaintiff failed to state a claim of race discrimination under Title VII because her pleadings “le[ft] open to speculation the cause for the defendant’s decision to select someone other than her.”<sup>70</sup> In affirming the district court’s judgment, however, the panel held that the district court applied an incorrect pleading standard in its analysis.<sup>71</sup> The Fourth Circuit unequivocally announced that *Twombly* and *Iqbal* “did not overrule *Swierkiewicz*’s holding that a plaintiff need not plead the *evidentiary* standard for proving a Title VII claim.”<sup>72</sup>

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68. The impracticability of the plausibility standard has been similarly criticized in other contexts. For example, courts have struggled to apply the standard in analyzing the sufficiency of complaints alleging violations of the Telephone Consumer Protection Act (TCPA) of 1991, Pub. L. No. 102-243, 105 Stat. 2394 (1991) (codified as amended at 47 U.S.C. § 227 (2012)). See John R. Chiles & Zachary D. Miller, *A Repurposed Consumer Protection Statute—2013 Survey of TCPA Developments*, 69 BUS. LAW. 633, 637 (2014). Recognizing the barrier that the plausibility standard imposes on TCPA plaintiffs, those courts advocating a lower pleading standard have required that plaintiffs plead only “minimal allegations regarding use of an ATDS in recognition of the fact that the type of equipment used by the defendant to place the ‘call’ is within the sole possession of the defendant at the pleading stage.” *Maier v. J.C. Penney Corp.*, No. 13cv0163-IEG(DHB), 2013 WL 3006415, at \*3 (S.D. Cal. June 13, 2013) (citing *In re Jiffy Lube Int’l, Inc., Text Spam Litig.*, 847 F. Supp. 2d 1253, 1260 (S.D. Cal. 2012)).

69. See *McCleary-Evans*, 780 F.3d at 586; see also *Coleman v. Md. Court of Appeals*, 626 F.3d 187, 190 (4th Cir. 2010) (“[A] plaintiff is not required to plead facts that constitute a prima facie case in order to survive a motion to dismiss.”), *aff’d*, 566 U.S. 30 (2012).

70. 780 F.3d 582, 588 (4th Cir. 2015).

71. See *id.* (“[W]hile the district court improperly applied the *McDonnell Douglas* evidentiary standard in analyzing the sufficiency of *McCleary-Evans*’ complaint, contrary to *Swierkiewicz*, the court nonetheless reached the correct conclusion under *Twombly* and *Iqbal*.”); *McCleary-Evans v. Md. Dep’t of Transp.*, No. CCB-13-990, 2013 WL 5937735, at \*3-4 (D. Md. Nov. 5, 2013) (granting the defendant’s motion to dismiss because the plaintiff failed to “state[] facts sufficient to meet the pleading requirements as to the fourth prong” of the *McDonnell Douglas* burden-shifting scheme), *aff’d*, 780 F.3d 582 (4th Cir. 2015).

72. *McCleary-Evans*, 780 F.3d at 586; see also *Coleman*, 626 F.3d at 190 (holding that “a plaintiff is not required to plead facts that constitute a prima facie case in order to survive a

Despite clear guidance from the Fourth Circuit, district courts have struggled to apply the correct legal standard when faced with a motion to dismiss for failure to state a claim. For example, in *Hayes v. Sotera Defense Solutions, Inc.*, the plaintiff filed suit against the defendant employer for failure to hire based on race in violation of Title VII.<sup>73</sup> In evaluating whether the plaintiff's complaint would survive the defendant's motion to dismiss for failure to state a claim, the *Hayes* court began by listing the elements of a prima facie case for failure to hire under the *McDonnell Douglas* burden-shifting framework.<sup>74</sup>

Without citing the relevant Fourth Circuit precedent governing the pleading standard in employment discrimination cases, the court found that the plaintiff's complaint was factually insufficient.<sup>75</sup> Concluding that the plaintiff failed to satisfy one element of the *McDonnell Douglas* scheme<sup>76</sup>—a framework that the Fourth Circuit had announced “is an evidentiary standard, not a pleading requirement”<sup>77</sup>—the court granted the defendant's motion to dismiss the plaintiff's Title VII claim.<sup>78</sup> The holding in *Hayes*, therefore, stands in stark contrast with the pronouncements of the Fourth Circuit that the *McDonnell Douglas* framework “may require demonstrating more elements than are otherwise required to state a claim for relief.”<sup>79</sup> *Hayes* demonstrates the confusion of the lower courts to discern the appropriate pleadings standard in employment discrimination cases and the general failure of plausibility pleading as a workable standard, even when the relevant circuit court issues clear guidance on the subject.<sup>80</sup>

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motion to dismiss” (citing *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510-15 (2002)).

73. No. 1:15cv1130(JCC/IDD), 2015 WL 6758294, at \*2 (E.D. Va. Nov. 4, 2015).

74. *Id.* at \*5.

75. *Id.*

76. *Id.* (“Under the facts in the complaint, this claim will fail as a matter of law due to Hayes [sic] failure to show that Defendant ultimately filled the position with someone of a different race.”).

77. *McCleary-Evans*, 780 F.3d at 584 (quoting *Swierkiewicz*, 534 U.S. at 510).

78. *Hayes*, 2015 WL 6758294, at \*5.

79. *McCleary-Evans*, 780 F.3d at 584 (citing *Swierkiewicz*, 534 U.S. at 511-12).

80. This Note does not intend to criticize the district court for failing to respect judicial hierarchy. On the contrary, the *Hayes* case merely serves as an example of the failure of *Twombly* and *Iqbal* to provide lower courts with a meaningful standard to evaluate the sufficiency of employment discrimination complaints.

## 2. *The Port Authority Case*

*EEOC v. Port Authority of New York & New Jersey*, the case referenced in the Introduction of this Note, represents the extreme barrier that the plausibility standard imposes on civil rights litigants.<sup>81</sup> In that case, a group of female attorneys filed a charge with the EEOC, alleging that their employer, the Port Authority of New York and New Jersey (the Port Authority), had systematically paid female lawyers less than their male counterparts in violation of the Equal Pay Act of 1963 (the EPA).<sup>82</sup> The EEOC subsequently conducted its investigation into the Port Authority's compensation practices.<sup>83</sup> Following standard procedure, the EEOC issued a determination letter, in which it concluded that the Port Authority paid its female attorneys less than its male attorneys in violation of the EPA.<sup>84</sup> After failed conciliation efforts, the EEOC brought suit on behalf of the charging female attorneys in federal court.<sup>85</sup>

In its complaint, the EEOC alleged that the Port Authority engaged in discriminatory pay practices because it “has paid and continues to pay wages to its non-supervisory female attorneys at rates less than the rates paid to male employees in the same establishments for substantially equal work for jobs the performance of which requires skill, effort, and responsibility, and which are performed under similar working conditions.”<sup>86</sup> Following the Port Authority's answer, the EEOC responded to a series of court-ordered interrogatories regarding its position as to the Port Authority's pay practices.<sup>87</sup> In its responses, the EEOC averred that “all of the non-supervisory attorney jobs in [the Port Authority's] law department are substantially equivalent and require the same skill, effort, and responsibility.”<sup>88</sup> Based on the EEOC's pleadings and interrogatory responses, and despite the EEOC's extensive efforts in investigating and prioritizing the charge, the district court dismissed the EEOC's

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81. 768 F.3d 247 (2d Cir. 2014).

82. *Id.* at 249.

83. *Id.*

84. *Id.*

85. *Id.*

86. Complaint, *supra* note 5, at 3-4.

87. *Port Auth. of N.Y. & N.J.*, 768 F.3d at 250.

88. *Id.* at 251 (alteration in original).

complaint, finding that its pleadings “d[id] not rise to the requisite level of facial plausibility.”<sup>89</sup>

## II. FILING SUIT FOR EMPLOYMENT DISCRIMINATION

*Port Authority* is merely one example of the harsh application of the plausibility standard in employment discrimination suits. This Part discusses the procedural role of the EEOC in employment discrimination matters. It outlines the administrative remedies that charging plaintiffs must generally exhaust. Finally, Part II discusses cases in which the EEOC brings suit on a plaintiff’s behalf and details the legal analysis in *Port Authority*.

### A. *The Role of the EEOC*

As a part of its efforts to correct the long and dark history of discrimination in the United States,<sup>90</sup> Congress passed the Civil Rights Act of 1964,<sup>91</sup> landmark legislation that outlawed discrimination in the workplace based on race, color, religion, sex, or national origin.<sup>92</sup> Pursuant to the goal of eradicating workplace discrimination, Congress created the EEOC as an administrative body with broad power to police discriminatory acts committed by private employers.<sup>93</sup>

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89. *EEOC v. Port Auth. of N.Y. & N.J.*, No. 10 Civ. 7462 (NRB), 2012 WL 1758128, at \*6 (S.D.N.Y. May 17, 2012), *aff’d*, 768 F.3d 247 (2d Cir. 2014).

90. See Jacqueline A. Berrien, Chair, EEOC, Statement on 50th Anniversary of Civil Rights Act of 1964 (July 2, 2014), <https://www.eeoc.gov/eeoc/history/cra50th/index.cfm> [<https://perma.cc/P7F7-RHNU>].

91. Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-716, 78 Stat. 241, 253-66 (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2012)).

92. See 42 U.S.C. §§ 2000e to 2000e-17 (2012).

93. *Id.* §§ 2000e-4(a), (g), 2000e-5(a). In addition to enforcement authority with regard to Title VII, the EEOC enforces other workplace antidiscrimination laws, including the Equal Pay Act of 1963 (EPA), the Age Discrimination in Employment Act of 1967 (ADEA), and the Americans with Disabilities Act of 1990 (ADA). See *Facts About Equal Pay and Compensation Discrimination*, EEOC, <https://www.eeoc.gov/eeoc/publications/fs-epa.cfm> [<https://perma.cc/Y8FA-MXLM>].

### *B. Administrative Hurdles*

The administrative hoops through which employment discrimination plaintiffs must jump begin when the plaintiff files a charge of discrimination with the EEOC.<sup>94</sup> After receiving the charge, the EEOC assesses it by sorting it into one of three categories<sup>95</sup>:

When an initial review of a charge reveals that it is “more likely than not” that discrimination has occurred, the charge is classified as Category A. These Category A charges receive priority treatment and are investigated promptly. If, after the initial charge review, it appears that the EEOC will need additional evidence to determine whether the employer has violated Title VII, the charge is classified as Category B. Category B charges are investigated if the EEOC’s resources permit. Finally, if a charge reflects an obviously meritless case, or one outside the EEOC’s jurisdiction, it is classified as Category C. These charges are not investigated and are promptly dismissed.<sup>96</sup>

After the initial triage, EEOC investigators pursue Category A and Category B charges.<sup>97</sup>

Following the completion of its investigation, the EEOC issues a “letter of determination” to the relevant parties.<sup>98</sup> The letter informs the parties whether the EEOC has been able to determine if the employer violated the law.<sup>99</sup> If the EEOC is unable to make such a determination, then the EEOC issues a right to sue letter to the charging party.<sup>100</sup> If the EEOC finds “reasonable cause” that the employer has committed a prohibited employment practice,<sup>101</sup> however, then the EEOC begins its efforts to eliminate that practice, in-

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94. See 29 C.F.R. § 1601.6 (2017).

95. See DONALD R. LIVINGSTON & REED L. RUSSELL, *EEOC LITIGATION AND CHARGE RESOLUTION* § 7.XI.A (2d ed. 2014).

96. Anne Noel Occhialino & Daniel Vail, *Why the EEOC (Still) Matters*, 22 HOFSTRA LAB. & EMP. L.J. 671, 694 (2005) (footnotes omitted).

97. LIVINGSTON & RUSSELL, *supra* note 95, § 7.XII.D.1-.3.

98. 29 C.F.R. § 1601.19(a).

99. *Id.*

100. *Id.*

101. *Id.* § 1601.21(a).

cluding the conciliation process.<sup>102</sup> If the EEOC's conciliation efforts are unsuccessful, then the EEOC either issues a right to sue letter to the charging party<sup>103</sup> or decides to initiate litigation in federal court on behalf of the charging party.<sup>104</sup>

### *C. When the EEOC Files Suit on a Plaintiff's Behalf*

While the EEOC maintains the authority to file suit on behalf of a charging party,<sup>105</sup> “the EEOC is guided by ‘the overriding public interest in equal employment opportunity ... asserted through direct Federal enforcement.’”<sup>106</sup> In *EEOC v. Waffle House, Inc.*, the Supreme Court declared that the EEOC “is in command of the process”<sup>107</sup> and, in other words, “essentially has a right of first refusal over a charging party's claim.”<sup>108</sup> The Court also acknowledged that the allocation of limited administrative resources is among the factors that the EEOC considers when it decides to bring suit on a plaintiff's behalf: “[I]t is the public agency's province ... to determine whether public resources should be committed to the recovery of victim-specific relief.”<sup>109</sup>

Compared with the number of cases filed with the EEOC each year, the EEOC pursues only a small percentage of cases on behalf of charging parties.<sup>110</sup> Recognizing the need to use its “limited resources strategically to pursue its mission of eradicating work-

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102. *Id.* § 1601.24(a).

103. *Id.* § 1601.28(b).

104. *Id.* § 1601.27.

105. See *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 296 (2002) (“[W]henver the EEOC chooses from among the many charges filed each year to bring an enforcement action in a particular case, the agency may be seeking to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief.”).

106. *Gen. Tel. Co. of the N.W. v. EEOC*, 446 U.S. 318, 326 (1980) (quoting 118 Cong. Rec. 4941 (1972)).

107. 534 U.S. at 291.

108. *Occhialino & Vail*, *supra* note 96, at 698.

109. *Waffle House*, 534 U.S. at 291-92.

110. For example, the EEOC pursued 114 enforcement actions in federal court in Fiscal Year 2016. *EEOC Litigation Statistics, FY 1997 Through FY 2016*, EEOC, <https://www.eeoc.gov/eeoc/statistics/enforcement/litigation.cfm> [<https://perma.cc/QXR8-KRAZ>] [hereinafter *Litigation Statistics*]. The EEOC received 91,503 charges that year. See *Charge Statistics (Charges filed with EEOC): FY 1997 Through FY 2016*, EEOC, <https://www.eeoc.gov/eeoc/statistics/enforcement/charges.cfm> [<https://perma.cc/E83X-UFMT>] [hereinafter *Charge Statistics*].

place discrimination,”<sup>111</sup> the EEOC adopted a National Enforcement Plan on April 19, 1995 (the Plan).<sup>112</sup> The Plan advanced three categories of cases that the EEOC would prioritize, including in its litigation efforts<sup>113</sup>:

A. Cases involving violations of established anti-discrimination principles, whether on an individual or systemic basis, including Commissioner charge cases raising issues under the NEP, which by their nature could have a potential significant impact beyond the parties to the particular dispute....

B. Cases having the potential of promoting the development of law supporting the antidiscrimination purposes of the statutes enforced by the [EEOC]....

C. Cases involving the integrity or effectiveness of the [EEOC’s] enforcement process, particularly the investigation and conciliation of charges.<sup>114</sup>

The EEOC’s litigation efforts, therefore, represent a small percentage of charges that it receives each year and are conducted pursuant to a national agenda as to how to allocate limited administrative resources to achieve its goal of eradicating discriminatory workplace practices. Moreover, if the EEOC brings an enforcement action, then that means it also has conducted “an assessment that the strength and potential impact of the case supports the decision to proceed.”<sup>115</sup>

In Fiscal Year 2011, the year in which the EEOC filed suit in federal court on behalf of the charging plaintiffs in *Port Authority*,<sup>116</sup> the EEOC received 99,947 charges of employment discrimination.<sup>117</sup> That same year, the EEOC filed 300 lawsuits on behalf of a charging plaintiff.<sup>118</sup> In other words, of the 99,947 charges of discrim-

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111. *National Enforcement Plan*, EEOC, <https://www.eeoc.gov/eeoc/plan/nep.cfm> [<https://perma.cc/UZE6-R7MQ>].

112. *Id.*

113. *Id.* (“These priority categories will apply, as appropriate, to ... litigation, including both trial and appellate practice.”).

114. *Id.*

115. EEOC, *supra* note 111.

116. *See* EEOC v. Port Auth. of N.Y. & N.J., No. 10 Civ. 7462(NRB), 2012 WL 1758128, at \*1 (S.D.N.Y. May 17, 2012), *aff’d*, 768 F.3d 247 (2d Cir. 2014).

117. *See Charge Statistics*, *supra* note 110.

118. *See Litigation Statistics*, *supra* note 110.

ination, the EEOC devoted its limited administrative resources to pursue litigation on behalf of charging parties in 0.3 percent of the charges it received.

The district court, applying the plausibility standard,<sup>119</sup> granted the Port Authority's motion to dismiss for failure to state a claim, preventing the charging women attorneys from proceeding to discovery to gain additional facts to bolster their claim.<sup>120</sup> In an opinion that closely resembles one granting summary judgment,<sup>121</sup> the court devoted multiple paragraphs to assessing the merits of the EEOC's claim for relief.<sup>122</sup> After first grappling with the status of *Swierkiewicz*,<sup>123</sup> the Second Circuit similarly assessed the merits of the EEOC's EPA claim, concluding that that the EEOC failed to satisfy the plausibility standard.<sup>124</sup>

### III. THE INEVITABLE MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

This Part revisits the policy rationale that motivated the Court's holding in *Twombly* and *Iqbal*, and argues that the motion to dismiss for failure to state a claim has replaced the motion for summary judgment. It suggests that the plausibility standard has improperly permitted courts to evaluate the merits of the suit on the pleadings. Part III concludes by arguing that the policy rationale behind plausibility pleading weighs strongly against dismissal when the EEOC brings an enforcement action on behalf of a charging

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119. See *Port Auth. of N.Y. & N.J.*, 2012 WL 1758128, at \*3.

120. See *id.* at \*6.

121. See *infra* notes 142, 145 and accompanying text.

122. See, e.g., *Port Auth. of N.Y. & N.J.*, 2012 WL 1758128 at \*6 (“The maturity curve specifies ranges of possible salaries based on experience; determinations of specific salaries within those ranges must be based on other factors. The EEOC has alleged without substantiation that those determinations are based on sex, but—without any analysis of job content—we cannot rely on that bald assertion.”).

123. See *EEOC v. Port Auth. of N.Y. & N.J.*, 768 F.3d 247, 254 (2d Cir. 2014) (“[W]e conclude that, while a discrimination complaint need not allege facts establishing each element of a prima facie case of discrimination to survive a motion to dismiss, it must at a minimum assert nonconclusory factual matter.”).

124. See *id.* at 256 (“To be sure, the bulk of these cases concerned whether the plaintiffs had proven their EPA claims following summary judgment or trial, not whether the plaintiffs had adequately pleaded their claims. Nonetheless, these cases ... stand for a common principle: a successful EPA claim depends on the comparison of actual job content; broad generalizations ... cannot suffice.”).

party. In such cases, the EEOC's pleadings should be granted deferential review.

### *A. Revisiting the Rationale for Plausibility Pleading*

Scholars and courts have intensely criticized the policy rationale that motivated the Court in *Twombly* and *Iqbal* to establish the plausibility standard—concerns about dragging defendants into expensive litigation and preventing plaintiffs from filing meritless lawsuits.<sup>125</sup> Since the Court announced the plausibility standard, district courts have become inundated with motions to dismiss for failure to state a claim under Rule 12(b)(6), especially in civil rights cases like employment discrimination actions.<sup>126</sup> After *Twombly* and *Iqbal*, defense attorneys have viewed the motion to dismiss as standard procedure in pretrial civil litigation, perceiving the Court's holding in *Twombly* as an invitation to file such a motion in every case possible.<sup>127</sup>

Justice Clarence Thomas, writing for a unanimous Court in *Swierkiewicz*, directly confronted the opportunity to impose a heightened pleading standard in employment discrimination suits, but expressly declined the opportunity to take it.<sup>128</sup> The Court acknowledged the practical effect of the underlying policy rationale that later drove the establishment of plausibility pleading in *Twombly* and *Iqbal*, but it expressly decided not to travel down a more rigorous pleading path in employment discrimination cases:

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125. See *supra* Part I.B.

126. For an empirical analysis of rates of dismissal pre- and post-*Iqbal*, see Raymond H. Brescia, *The Iqbal Effect: The Impact of New Pleading Standards in Employment and Housing Discrimination Litigation*, 100 KY. L.J. 235, 268 (2011). Analyzing groups of employment and housing discrimination decisions issued before and after *Iqbal*, Professor Brescia found a 26 percent increase in dismissal post-*Iqbal*. See *id.* In a similar study, Professor Patricia Hatamyar found that courts “appear to be granting 12(b)(6) motions at a significantly higher rate than they did under *Conley*.” Patricia W. Hatamyar, *The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?*, 59 AM. U. L. REV. 553, 624 (2010).

127. Faced with the inevitable motion to dismiss, now-Chief Judge Clay Land of the Middle District of Georgia astutely criticized the proliferation of the 12(b)(6) motion in a post-*Twombly* and *Iqbal* world, arguing that 12(b)(6) motions “almost always, either expressly or, more often, implicitly, attempt to burden the plaintiff with establishing a reasonable likelihood of success on the merits under the guise of the ‘plausibly stating a claim’ requirement.” *Barker ex rel. U.S. v. Columbus Reg'l Healthcare Sys., Inc.*, 977 F. Supp. 2d 1341, 1346 (M.D. Ga. 2013) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)).

128. *Cf. Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514-15 (2002).

Respondent argues that allowing lawsuits based on conclusory allegations of discrimination to go forward will burden the courts and encourage disgruntled employees to bring unsubstantiated suits. Whatever the practical merits of this argument, the Federal Rules do not contain a heightened pleading standard for employment discrimination suits.... Furthermore, Rule 8(a) establishes a pleading standard *without regard to whether a claim will succeed on the merits*. “Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test.”<sup>129</sup>

The *Swierkiewicz* Court held that the Federal Rules do not impose a heightened pleading standard in employment discrimination cases.<sup>130</sup> Instead of citing concerns that a lower pleading standard might invite frivolous litigation, courts should more appropriately focus on broad citizen access to the federal courts—especially to achieve the policy goal of combating discrimination in the workplace—in order to allow potentially meritorious claims to proceed past the pleadings stage.

Professor Arthur Miller has argued that the forces that led to the establishment of the plausibility standard overlooked the more important value of appropriate citizen access and allowing potentially meritorious claims to proceed to discovery<sup>131</sup>: “[T]he shortfall of *Twombly* and *Iqbal* is the Court’s failure to acknowledge the potential those decisions have to impair meaningful access to the federal courts.... The result is likely to operate in derogation of effectuating rights and policy norms established by Congress and state legislatures.”<sup>132</sup>

Moreover, plausibility pleading “erects a formidable—perhaps insurmountable—barrier to civil rights lawsuits in particular.”<sup>133</sup> Professor Elizabeth Schneider has suggested that “the greatest im-

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129. *Id.* (emphasis added) (citations omitted) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

130. *See id.*; FED. R. CIV. P. 8(a)(2) (requiring only “a short and plain statement of the claim showing that the pleader is entitled to relief”).

131. *See Miller, supra* note 25, at 72.

132. *Id.* at 77.

133. Rakesh N. Kilaru, Comment, *The New Rule 12(b)(6): Twombly, Iqbal, and the Paradox of Pleading*, 62 STAN. L. REV. 905, 909 (2010).

part of this change in the landscape of federal pretrial practice is the dismissal of civil rights and employment discrimination cases from federal courts in disproportionate numbers.”<sup>134</sup> Professor Schneider has further argued that the citizen-access argument lost in favor of increased dismissal rates in part because “many federal judges have expressed the view that employment discrimination and civil rights cases are often weak and without merit.”<sup>135</sup>

The argument that broad citizen access is the more appropriate concern rings especially true when the EEOC brings an enforcement action on behalf of a charging party. In those cases, the EEOC takes several affirmative steps *before* filing suit in federal court. Specifically, the EEOC: (1) triages the charge and sorts it into one of three categories, weeding out completely baseless claims;<sup>136</sup> (2) conducts a full-scale investigation into the merits of the charge, finding relevant facts;<sup>137</sup> (3) issues a determination letter following the investigation, in which the EEOC assesses whether there is reasonable cause to believe that the employer has violated the law;<sup>138</sup> (4) determines that the charging party’s claim meets the requirements of its litigation priorities;<sup>139</sup> and (5) expends finite administrative resources by filing suit on behalf of the charging party.<sup>140</sup> Professor Suja Thomas has suggested that the plausibility standard has transformed the motion to dismiss into “the new summary judgment motion” because, similar to a motion for summary judgment, plausibility pleading allows courts to evaluate the *merits* of the case on the pleadings, especially in employment discrimination cases.<sup>141</sup>

The failings of plausibility pleading in employment discrimination cases were on full display in the illustrative case, *Port Authority*.<sup>142</sup> In that case, the Second Circuit’s efforts to determine whether the EEOC’s pleadings were plausible led it to evaluate the merits of the

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134. 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, 519 (2010).

135. *Id.*

136. *See supra* note 114 and accompanying text.

137. *See supra* note 83 and accompanying text.

138. *See supra* notes 85-89 and accompanying text.

139. *See supra* notes 100-04 and accompanying text.

140. *See supra* notes 97-99, 103-04 and accompanying text.

141. Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under Iqbal and Twombly*, 14 LEWIS & CLARK L. REV. 15, 18 (2010).

142. 768 F.3d 247 (2d Cir. 2014).

case,<sup>143</sup> an analysis that the court should conduct on a motion for summary judgment, not a motion to dismiss the complaint for failure to state a claim.<sup>144</sup> By dismissing the EEOC's pleadings under the plausibility standard,<sup>145</sup> the court prevented the charging female attorneys from gaining access to the federal courts. Even more striking is that the court dismissed the EEOC's complaint for failure to state a claim *after* the EEOC conducted a lengthy investigation, concluded that the Port Authority violated the EPA, and decided to expend limited administrative resources pursuing the case in federal court.<sup>146</sup> Given that the Supreme Court intended the plausibility standard to prevent baseless and meritless lawsuits from proceeding to discovery, it "strains credulity"<sup>147</sup> to imagine how that same standard enabled a court to prevent a clearly meritorious suit—not the frivolous sort the Court feared in *Twombly* and *Iqbal*<sup>148</sup>—from proceeding past the pleadings stage.

### *B. The Case Against Granting the Motion to Dismiss*

The policy justifications underlying the plausibility standard—including preventing plaintiffs from filing frivolous lawsuits<sup>149</sup>—have much less force when the EEOC files on a plaintiff's behalf. In those cases, the EEOC will have investigated the employer's alleged discriminatory practices;<sup>150</sup> issued a reasonable cause determination that, in the agency's view, the employer violated the law;<sup>151</sup> and made the affirmative decision to represent the plaintiff in federal

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143. *Cf. id.* at 256 ("The EEOC's bald recitation of the elements of an EPA claim and its assertion that the attorneys at issue held 'the same job code' are plainly insufficient to support a claim under the EPA." (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007))).

144. *See Thomas, supra* note 141, at 29-31 (discussing the similarities between motions to dismiss and motions for summary judgment after the *Twombly* and *Iqbal* decisions).

145. *See Port Auth. of N.Y. & N.J.*, 768 F.3d at 259 ("The EEOC has not ... plausibly pleaded that these pay differentials existed despite the ... performance of 'substantially equal' work, the only workplace ill addressed by the EPA.")

146. *See id.* at 249-50.

147. *EEOC v. Port Auth. of N.Y. & N.J.*, No. 10 Civ. 7462 (NRB), 2012 WL 1758128, at \*6 (S.D.N.Y. May 17, 2012), *aff'd*, 768 F.3d 247 (2d Cir. 2014).

148. *See supra* Part I.A.

149. *See supra* Part I.A.

150. *See supra* notes 96-97 and accompanying text.

151. *See supra* notes 98-99 and accompanying text.

court pursuant to the EEOC's litigation priorities.<sup>152</sup> Further, if the EEOC decides to file suit on a plaintiff's behalf, then the EEOC presumably believes that it has a reasonable case against the defendant.<sup>153</sup> Otherwise, the EEOC would not expend such great administrative costs in prosecuting the case.<sup>154</sup>

Accordingly, the EEOC, a vast federal agency with broad pre-discovery power, must believe that there are facts supporting the plaintiff's claim that render the claim more than just possible or conceivable. Indeed, in such a case, the plaintiff's claim for relief is *plausible*—by the very definition of the term set forth in *Twombly* and *Iqbal*—because the plaintiff will have “nudged [his or her] claim[] across the line from conceivable to plausible.”<sup>155</sup>

In his article, *Agencies as Litigation Gatekeepers*, Professor David Freeman Engstrom contends that the EEOC should be granted greater authority to litigate discrimination suits, because

an EEOC armed with robust gatekeeper powers over class and systemic suits could settle, terminate, or steer cases in order to (i) prevent duplicative, piggyback litigation efforts; (ii) counteract the repeat-player advantage that defendants might otherwise enjoy; (iii) police cheap or collusive settlements by private class counsel; and (iv) shield employers from transitional costs where plaintiffs advance a new theory of liability that may only belatedly be subject to legislative or appellate override.<sup>156</sup>

The assumption upon which Professor Engstrom's argument relies is that greater litigation authority would *increase* the EEOC's gatekeeping power.<sup>157</sup> If that assumption is correct, then it follows that the EEOC's *current* litigation efforts act as an effective gatekeeper.

Moreover, when the EEOC files suit on a plaintiff's behalf, it has already served its gatekeeping purposes by pursuing only truly meritorious claims with a reasonable chance of success.<sup>158</sup> The EEOC

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152. See *supra* notes 104, 114 and accompanying text.

153. See *supra* note 115 and accompanying text.

154. See *supra* notes 110-12 and accompanying text.

155. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

156. David Freeman Engstrom, *Agencies as Litigation Gatekeepers*, 123 *YALE L.J.* 616, 701-02 (2013) (footnotes omitted).

157. See *id.*

158. See *supra* Part II.C.

has weeded out frivolous claims and has taken the affirmative step to represent a plaintiff in federal court.<sup>159</sup> Assuming a good faith drafting effort,<sup>160</sup> the EEOC's pleadings, then, should easily satisfy the plausibility standard.<sup>161</sup>

Indeed, the proposition that agency decision-making should be granted some degree of deference is neither a novel nor radical one. Since the Supreme Court's landmark decision in *Chevron, U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, for example, courts have deferred to reasonable administrative legal interpretations of ambiguous statutes.<sup>162</sup> A central "theoretical justification" for *Chevron* deference centers around "the 'expertise' of the agencies in question, their intense familiarity with the history and purposes of the legislation at issue, [and] their practical knowledge of what will best effectuate those purposes."<sup>163</sup> Tracking the rationale behind *Chevron*, this Note proposes that the EEOC—not a federal court—is

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159. See *supra* Part II.C.

160. This Note neither intends to suggest that the EEOC should be free to be careless in its drafting efforts, nor endorses giving the EEOC a pass for shoddy pleadings. For an example of a case in which the district court accused the EEOC of poor drafting efforts, see *EEOC v. Hobson Air Conditioning, Inc.*, No. 3:10-CV-818-L, 2010 WL 3835553, at \*2 (N.D. Tex. Sept. 28, 2010). In that case, the court reluctantly denied the defendant's motion to dismiss, but suggested that the EEOC failed to "take[] about twenty minutes to add a few sentences with more factual detail." *Id.*

161. Proponents of a more scrutinizing standard for pleadings fail to appreciate the extent to which the federal courts were designed to ensure broad citizen access. See Miller, *supra* note 25, at 77. Furthermore, such proponents conflate the following distinct inquiries: (1) whether a plaintiff's pleadings are sufficient under FED. R. CIV. P. 8(a)(2) to survive a motion to dismiss and proceed to discovery; and (2) whether that plaintiff is likely to succeed on the merits—an inquiry that more closely resembles the standard for summary judgment. Compare FED. R. CIV. P. 8(a)(2) (requiring plaintiffs to plead only "a short and plain statement of the claim showing that the pleader is entitled to relief"), with FED. R. CIV. P. 56(a) (requiring that courts grant a motion for summary judgment if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law"). As Justice Thomas opined in *Swierkiewicz*, "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 515 (2002) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)).

162. 467 U.S. 837, 843 (1984) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.")

163. Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 514.

in the best position to evaluate the merits of a potential lawsuit at the pre-discovery stage.<sup>164</sup>

### CONCLUSION

When the Supreme Court overruled *Conley* and announced that plaintiffs must allege facts rendering their cause of action “plausible” in *Twombly*<sup>165</sup> and *Iqbal*,<sup>166</sup> the Court stressed that a broader policy concern motivated its holding.<sup>167</sup> In particular, the Court feared that the liberal pleading standard under *Conley* had enticed plaintiffs to file frivolous suits in federal court, dragging defendants into expensive litigation and forcing them to settle.<sup>168</sup>

That policy concern becomes considerably less troublesome when the EEOC files suit on a plaintiff’s behalf.<sup>169</sup> When the EEOC decides to initiate litigation in federal court, as in *Port Authority*,<sup>170</sup> not only has it expended great administrative costs in reviewing the charge, investigating the claim, and issuing a reasonable cause determination, but also it has decided to expend limited administrative resources in pursuing the action on the plaintiff’s behalf.<sup>171</sup> At bottom, such litigation cannot be of the baseless, frivolous sort that the Court feared in *Twombly* and *Iqbal*.<sup>172</sup>

To be sure, whether the EEOC should be successful in its litigation efforts is an entirely different matter. But if lower courts are

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164. Whether any particular legal interpretation that the EEOC might promulgate is entitled to *Chevron* deference is beyond the scope of this Note. But the rationale behind *Chevron* nonetheless rings true in the context of a Rule 12(b)(6) motion. When the EEOC files suit on behalf of a plaintiff (or group of plaintiffs), it has investigated the plaintiff’s charge, rendered a determination that the employer violated the law, and deemed the case a litigation priority worthy of the expenditure of limited administrative resources. See *supra* note 115 and accompanying text. As such, the EEOC’s pleadings should easily satisfy the plausibility standard to survive a motion to dismiss under Rule 12(b)(6). Put differently, the EEOC is “much better placed than generalist judges” to assess the merits of the case at such an early stage of litigation. Kenneth W. Starr, *Judicial Review in the Post-Chevron Era*, 3 YALE J. ON REG. 283, 310 (1986).

165. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

166. See *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009).

167. See *supra* Part I.A.

168. See *supra* notes 39-41.

169. See *supra* Part II.

170. See *EEOC v. Port Auth. of N.Y. & N.J.*, 768 F.3d 247 (2d Cir. 2014).

171. See *supra* Part II.C.

172. See *supra* Part III.A.

to take seriously the Supreme Court's word regarding the rationale for the plausibility standard, courts should not absolve defendant employers from their duty to file an answer to the EEOC's complaint.<sup>173</sup> Accordingly, absent the extraordinarily unusual case in which the EEOC has filed a complaint entirely devoid of factual allegations, the EEOC's pleadings should survive a motion to dismiss for failure to state a claim.<sup>174</sup>

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173. *See supra* Part III.A.

174. *See supra* Part III.A.

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