Plausibility and Disparate Impact

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In Bell Atlantic Corp. v. Twombly *and* Ashcroft v. Iqbal*, the Supreme Court introduced a new plausibility pleading standard, abrogating well-established precedent. Under this standard, a plaintiff must now allege enough facts in the complaint to state a plausible claim to relief.* Twombly *and* Iqbal *transformed civil procedure law, and both courts and litigants have struggled with its meaning. One area that has been dramatically affected by these recent decisions is the field of workplace discrimination.*

There are two types of employment discrimination claims—intentional (or disparate treatment) and unintentional (or disparate impact) discrimination. The academic scholarship is replete with discussions of the problems that the plausibility standard has created for victims alleging disparate treatment claims. Discriminatory intent is difficult to establish, and this is particularly true when a plaintiff has not had access to discovery.

One area that has remained unexplored in the academic literature, however, is the effect of Twombly *and* Iqbal *on disparate impact cases. This Article seeks to fill that void in the scholarship. This Article closely examines the two most likely approaches for applying the plausibility standard to unintentional discrimination claims. It offers an analytical framework for considering these claims under either standard, and explains why a more streamlined approach to the Supreme Court's recent decisions is preferable.* Twombly *and* Iqbal *represent a sea change for workplace plaintiffs, and this Article attempts—for the first time—to make sense of these decisions in one of the most complex areas of employment discrimination law.*

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Introduction

"Here the problem is . . . just vagueness or uncertainty."

—Justice David Souter, Oral Argument in *Ashcroft v. Iqbal*[1]

In *Bell Atlantic Corp. v. Twombly*[2] and *Ashcroft v. Iqbal*,[3] the Supreme Court introduced a new plausibility pleading requirement that would transform civil procedure law. Those decisions abrogate well-established pleading precedent and require that all civil litigants allege enough facts in a complaint to state a *plausible* claim to relief.[4] In announcing this new standard, however, the Court did not clearly define what "plausibility" actually means.[5]

The Court's ill-defined pleading standard has created significant confusion in the lower courts. One area where this uncertainty appears particularly pronounced is with *intentional* employment discrimination claims.[6] The subjective nature of these cases, combined with the difficulty of acquiring evidence of discriminatory intent prior to discovery, have left both litigants and courts struggling with the correct standard to apply.[7] The academic literature has already highlighted this problem, and much has been written on the impact of *Twombly* and *Iqbal* in the workplace.[8]

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1. Transcript of Oral Argument at 10, Ashcroft v. Iqbal, 556 U.S. 662 (2009) (No. 07-1015).

2. 550 U.S. 544 (2007).

3. 556 U.S. 662 (2009).

4. *See id.* at 678 ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." (internal quotation marks omitted)); *Twombly*, 550 U.S. at 570 (requiring "only enough facts to state a claim to relief that is plausible on its face").

5. *See generally Iqbal*, 556 U.S. 662; *Twombly*, 550 U.S. 544.

6. *See, e.g.*, Joseph A. Seiner, *After* Iqbal, 45 Wake Forest L. Rev. 179 (2010).

7. *See generally id.*

8. *See generally* Joseph A. Seiner, *The Trouble with* Twombly*: A Proposed Pleading Standard for Employment Discrimination Case*s, 2009 U. Ill. L. Rev. 1011 (2009); Charles Sullivan, *Plausibly Pleading Employment Discrimination*, 52 Wm. & Mary L. Rev. 1613 (2011); Suja A. Thomas, *The New Summary Judgment Motion: The Motion to Dismiss Under* Iqbal *and* Twombly, 14 Lewis & Clark L.

One area that has remained completely unexplored, however, is the impact of the Supreme Court's decisions on the other major theory of employment discrimination—*unintentional* discrimination. This Article seeks to fill that void in the academic scholarship. Disparate impact, or unintentional discrimination, was recognized as a viable theory by the Supreme Court several decades ago in *Griggs v. Duke Power*,[9] and was eventually codified as part of the Civil Rights Act of 1991.[10] A disparate impact claim arises when an employer's facially neutral policy or practice has a discriminatory impact on a protected group for which there is no legitimate business justification.[11] Courts have faced tremendous difficulty in analyzing disparate impact claims.[12] The ambiguity of the statute, combined with the often complex factual and statistical nature of these cases, left this area of the law unclear.[13] Even the Supreme Court, in its recent and controversial decision in *Ricci v. DeStefano*,[14] demonstrated the confusion that still exists in this area of the law.[15]

When the uncertainty of *Twombly* and *Iqbal* are combined with the ambiguity of disparate impact theory, the result is marked confusion. Unfortunately, this confusion may be particularly harmful to victims of employment discrimination. Both the number of motions to dismiss and the rate at which they are granted in these cases are on the rise.[16] Pleading a successful case of disparate impact is now an uphill battle, and plaintiffs are left guessing as to what facts they must allege to plausibly state a claim for unintentional discrimination. This Article attempts to resolve the confusion. Navigating *Twombly*, *Iqbal*, and the Civil Rights Act of 1991, this Article closely examines the two most likely approaches

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REV. 15 (2010).

9. 401 U.S. 424 (1971).

10. *See infra* Part II (providing an overview of disparate impact theory).

11. *See infra* Part II (providing an overview of disparate impact theory).

12. *See generally* Joseph A. Seiner, *Disentangling Disparate Impact and Disparate Treatment: Adapting the Canadian Approach*, 25 YALE L. & POL'Y REV. 95 (2006). There has been similar difficulty properly analyzing intentional discrimination claims as well. *See, e.g.*, Sandra F. Sperino, *Rethinking Discrimination Law*, 110 MICH. L. REV. 69, 71 (2011) (noting the "doctrinal, procedural, and theoretical confusion within employment discrimination law [that] has mired the field in endless questions about frameworks rather than in addressing the field's core issues").

13. *See infra* Part II (discussing the confusion surrounding disparate impact theory). *See generally* Jennifer L. Peresie, *Toward a Coherent Test for Disparate Impact Discrimination*, 84 IND. L.J. 773, 775 (2009) ("[N]one of the circuits have a uniform standard for evaluating disparate impact cases.").

14. 557 U.S. 557 (2009).

15. *See* Joseph A. Seiner & Benjamin N. Gutman, *Does* Ricci *Herald a New Disparate Impact?*, 90 B.U. L. REV. 2181 (2010) (discussing possible interpretations of the *Ricci* decision as it applies to disparate impact cases).

16. *See generally* JOE S. CECIL ET AL., FED. JUDICIAL CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL*: REPORT TO THE JUDICIAL CONFERENCE ADVISORY COMMITTEE ON CIVIL RULES (Mar. 2011) (providing a study analyzing the impact of the *Twombly* and *Iqbal* decisions on dismissal rates in a wide range of case types).

to disparate impact theory under the plausibility standard: the *first-step-only* approach and the *whole-case* approach.[17] This Article explains why the first approach is the better of the two interpretations.

The *first-step-only* approach would require a plaintiff to plead only a prima facie case of disparate impact discrimination.[18] Under this analysis the plaintiff must identify the particular employment policy that is in question, specify the protected class that has been disproportionately impacted, and indicate what the adverse effect has been on this protected group.[19] The plaintiff should further identify when the policy was implemented and provide any statistical data that would help establish that this policy has resulted in an adverse impact.[20]

Just like the first-step-only analysis, the *whole-case* approach would also require a plaintiff to allege sufficient facts to support a prima facie case of disparate impact discrimination.[21] By contrast, however, a plaintiff proceeding under the whole-case approach would be required to go much further in the complaint by alleging facts that would support the *entire* disparate impact claim. In particular, under this analysis, a plaintiff must also provide facts challenging the employer's business rationale for adopting the policy.[22] Moreover, the whole-case approach would require a plaintiff to identify any alternative policies that might exist that would have a less discriminatory impact but still serve the employer's business goals.[23]

This Article explains why the whole-case analysis must fail in favor of the first-step-only approach. While the whole-case analysis does provide substantially more information to defendants and courts, this approach applies a heightened pleading standard to plaintiffs that runs afoul of *Twombly* and *Iqbal*.[24] The approach is also counter to the Supreme Court's fundamental message in these cases that costs must be controlled in civil litigation; the whole-case analysis would only increase the expense of the

17. *See infra* Part III (discussing the impact of the plausibility standard on disparate impact theory).

18. *See infra* Part III.A (discussing the first-step-only approach to the plausibility standard in disparate impact cases).

19. *See* 42 U.S.C. § 2000e-2(k) (2006).

20. The question of what—if any—statistical data are necessary to support a disparate impact allegation is discussed in greater detail in this Article. *See infra* Part IV.A–B (discussing different approaches to numerical analyses for unintentional discrimination claims).

21. *See infra* Part III.B (discussing the whole-case approach to the plausibility standard in disparate impact cases).

22. *See infra* Part III.B.

23. *See infra* Part III.B. As discussed in more detail in this Article, this requirement is only necessary where the plaintiff has not asserted enough facts to adequately dispute the employer's business rationale, or where the plaintiff wants to preserve the issue for trial.

24. *See generally* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

proceedings.[25] Finally, this approach would bring the motion to dismiss much closer to the motion for summary judgment—an outcome that could result in legitimate disparate impact cases being dismissed prematurely.[26] By contrast, and as explained in greater detail in this Article, the first-step-only approach is equitable to the parties, affords sufficient notice to defendants, and limits litigation costs early in the proceedings.[27] This approach is more in line with *Twombly* and *Iqbal*, as well as other Supreme Court precedent, and the facts required under this analysis would adequately state a plausible claim to relief.[28] Therefore, this approach ordinarily should be used when analyzing disparate impact cases, with certain exceptions discussed in greater detail below.

Part I of this Article provides an overview of the plausibility standard announced in *Twombly* and *Iqbal*, and explores other relevant Supreme Court precedent. Part II of this Article examines the evolution of the disparate impact theory of discrimination, providing an analysis of the current state of the law.

Part III of this Article looks at the future of disparate impact under the plausibility standard. This Part considers the two most likely applications of this standard to disparate impact claims—the first-step-only approach and the whole-case approach. This Part offers an analytical framework for pleading claims under each approach, and explains why the first-step-only analysis is the better interpretation of the recent Supreme Court decisions. It also explores appropriate exceptions to this approach, clarifying that in some instances a more nuanced, context-specific analysis may be necessary. Part IV of this Article discusses the implications for courts and litigants of adopting the first-step-only approach for disparate impact claims. This Part explores the unique opportunity disparate impact claims provide employment plaintiffs after *Twombly* and *Iqbal*, as this theory of discrimination avoids the difficult requirement of pleading discriminatory intent.

I. The Supreme Court and the Plausibility Standard

The origins of the plausibility standard have already been well explored, and many commentators have already provided excellent discussions of the *Twombly* and *Iqbal* decisions.[29] This Part thus offers only

25. *See Iqbal*, 556 U.S. at 685; *Twombly*, 550 U.S. at 557–61.

26. *See* Thomas, *supra* note 8, at 40–42 (discussing the potential impact of the plausibility standard).

27. *See infra* Part III (discussing the benefits of the first-step-only approach).

28. *See infra* Part III.

29. *See, e.g.*, Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on* Ashcroft v. Iqbal, 85 Notre Dame L. Rev. 849 (2010); Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 Iowa L. Rev. 821 (2010); Arthur R. Miller, *From* Conley *to* Twombly *to* Iqbal*: A Double Play on the Federal Rules of Civil Procedure*, 60 Duke L.J. 1 (2010).

a brief overview of these cases, as well as a discussion of *Swierkiewiecz v. Sorema*—the Supreme Court's most recent decision on the pleading standard for employment discrimination litigants.[30]

The current debate in this area of the law centers on the meaning of Federal Rule of Civil Procedure 8(a)(2).[31] That rule requires that a plaintiff's complaint provide "a short and plain statement of the claim showing that the pleader is entitled to relief."[32] In *Conley v. Gibson*,[33] decided several decades ago, the Supreme Court considered the proper pleading standard for cases brought under this rule.[34] The Court, in deciding a civil rights case brought under the Railway Labor Act, concluded that a motion to dismiss should not be granted "unless it appears beyond doubt that the plaintiff can prove *no set of facts* in support of his claim which would entitle him to relief."[35] This "no set of facts" language largely controlled the pleading of civil cases under Rule 8(a)(2) for the next fifty years.[36]

This all changed with the Supreme Court's controversial decision in *Bell Atlantic Corp v. Twombly*.[37] In *Twombly*, the Court considered whether the plaintiffs' complaint in a class-action antitrust case was sufficient to proceed under the Federal Rules of Civil Procedure.[38] The plaintiffs alleged that the defendants—several major telephone companies—had violated Section One of the Sherman Act by unlawfully "conspir[ing] to restrain trade."[39] The complaint specifically alleged that this conspiracy was the result of unlawful parallel conduct and an agreement between the companies not to engage in competition.[40]

In considering the sufficiency of these pleadings, the Supreme Court addressed the proper standard for evaluating a complaint.[41] The Court noted that the allegations must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not

30. 534 U.S. 506 (2002).

31. *See, e.g.*, Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293 (2010) (discussing Federal Rule of Civil Procedure 8(a)).

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

33. 355 U.S. 41 (1957).

34. *See id.* at 47–48.

35. *Id*. at 45–46 (emphasis added). The Court further noted that the "Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Id*. at 48.

36. *See generally* Lisa Eichhorn, *A Sense of Disentitlement: Frame-Shifting and Metaphor in* Ashcroft v. Iqbal, 62 FLA. L. REV. 951, 954–57 (2010) (discussing the *Conley* decision).

37. 550 U.S. 544 (2007).

38. *Id*. at 548–49.

39. *Id*. at 548–51.

40. *Id*. at 550–51.

41. *Id*. at 554–55.

do."[42] And, the complaint should include enough facts "to raise a right to relief above the speculative level."[43] Perhaps most importantly, the Court abrogated the "no set of facts language" from *Conley*, concluding that the phrase had "earned its retirement" by "puzzling the profession for 50 years."[44] The "no set of facts" language "is best forgotten as an incomplete, negative gloss on an accepted pleading standard."[45] In place of the *Conley* standard, the Court introduced a *plausibility* requirement.[46] Under this new requirement a plaintiff must allege "enough facts to state a claim to relief that is plausible on its face."[47] A plausible claim is one that is more than possible or "conceivable," but it need not rise to the level of "probability."[48] The Court emphasized that this plausibility requirement does "not require heightened fact pleading of specifics."[49] The Court concluded that the plaintiffs in the case had not provided sufficient facts to support their allegations and had thus failed to satisfy the plausibility standard.[50]

In *Ashcroft v. Iqbal*,[51] the Court expanded the plausibility standard by making clear that it would apply to all civil claims.[52] In *Iqbal*, the plaintiff—a Muslim citizen of Pakistan—alleged that high-level government officials had violated his civil rights by adopting "an unconstitutional policy that subjected [him] to harsh conditions of confinement on account of his race, religion, or national origin."[53] Iqbal had been arrested and held on criminal charges following the events of September 11, 2001.[54]

In considering the plaintiff's allegations, the Court made clear that the plausibility standard would apply not only to complex antitrust claims but to *all* civil cases as well.[55] Thus, this standard should be considered in

42. *Id*. at 555.

43. *Id*. As the Court observed, "[w]ithout some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only 'fair notice' of the nature of the claim, but also 'grounds' on which the claim rests." *Id*. at 555 n.3 (citation omitted).

44. *Id*. at 562–63.

45. *Id*. at 563. The Court noted that the standard from *Conley* "has been questioned, criticized, and explained away long enough." *Id*. at 562.

46. *See id.* at 557–60, 570.

47. *Id*. at 570. The Court stated, however, that "a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need *detailed* factual allegations." *Id*. at 555 (emphasis added).

48. *See id*. at 556, 557, 570.

49. *Id*. at 570.

50. *Id*.

51. 556 U.S. 662 (2009).

52. *See id.* at 684.

53. *Id*. at 666 ("[R]espondent filed a complaint against numerous federal officials, including John Ashcroft, the former Attorney General of the United States, and Robert Mueller, the Director of the Federal Bureau of Investigation.").

54. *Id*.

55. *Id*. at 684.

"antitrust and discrimination suits alike."[56] The Court stressed the importance of avoiding unsupported, conclusory statements in the complaint, noting that "an unadorned, the-defendant-unlawfully-harmed-me accusation" would fail.[57] The Court further advised that it is improper to "credit a complaint's conclusory statements without reference to its factual context," noting that discriminatory intent cannot be alleged "generally."[58]

Applying the *Twombly* standard to the facts of the case, the *Iqbal* Court held that the plaintiff's complaint lacked sufficient factual detail and was unsuccessful in alleging "a claim for purposeful and unlawful discrimination."[59] While the implications of *Iqbal* are far-reaching—and this Article only touches on the potential impact of the decision—perhaps the greatest import of the case is that it is now clear that the plausibility standard announced in *Twombly* will apply to all civil case law.[60] And it is now equally clear that this standard demands factual support for a plaintiff's claims.[61]

The Supreme Court has not yet had the opportunity to apply the plausibility standard to an employment discrimination case. In *Swierkiewicz v. Sorema*—a pre-*Twombly* decision—the Court provided its clearest statement of what is necessary to adequately allege an intentional employment discrimination claim.[62] In *Swierkiewicz*, the Court considered whether a plaintiff had alleged sufficient facts to proceed in a discrimination case brought pursuant to Title VII and the Age Discrimination in Employment Act.[63] A unanimous Supreme Court held that a plaintiff asserting a claim of intentional discrimination is *not* required to plead a prima facie case of intentional discrimination.[64] In reaching this decision, the Court noted that the prima facie case "should not be transposed into a rigid pleading standard for discrimination

56. *Id*.

57. *Id*. at 678. The Court also noted that "[a]lthough for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as factual allegation." *Id*. (internal quotation marks omitted).

58. *Id*. at 686.

59. *Id*. at 687.

60. *See id.* at 686.

61. *See id*. at 678. The Court indicated that "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

62. 534 U.S. 506 (2002).

63. *See id*. at 508. As the *Twombly* Court observed, "Swierkiewicz's pleadings detailed the events leading to his termination, provided relevant dates, and included the ages and nationalities of at least some of the relevant persons involved with his termination." Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007) (internal quotation marks omitted).

64. *Swierkiewicz*, 534 U.S. at 511–15. Under *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), establishing a prima facie case requires plaintiffs to show that they are a member of a protected class, that they are qualified for the job, that they suffered an adverse action, and that there is other evidence of discrimination in the case. *See Swierkiewicz*, 534 U.S. at 510–11.

cases,"[65] and further indicated that applying a "heightened pleading standard" in this context would run counter to the provisions of Federal Rule of Civil Procedure 8(a)(2).[66]

Swierkiewicz thus provided significant guidance to employment discrimination plaintiffs, and helped clarify what must be alleged in a Title VII complaint.[67] What remains undecided, however, is the extent to which *Twombly* and *Iqbal* either changed or overruled *Swierkiewicz*. It is also unclear what factual support is necessary to *plausibly* allege a claim of workplace discrimination. These questions are discussed in greater detail below.

II. Disparate Impact Under Title VII: A Confused Standard

There are two primary theories of employment discrimination—intentional (disparate treatment) and unintentional (disparate impact) discrimination.[68] Both theories have proven difficult to apply.[69] Disparate impact has a long and complex history under Title VII of the Civil Rights Act of 1964.[70] As this theory contains no requirement of discriminatory intent, disparate impact has been marked with controversy since its inception.[71] The origins of disparate impact law have already been well explored in the literature, and this Article only briefly summarizes them here for purposes of providing context.[72]

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65. *Swierkiewicz*, 534 U.S. at 512.

66. *Id*. The Court also provided that "[t]his simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Id*.

67. *See id.* at 514–15.

68. *See, e.g.*, Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 Harv. C.R.-C.L. L. Rev. 91, 111 (2003) ("Title VII jurisprudence is typically divided into two main theories: disparate treatment theory . . . and disparate impact theory . . . . To these, we might add a third theory: hostile work environment theory."); Charles A. Sullivan, *Disparate Impact: Looking Past the* Desert Palace *Mirage*, 47 Wm. & Mary L. Rev. 911, 913–14 (2005) ("Early in its history, the Supreme Court adopted two definitions of the term ["discriminate"]. The first definition, disparate impact . . . required neither proof of motive nor intent on the employer's behalf. Ironically, the second theory the Court recognized, disparate treatment, has come to dominate the cases and commentary.").

69. *See generally* Sperino, *supra* note 12 (discussing the "theoretical confusion within employment discrimination law").

70. *See, e.g.*, Susan D. Carle, *A Social Movement History of Title VII Disparate Impact Analysis*, 63 Fla. L. Rev. 251, 255 (2011) (providing "a new look at the historical origins of disparate impact analysis"); Charles A. Sullivan, *The World Turned Upside Down?: Disparate Impact Claims by White Males*, 98 Nw. U. L. Rev. 1505, 1513–24 (2004) (providing an overview of disparate impact theory). *See generally* Seiner, *supra* note 12 (describing the history and role of disparate impact law).

71. *See* Carle, *supra* note 70, at 255; Seiner, *supra* note 12, at 98–104; Sullivan, *supra* note 70, at 1513–24.

72. *See generally* Seiner & Gutman, *supra* note 15 (discussing the history of disparate impact in employment discrimination cases).

Disparate impact was first recognized as a viable theory of discrimination by the Supreme Court in *Griggs v. Duke Power*.[73] In *Griggs*, the Court considered whether an employer requiring a high school education and a minimum score on two standardized tests for placement in preferred company departments ran afoul of Title VII.[74] These requirements were shown to have an adverse effect on African-American workers at the time, though no intentional discrimination was established in the case.[75] Though the statute contained no express provision outlawing unintentional discrimination when the case was considered, the Court held that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[76] The Court made clear that where a company institutes a facially neutral policy that has a disparate impact on a protected group, the employer must demonstrate that its policy is job-related to avoid liability under Title VII.[77]

Over time, the Court would back away from its characterization of disparate impact in *Griggs*. Most notably, in *Wards Cove Packing Co., Inc. v. Atonio*,[78] the Court established new parameters for considering these cases. Pursuant to *Wards Cove*, plaintiffs bringing disparate impact claims must "begin by identifying the specific employment practice that is challenged."[79] Additionally, the employer's business justification for the practice should be given only a "reasoned review," and the policy need not "be essential or indispensable."[80] Indeed, the *Wards Cove* Court made clear that the employer does not even carry the burden of persuasion in establishing its business rationale for the policy.[81]

Congress would eventually intervene, largely overturning the *Wards Cove* decision.[82] As part of the Civil Rights Act of 1991, which amends

73. 401 U.S. 424 (1971). *See, e.g.*, Michelle A. Travis, *Recapturing the Transformative Potential of Employment Discrimination Law*, 62 WASH. & LEE L. REV. 3, 77–78 (2005) ("Although the original version of Title VII did not say anything explicit about the disparate impact theory of discrimination, the United States Supreme Court recognized in *Griggs v. Duke Power Co*. that the disparate impact theory was implicit in this statutory provision.").

74. *Griggs*, 401 U.S. at 427–28.

75. *Id.* at 428–33.

76. *Id*. at 430.

77. *Id*. at 436 ("Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving these devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance.").

78. 490 U.S. 642 (1989).

79. *Id*. at 656.

80. *Id*. at 659 (internal quotation marks omitted).

81. *Id*. The Court held that defendants have only a burden of production—not persuasion—of asserting a business rationale for the policy in question. *See id.* at 658–61.

82. *See, e.g.*, Keith R. Fentonmiller, *The Continuing Validity of Disparate Impact Analysis for Federal-Sector Age Discrimination Claims*, 47 AM. U. L. REV. 1071, 1119 (1998) ("Congress statutorily

Title VII of the Civil Rights Act of 1964, Congress included (for the first time) a specific statutory basis for disparate impact claims.[83] Title VII now provides that to proceed in a disparate impact case the plaintiff must first show that a facially neutral policy or practice adversely affects a protected group.[84] The defendant then has the burden of production and persuasion in establishing that the policy or practice is job-related and consistent with business necessity.[85] Finally, the plaintiff may show that there are alternative practices available that have less discriminatory impact but still serve the employer's business needs.[86] This three-part test thus forms the foundation for analyzing all disparate impact employment discrimination claims.

This test, for the first time, provides a solid theoretical and statutory basis for disparate impact claims.[87] At the same time, it has also generated a significant amount of confusion in the courts, as the factors that compose this test are somewhat subjective and can be applied in varying ways.[88] And the lines between intentional and unintentional discrimination are not always entirely clear.[89] This confusion has led to tremendous difficulty in the courts, which have struggled to find a consistent way to apply the doctrine.[90] Many academics have already identified the problems with interpreting the statutory text that underlies disparate impact law.[91] Professor Richard Primus, for example, correctly highlights the lack of clarity in the statute, stating that its provisions:

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overturned *Wards Cove* through the CRA."); *see also* 42 U.S.C. § 2000e-2(k)(1)(A)–(C) (2006) ("The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of 'alternative employment practice.'").

83. *See* 42 U.S.C. § 2000e-2(k).

84. *Id.* § 2000e-2(k)(1).

85. *Id.*

86. *Id*. The statute further provides:

> [T]he complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

Id. § 2000e-2(k)(1)(B)(i).

87. *See* Seiner, *supra* note 12, at 96–97 ("Congress attempted to resolve many of these questions by enacting the Civil Rights Act of 1991 . . . which for the first time established a statutory basis for disparate impact claims."); Sullivan, *supra* note 68, at 964 (discussing disparate impact analysis).

88. *See* Seiner, *supra* note 12, at 97 ("The blurry legal landscape of disparate impact and disparate treatment in cases alleging discriminatory employment standards cries out for clarity.").

89. *Id*.

90. *See* Richard A. Primus, *Equal Protection and Disparate Impact: Round Three*, 117 HARV. L. REV. 494, 518 (2003) (noting "ambiguities" of disparate impact even after amendments to the statute); Seiner, *supra* note 12 (discussing the confusion over the disparate impact standard).

91. *See generally* Peresie, *supra* note 13 (addressing the difficulty of using statistics in disparate impact claims); Primus, *supra* note 90 (discussing the difficulty with interpreting disparate impact law); Seiner, *supra* note 12 (discussing the confusion over the disparate impact standard); *see also* Sullivan,

> reflect the lack of consensus among those who passed the amendments about the rationale for and contours of the disparate impact standard. Judicial developments since 1991 have not clarified matters: the Supreme Court has yet to construe section 703(k). The purpose, meaning, and operation of disparate impact doctrine thus remain a pastiche of statutory fragments and judicial opinions that those fragments may or may not supersede.[92]

Thus, even after the statutory amendments, disparate impact doctrine—just like disparate treatment law—remains difficult to interpret and apply.[93] Correctly identifying a particular policy that is unlawful, establishing the existence of a statistical disparity, providing a business rationale for an employment practice, and proposing a less discriminatory alternative are all subjective determinations open to interpretation by the particular court.[94] This subjectivity has clouded disparate impact law with confusion and uncertainty, as both the litigants and courts attempt to define its terms.[95]

Despite this confusion, the statutorily created three-part test at least provides a firm basis for alleging disparate impact claims.[96] The burden-shifting framework set forth in the statute must now be considered when evaluating these cases.[97] This disparate impact framework established by the statute must thus form the basis for determining whether a particular claim is *plausible* under the recent *Twombly* and *Iqbal* decisions.

III. Plausibility and Disparate Impact

The Civil Rights Act of 1991, which amends Title VII, now gives employment discrimination plaintiffs a statutory basis for proceeding with claims of unintentional discrimination.[98] What is less clear, however, is what a plaintiff must allege in a complaint to state a plausible claim to relief.

The plausibility standard announced in *Twombly* and *Iqbal* called into question decades of well-established pleading precedent.[99] Not only did these recent Supreme Court decisions abrogate the well-developed *Conley* "no set of facts" standard, but they also failed to clearly define

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supra note 68, at 964 ("[D]isparate impact theory remains a complicated and confusing doctrine.").

92. Primus, *supra* note 90, at 518 (citation omitted).

93. *See generally* Sperino, *supra* note 12.

94. *See generally* Peresie, *supra* note 13 (discussing the role of statistics in disparate impact doctrine); Primus, *supra* note 90 (discussing the lack of clarity in disparate impact provisions); Seiner, *supra* note 12 (noting confusion in the disparate impact standard).

95. *See generally* Peresie, *supra* note 13; Primus, *supra* note 90; Seiner, *supra* note 12.

96. *See* 42 U.S.C. § 2000e-2(k) (2006).

97. *See id*.

98. *See id*.

99. *See generally* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

the new standard that was put in place.[100] Indeed, from *Twombly* and *Iqbal* we are left only with the knowledge that a particular claim must be *plausible*—meaning something more than "possible" or "conceivable" but less than "probable."[101] This ill-defined standard has already created confusion in the lower courts, as the judiciary struggles with how to apply this analysis.[102]

This ambiguous plausibility standard has created particular difficulty for employment discrimination plaintiffs.[103] Workplace claims appear to be one of the areas most directly impacted by the *Twombly* and *Iqbal* decisions.[104] My prior analysis of this area of the law has demonstrated the confusion that the lower courts have experienced in applying the plausibility standard to employment disputes.[105] Some of this confusion is the result of the discriminatory-intent showing that is required in a typical disparate treatment case. Determining whether discriminatory intent has been adequately established is often a difficult and subjective inquiry.[106] While no area of the law is completely safe from the lack of clarity of the plausibility standard, employment discrimination plaintiffs appear to be one of the groups most largely affected by the Supreme Court's recent decisions.[107]

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100. *See Iqbal*, 556 U.S. 662; *Twombly*, 550 U.S. 544.

101. *See, e.g.*, *Iqbal*, 556 U.S. at 696 (Souter, J., dissenting) ("[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable." (quoting *Twombly*, 550 U.S. at 556)); *Twombly*, 550 U.S. at 570 ("Because the plaintiffs here have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed."). *See generally* Joseph A. Seiner, *Plausibility Beyond the Complaint*, 53 WM. & MARY L. REV. 987 (2012) (noting the Court's lack of clarity in defining the plausibility standard).

102. *See, e.g.*, Seiner, *supra* note 8, at 1035 (discussing the confusion of lower courts in applying the plausibility standard to employment discrimination cases). *See generally* Kevin M. Clermont, *Three Myths About* Twombly-Iqbal, 45 WAKE FOREST L. REV. 1337, 1371 (2010) ("The *Twombly-Iqbal* regime is a novel and uncertain one, as well as one instituted by an unwise legal process."); A. Benjamin Spencer, *Pleading Civil Rights Claims in the Post-*Conley *Era*, 52 How. L.J. 99, 160 (2008) (discussing the "amorphous concept of 'plausibility'").

103. *See generally* Seiner, *supra* note 8 (discussing the difficulty lower courts have experienced in applying the plausibility standard to workplace disputes).

104. *See generally* CECIL ET AL., *supra* note 16 (providing a study analyzing the impact of *Twombly*/*Iqbal* on dismissal rates in a wide range of case types); Lonny Hoffman, Twombly *and* Iqbal*'s Measure: An Assessment of the Federal Judicial Center's Study of Motions to Dismiss* (U. Hous. Law Ctr., Working Paper No. 1904134), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1904134 (discussing the federal judicial center dismissal study).

105. *See generally* Joseph A. Seiner, *Pleading Disability*, 51 B.C. L. REV. 95 (2010) (discussing the confusion in lower courts of applying the plausibility standard to claims brought under the Americans with Disabilities Act); Seiner, *supra* note 6 (discussing the confusion in lower courts over applying the plausibility standard to claims brought under Title VII of the Civil Rights Act of 1964); Seiner, *supra* note 8 (same).

106. *See generally Iqbal*, 556 U.S. 662 (discussing the pleading of discriminatory intent in a civil rights case); Seiner, *supra* note 6 (discussing the pleading of discriminatory intent in Title VII employment discrimination cases).

107. *See generally* CECIL ET AL., *supra* note 16 (setting forth a study on the impact of the plausibility

The uncertainty the courts have already experienced in applying the plausibility standard to employment claims is only exacerbated by disparate impact analysis. As already discussed, the courts have been confused over how to analyze unintentional discrimination cases for years—long before the *Twombly* standard was ever announced.[108] This existing confusion, combined with the ambiguity of the new plausibility standard, will likely leave a court bewildered when faced with a dismissal motion in a disparate impact case. As one federal court recently observed in a case involving allegations of both intentional and unintentional discrimination, "*Twombly* and *Iqbal* confused matters."[109] This Article attempts to bring some clarity to this area of the law by exploring the most likely ways of analyzing a disparate impact claim following *Iqbal*.

While a court could impose various requirements on a plaintiff depending on the facts of the particular case, there are two broad approaches to disparate impact pleading that should be evaluated. The first approach would require the plaintiff to allege a prima facie case of discrimination—alleging (with factual support) the elements of the first step of the three-part test set forth under Title VII.[110] The second, broader approach to disparate impact pleading would require the plaintiff to allege more comprehensive facts in the complaint. These additional facts would support the plaintiff's *entire* disparate impact claim under Title VII, rather than simply the prima facie case. Such additional facts would establish any flaws with the employer's business rationale for implementing the policy and whether any alternative policies with less discriminatory impact were available. This Part considers both readings of the Federal Rules and recent Supreme Court precedent, and explains why the first approach is the preferable one.

Initially, it should be noted that under either reading of the Federal Rules, the plaintiff must raise disparate impact as an independent claim in the case. The Supreme Court has made clear that where the plaintiff does not, the claim is subject to dismissal. Thus, for example, in *Raytheon Co. v. Hernandez*,[111] the Court rejected the plaintiff's disparate impact claim which the plaintiff had "failed to plead or raise . . . in a timely

standard on dismissal rates in a wide range of district court cases); Hoffman, *supra* note 104 (discussing the federal judicial center dismissal study); Seiner, *supra* note 6 (discussing the impact of the *Twombly* and *Iqbal* decisions on workplace litigants).

108. *See supra* Part II (discussing the confusion courts have faced in analyzing disparate impact cases).

109. Sablan v. A.B. Won Pat Int'l Airport Auth., No. 10-00013, 2010 WL 5148202, at *3 (D. Guam. Dec. 9, 2010). *See* Sablan v. A.B. Won Pat Int'l Airport Auth., No. 10-00013, 2011 WL 1440091, at *6 (D. Guam. Apr. 13, 2011) ("Accordingly, the . . . complaint is . . . dismissed, so far as it purports to articulate a disparate impact theory under Title VII.").

110. *See* 42 U.S.C. § 2000e-2(k) (2006).

111. 540 U.S. 44 (2003).

manner."[112] And, in *Hazen Paper Co. v. Biggins*, the Court considered an allegedly discriminatory vesting policy under only an *intentional* discrimination analysis where a disparate impact claim had not been brought by the plaintiff.[113] Similarly, plaintiffs should make certain that they raise a disparate impact claim even before a federal complaint is filed. If such a claim is not properly asserted in the charge of discrimination before the U.S. Equal Employment Opportunity Commission, it may be subject to dismissal.[114]

A. First-Step-Only Approach

Under the first reading of the Federal Rules—the *first-step-only* approach—the plaintiff would be required to allege only a prima facie case of disparate impact discrimination. This would require the plaintiff to assert the first step of the three-part test set forth under Title VII.[115] More specifically, the plaintiff must allege facts sufficient to show that a facially neutral policy or practice adversely affects a protected group.[116] To proceed under this first approach, then, the plaintiff must allege the following three facts:

First, the plaintiff must identify the policy that is in question. This is perhaps the most basic—and most important—fact involved in the case.

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112. *Id*. at 49 (discussing the holding of the lower courts). *See generally* Seiner, *supra* note 12, at 113 ("*Hazen Paper* and *Raytheon* strongly suggest, then, that a litigant must specifically set forth a disparate impact theory or else this theory will be considered waived.").

113. 507 U.S. 604, 609–10 (1993).

114. *See, e.g.*, NAACP v. Ballard, 741 F. Supp. 2d 925, 940 (S.D. Ind. 2010) ("A charge that alleges disparate treatment and does not identify a neutral employment policy does not preserve a disparate impact claim."); Santos v. Panda Express, Inc., No. C 10-01370 SBA, 2010 WL 4971761, at *4 (N.D. Cal. Dec. 3, 2010) ("[F]ederal courts in general have concluded that an administrative charge that only alleges a discrimination claim based on disparate treatment is insufficient to exhaust a claim for disparate impact—and vice-versa."); Leo v. Garmin Int'l, No. 09-CV-2139-KHV, 2009 WL 3122502, at *5 (D. Kan. Sept. 24, 2009) ("[P]laintiff's charge did not mention a specific policy or an adverse effect on a protected class . . . [P]laintiff did not exhaust administrative remedies on his disparate impact claim . . . .").

115. *See* 42 U.S.C. § 2000e-2(k); *see also* Rogers v. First Union Nat'l Bank, 259 F. Supp. 2d 200, 208 (D. Conn. 2003) ("To establish a prima facie case of disparate impact, a plaintiff must (1) identify a policy or practice, (2) demonstrate that a disparity exists, and (3) establish a causal relationship between the two."); Jill Gaulding, *Against Common Sense: Why Title VII Should Protect Speakers of Black English*, 31 U. Mich. J.L. Reform 637, 682 (1998) ("The plaintiff's prima facie case in a Title VII disparate impact case requires a showing that a facially neutral employment practice has a disproportionately adverse impact on a protected class.").

116. *See, e.g.*, Padron v. Wal-Mart Stores, Inc., 783 F. Supp. 2d 1042, 1046 (N.D. Ill. 2011) ("Plaintiffs do not describe in their complaint a specific, facially-neutral policy that has a disparate impact on people . . . who work for Defendant."); *see also* 42 U.S.C. § 2000e-2(k)(1); Ernest F. Lidge III, *Financial Costs as a Defense to an Employment Discrimination Claim*, 58 Ark. L. Rev. 1, 24 (2005) ("In a disparate impact claim, the plaintiffs establish a prima facie case by showing that a facially neutral employment practice has a significant disparate impact on one of the groups protected by Title VII.").

Any plausible complaint will thus include a plain statement of the employer's policy or practice that is purportedly resulting in an unlawful disparate impact.[117] This statement should be as straightforward and specific as possible. Thus, for example, where a standardized test is at issue, the plaintiff should allege the type of test used, what the test purports to measure, and how the results of the test are being used by the employer.[118] The plaintiff should further include the timing of the particular policy, setting forth when the policy was implemented by the employer. By including the timing of the practice used, the plaintiff will further help avoid any assertion that the charge of discrimination was not filed in a timely manner.[119]

Second, to sufficiently allege a disparate impact claim under the first-step-only reading of the Federal Rules, the plaintiff must assert the protected class that has been disproportionately impacted by the policy or practice in question.[120] Thus, the plaintiff must allege whether the discrimination occurred on the basis of race, color, sex, national origin or religion.[121] And the plaintiff should be as specific as possible, identifying the particular protected characteristic that has been affected.[122] Thus, for

117. *See, e.g.*, *Padron*, 783 F. Supp. 2d at 1050 ("Plaintiffs' EEOC charges not only fail to use the term 'disparate impact,' but they also fail to allege any specific policy, much less one that could be construed as having a disparate impact on Defendant's . . . employees."); Jenkins v. N.Y.C. Transit Auth., 646 F. Supp. 2d 464, 469 (S.D.N.Y. 2009) ("[A plaintiff must] identify in his pleadings a specific employment practice that is the cause of the disparate impact."); Combs v. Grand Victoria Casino & Resort, No. 1:08-CV-00414-RLY-JMS, 2008 WL 4452460, at *3 (S.D. Ind. Sept. 30, 2008) ("In the instant case, Plaintiffs have not pointed to a specific employment practice to support their disparate impact claims. Their vague claims of subjective decision-making cannot be considered a specific test, requirement, or practice." (internal quotation marks omitted)).

118. It is worth noting that "although the plaintiff 'normally' has the burden of identifying the specific practice she claims causes the disparity she identifies, she need not do so if the employer's process is not 'capable' of being subdivided for such purposes." Sullivan, *supra* note 68, at 980 (citing 42 U.S.C. § 2000e-2(k)(1)(B)(i)).

119. *See* 42 U.S.C. § 2000e-5(e)(1) ("A charge under this section shall be filed within one hundred and eighty days after the alleged unlawful employment practice occurred . . . except that in a case [where] the person aggrieved has initially instituted proceedings with a State or local agency . . . such charge shall be filed . . . within three hundred days . . . ."). *Cf.* Ndondji v. InterPark, Inc., 768 F. Supp. 2d 263, 280 (D.D.C. 2011) ("[B]ecause statute of limitations issues often depend on contested questions of fact, dismissal is appropriate only if the complaint on its face is conclusively time-barred." (alteration in original)).

120. *See* 42 U.S.C. § 2000e-2(k)(1).

121. *Id.* § 2000e-2(a) ("It shall be an unlawful employment practice for an employer . . . to limit, segregate, or classify his employees . . . because of such individual's race, color, religion, sex, or national origin."). *Cf.* EEOC v. Steamship Clerks Union, Local 1066, 48 F.3d 594, 601 (1st Cir. 1995) ("[T]he plaintiff must demonstrate a disparate impact on a group characteristic, such as race, that falls within the protective ambit of Title VII.").

122. As noted earlier, the analysis in this Article addresses claims brought pursuant to Title VII only, and does not consider other bases of discrimination, such as disability or age. *See* Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101–213; Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621–34. Also, a plaintiff should closely examine the law of the jurisdiction before pleading a complaint when proceeding under a theory of intersectionality. *See generally* Bradley Allan Areheart,

example, a plaintiff could allege that the policy in question has adversely affected female workers.[123]

Third, the plaintiff should allege that the policy has resulted in an *adverse effect* on the protected group identified in the complaint.[124] Thus, the impact of the facially neutral policy or practice must truly be adverse.[125] And, this adverse effect must further impact the protected group identified (as well as the plaintiff).[126] Though there are many ways to allege such an adverse impact, one common way is through some type of numerical data.[127] This type of data often takes the form of a statistical analysis of the impact of the employer's policy.[128] Not all courts require the inclusion of these types of statistics to proceed with a disparate impact claim.[129] And it may be entirely possible to sufficiently show an adverse

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Intersectionality and Identity: Revisiting a Wrinkle in Title VII, 17 GEO. MASON U. C.R. L.J. 199 (2006).

123. *Cf.* Bennett v. Schmidt, 153 F.3d 516, 518 (7th Cir. 1998) ("'I was turned down for a job because of my race' is all a complaint has to say.").

124. *See, e.g.*, Sablan v. A.B. Won Pat Int'l Airport Auth., No. 10-00013, 2011 WL 1440091, at *6 (D. Guam. Apr. 13, 2011) ("Plaintiff has failed to demonstrate . . . a disparate impact on a protected group."); Worrell v. Colo. Cmty. Bank, No. 10-CV-00671-ZLW-BNB, 2010 WL 2943487, at *2 (D. Colo. July 21, 2010) ("[A] plaintiff alleging disparate impact must point to both a significant disparate impact and to a particular policy or practice that caused the disparity." (internal quotation marks omitted)).

125. *See, e.g.*, *Worrell*, 2010 WL 2943487, at *2 (discussing the lack of damages in an alleged disparate impact case).

126. *See, e.g.*, *id*. ("A workplace requirement which was imposed only on the plaintiff, as opposed to a workplace policy affecting all employees, cannot form the basis of a disparate impact claim. In other words, discriminatory impact cannot be established where you have just one isolated decision." (internal quotation marks omitted)); *see also* Sandra F. Sperino, *The Sky Remains Intact: Why Allowing Subgroup Evidence Is Consistent with the Age Discrimination in Employment Act*, 90 MARQ. L. REV. 227, 263 (2006) ("Because plaintiffs must establish a particular employment practice that resulted in the disparate impact, the employees used to create the statistical disparity must be subjected to the same employment decision.").

127. *See Sablan*, 2011 WL 1440091, at *5 ("The focus in a disparate impact case is usually on statistical disparities, rather than specific incidents, and on competing explanations for those disparities." (internal quotation marks omitted)); Peresie, *supra* note 13, at 778 ("Because neither the doctrine nor the statutes specify the statistical showing required to establish disparate impact, courts make that decision within the context of particular cases.").

128. *See* Sperino, *supra* note 126, at 260 ("[A] plaintiff may proceed with a disparate impact case only after establishing that a particular employment practice creates a disparate impact on a protected group. The primary way of making this showing is through the use of statistical evidence.").

129. *See* Elaine W. Shoben, *Disparate Impact Theory in Employment Discrimination: What's* Griggs *Still Good For? What Not?*, 42 BRANDEIS L.J. 597, 606 (2004) ("Disparate impact is ordinarily proven by statistics, but there are cases in which the facts permitted proof without this step."); *see also* Wright v. Nat'l Archives & Records Serv., 609 F.2d 702, 712 (4th Cir. 1979) ("[W]e quite agree that an individual may, in appropriate circumstances establish without elaborate statistical proof a disparate impact prima facie case . . . ."); Sullivan, *supra* note 68, at 989 ("[N]othing in the statutory language requires that a plaintiff use a particular kind of proof to establish disparate impact."). *Compare, e.g.*, Jenkins v. N.Y.C. Transit Auth., 646 F. Supp. 2d 464, 469 (S.D.N.Y. 2009) ("It would be inappropriate to require a plaintiff to produce statistics to support her disparate impact claim before the plaintiff has had the benefit of discovery."), *with* Howard v. Gutierrez, 571 F. Supp. 2d 145, 159 (D.D.C. 2008) ("[P]laintiffs must prove causation—that is, they must amass statistical evidence of a kind and degree

effect without resort to such numerical data. Nonetheless, given the way in which *Twombly* and *Iqbal* have changed the playing field for employment discrimination litigants, plaintiffs will want to plead such data when it is available.[130] At a minimum, a claim accompanied by numerical support demonstrating a disparate impact in the workplace would seem to allege a more plausible case than a claim without these data.[131]

This third component of the disparate impact claim will often prove the most difficult for a plaintiff to allege. It may be that the data needed to perform an adequate statistical analysis are within the employer's possession and cannot be attained until discovery—which may be too late if the claim is dismissed.[132] And such an analysis will typically prove costly. Experts will often be required to properly analyze the data, and this type of testimony can come with substantial expense.[133] Nonetheless, plaintiffs should allege these data where at all possible to help establish a plausible disparate impact claim. And courts should take a flexible approach to allowing limited discovery for these claims, and in permitting leave to amend a complaint where important data are discovered later in court proceedings.[134]

In sum, to properly plead a disparate impact claim under the first-step-only approach, a plaintiff must allege the following three facts:

(1) The employment policy or practice in question;

(2) The protected class that has been disproportionately impacted; and

(3) The adverse effect on the plaintiff and the protected group.

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sufficient to show that the practice in question has caused the exclusion of members of the protected class from obtaining promotions and promotional opportunities." (internal quotation marks omitted)).

130. *See* McCoy v. Canterbury, No. 3:10-0368, 2010 WL 5343298, at *5 (S.D. W. Va. Dec. 20, 2010) ("Because Plaintiff fails to offer numerical or statistical evidence demonstrating disparate impact, she must allege sufficient factual detail of a series of discrete episodes of the contested employment practice in order to raise a plausible inference that it has a discriminatory impact on minorities, and that Defendant is responsible for it.").

131. *See* Peresie, *supra* note 13, at 774 ("[I]n Title VII disparate impact discrimination cases . . . statistics are plaintiffs' key evidence in establishing a prima facie case.").

132. *See, e.g.*, Jenkins v. N.Y.C. Transit Auth., 646 F. Supp. 2d 464, 469 (S.D.N.Y. 2009) (noting the importance of discovery to obtain statistical data).

133. *See* Sharon Rabin-Margalioth, *The Market Defense*, 12 U. PA. J. BUS. L. 807, 829 (2010) ("For individual claimants, the disparate impact course of action may prove too expensive. It is not sufficient to argue that to prove specific practices disparately impact women compared to men, the plaintiff has to offer statistical data supporting the claim which requires collecting data and hiring experts to conduct regression analysis.").

134. *See generally* Scott Dodson, *New Pleading, New Discovery*, 109 MICH. L. REV. 53 (2010) (discussing the use of discovery following *Twombly* and *Iqbal*); *see also* Francisco v. Verizon S., Inc., No. 3:09cv737, 2010 WL 2990159, at *8 (E.D. Va. July 29, 2010) ("Rule 15 of the Federal Rules of Civil Procedure contemplates . . . motions to amend pleadings on that basis of relevant facts learned during discovery, and such motions should be liberally granted, meaning that the flexibility of amendment softens any painful blow of heightened pleading standards." (internal quotation marks omitted)).

The first-step-only approach is the more straightforward of the two models discussed in this Article. A plaintiff proceeding under this approach should often have little difficulty surviving a motion to dismiss.

By way of example, then, let us consider a hypothetical case where a retail shoe company refuses to hire short workers because they cannot reach the inventory on higher stocking shelves for prospective customers. A female plaintiff negatively affected by this policy could properly plead a Title VII disparate impact claim under the first-step-only approach by alleging the following:

> The defendant-employer unlawfully adopted a height policy in March 2012, which requires all workers to be at least five-feet, six-inches tall. On July 31, 2012, I was denied employment at the company as a result of this policy, which disproportionately impacts me and other female employees. The attached statistical data reflect that this policy restricts the employment opportunities of women workers in direct violation of Title VII.

As seen by this example, the first-step-only approach should not be particularly onerous to satisfy, and a short paragraph will often suffice. Nonetheless, the example conveys important information about the claim to the defendant, which will now be able to begin its investigation of the allegations. Thus, the example above identifies the policy or practice in question (height requirement), the protected group that has been impacted (prospective female workers), and the adverse impact that has resulted (failure to hire). The allegations also include numerical data, as well as the timing of the policy and adverse action, which would further bolster the plaintiff's claim.

The first-step-only approach is entirely consistent with the Supreme Court's decisions in *Twombly* and *Iqbal*, and should satisfy the plausibility standard. Both decisions were primarily concerned with providing fair notice to defendants of the plaintiff's claims.[135] And, the decisions reflect the Court's concerns over unmeritorious claims imposing unnecessary costs on defendants or even forcing defendants to settle baseless allegations.[136] The approach outlined above satisfies these concerns. It provides enough factual support of a plaintiff's disparate impact claim to give both the defendant and the court a sufficient understanding of the claim and whether it should be allowed to proceed. Thus, in the example set forth above, a defendant would have a very clear picture of the claim, as the specific policy in question, the adverse action, and the statistical impact on a particular protected group have all been clearly identified.

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135. *See generally* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

136. *See generally Iqbal*, 556 U.S. 662; *Twombly*, 550 U.S. 544.

At the same time, the first-step-only analysis offers a fair approach for plaintiffs. Most plaintiffs will typically have access to the information required under this approach, and many litigants could therefore adequately allege their claims without the need for discovery. As seen by the example above, a plaintiff would clearly know the specific policy (height requirement) which resulted in the adverse action (failure-to-hire) that they suffered. And, though not always the case, the statistical data used to support this particular claim would likely be available to the plaintiff without the need for any discovery.

The first-step-only approach is also well supported by the Supreme Court's decision in *Swierkiewicz v. Sorema*.[137] *Swierkiewicz* is the seminal pleading decision for employment discrimination litigants, which held that a Title VII plaintiff "need *not* plead a prima facie case of discrimination."[138] Thus, where a plaintiff *does* plead a prima facie case, that litigant should typically survive dismissal.[139] In essence, where a plaintiff in an employment discrimination case pleads more than what *Swierkiewicz* requires, that plaintiff will have inherently alleged a plausible claim under *Twombly* and *Iqbal*. Adequately pleading a prima facie case should thus permit the vast majority of Title VII plaintiffs to proceed with their cases.[140] *Swierkiewicz* therefore creates a safe-harbor for these Title VII plaintiffs.[141]

For disparate impact litigants, this means that to survive dismissal a plaintiff need only allege sufficient facts to establish a prima facie case—asserting that a facially neutral employment policy or practice resulted in a disparate impact on a protected group.[142] The first-step-only approach outlined above thus fits perfectly with the *Swierkiewicz* safe harbor, as it essentially requires the pleading of those facts necessary to establish a prima facie case of disparate impact discrimination.[143] A plaintiff proceeding under the approach outlined above will therefore have satisfied what is required by *Swierkiewicz*, and will have plausibly

137. 534 U.S. 506, 515 (2002).

138. *Id*. (emphasis added).

139. *See id.* at 511–12.

140. There may be certain exceptions to this approach, as *Swierkiewicz* is fact-specific. *See id*. at 512.

141. *See* Seiner, *supra* note 6, at 222–23 (discussing safe harbor for employment discrimination plaintiffs under *Swierkiewicz*).

142. *See* 42 U.S.C. § 2000e-2(k) (2006).

143. *See* Ernest F. Lidge III, *An Employer's Exclusion of Coverage for Contraceptive Drugs Is Not Per Se Sex Discrimination*, 76 TEMP. L. REV. 533, 564–65 (2003) ("To establish a prima facie case of disparate impact, the plaintiffs must identify a specific practice or policy that causes a significant disparate impact on a protected class or group. The plaintiffs must show a causal relationship between the challenged practices or criteria and the disparate impact." (footnote omitted) (internal quotation marks omitted)); Seiner, *supra* note 6, at 222–23 (explaining the contours of *Swierkiewicz* safe harbor).

pleaded a claim of disparate impact discrimination under *Twombly* and *Iqbal*.[144]

One emerging issue in Supreme Court jurisprudence is whether the *Iqbal* and *Twombly* decisions somehow overturned *Swierkiewicz*.[145] Though the courts have already taken divergent approaches to this question, the more sensible view is that the decision remains good law.[146] Nothing in the Supreme Court's recent decisions expressly overrules *Swierkiewicz*.[147] In fact, *Twombly* even cites the decision with approval while *Iqbal* fails to refer to the decision at all.[148] While the viability of *Swierkiewicz* is beyond the scope of this Article, the fate of the decision will have broad-sweeping consequences for all Title VII litigants. This fate will ultimately be decided in the courts.[149]

Similarly, there may be some question as to whether *Swierkiewicz* even applies to disparate impact cases. Though several courts have already applied the Supreme Court decision in the disparate impact context,[150] the case itself arose as a disparate treatment claim.[151] Thus, *Swierkiewicz* specifically addressed the pleading standards for *intentional* discrimination cases, and whether a plaintiff must plead a prima facie case under the most commonly used test for analyzing these claims.[152] It

144. *See generally Iqbal*, 556 U.S. 662; *Twombly*, 550 U.S. 544; *Swierkiewicz*, 534 U.S. 506.

145. *See* David Noll, *The Indeterminacy of* Iqbal, 99 GEO. L.J. 117, 144 (2010) ("[S]ome courts and commentators have questioned whether *Swierkiewicz* remains good law after *Iqbal*."); *see also* Miller, *supra* note 29, at 31 (discussing the viability of *Swierkiewicz*); Seiner, *supra* note 6, at 193–95 (same); Steinman, *supra* note 31, at 1322–23 (same); Sullivan, *supra* note 8, at 1621 (same); Thomas, *supra* note 8, at 34–38 (same).

146. *See, e.g.*, Noll, *supra* note 145, at 145 ("The better view, however, is that *Iqbal* left the essential holding of *Swierkiewicz*—that the complaint in that case was sufficient—intact.").

147. *See id*. ("To begin with, the notion that *Iqbal* overruled *Swierkiewicz* ignores the maxim that lower courts are not to infer implied overrulings of directly applicable Supreme Court precedent, even if later decisions undercut an earlier case's reasoning.").

148. *See generally Iqbal*, 556 U.S. 662; *Twombly*, 550 U.S. 544; Seiner, *supra* note 6 (discussing the viability of *Swierkiewicz*).

149. *See, e.g.*, Sullivan, *supra* note 8, at 1621 ("The ultimate interplay between *Twombly*/*Iqbal* and *Swierkiewicz* remains to be finally resolved in the courts, or, perhaps, in Congress . . . .").

150. *See, e.g.*, Hall v. Kone, Inc., No. 3:10-CV-2534-d, 2011 WL 3510861, at *2 (N.D. Tex. Aug. 10, 2011) ("[Plaintiff] need not establish a prima facie case at the pleadings stage, and his allegation that the Exam failure rate for older workers is higher than for younger workers is sufficient." (citation omitted)); Samuels v. William Morris Agency, No. 10 Civ. 7805(DAB), 2011 WL 2946708, at *3 (S.D.N.Y. July 19, 2011) ("Plaintiff need not set out facts that would establish every element of a prima facie case, but must give Defendants notice of the nature of his complaint."); McQueen v. City of Chicago, 803 F. Supp. 2d 892, 906 (N.D. Ill. 2011) (citing *Swierkiewicz* in analyzing a disparate impact claim); Jenkins v. N.Y.C. Transit Auth., 646 F. Supp. 2d 464, 469 (S.D.N.Y. 2009) ("It is unnecessary in this [disparate impact] case to test the dividing line that distinguishes a discrimination claim which, although not required to set forth a prima facie case under *Swierkiewicz*, has alleged sufficient facts to make it plausible under *Iqbal* and *Twombly*.").

151. Swierkiewicz v. Sorema, 534 U.S. 506, 509 (2002).

152. *See id*. at 508. In *Swierkiewicz*, the Court held that a plaintiff need not allege the four elements set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), to proceed in an

is quite possible, then, that the Supreme Court would not extend its reasoning in *Swierkiewicz* to disparate impact cases, particularly where the prima facie case for unintentional discrimination claims is codified by statute.[153]

Regardless of whether *Swierkiewicz* remains good law or applies in the disparate impact context, however, the first-step-only approach is well-supported by the reasoning of *Twombly* and *Iqbal* as discussed above. The approach provides sufficient notice to defendants, and addresses the cost concerns raised in the recent Court decisions. This is not to say that this approach is not without its limitations.

Initially, it should be considered that the first-step-only approach is primarily concerned with addressing the pleading standards of disparate impact employment discrimination claims under Title VII. Thus, as noted earlier, this model should not be used to analyze the pleading of other employment claims, such as those brought under the Americans with Disabilities Act or the Age Discrimination in Employment Act. Additionally, those courts taking a particularly rigid view of *Twombly* and *Iqbal* may ultimately reject the first-step-only approach, requiring more facts from a plaintiff's pleading. While this Article explains why the approach discussed here complies with the Supreme Court's plausibility standard, some lower courts may nonetheless choose to apply a higher pleading standard.[154]

Others may argue the complete opposite—that in light of *Swierkiewicz* the first-step-only approach goes too far in requiring a plaintiff to plead a prima facie case of discrimination. While a fair concern, it is difficult to identify a clear "dividing line"[155] for disparate impact cases, and the first-step-only approach helps establish a bright-line pleading rule. Nonetheless, there may be instances where a plaintiff that has *not* alleged a prima facie case has still established a plausible disparate impact claim.

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intentional discrimination case. *Swierkiewicz*, 534 U.S. at 515 ("For the foregoing reasons, we hold that an employment discrimination plaintiff need not plead a prima facie case of discrimination and that petitioner's complaint is sufficient to survive respondent's motion to dismiss.").

153. In its reasoning, the *Swierkiewicz* Court emphasized that the *McDonnell Douglas* four-part test for establishing a prima facie case of intentional discrimination "is an evidentiary standard, not a pleading requirement." *Swierkiewicz*, 534 U.S. at 510. Disparate impact claims do not rely on this *McDonnell Douglas* test, and analyzing these cases is much more a determination of whether the statutory standards have been satisfied. *See* 42 U.S.C. § 2000e-2(k) (2006). This is a critical distinction between disparate treatment and disparate impact cases, and might impact whether the Supreme Court would extend its reasoning in *Swierkiewicz* to unintentional discrimination claims.

154. As already discussed, the first-step-only approach is consistent with the Supreme Court's earlier decision in *Swierkiewicz* and should be viable regardless of whether this decision remains good law. Nonetheless, those lower courts that may perceive that *Swierkiewicz* has been overturned by *Twombly* and *Iqbal* would also be more likely to question the first-step-only approach discussed in this Article.

155. *Jenkins*, 646 F. Supp. 2d at 469.

The courts should thus remain flexible when evaluating these cases, and remember that the first-step-only approach is only one way of satisfying the *Iqbal* standard.

Finally, it is worth noting that the first-step-only analysis—while providing sufficient information to defendants—does require far less than the alternative approach set forth below.[156] Thus, from the standpoint of pure fact-gathering and sharing, the first-step-only approach is much more limited. As discussed in greater detail in the next Part of this Article, however, the first-step-only approach is still distinctly preferable to the whole-case approach for several important reasons. And, as discussed in greater detail below, in certain fact-specific contexts, a more nuanced approach to the first-step-only analysis may be required.

B. Whole-Case Approach

Under the second reading of the Federal Rules of Civil Procedure—the whole-case approach—the plaintiff would have to allege more than a prima facie case of disparate impact discrimination. This would require the plaintiff to assert not only the first step of the three-part test set forth under Title VII,[157] but to provide additional details as well. These additional facts would support the plaintiff's *entire* disparate impact claim under Title VII, rather than simply the prima facie case.[158]

Thus, to proceed under the whole-case reading, a plaintiff would need to begin by alleging all of the factors already discussed in the first-step-only approach.[159] This would include alleging sufficient facts to support the claim that a facially neutral employment practice has a disparate impact on a protected group.[160] Beyond this, however, the whole-case reading of the rules would require greater factual detail than the first-step-only approach in three important areas.

First, while the first-step-only approach strongly suggests that the plaintiff provide statistical support where possible to establish an unlawful disparate impact, the whole-case approach would *require* such statistics, or an explanation of why these statistics are absent.[161] The statistics provided by the plaintiff must plausibly show that the policy or practice in question has resulted in a numerical disparity of substantial significance.[162] In many cases, this would necessitate that the plaintiff

156. *See infra* Part III.B (discussing the whole-case approach).

157. *See* 42 U.S.C. § 2000e-2(k).

158. *See id*.

159. *See supra* Part III.A (setting forth facts that must be alleged under the first-step-only approach).

160. *See supra* Part III.A.

161. *See supra* Part III.A (discussing the role of statistics in pleading a disparate impact claim).

162. The whole-case reading discussed here would in many ways adopt the approach used by those courts that already require statistical support for a disparate impact claim. *See, e.g.*, Howard v.

secure the services of an expert to generate the data necessary. Where a plaintiff attempts to proceed without the use of statistical support, that plaintiff would be required to clearly allege how the policy or practice in question can be shown to have a disparate impact without reliance on numerical data.[163] Thus, the plaintiff would have the burden of either providing data to support a statistical impact, or of explaining why such statistics are unnecessary for the particular claim.[164] As already noted, it may be difficult to gather this type of statistical information early in the case (before discovery has begun).[165] Even under the whole-case approach, however, the courts should remain flexible in allowing limited discovery on this issue, or in permitting plaintiffs to amend their pleadings once discovery has commenced.[166]

Second, under the whole-case approach, the plaintiff must allege facts that call into question whether the employer's policy or practice is job-related and consistent with business necessity.[167] Challenging the employer's business rationale for the policy is critical to the whole-case approach. There are *numerous* ways in which a plaintiff could plead facts undermining the employer's policy. Thus, for example, the plaintiff could allege facts showing that the employer's policy fails to accurately measure a critical requirement of the job—effectively questioning the practice adopted by the employer.[168] For instance, if an employer implemented a strength requirement for a particular position, the plaintiff could assert facts that would help show that the position could

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Gutierrez, 571 F. Supp. 2d 145, 159 (D.D.C. 2008) (discussing the role of statistics in disparate impact cases).

163. *See generally* McCoy v. Canterbury, No. 3:10-0368, 2010 WL 5343298, at *5 (S.D. W. Va. Dec. 20, 2010) ("Because Plaintiff fails to offer numerical or statistical evidence demonstrating disparate impact, she must allege sufficient factual detail of a series of discrete episodes of the contested employment practice in order to raise a plausible inference that it has a discriminatory impact on minorities, and that Defendant is responsible for it.").

164. As noted, the whole-case-approach also allows plaintiffs to explain why statistical data may not be necessary for a particular claim. This might occur, for example, where the disparate impact is obvious on the face of the complaint itself. For example, a court might be willing to accept that an English-only requirement in the workplace would have a disparate impact on the basis of national origin without resort to a statistical inquiry. *Cf.* Peresie, *supra* note 13, at 778 ("Because neither the doctrine nor the statutes specify the statistical showing required to establish disparate impact, courts make that decision within the context of particular cases."). *See generally* Shoben, *supra* note 129, at 606 (discussing how disparate impact is established).

165. *See* Peresie, *supra* note 13, at 778 (discussing the difficulty of using statistical data).

166. *See generally* Dodson, *supra* note 134 (discussing the role of discovery under the plausibility standard); *see also* Francisco v. Verizon S., Inc., No. 3:09cv737, 2010 WL 2990159, at *8 (E.D. Va. July 29, 2010) (discussing the importance of a flexible approach to allowing amendments to pleadings).

167. *See* 42 U.S.C. § 2000e-2(k) (2006). As discussed later in this Part, this requirement would run counter to the view expressed by several courts that the defendant must plausibly plead any affirmative defenses.

168. *See id*.

be effectively performed by a worker that is not as strong as the policy requires.[169]

Another way of challenging the employer's business rationale for a particular policy would be to undermine any validation studies performed by the defendant. Employers sometimes perform validation studies to support the assertion that a particular policy or practice is job-related and essential to the business.[170] A validation study attempts to ascertain whether a particular test accurately assesses what it purports to measure.[171] Thus, for example, an employer might perform a validation study to determine whether a standardized test used to decide eligibility for promotion correctly measures the requirements necessary for success in the new position.[172] Such a study may help insulate employers from liability, possibly even creating a safe harbor from a disparate impact claim.[173] Where an employer properly uses a validation study to support a particular selection procedure, then, the plaintiff will have a difficult—if not impossible—path toward establishing employer liability.

Under the whole-case approach, where an employer has undergone a validation study to support a test or procedure (which it provides to the plaintiff), the plaintiff would be required to plead sufficient facts to show how the study is flawed.[174] Such facts could take many forms. For instance, a plaintiff could argue that the validation study in question failed to comply with the guidelines established by a particular governmental agency.[175] Thus, the plaintiff could plead facts showing that the employer's analysis did not comport with the procedures established by the U.S. Equal Employment Opportunity Commission and the Department of Justice.[176] Alternatively, the plaintiff could demonstrate that the employer's validation study was flawed in some other way, and that the particular test or procedure analyzed does not accurately measure what it purports to.[177]

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169. *See generally* Isaac B. Rosenberg, *Height Discrimination in Employment*, 2009 UTAH L. REV. 907 (2009) (discussing discrimination on the basis of height in the workplace).

170. *See* Seiner & Gutman, *supra* note 15, at 2209–10 (discussing validation studies).

171. *See id*. at 2210 (discussing the role of validation studies in analyzing "tests and other selection procedures").

172. *See generally, e.g.*, Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (discussing the validation of a test for promotion).

173. *See* Seiner & Gutman, *supra* note 15, at 2209–12 (discussing the possibility of validation studies creating "a limited safe harbor" for disparate impact claims).

174. *See* 42 U.S.C. § 2000e-2(k) (2006).

175. *See* Seiner & Gutman, *supra* note 15, at 2210 ("Federal enforcement agencies, including the Department of Justice and the EEOC, have adopted the *Uniform Guidelines on Employee Selection Procedures* to explain in detail how to validate tests and other selection procedures." (citing Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (2009))).

176. *See* Seiner & Gutman, *supra* note 15, at 2210.

177. *Cf. id*. at 2209–12 (discussing limited safe harbor for validation studies).

Once again, properly pleading that the employer's validation study is defective would often require access to limited discovery in the case. It is possible that an employer would have provided the study to the plaintiff as part of the administrative process before the Equal Employment Opportunity Commission, or in response to inquiries from the plaintiff's attorney.[178] In many instances, however, a plaintiff will not have access to this type of information prior to filing the complaint, and may be unaware whether a validation study was even performed. Limited discovery, or liberal amendment later in the proceedings, would thus be necessary to allow plaintiffs access to this information.[179] This type of flexible approach to discovery is thus a critical component of the whole-case reading of the Federal Rules. A plaintiff cannot fairly be expected to challenge a study that has not been provided to her and of which she is unaware.

Challenging an employer's validation study is only *one* way for a plaintiff to establish that the policy or practice in question is not job-related and consistent with business necessity.[180] Depending upon the procedure used by the employer, however, there are likely many other ways of showing that the policy is not essential to the business.[181] Though it is impossible to anticipate all of the factual scenarios that could arise, undermining an employer's business rationale—either by showing that the procedure used is ineffective or by challenging a validation study performed by the employer, for example—is imperative to the whole-case approach to the Federal Rules.

Third, under the whole-case approach the plaintiff would also be required to plead any alternative policies or practices that would have less discriminatory impact but still serve the employer's business needs.[182] This requirement would only be necessary where the plaintiff is unable to sufficiently challenge the employer's business rationale for its policy, or where the plaintiff simply wants to preserve the issue for trial. Thus, to the extent that there are viable alternatives to the employer's policy, the

178. *See* Margaret H. Lemos, *The Consequences of Congress's Choice of Delegate: Judicial and Agency Interpretations of Title VII*, 63 VAND. L. REV. 363, 400 (2010) (noting the "EEOC's focus on information gathering and conciliation").

179. *See generally* Dodson, *supra* note 134 (discussing the role of discovery under the plausibility standard); *see also* Francisco v. Verizon S., Inc., No. 3:09cv737, 2010 WL 2990159, at *8 (E.D. Va. July 29, 2010) (discussing the importance of a flexible approach to allowing amendments to pleadings).

180. *See* 42 U.S.C. § 2000e-2(k) (2006).

181. *See* Michael Carvin, *Disparate Impact Claims Under the New Title VII*, 68 NOTRE DAME L. REV. 1153, 1157–58 (1993) (discussing the defense of job-relatedness and consistency with business necessity); Susan S. Grover, *The Business Necessity Defense in Disparate Impact Discrimination Cases*, 30 GA. L. REV. 387, 395–97 (1996) (same); Andrew C. Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. REV. 1479, 1513–14 (1996) (same).

182. *See* 42 U.S.C. § 2000e-2(k)(1).

plaintiff should allege those as well.[183] For example, where an employer has adopted a particular standardized test to determine which employees are qualified for promotion, the plaintiff could allege an alternative standardized test that could be used more effectively while having less discriminatory results.[184] In this context, the plaintiff could assert facts which would set forth the specific alternative test available, other situations where the test has been used successfully, and expert testimony indicating that the test would be the preferred selection device in the case.[185] It is worth noting that the example provided here is only one way of establishing a less discriminatory alternative. Depending upon the nature of the case and the policy or practice used by the employer, there are numerous ways that a plaintiff could properly allege facts supporting an effective alternative approach.[186]

In sum, to properly plead a claim under the whole-case approach, a plaintiff must allege a prima facie case of disparate impact discrimination. As set forth under the first-step-only analysis, this would include pleading sufficient facts to show that a facially neutral policy or practice has an adverse effect on a protected group.[187] Beyond the prima facie case, however, the plaintiff would further be required to plead facts supporting the following three areas:

(1) Statistical data and/or other facts supporting the disparate impact;

(2) Information plausibly showing that the policy is not job-related and/or consistent with business necessity; and

(3) To the extent that the plaintiff is relying on alternative practices to prove its case, how the practices would serve the employer's business goals and have less discriminatory impact.

As discussed throughout this Part, the whole-case reading relies heavily on courts and parties adopting a flexible approach to the Federal Rules and discovery. By nature, this approach requires plaintiffs to allege additional facts that would—pre-*Twombly* and *Iqbal*—likely not have been required by the courts.[188]

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183. *See id*.

184. *Cf.* Griggs v. Duke Power, Co., 401 U.S. 424, 430–32 (1971) (discussing the use of a test in a race discrimination case). *See generally* Ricci v. DeStefano, 129 S. Ct. 2658 (2009) (discussing the use of a standardized test for promotion in a disparate treatment case).

185. Though the plaintiff would likely have access to much if not all of this information as part of her own investigation, limited discovery might again be required in this context. For example, the plaintiff might need information from the employer to establish that the alternative policy suggested would have a less discriminatory impact than the test currently used.

186. *See* Barbara J. Flagg, *Fashioning a Title VII Remedy for Transparently White Subjective Decisionmaking*, 104 YALE L.J. 2009, 2044–45 (1995) (discussing alternative practices under the Civil Rights Act of 1991); Peresie, *supra* note 13, at 778 (same).

187. *See* 42 U.S.C. § 2000e-2(k).

188. *Cf.* Malone v. N.Y. Pressman's Union No. 2, No. 07 Civ. 9583(LTS)(GWG), 2011 WL 2150551, at *5 (S.D.N.Y. May 31, 2011) (discussing the impact of *Iqbal* and *Twombly* on disparate

Some courts disposed toward the whole-case approach may be inclined against taking this type of flexible approach to a particular case. Such a restrictive analysis would be inconsistent with the equity and fairness concerns underlying the *Twombly* and *Iqbal* decisions.[189] And, this type of restrictive approach would simply be unfair to plaintiffs. Trying to plead facts that would support a complicated statistical claim, undermine an employer's validation study, or generate less discriminatory policy alternatives would inherently require obtaining some information from the employer. If a court were to require a plaintiff to provide this type of factual information at the early stages of the litigation, then that court *must* adopt a liberal approach toward permitting the plaintiff to gather certain information. The whole-case approach and flexibility in the proceedings are thus inseparable.

The whole-case approach to the Federal Rules is the much more complex of the two models discussed in this Article. A plaintiff proceeding under this approach may often face substantial difficulty overcoming a motion to dismiss, particularly if a court refuses to apply a flexible approach to discovery in the case. Let us consider the same example discussed earlier of the prospective worker who had been denied employment at a retail shoe company because she was too short to reach the inventory on higher shelves.[190] This plaintiff could properly plead a Title VII disparate impact claim under the whole-case approach by alleging the following:

> The defendant-employer unlawfully adopted a height policy in March 2012, which requires all workers to be at least five-feet, six-inches tall. On July 31, 2012, I was denied employment at the company as a result of this policy, which disproportionately impacts me and other female employees. The attached statistical data and expert affidavit reflect that this policy restricts the employment opportunities of women workers in direct violation of Title VII. The employer's policy is not essential to the business, and studies have shown that shorter workers at other companies in the same industry have performed their position effectively. Where height may be necessary to the job, workers could use small step-stools for elevation, as an alternative to this policy.

This example provides the prima facie case of discrimination set forth in the first-step-only approach. Beyond this, it pleads the expert testimony set forth in an affidavit to support the statistical data attached to the complaint. It also provides information demonstrating that the policy is not job-related and consistent with business necessity, stating that other employers in the same industry operate effectively in the

impact and disparate treatment claims). *See generally* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

189. *See generally Iqbal*, 556 U.S. 662; *Twombly*, 550 U.S. 544.

190. *See supra* Part III.A (summarizing the first-step-only approach).

absence of such a practice. Finally, the complaint also provides an alternative to the employer's approach which would have a less discriminatory impact: providing shorter workers with a step-stool so that they can reach the necessary inventory.

Though this example is overly simplistic, it provides a clear picture of what information would generally be required to proceed under either the first-step-only approach or the whole-case approach. More importantly, however, it demonstrates the distinction between the two approaches, highlighting the additional information that would be required under the more complex reading of the Federal Rules of Civil Procedure. The whole-case approach is a fair reading of the Federal Rules. In some ways, the *Iqbal* decision supports this approach.[191]

Most notably, *Iqbal* suggests that a plaintiff's pleading should reject any plain alternative justifications for a particular claim.[192] Thus, in *Iqbal*, the Court found the government's argument that the arrests in question were lawful to be an "obvious alternative explanation"[193] to the plaintiff's allegation of intentional discrimination.[194] Similarly, the Court acknowledged that the *Twombly* plaintiffs "did not plausibly suggest an illicit accord because it was not only compatible with, but indeed was more likely explained by, lawful, unchoreographed free-market behavior."[195] The whole-case approach thus complies with *Iqbal* by requiring an alternative explanation to the defendant's assertion that the adopted policy or practice is lawful. Indeed, under this approach, a plaintiff would specifically plead a less discriminatory alternative to the employer's policy. Additionally, the plaintiff would also call into question any validation study that had been performed, which would further challenge the employer's lawful explanation for the practice.[196]

In sum, under the whole-case approach, the plaintiff's allegations would be required to directly challenge the employer's position that it has acted lawfully. This approach necessitates that a plaintiff provide facts rejecting the defendants' "obvious alternative explanation"[197] for its purported lawful policy—namely that it is job-related and consistent with business necessity—and is thus consistent with the *Iqbal* Court's analysis.[198]

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191. *See generally Iqbal*, 556 U.S. 662.

192. *See generally id.*

193. *Id.* at 682 (citing *Twombly*, 550 U.S. at 567).

194. *See id.*

195. *Id*. at 680 (citing *Twombly*, 550 U.S. at 567). *See generally* Seiner, *supra* note 6, at 208 ("After *Iqbal* and *Twombly*, then, most civil litigants should refute any obvious alternative explanations for the alleged unlawful conduct set forth in the complaint.").

196. Under the whole-case approach the plaintiff would further plead facts that would weaken the defendant's assertion that the policy is job-related and consistent with business necessity.

197. *Iqbal*, 556 U.S. at 682 (citing *Twombly*, 550 U.S. at 567).

198. *See id.* at 680–82.

At the same time, the approach further comports with *Iqbal* by requiring the plaintiff to identify a lawful alternative to the practice used by the employer.

Perhaps the most significant benefit of the whole-case analysis is that the defendant is provided with a considerable amount of information early in the case. Nonetheless, in most cases, this approach should fail in favor of the first-step-only analysis. The limitations of the whole-case approach are simply too substantial. Most notably, this approach requires far too much information at this early stage of the proceedings. As already discussed, the whole-case analysis would require the courts to permit limited discovery in many cases to allow plaintiffs a fair opportunity to gather the required information. And, if the courts must permit some discovery in the case prior to ruling on a dismissal motion, it would increase the litigation costs for both parties. These increased costs are inconsistent with one of the primary messages of *Twombly* and *Iqbal*—that plausibility pleading will result in less expensive litigation.[199] If a court did not permit this type of flexible discovery, then this approach should fail as being largely inequitable to the plaintiff: A party should not be held to an impossible standard where it is required to provide information that it has not been given a fair opportunity to gather.

Additionally, the whole-case approach is also directly contrary to the *Twombly* Court's insistence that it was not creating a heightened pleading standard by adopting a plausibility standard.[200] This approach does exactly the opposite, requiring far more information than what was necessary prior to *Twombly*.[201] As noted earlier, the Supreme Court made clear in *Swierkiewicz v. Sorema*[202] (a pre-*Twombly* decision) that a plaintiff is *not* required to allege a prima facie case of discrimination to proceed in a Title VII matter.[203] The whole-case approach requires a plaintiff to allege far more than a prima facie case. Indeed, this approach requires a plaintiff to provide statistical data supporting the claim, as well as facts questioning whether the policy is job-related and consistent with business necessity. Under this approach the plaintiff must also allege an

199. *See generally id.*; *Twombly*, 550 U.S. 544.

200. *See Twombly*, 550 U.S. at 570 ("Here . . . we do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face.").

201. *See, e.g.*, Jenkins v. N.Y.C. Transit Auth., 646 F. Supp. 2d 464, 469 (S.D.N.Y. 2009) ("It is unnecessary in this case to test the dividing line that distinguishes a discrimination claim which, although not required to set forth a prima facie case under *Swierkiewicz*, has alleged sufficient facts to make it plausible under *Iqbal* and *Twombly*."); Howard v. Gutierrez, 571 F. Supp. 2d 145, 159 (D.D.C. 2008) (noting that plaintiffs are not required to allege a prima facie case of employment discrimination under Title VII).

202. 534 U.S. 506 (2002).

203. *Id.* at 515.

alternative, less discriminatory employment practice. Thus, the whole-case approach far exceeds what is required by *Swierkiewicz* and the pre-*Twombly* case law.

This is not to say that there is no question as to the viability of the *Swierkiewicz* decision. Indeed, as already noted, there may be some doubt as to whether that case remains good law.[204] Nonetheless, *Swierkiewicz* has not been expressly overruled, and the Supreme Court even suggested that *Twombly* is not inconsistent with *Swierkiewicz* because the Court did not create a heightened standard with its plausibility analysis.[205] Under the current state of the law, then, the whole-case approach would require far more than what is necessary to allege a plausible claim of disparate impact discrimination.

Additionally, as already discussed, the whole-case approach would likely require the parties to engage in at least some level of discovery and would thus be inconsistent with the current state of the law for employment discrimination claims. In many ways, courts adopting the whole-case approach would be creating a process not unlike summary judgment for disparate impact allegations. At the summary judgment stage of the proceedings discovery has already often occurred and the court assesses whether there is sufficient evidence—examined in the light most favorable to the nonmoving party—to allow the case to proceed.[206] Professor Suja Thomas has already criticized the Supreme Court's plausibility standard as creating a new summary judgment.[207] She correctly maintains that there has been a "convergence of the standards" between the motion to dismiss and summary judgment in light of *Twombly* and *Iqbal*.[208] Adopting the whole-case approach would only be endorsing this convergence for disparate impact claims. While there is certainly room for debate as to whether this would be a desirable result, there is a strong argument that this type of rigorous approach would lead to the potential for a heightened dismissal rate in Title VII cases.[209] And, there is a substantial risk that otherwise viable employment discrimination claims might be dismissed inappropriately.[210]

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204. *See supra* Part III.A (discussing whether *Swierkiewicz* survives *Twombly* and *Iqbal*).

205. *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007).

206. FED. R. CIV. P. 56. *See generally* Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889 (2009) (discussing discovery and summary judgment).

207. *See generally* Thomas, *supra* note 8.

208. *Id*. at 18.

209. *See id*. at 41.

210. *See id*. at 39. ("It seems likely then that under the plausibility standard, motions to dismiss may be granted inappropriately in at least some cases where facts may be discovered that would make the claim plausible under a summary judgment motion."). *See generally* Seiner, *supra* note 6 (discussing the role of the plausibility standard in employment discrimination cases); Suja A. Thomas, *Why the Motion to Dismiss Is Now Unconstitutional*, 92 MINN. L. REV. 1851 (2008) (discussing whether

Finally, the whole-case approach would run counter to the view expressed by several courts that the defendant must plausibly plead any affirmative defenses under *Twombly* and *Iqbal*.[211] As the business necessity defense to a disparate impact claim is an affirmative defense, this would suggest that many courts would hold the defendant—rather than the plaintiff—responsible for alleging any facts related to business necessity.[212] These courts would thus likely find the second prong of the whole-case approach too burdensome for plaintiffs and inconsistent with the Supreme Court's pleading precedent. My previous scholarship has carefully examined the question of whether defendants must plausibly plead an affirmative defense, and concluded that they should bear this burden under *Twombly* and *Iqbal*.[213] In my view, then, the whole-case approach would be inconsistent with the existing pleading precedent, as defendants—rather than plaintiffs—should be required to plead facts related to the question of business necessity. The second prong of the whole-case approach thus goes too far.

In sum, the whole-case approach must fail in favor of the first-step-only approach when all of the drawbacks are fully considered.[214] The whole-case analysis applies a heightened pleading standard rejected by *Twombly* and *Iqbal* by requiring a plaintiff to plead far more than what is necessary to establish a prima facie case of disparate impact discrimination.[215] The approach also runs afoul of the Supreme Court's underlying message in these decisions that we should attempt to contain costs in civil litigation—the whole-case analysis would only increase costs as some discovery would often be necessary prior to consideration of a dismissal motion.[216] This approach would bring the motion to dismiss much

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the *Twombly* and *Iqbal* standard survives constitutional analysis).

211. *See, e.g.*, Seiner, *supra* note 101, at 1013 ("[A] number of lower courts have adopted this broader reading of the plausibility standard, applying the *Iqbal* and *Twombly* reasoning to a defendant's affirmative defenses."). Not all courts have followed this approach, however. *Cf. id*. at 1002 ("Many of these [lower] courts have found the complaint-only approach persuasive, limiting the reasoning of *Twombly* and *Iqbal* to the plaintiff's complaint.").

212. *See, e.g.*, Michael Evan Gold, *Disparate Impact Is Not Unconstitutional*, 16 TEX. J. C.L. & C.R. 171, 182 (2011) ("As a matter of procedure, business necessity is an affirmative defense. As a matter of substance, however, an employer's failure to prove business necessity completes the plaintiffs' prima facie case of discrimination."); Kelly Cahill Timmons, *Sexual Harassment and Disparate Impact: Should Non-Targeted Workplace Sexual Conduct Be Actionable Under Title VII?*, 81 NEB. L. REV. 1152, 1236 (2003) ("The precise scope of the affirmative defense of business necessity and job-relatedness is unclear.").

213. *See generally* Seiner, *supra* note 101.

214. Like the first-step-only approach, it is worth noting that the whole-case approach is also intended to be used primarily in analyzing disparate impact claims brought pursuant to Title VII. *See supra* Part III.A (discussing the limitations of the first-step-only approach to the Federal Rules of Civil Procedure).

215. *See, e.g.*, Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

216. *See generally* Ashcroft v. Iqbal, 556 U.S. 662 (2009); *Twombly*, 550 U.S. 544.

closer to the motion for summary judgment—a result that could lead to some disparate impact cases being dismissed inappropriately.[217] Finally, the whole-case approach is inconsistent with the view of those courts that have concluded that the defendant must plausibly plead an affirmative defense. As the first-step-only approach offers an analysis that is equitable to both parties, provides sufficient notice to defendants, and addresses the cost concerns raised by the Supreme Court, it is far preferable to the whole-case approach.[218] This approach should thus typically be used when analyzing a disparate impact case.

It is also worth noting that, as explained above, the first-step-only approach will *ordinarily* be the preferred analysis for disparate impact cases. In the majority of instances, then, the plaintiff should not have to plead facts beyond the prima facie case. However, in certain fact-specific contexts, an analysis more nuanced than the first-step-only approach (but less onerous than the whole-case approach) may be required. In particular, there may be certain extreme cases where it is obvious on the face of the allegations that the plaintiff must plead more than the prima facie case to proceed. These cases will typically present the somewhat rare factual scenario where the defendant's business justification would be obvious on the face of the complaint itself.

Take, for example, the hypothetical case where a foreign-born plaintiff alleges that she was denied a job as an English teacher because the school to which she applied maintains a policy requiring applicants for the position to be able to speak and read English. The plaintiff in this scenario could establish a prima facie case of discrimination, namely that the employer's facially neutral policy has a disparate impact on individuals on the basis of national origin. On the face of the complaint, however, the employer's business justification would be obvious—an effective English teacher must have an adequate command of the English language. In this type of case, then, where the facts as alleged by the plaintiff call to mind a plain business rationale for the employer's policy, the plaintiff must either dispute the obvious business justification or explain the alternative practice that could be implemented.

These types of cases admittedly do not fit within the strict contours of either approach discussed above, and a court presented with this factual situation would have to apply a more nuanced analysis in determining whether the plaintiff satisfied the plausibility standard. Such cases are likely at the margins, however, and the vast majority of plaintiffs should succeed in alleging a plausible disparate impact claim by establishing a prima facie case under the first-step-only analysis. Consistent with

217. *See* Thomas, *supra* note 8, at 39–42 (discussing the potential impact of the plausibility standard).

218. *See supra* Part III.A (discussing the first-step-only approach).

Twombly and *Iqbal*, however, the first-step-only approach must be modified in those instances where an "obvious alternative explanation"[219] to the plaintiff's allegation of discrimination exists on the face of the complaint.[220] And, of course, as no theory can completely capture every unusual factual scenario, there may be other unique cases that will arise where the court will want to expand its analysis beyond the approach advocated here.

Similarly, there are certainly other approaches to disparate impact analysis than the two models set forth above. For example, a court would be entirely free to adopt an intermediary approach. Such an approach might require plaintiffs to plead a prima facie case of disparate impact discrimination and provide facts rejecting the employer's business rationale, while not mandating the articulation of a less discriminatory practice. This type of model would fall squarely between the two analyses discussed here. Most courts, however, would likely adopt one of the two approaches addressed above—or a model largely patterned after one of these analyses. These models offer the two most common readings of *Twombly* and *Iqbal*—that the decision either keeps the *Swierkiewicz* decision largely intact or that it would apply a new heightened-type standard to employment discrimination claims.[221] The first-step-only approach follows the first reading while the whole-case analysis adopts the second approach.[222]

Nonetheless, it is for the courts to ultimately decide what will be required of a litigant trying to properly allege a disparate impact claim. While there are countless alternatives to the two models set forth here, the courts will likely either follow one of these approaches or adopt an alternative that is somewhere in the middle. And, in certain circumstances, the courts will likely want to consider a more nuanced, context-specific approach to the case.

IV. Implications of Adopting the First-Step-Only Approach

This Article advocates adopting the first-step-only approach for analyzing disparate impact claims. Following this analysis would have a number of notable implications for employment discrimination litigants, as well as the courts.

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219. *Iqbal*, 556 U.S. at 682 (citing *Twombly*, 550 U.S. at 567).

220. *See id.*

221. *See generally* Seiner, *supra* note 6 (discussing the role of the plausibility standard in employment discrimination cases); Sullivan, *supra* note 8 (discussing the viability of *Swierkiewicz* and the potential impact of the plausibility standard on employment cases); Thomas, *supra* note 8 (same).

222. It is worth emphasizing that where a court does follow the whole-case model, it should do so pursuant to a flexible standard that allows limited discovery and permits amending the complaint. A more rigid approach than this would be wholly inequitable to the plaintiff, which has not had a fair opportunity to gather the required information.

The first-step-only analysis offers a simplified, streamlined approach to disparate impact law while still satisfying the *Twombly* and *Iqbal* plausibility standard. Not as cumbersome as the whole-case approach or other similar alternatives, this analysis would allow courts and litigants to quickly assess unintentional employment discrimination claims. As discussed earlier, disparate impact has been a confused area of the law since its inception.[223] And the plausibility standard only adds to this uncertainty. The first-step-only approach helps avoid this confusion by providing a streamlined framework for analyzing unintentional discrimination claims. Through this framework, both courts and litigants may quickly determine whether additional information is needed for the case to proceed.

Plausibility is an ill-defined term open to many subjective interpretations.[224] And the Supreme Court provided little guidance as to what this term actually means.[225] The first-step-only approach defines "plausible" for one important subset of cases—disparate impact employment discrimination claims.[226] This model would help avoid the uncertainty that currently exists in trying to determine whether a particular unintentional discrimination claim is plausible by establishing a straightforward framework by which to analyze these cases. This approach successfully navigates the *Twombly* and *Iqbal* decisions, and more closely follows these cases than other possible frameworks, such as the whole-case analysis.[227] A claim that satisfies the contours of the first-step-only approach would also be a *plausible* claim under *Twombly* and *Iqbal.*[228] This approach would thus help remove much of the subjectivity that currently exists when evaluating claims under the plausibility standard. The courts should keep in mind, however, that this approach is only *one* way of establishing plausibility. Other avenues of alleging a plausible disparate impact claim certainly remain.

The first-step-only approach also offers plaintiffs a valuable alternative to alleging intentional discrimination claims. As discussed earlier, one of the difficulties courts often face post-*Iqbal* is determining whether the plaintiff has sufficiently alleged discriminatory intent—a

223. *See supra* Part II (discussing disparate impact law).

224. *See supra* Part III (discussing the vagueness of the plausibility standard).

225. *See id*. (discussing the Supreme Court definition of "plausible").

226. There is some question as to the extent to which the plausibility standard is transsubstantive. *See, e.g*., Miller, *supra* note 29, at 90–94 (discussing whether plausibility is transsubstantive); Seiner, *supra* note 101, at 1015 (same). Regardless, the first-step-only approach helps define what this standard means for a particular area of the law.

227. *See generally* Ashcroft v. Iqbal, 556 U.S. 662 (2009); Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007).

228. *See generally Iqbal*, 556 U.S. 662; *Twombly*, 550 U.S. 544.

showing that is often subjective in nature.[229] Establishing discriminatory intent prior to a motion to dismiss may be particularly difficult, as plaintiffs often do not have access to critical discovery that would help them demonstrate an employer's animus.[230] In many ways, disparate impact claims—which do not require litigants to plead discriminatory intent—offer an opportunity for plaintiffs to circumvent this requirement.[231] It may often be the case that an individual is the victim of a discriminatory policy or employment practice, but it is less clear whether that policy or practice was put in place to *intentionally* discriminate against the individual.[232] In these instances, plaintiffs may be able to avoid the dismissal of their case by characterizing the claim as one of unintentional (rather than intentional) discrimination.[233] Where a particular court interprets the plausibility standard as imposing an onerous burden on the plaintiff in establishing discriminatory intent—or where the plaintiff simply cannot access the necessary evidence prior to discovery—alleging unintentional discrimination may thus provide a viable alternative for these victims.[234]

This alternative becomes particularly attractive where a court follows the less cumbersome first-step-only analysis for disparate impact claims. This approach offers many plaintiffs a viable and streamlined way to allege the existence of an unlawful policy or practice—an approach that would be particularly useful where the plaintiff is unable to establish discriminatory intent early in the case. This is not to say that plaintiffs should necessarily pursue a disparate impact claim in lieu of alleging disparate treatment. Indeed, there are many drawbacks to doing so. In particular, disparate impact claims—which often require a detailed statistical analysis—can be quite expensive to prove.[235] Further, unlike cases involving intentional discrimination, a prevailing plaintiff in a disparate impact case cannot recover punitive or compensatory damages.[236] And, even though a plaintiff may in some instances be more likely to

229. *See supra* Part III (discussing discriminatory intent in employment discrimination cases).

230. *See generally* Seiner, *supra* note 6 (discussing discriminatory intent in employment discrimination cases).

231. *See* 42 U.S.C. § 2000e-2(k) (2006). I have previously argued that pleading discriminatory intent in a Title VII employment discrimination case should be a relatively straightforward process. *See generally* Seiner, *supra* note 6.

232. *See generally* Seiner, *supra* note 12 (discussing the distinction between disparate impact and disparate treatment claims).

233. Of course, there is nothing that prohibits an employment discrimination plaintiff from alleging both disparate impact and disparate treatment in the complaint. Plaintiffs may find it beneficial to allege both where it is unclear how the particular court will treat the allegations.

234. *See* Seiner, *supra* note 8, at 1035 (providing a discussion of cases applying the plausibility standard after *Twombly*).

235. *See, e.g.*, Rabin-Margalioth, *supra* note 133, at 829 (discussing the cost of statistical data in disparate impact cases).

236. *See* Robert Belton, *The Unfinished Agenda of the Civil Rights Act of 1991*, 45 RUTGERS L. REV. 921, 946–50 (1993) (discussing damages in employment discrimination cases).

survive a motion to dismiss in a disparate impact case, that claim may ultimately fail later in the proceedings. Nonetheless, where *Twombly* and *Iqbal* have muddied the waters for plaintiffs trying to establish discriminatory intent, alleging disparate impact (either in addition to or instead of a disparate treatment claim) may be a way for plaintiffs to increase their likelihood of prevailing in the case. And, as already noted, this is particularly true where a court follows the more streamlined first-step-only approach to disparate impact.

This Article is not the first to suggest that plaintiffs should more strongly consider bringing unintentional discrimination claims.[237] Professor Elaine Shoben, for example, has called disparate impact an "underutilized" theory.[238] Similarly, Professor Charles Sullivan has noted that "the obsession of the legal academy and the plaintiffs' bar with disparate treatment cases, to the wholesale exclusion of the disparate impact alternative, is largely responsible for the present crisis in the field."[239] After *Twombly* and *Iqbal*, the potential attractiveness of utilizing the disparate impact theory in employment discrimination cases has only increased. The confusion created by these decisions—particularly with regard to pleading discriminatory intent—may be avoided by plaintiffs proceeding under the disparate impact theory. And this is particularly true where the first-step-only approach has been adopted.

The first-step-only approach is not without its limitations. As already discussed, this analysis does not provide the defendant with as much information as other possible models.[240] And, the approach would be disfavored by those courts taking a particularly rigid view of *Iqbal* and *Twombly*.[241] Others might even take the opposite view—that the first-step-only approach goes *too* far in requiring a plaintiff to plead a prima facie case. Finally, the validity of this approach in many ways rests with the issue of whether the Supreme Court's decision in *Swierkiewicz* remains good law—a question that is still yet to be resolved.[242]

And as discussed above, one notable limitation of this model will occur in those rare fact-specific scenarios where the defendant's business justification would be obvious on the face of the complaint itself.[243] In these instances, where the employer's business rationale would be readily

237. *See* Sullivan, *supra* note 68, at 991–1000 (discussing the academic scholarship on disparate impact theory).

238. Shoben, *supra* note 129, at 597–98.

239. Sullivan, *supra* note 68, at 912. Professor Sullivan further notes that there are "some severe" difficulties with disparate impact theory. *Id*. at 913.

240. *See supra* Part III (discussing the limitations of the first-step-only approach).

241. *See supra* Part III (discussing the application of the plausibility standard by lower courts).

242. *See supra* Part III (discussing whether *Swierkiewicz* remains good law following *Iqbal*).

243. *See supra* Part III.B (discussing a scenario where a more nuanced approach to first-step-only analysis would be required).

apparent to the court, a more nuanced approach will be required. As these types of cases do not fit neatly within either model set forth above, the courts will have to look more closely at the facts alleged in these complaints to determine whether the plaintiff has asserted a plausible claim of disparate impact discrimination. Similarly, there may be other unique or unusual cases that will arise where the court will want to expand its analysis beyond the approach advocated here. Fortunately, however, these factual scenarios will likely only arise in a minority of claims, and the more streamlined first-step-only approach should suffice in most cases.

At the end of the day, the benefits of the first-step-only approach far outweigh its drawbacks. This analysis offers the most simplified, straightforward interpretation of the plausibility standard that still satisfies the tenets of *Twombly* and *Iqbal*. The approach clearly defines what plausibility means, helping to avoid the current uncertainty in this area of the law. And, this analysis is far preferable to the whole-case approach, which applies a heightened pleading standard, increases litigation costs, and would bring the motion to dismiss standard much closer to the summary judgment analysis.[244]

CONCLUSION

The plausibility test announced in *Twombly* and *Iqbal* has created confusion in many areas of the law, and employment discrimination plaintiffs have faced particular difficulty proceeding under this standard. Though the problems of establishing discriminatory intent after *Iqbal* have been well documented, the uncertainty of analyzing a disparate impact case under the plausibility standard has remained largely unexplored. By evaluating the two most likely interpretations of *Twombly* and *Iqbal* for unintentional discrimination claims, this Article seeks to fill that void in the scholarship. Adopting the more streamlined of the two approaches discussed here would help assist the courts and parties in assessing most disparate impact claims, while minimizing the costs of litigation. This Article thus provides a foundation for considering disparate impact cases after *Iqbal* and provides clarity to an ill-defined standard.

244. *See supra* Part III (analyzing the first-step-only and whole-case approaches to disparate impact claims).

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