A TALE OF TWO PROCEDURES: FEDERAL AND ILLINOIS PLEADING REQUIREMENTS

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I. INTRODUCTION

Jane Doe, who worked for Big Corporation, applied for a promotion.[1] Several male employees also applied for the promotion. Ms. Doe held a master's degree, while the other applicants held only bachelor's degrees. Additionally, Ms. Doe had been working at Big Corporation for five years, while each of the other applicants had been at the company for less than three years. Ms. Doe was the most qualified out of all the applicants. However, during the interview, Ms. Doe was being asked many personal questions about her plans to start a family along with other invasive personal questions. Subsequently, one of the male employees was promoted over Ms. Doe. As a result of the uncomfortable interview questions coupled with the fact that Big Corporation has only 3 women managers out of the 150 management positions at the company, Ms. Doe expressed to her manager her concern that Big Corporation was discriminating based on sex in violation of anti-discrimination laws. She continued and stated that she would be filing a complaint with the appropriate governmental agency. As a result, Big Corporation fired Ms. Doe. She is now suing her former employer for discrimination on the basis of sex. One issue Ms. Doe and her attorneys must address is where to file this suit. An important component to consider when deciding where to file the lawsuit is the pleading requirements for each court.

On May 12, 2007, the United States Supreme Court decided *Bell Atlantic Corporation v. Twombly*, outlining a new standard that must be met to survive a Rule 12(b)(6) motion to dismiss for failure to state a claim under the Federal Rules of Civil Procedure.[2] Initially, many legal scholars thought that this decision was meant to be narrowly construed, applying the standard only to anti-trust cases.[3] However, almost exactly a year later, the Supreme Court rendered the *Ashcroft v. Iqbal* decision, clarifying that this new standard, the plausibility test, applied to all cases governed by the Federal Rules of Civil Procedure.[4] Immediately, this decision increased the

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1 This hypothetical will be utilized throughout this Note.

2 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007).

3 Ettie Ward, *The After-Shocks of Twombly: Will We Notice Pleading Changes*, 82 SAINT JOHN'S L. REV. 893, 902 (2008).

4 Ashcroft v. Iqbal, 556 U.S. 662, 678 (2008).

likelihood of certain types of cases being dismissed from federal court during the pleading stage of litigation.[5] In particular, employment discrimination claims in federal court have been negatively impacted by the Iqbal decision because it is often difficult to meet the plausibility test.[6]

State courts do not follow the Federal Rules of Civil Procedure.[7] Instead, each state legislature adopts its own rules of civil procedure that are then interpreted and applied by that state's supreme court.[8] All states provide some type of motion to dismiss, but the standards are not the same.[9] In order to understand the differences between the parallel civil procedure systems present in the United States, one must understand the history and previous iterations of the procedures, as well as the slight distinctions present.[10]

This note will first provide a brief summary of employment law in Section II. The history of civil procedure in the United States will be presented in Section III, to explain the necessary background information for understanding how the two systems of civil procedure interact. Next, Section IV will explain the evolution of the federal plausibility standard including where the standard in federal court is today. Then, the evolution of Illinois civil procedure is discussed in Section V, concluding with current pleading standards in Illinois. Finally, the Jane Doe hypothetical presented above will be used in Section VI to compare the difference between federal and Illinois civil procedure, showing how the exact same case has different outcomes based solely on civil procedure.[11]

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5 William Kolasky & David Olsky, Bell Atlantic Corp. v. Twombly*: Laying* Conley v. Gibson *to Rest*, 22 ANTITRUST 27, 27 (2007). It should be noted that it is not entirely clear that the Twombly-Iqbal Standard applies to employment discrimination cases. *See* Charles A. Sullivan, *Plausibly Pleading Employment Discrimination*, 52 WM. & MARY L. REV. 1613, 1617-21 (2011) (explaining the complex relationship between *Swierkiewicz v. Sorema N.A.* and the plausibility standard articulated in *Iqbal*).

6 Joseph A. Seiner, *The Discrimination Presumption*, 94 NOTRE DAME L. REV. 1115, 1117 (2019).

7 *Civil Procedure*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/civil_procedure#:~:text=In%20the%20U.S.%2C%20civil%20procedure,many%20of%20the%20federal%20rules (last visited Mar. 19, 2022).

8 Bahen v. Diocese of Steubenville, No. 11 JE 34, 2013 WL 2316640, at *3 (Ohio Ct. App. May 24, 2013) ("Consistent with federalism, it is the Ohio Supreme Court, rather than the United States Supreme Court, which has the sole authority to construe Ohio civil procedure.").

9 *See* FED. R. CIV. P. 8(a)(2); 735 ILL. COMP. STAT. 5/2-603(a) (1982); MO. SUP. CT. R. 55.27; W. VA. R. CIV. P. 12(b)(6) (providing examples of different language used regarding motions to dismiss).

10 *See* Antonio Gidi, *Teaching Comparative Civil Procedure*, 56 J. LEGAL EDUC. 502 (2006) (discussing teaching methods for comparative civil procedure as well as the benefits of learning comparative civil procedure).

11 *See* hypothetical provided *supra* Section I.

II. BACKGROUND ON FEDERAL EMPLOYMENT DISCRIMINATION

President Lyndon B. Johnson signed the Civil Rights Act[12] into law on July 2, 1964.[13] The Civil Rights Act included a ban on employment discrimination "because of sex," but this clause was a last minute addition by Congressman Howard Smith in an effort to kill the bill.[14] Fortunately for women across the United States, Congresswoman Martha Griffiths advocated for the amendment and it ultimately passed the House of Representatives 168 to 133.[15] The clause remained part of the bill in the Senate before making its way to the President's desk and becoming law.[16] However, while sex discrimination in employment was illegal, there was little impact on the fate of women in the workplace until many years after the law went into effect.[17] This was due in part to the lack of legislative history and the fact that the majority of attorneys were male.[18]

Eventually, after several court cases,[19] a structure to Title VII[20] sex discrimination cases emerged. First, the plaintiff must show a prima facie case of sex discrimination, including a discriminatory policy, disparate treatment, or a facially neutral policy that results in discriminatory outcomes.[21] The employer then must show that employment action being challenged by the employee was based on a legitimate, nondiscriminatory reason.[22] As the Supreme Court noted in *McDonnell Douglas Corp. v. Green*, there are any number of legitimate reasons that an employee might fire, hire, promote, or demote an individual that are perfectly legal.[23] If the employer is capable of showing the requirement is related to employment, the plaintiff may then show that the proffered reason was not the true reason for the employment decision.[24] This final step is the ultimate burden of persuading the court that the employee has been the victim of *intentional* discrimination.[25] This general structure is used in anti-discrimination cases

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12 Civil Rights Act of 1964, 42 U.S.C. § 2000.

13 *Id.* § 2000e-2(a)(1); GILLIAN THOMAS, BECAUSE OF SEX: ONE LAW, TEN CASES, AND FIFTY YEARS THAT CHANGED AMERICAN WOMEN'S LIVES AT WORK 2 (2016).

14 *Id.* at 1-3.

15 *Id.*

16 *Id.*

17 *Id.* at 3.

18 *Id.*

19 *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (describing the process for proving discrimination based on race); *see also* Dothard v. Rawlinson, 433 U.S. 321 (1977) (describing the process for proving discrimination based on sex).

20 42 U.S.C. § 2000e-2(a)(1).

21 *Dothard*, 433 U.S. at 329; Price Waterhouse v. Hopkins, 490 U.S. 228, 241-42 (1989).

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

23 *Id.*

24 Tex. Dep't of Cmty. Affs. v. Burdine, 450 U.S. 248, 256 (1981).

25 *Id.*

brought under Title VII of the 1964 Civil Rights Act as well as other anti-discrimination statutes such as the Age Discrimination Act and Americans with Disabilities Act.[26]

If Ms. Doe were to file a federal claim against Big Corporation in federal court,[27] the claim would be brought under the "because of sex" clause of Title VII.[28] The problem with cases such as Ms. Doe's is that there is no facially discriminatory policy in place for Ms. Doe to use to state her claim in her complaint. An example of a facially discriminatory policy is refusing to allow any women to apply for an open position.[29] If there had been a facially discriminatory policy, Ms. Doe could point to the policy and it would be enough to present a plausible cause of action for discrimination.[30] Instead, Ms. Doe will have to show disparate treatment based on what happened to her compared to what has happened to other employees in the past.[31] In order to support this claim, Ms. Doe will need to get into the discovery phase of the litigation so she can access Big Corporation's records.

This is typical of sex discrimination cases today. Generally, cases of sex discrimination are based on a facially neutral policy that results in discrimination or hiring managers that have personal biases which shine through in their hiring decisions.[32] This type of sex discrimination can often only be shown by accessing company records and showing a pattern of discriminatory behavior that is disadvantaging one gender over the other.[33] In order to get access to those records, a plaintiff must be able to access the discovery process, which requires surviving motions to dismiss.[34]

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[26] *See* Griggs v. Duke Power Co., 401 U.S. 424 (1971) (describing the process for proving discrimination based on race); *see also Dothard*, 433 U.S. 321 (describing the process for proving discrimination based on sex); SANDRA E. SPERINO & JAROD S. GONZALEZ, EMPLOYMENT DISCRIMINATION: A CONTEXT AND PRACTICE CASEBOOK 71 (Michael Hunter Schwartz ed., 3d ed. 2019).

[27] This is assuming that, even though the required process outlined by the EEOC was followed, the EEOC did not take the case. *See* 29 C.F.R. §§ 1601.6-.14 (2020) (outlining the process to file a claim with the EEOC).

[28] Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a).

[29] *See* Phillips v. Martin Marietta Corp., 400 U.S. 542 (1971) (explaining that a policy discriminating against women with children violates Title VII).

[30] *See id.*; *see also* Ashcroft v. Iqbal, 556 U.S. 662 (2008) (establishing the plausibility test).

[31] *See* Hazelwood Sch. Dist. v. United States, 433 U.S. 299 (1977) (explaining how a pattern or practice may be established).

[32] Connson Locke, *Why Gender Bias Still Occurs and What We Can Do About it*, FORBES (July 5, 2019, 9:30 AM EDT), https://www.forbes.com/sites/londonschoolofeconomics/2019/07/05/why-gender-bias-still-occurs-and-what-we-can-do-about-it/?sh=1d2e29455228.

[33] § 2000e-2(a); *see* Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989) (establishing a mixed motive claim under Title VII, finding that "because of" does not mean "solely because of").

[34] *How Courts Work*, AM. BAR ASS'N (Nov. 28, 2021), https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/discovery/.

III. BACKGROUND OF THE FEDERAL RULES OF CIVIL PROCEDURE

On June 1st, 1872, the Conformity Act of 1872 was enacted.[35] This act instructed the federal courts to follow the procedural rules of the states they were located in.[36] This resulted in federal courts using fifty different civil procedures based entirely on the state systems of civil procedure.[37] Because state courts all had different rules and procedures, results wildly varied between different federal district courts.[38] The federal court system was very disjointed as a result of this law, making practicing in several different states, each with its own procedure, very challenging.[39] The American Bar Association began campaigning for federal rules of civil procedure written by the U.S. Supreme Court at the beginning of the twentieth century leading to three different proposed laws.[40] In 1934, President Franklin D. Roosevelt signed the Rules Enabling Act into law, authorizing the writing of the Federal Rules of Civil Procedure.[41] There is very little information included in the legislative record regarding how expansive or restrictive the Act was meant to be.[42]

Since the Act was enacted on September 16, 1938, the Supreme Court has considered several times if the Rules Enabling Act places limits on the power to create Federal Rules of Civil Procedure.[43] The Federal Rules of Civil Procedure were challenged in 1965.[44] The Supreme Court explained "to hold that a Federal Rule of Civil Procedure must cease to function whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress' attempt to exercise that power in the Enabling Act."[45] To date the Court has never struck a rule down or held that state law would prevail over the Federal Rules of Civil Procedure.[46]

In addition to creating uniform rules for federal courts, advocates of the Rules Enabling Act and the Federal Rules of Civil Procedure thought they

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35 Thomas O. Main, *Reconsidering Procedural Conformity Statutes*, 35 W. ST. U. L. REV. 75, 90 (2007).

36 *Federal Rules of Civil Procedure Establish Uniformity*, FED. JUD. CTR., https://www.fjc.gov/history/timeline/federal-rules-civil-procedure-establish-uniformity (last visited Nov. 11, 2020).

37 *Id*.

38 *Id*.

39 *Id*.

40 *Id*.

41 *Id*.

42 Stephen B. Burbank, *The Rules Enabling Act of 1934*, 130 U. PA. L. REV. 1015, 1023-24 (1982).

43 *Federal Rules of Civil Procedure Establish Uniformity*, *supra* note 36; Burbank, *supra* note 42, at 1028.

44 Hanna v. Plumer, 380 U.S. 460 (1965).

45 *Id*. at 473-74.

46 Burbank, *supra* note 42, at 1028.

were providing a standard and that the states would adopt parallel rules, leading to a uniform system of civil procedure.[47] However, even within federal district court, there are still variations between districts due to local rules and Federal Rules of Civil Procedure that allow local judges to operate under their individualized discretion.[48]

IV. THE FEDERAL PLAUSIBILITY STANDARD

The Supreme Court completely changed the federal pleading standards when it decided *Bell Atl. Corp v. Twombly* ("*Twonbly*") in 2007[49] and, subsequently, *Aschcroft v. Iqbal* ("*Iqbal*") in 2008.[50] Prior to those decisions, the pleading standard had been governed by *Coney v. Gibson*, which only required that there be a claim under some set of facts.[51] The *Twombly* decision set a forth a new standard, called the plausibility test.[52] The circuit courts were unsure if the plausibility test was a new pleading standard for all federal proceedings, and the Supreme Court decided *Iqbal* to clarify *Twombly*.[53] The extent of the impact of the *Twombly/Iqbal* decisions are still being explored today.[54]

A. Pre-*Twombly/Iqbal* Pleading Requirements

Rule 8(a)(2) requires that any pleading with a claim for relief must have "a short and plain statement of the claim showing that a pleader is entitled to relief."[55] The goal of this standard was to allow the merits of the claim to be addressed during discovery, pretrial conferencing, and summary judgment phases of litigation.[56] Further, the main function of the pleading was to give notice of the claim to all parties involved in the case.[57]

This goal is illustrated by the Supreme Court's opinion in *Conley v. Gibson*.[58] The Court explained that "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can

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47 Glenn S. Koppel, *Toward a New Federalism in State Civil Justice: Developing a Uniform Code of State Civil Procedure Through a Collaborative Rule-Making Process*, 58 VAND. L. REV. 1167, 1179 (2005).

48 *Id.* at 1180-82.

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

50 Ashcroft v. Iqbal, 556 U.S. 662 (2008).

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

52 *Twombly*, 550 U.S. at 560-61.

53 *Iqbal*, 556 U.S. at 678.

54 JOE S. CECIL ET AL., FED. JUD. CTR., MOTIONS TO DISMISS FOR FAILURE TO STATE A CLAIM AFTER *IQBAL* 1 (2011), https://www.fjc.gov/sites/default/files/2012/MotionIqbal.pdf.

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

56 Ward, *supra* note 3, at 896.

57 *Id.*

58 Conley v. Gibson, 355 U.S. 41 (1957).

prove no set of facts in support of his claim which would entitle him to relief" which is known as notice pleading.[59] This standard still required that a complaint included enough information to provide "fair notice of what the plaintiff's claim is and the grounds upon which it rests."[60] The Court also outlined the interrelating roles of Rules 8 and 12.[61] Rule 12(b)(6) was used to dismiss complaints that have no viable legal theory that can support plaintiff's claim.[62]

Other rules also ensure that fair notice of the claim is given. Rule 11 requires attorneys to certify that there is a good faith basis for all claims and allegations made in pleadings, which inherently encourages more detailed pleadings.[63] Finally, there are heightened pleading requirements for some claims, such as fraud.[64] Under Rule 9(b) "a party must state with particularity the circumstances constituting fraud or mistake."[65] All of these factors contributed to pleadings requiring more information than notice pleading would initially suggest.[66]

Even under notice pleading, district courts still routinely granted motions to dismiss for failure to state a claim.[67] Between March 31, 2005 and March 31, 2006, there were 280,492 civil cases filed in federal court.[68] Of those cases, 178,626 were terminated before pre-trial actions were taken.[69] One study calculated that approximately 34.5% of all claims were dismissed for failure to state a claim when notice pleading was used.[70] Based on the number of cases filed during this one year period, approximately 96,770 cases were dismissed for failure to state a claim.[71] In the years leading up to the *Twombly/Iqbal* decisions, there was a serious concern that frivolous lawsuits were overwhelming the system and forcing defendants to spend money and time litigating.[72]

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59 *Id.* at 45-46.

60 *Id.* at 47.

61 *Id.* at 45-46; Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2125-26 (2015).

62 *Conley*, 355 U.S. at 45-46; Reinert, *supra* note 61, at 2125-26.

63 Ward, *supra* note 3, at 900.

64 FED. R. CIV. P. 9(b).

65 *Id*.

66 *Id*. R. 11; Ward, *supra* note 3, at 900.

67 Ward, *supra* note 3, at 899.

68 U.S. CTS., TABLE C-4 51 (2006), https://www.uscourts.gov/sites/default/files/statistics_import_dir/C04Mar06.pdf.

69 *Id.*

70 Scott Dodson, *A New Look at Dismissal Rates in Federal Civil Cases*, JUDICATURE, Nov./Dec. 2012, at 127, 132.

71 U.S. CTS., *supra* note 68 (giving raw data about the number of cases dismissed for failure to state a claim); *see also* Dodson, *supra* note 70, at 132 (giving statistical analysis related to dismissals for failure to state a claim).

72 Ward, *supra* note 3, at 901.

Under notice pleading, Ms. Doe would not have had a problem surviving a motion to dismiss.[73] Since the goal of notice pleading is only to provide fair notice to the opposing party about the claim, Ms. Doe's complaint would only have to state that she was being discriminated against based on her sex when she was asked personal questions about her family during an interview and a less qualified man was promoted over her.[74] She would assert that these actions violated Title VII and these statements together would satisfy notice pleading.

B. The *Twombly/Iqbal* Pleading Requirement

1. Twombly

On May 21, 2007, the Supreme Court issued its decision in *Bell Atlantic Corporation v. Twombly*.[75] At the center of the case was a major shift in the requirements for pleading under the Federal Rules of Civil Procedure—ending notice pleading—and introducing a new standard, the plausibility test.[76]

The facts of *Twombly* were very complicated; the case revolved around an alleged violation of the Sherman Act and a violation based on conscious parallel behavior.[77] The plaintiffs tried to sue local telephone and high-speed Internet service providers for violation of the Sherman Act for an illegal conspiracy to fix prices among themselves.[78] The defendants filed a Rule 12(b)(6) motion, and the district court granted the motion.[79] The Court of Appeals for the Second Circuit reversed, holding that the district court had provided enough information to meet the notice pleading requirement.[80]

The Supreme Court determined that Rule 8(a) had an implied standard which required that plaintiffs plead enough information to create more than a mere suspicion of a legally recognized cause of action.[81] Instead, the plaintiff must show that the cause of action is *plausible*.[82] This decision created the standard known as the plausibility test, which must be met to

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73 *See* Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (explaining notice pleading); *see also* Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (explaining the type of treatment that violated Title VII).

74 *See Conley*, 355 U.S. at 45-46 ; *see also Price Waterhous*e, 490 U.S. 228.

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

76 *Id.* at 546.

77 *Id.* at 548; Ward, *supra* note 3, at 902.

78 *Twombly*, 550 U.S. at 546.

79 *Id.* at 552.

80 *Id.* at 553.

81 *Id.* at 561.

82 *Id.*

satisfy Rule 8(a) and survive a Rule 12(b)(6) motion to dismiss for failure to state a claim.[83]

2. Before Iqbal

Immediately after the Supreme Court issued the *Twombly* decision, judges, law professors, attorneys, and law students began to analyze the implications of the new standard.[84] This analysis was further complicated by the *Erickson v. Pardus*[85] decision that the Supreme Court released a mere two weeks after *Twombly*.[86] There, the Court found that a prisoner had successfully pled his claim under Rule 8(a), and the claim should be allowed to continue.[87] Notably, the Court explained that Rule 8(a) was a "liberal pleading standard" and should be treated as such.[88]

The *Erickson* decision led to confusion about when the plausibility test should be applied.[89] As discussed above, the Federal Rules of Civil Procedure were created so all federal district courts would follow the same procedure in all civil cases.[90] Given the history of the rules and the text of Rule 1, many courts concluded that the plausibility test should be applied to all cases in federal court.[91]

The Second Circuit analyzed the requirements of the plausibility test a mere three weeks after *Twombly* was decided in *Iqbal v. Hasty*.[92] The Second Circuit determined that the plausibility test should not apply to all federal civil cases because there were conflicting signals from the Supreme Court both within the *Twombly* decision itself and in *Erickson*.[93] Additionally, *Iqbal v. Hasty* was a qualified immunity case, so the Second Circuit reasoned that absent any indication from the Supreme Court, heightened pleading requirements must be created by "amending the Federal rules, not court decision[s]."[94]

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83 *Id.*

84 Ward, *supra* note 3, at 906; Matthew A. Josephson, *Some Things Are Better Left Said: Pleading Practice After* Bell Atlantic Corp. v. Twombly, 42 GA. L. REV. 867, 887 (2008).

85 Erickson v. Pardus, 551 U.S. 89, 93 (2007).

86 *Twombly*, 550 U.S. 544.

87 *Erickson*, 551 U.S. at 93.

88 *Id.* at 94.

89 Ward, *supra* note 3, at 907 (explaining the contradictory message that the United States Supreme Court sent by creating the plausibility test while also reaffirming the liberal pleading standard in Federal Rule of Civil Procedure 8).

90 FED. R. CIV. P. 1; *see also* Josephson, *supra* note 84, at 888 (providing background on the Federal Rules of Civil Procedure).

91 Josephson, *supra* note 84, at 888.

92 Iqbal v. Hasty, 490 F.3d 143, 157 (2d Cir. 2007).

93 *Id.* at 157-58.

94 *Id.* at 158.

The Seventh Circuit came to a very different conclusion when it analyzed the plausibility test in *E.E.O.C. v. Concentra Health Services*.[95] The Seventh Circuit noted that the cases the appellants had cited to support their claim that Rule 8 was satisfied were no longer good precedent given the Supreme Court decision in *Twombly*.[96] The Court noted that "it is not enough to *avoid foreclosing* possible bases for relief" when making a claim.[97] Rather, a claim must suggest that the plaintiff has grounds for relief.[98] The Seventh Circuit cited to *Twombly* when performing this analysis and determined that the district court was correct in dismissing the complaint for failure to state a claim.[99]

The Third Circuit came to the same conclusion as the Second Circuit in *Wilkerson v. New Media Technology Charter School Inc.*[100] The Third Circuit had previously considered the plausibility test in *Phillips v. County of Allegheny*, but had only addressed the application of the standard in context of the specific case.[101] In *Wilkerson v. New Media Technology Charter School Inc.*, the Third Circuit further expanded its application of the plausibility test to employment discrimination claims.[102] These decisions suggested that the Third Circuit would be taking the same approach as the Seventh circuit in construing the *Twombly* decision broadly to include all claims brought in federal court.

As a result of the circuit split regarding the breath of *Twombly*, the pleading requirement applicable to Ms. Doe's case in federal court would depend on what circuit she filed her suit.[103] If she filed in the Third or Seventh Circuit, she would have to meet the new standard outlined in *Twombly*.[104] However, if she had filed in the Second Circuit, notice pleading would still apply and there would be no need to consider the implications of *Twombly*.[105]

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95 *See* Equal Emp. Opportunity Comm'n v. Concentra Health Servs., Inc., 496 F.3d 773 (7th Cir. 2007) (explaining the application of the *Twombly* standard).

96 *Id.* at 777.

97 *Id.*

98 *Id.*

99 *Id.* at 782.

100 Wilkerson v. New Media Tech. Charter Sch. Inc., 522 F.3d 315, 321 (3d Cir. 2008).

101 *See* Phillips v. County of Allegheny, 515 F.3d 224 (3d Cir. 2008) (analyzing the plausibility test and the implication of the *Twombly* decision).

102 *Wilkerson*, 522 F.3d at 322.

103 *See Concentra Health Servs., Inc.*, 496 F.3d 773 (explaining the application of the *Twombly* standard in the Seventh Circuit). *But see* Iqbal v. Hasty, 490 F.3d 143 (2d Cir. 2007) (explaining the application of the *Twombly* standard in the Second Circuit).

104 *See Concentra Health Servs., Inc.*, 496 F.3d 773; *Wilkerson*, 522 F.3d 315 (explaining the application of the *Twombly* standard).

105 *See Hasty*, 490 F.3d 143 (explaining the application of the *Twombly* standard).

3. Iqbal

Given the clear split among the circuits, the Supreme Court granted certiorari in *Iqbal v. Hasty* on June 16, 2008, to address the split and elaborate on when the plausibility test should be applied.[106] The plaintiff in the original case was a foreign national who was arrested for criminal charges related to the 9/11 terrorist attacks.[107] He sued, claiming he was deprived of various constitutional protections.[108] The agents from the Federal Bureau of Investigation and Immigration and Naturalization service arrested him on charges of fraud in relation to identification documents and conspiracy to defraud the United States.[109] The government filed a Rule 12(b)(6) motion to dismiss for failure to state a claim, which was denied by the district court on the grounds that Rule 8 was satisfied.[110]

The Supreme Court ultimately found that the complaint filed by the plaintiff did not meet the requirements of the plausibility test under Rule 8(a), and the district court should have granted the motion to dismiss.[111] The Court reiterated the plausibility test, explaining that "a claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."[112] The two prongs of the plausibility test must be met in order to survive a motion to dismiss.[113] The first prong requires the court to treat all factual allegations, but not legal conclusions, as true.[114] The second prong instructs lower courts to allow complaints to survive motions to dismiss when a plausible claim is stated.[115] The Court stressed that merely restating the elements of the claim is not enough.[116] While a plaintiff does not have to meet the same standards that that were required during the "hypertechnical, code-pleading" era, plaintiffs who have nothing more than offer legal conclusions do not get to use discovery to find information to support a claim.[117]

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106 Ashcroft v. Iqbal, 556 U.S. 662 (2008).
107 *Id.* at 662.
108 *Id.* at 668-69.
109 *Id.* at 667 (citing *Hasty*, 490 F.3d at 147-48).
110 *Id.* at 669.
111 *Id.* at 676-79.
112 *Iqbal*, 556 U.S. at 678.
113 *Id.* at 679-80.
114 *Id.* at 678.
115 *Id.* at 679.
116 *Id.* at 678-79.
117 *Id.*

4. Where the Plausibility Test Stands Today in Federal Court

Once the Supreme Court made clear that the plausibility test applied in all federal civil cases, judges, attorneys, law professors, and law students immediately began to analyze the implications of the standard.[118] *Twombly* has been cited in 257,020 cases, and *Iqbal* has been cited in 230,372 cases.[119] The impact of *Iqbal* has been felt across many types of civil litigation including civil rights, antitrust protection, consumer protection, and employment discrimination.[120]

The Federal Judicial Center ("FJC") studied the filing and resolutions of Rule 12(b)(6) motions to dismiss at the request of the Judicial Conference Advisory Committee on Civil Rules and released the results on March 11, 2011.[121] The Judicial Conference Advisory Committee was concerned that the decisions of *Twombly*[122] and *Iqbal*[123] would be applied by the lower courts in a way that would lead to the dismissal of claims that would have succeeded if discovery had proceeded.[124] This analysis was complicated by other changes to civil litigation and a large economic downturn.[125] There was a seven percent increase in civil case filings in the twenty-three federal district courts examined by this study over the course of four years.[126] An increase in filings will result in an increase in motions, even when there is no change in the way that motions are decided.[127]

The FJC study found that Rule 12(b)(6) motions were more common after *Iqbal*[128] than before *Twombly*.[129] Notably, motions to dismiss were more likely to be filed in cases that were removed from state court to federal court.[130] The study concluded that "approximately 31% of the orders granting motions to dismiss appeared to eliminate all claims by one or more plaintiffs from the litigation, compared to approximately 23% of such orders in 2006."[131] Importantly, individuals were much more likely to be impacted by

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118 Reinert, *supra* note 61, at 2118.

119 *Citing References*, WESTLAW, https://1.next.westlaw.com (last visited Apr. 15, 2022) (search "Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007)" in the search bar; then choose the case name when it appears in the list of generated cases; then choose "Citing References"; then follow the same process with a search for "Ashcroft v. Iqbal, 556 U.S. 662 (2008)" in the search bar).

120 Roger M. Machalski, *Assessing Iqbal*, HARV. L. & POL'Y REV., https://harvardlpr.com/online-articles/assessing-iqbal/ (last visited Mar. 1, 2021).

121 CECIL ET AL., *supra* note 54.

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

123 Ashcroft v. Iqbal, 556 U.S. 662 (2008).

124 CECIL ET AL., *supra* note 54.

125 *Id.*

126 *Id.*

127 *Id.*

128 *Iqbal*, 556 U.S. 662.

129 CECIL ET AL., *supra* note 54; Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).

130 CECIL ET AL., *supra* note 54.

131 *Id.*

motions to dismiss than corporations or governmental entities.[132] Additionally, there was nothing to suggest that the more rigorous pleading standard resulted in a higher quality of complaints or litigation.[133]

Another study by Patricia H. Moore analyzed five hundred district court opinions from before the *Twombly*[134] and *Iqbal*[135] decisions and two hundred district court opinions from after and found that motions to dismiss were four times more likely to be granted after the plausibility test was implemented.[136] The study also found that constitutional civil rights cases have been significantly impacted by the application of the plausibility test.[137] Overall, there was a significant increase in the number of cases being dismissed entirely under *Iqbal*.[138]

The decisions in *Twombly*[139] and *Iqbal*[140] have impacted the federal civil system by making it much more common for a 12(b)(6) motion to dismiss for failure to state a claim to be filed, thus preventing plaintiffs from using the discovery process to bolster their claims. There has been an increase in 12(b)(6) motions being granted as well, placing an additional hurdle between a claimant and federal court. This is true for all types of cases, but notably has impacted constitutional civil claims and employment discrimination claims.[141] This begs the question: is there anywhere these cases that do not meet the plausibility test can be filed?

V. ILLINOIS PLEADING STANDARDS

Modern Illinois civil procedure was first codified in 1933.[142] Prior to the statutory update, Illinois civil procedure had been primarily based on English common law.[143] Since then, Illinois civil procedure has evolved by both updates to the statutes and Illinois Supreme Court cases.[144]

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132 Reinert, *supra* note 61, at 2170.

133 *Id.* at 2162-63.

134 *Twombly*, 550 U.S. 544.

135 Ashcroft v. Iqbal, 556 U.S. 662 (2008).

136 Patricia Hatamyar Moore, *An Updated Quantitative Study of Iqbal's Impact on 12(B)(6) Motions*, 46 U. RICH. L. REV. 603, 604 (2012).

137 *Id*. at 603.

138 *Id*. at 624.

139 *Twombly*, 550 U.S. 544.

140 *Iqbal*, 556 U.S. 662.

141 Moore, *supra* note 136, at 627.

142 1 JANICE HOLBEN, NICHOLS ILLINOIS CIVIL PRACTICE § 1:1 (2021); *see* Harry N. Gottlieb, *Illinois Civil Procedure*, 19 CHI.-KENT L. REV. 342, 347-48 (1941) (providing further context for the creation of Illinois Civil Procedure).

143 Gottlieb, *supra* note 142, at 342-43.

144 735 ILL. COMP. STAT. 5/2-603(a) (1982); *see* Marshall v. Burger King Corp., 856 N.E.2d 1048, 1053 (Ill. 2006).

A. Brief History of Illinois Pleading

Illinois law, like nearly every state, is based on English common law.[145] From the time that England gained control of what would eventually become the Midwest of the United States, to the formation of the Illinois territory, what little written law there was operated on the assumption that common law procedure would be followed.[146] In 1813, an act entitled "An Act to Regulate Proceedings in Civil Cases and for other purposes," detailed several requirements for civil cases within the Illinois territory, including what must be included to file a complaint and how long a defendant had to respond to the complaint.[147] When Illinois became a state in 1818, the Constitution provided specifically that the laws that had been in place while Illinois had been a territory, including common law, remained in effect until the Illinois Legislature saw fit to change them.[148]

The first significant change in civil procedure came in 1933, when the Civil Practice Act was passed, which had a similar effect on Illinois civil procedure as the Rules Enabling Act on federal civil procedure.[149] The Chicago Bar Association Board of Managers started the effort to reform Illinois civil procedure on July 11, 1929, when they adopted a resolution to examine the failures of the courts to meet the needs that modern business practices required.[150] After two years of work, the Board assembled materials addressing the problems, including an article that had been prepared by Professor Edson R. Sunderland.[151]

Professor Sunderland addressed the American Bar Association in 1926, drawing attention to the historical development and characteristics of the English Procedural Reform.[152] He specifically addressed that the public had led the way for reform in England, essentially dragging the legal profession in to the reform debate.[153] Attorneys in Chicago who were part of the Board of Managers heard the address and were interested in implementing some of the reforms Professor Sunderland had discussed.[154] On March 15, 1930, Professor Sunderland released a draft of a proposed Practices Act, which was

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145 Gottlieb, *supra* note 142, at 342-43.

146 *Id*. at 345.

147 *Id*. at 345-46.

148 *Id*. at 347.

149 HOLBEN, *supra* note 142; *see* Gottlieb, *supra* note 142, at 347 (providing further context for the creation of Illinois Civil Procedure).

150 Gottlieb, *supra* note 142, at 359.

151 *See* George Ragland, Jr., *Edson R. Sunderland's Contribution to the Reform of Civil Procedure in Illinois*, 58 MICH. L. REV. 27 (1959) (discussing Professor Sunderland's writings and how they impacted civil procedure reform in Illinois); *see also* Gottlieb, *supra* note 142, at 361 (providing further context for the creation of Illinois Civil Procedure and the history of the legislation).

152 Ragland, Jr., *supra* note 151, at 28.

153 *Id*.

154 *Id*. at 30.

reviewed by the Illinois State Bar Association and the Chicago Bar Association.[155] After more discussion by many different committees within Illinois, a revised draft was created and introduced into the Illinois Legislature on April 11, 1933.[156] On June 23, 1933, Governor Henry Horner signed the Civil Practice Act into law.[157] It went into effect on January 1, 1934, successfully modernizing Illinois Civil Procedure.[158] Notably, one of the suggested practice changes that was passed with the bill was the removal of old forms and the formal distinctions between actions at law and actions for both law and chancery.[159]

The most significant change that the Civil Procedure Act brought was the transfer of rule-making power to the Illinois Supreme Court.[160] Notably, the Civil Procedure Act left the burden of identifying problems in the current system and suggesting solutions to legal professionals.[161] While the legislature retained regulatory power for large portions of civil procedure, the Illinois Supreme Court became responsible for all rules regarding pleadings, practice, and procedure in all Illinois state courts.[162] This change laid down the groundwork for the rules that are in place today.

B. Illinois Pleading Standards Today

Unlike the Federal courts which now use notice pleading and the plausibility test to assess the sufficiency of a civil complaint, Illinois is a fact-pleading jurisdiction.[163] Fact-pleading is defined by Black's Law Dictionary as "a procedural system requiring that the pleader allege merely the facts of the case giving rise to the claim or defense, not the legal conclusion necessary to sustain the claim or establish the defense."[164] Illinois requires that "all pleading . . . contain a plain and concise statement of the pleader's cause of action, counterclaim, defense, or reply."[165] All pleadings should be "liberally construed with a view to doing substantial justice between the parties."[166]

Similarly to the Federal Rules of Civil Procedure, Illinois Civil Procedure has several types of pretrial motions, including a motion that is essentially equivalent to a FRCP 12(b)(6) motion to dismiss for failure to

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155 *Id.* at 30-31.
156 *Id.* at 32.
157 *Id.*
158 Ragland, Jr., *supra* note 151, at 32.
159 Gottlieb, *supra* note 142, at 364.
160 Ragland, Jr., *supra* note 151, at 34.
161 *Id.* at 34-35.
162 *Id.* at 35.
163 Marshall v. Burger King Corp., 856 N.E.2d 1048, 1053 (Ill. 2006); Johnson v. Matrix Fin. Servs. Corp., 820 N.E.2d 1094, 1105 (Ill. App. Ct. 2004).
164 *Pleading*, BLACK'S LAW DICTIONARY (11th ed. 2019).
165 735 ILL. COMP. STAT. 5/2-603(a) (1982).
166 *Id.* § 2-603(c).

state a claim.[167] Illinois Civil Procedure allows for a motion to "point out specifically the defects complained of, and shall ask for appropriate relief, such as: that a pleading or portion thereof be stricken because substantially insufficient in law, or that the action be dismissed."[168]

The Illinois Supreme Court elaborated on what is required to survive a motion to dismiss under 735 ILL. COMP. STAT. 5/2-615(a) in *Marshall v. Burger King Corp* ("*Burger King*").[169] The court held that a cause of action should not be dismissed under section 2-615 unless it is clear that no set of facts would entitle plaintiff to recovery.[170] In Illinois, the plaintiff does not have to provide evidence in the complaint.[171] Rather, the plaintiff is required to allege facts sufficient to bring a claim within a legally recognized cause of action.[172] The plaintiff in *Marshall* was the representative of a person who had died when Pamela Fritz's car became airborne and jettisoned into the Burger King restaurant where the decedent was eating.[173] Four of the counts in the original complaint were seeking damages from Burger King and Davekiz, Inc., the franchisee, for negligence.[174] Burger King and Davekiz filed a Section 2-615 motion to dismiss for failure to state a cause of action arguing that they had no duty to protect the decedent from the injury caused by the car.[175] The circuit court granted the motion because the type of accident was so rare that the court thought requiring the defendants to offer the type of protection suggested by the plaintiff would result in all businesses becoming fortresses to protect from any and all freak accidents that may occur.[176] The appellate court reversed the circuit court's judgment, concluding that it could not, as a matter of law, determine that the precautions listed in the complaint were beyond the duty of reasonable care.[177] The defendants appealed the decision to the Illinois Supreme Court.[178]

The Illinois Supreme Court explained that under the fact-pleading standard, a complaint must allege facts that establish each element of the claim.[179] Here, the claim was negligence, so the complaint must allege facts that establish a duty of care, breach of duty, and an injury proximately caused

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167 *Id.* § 2-615(a); *see also* Steve L. Dellinger, *The Art of Motions: Understanding Illinois Civil Pretrial Motions*, 38 S. ILL. U. L.J. 183, 186 (2014) (describing the similarities between Illinois and federal civil procedure).

168 § 2-615(a).

169 *Id.*; Marshall v. Burger King Corp., 856 N.E.2d 1048 (Ill. 2006).

170 *Marshall*, 856 N.E.2d at 1053 (citing Canel v. Topinka, 818 N.E.2d 311 (Ill. 2004)).

171 *Id.* (citing Chandler v. Ill. Cent. R.R., 798 N.E.2d 724 (Ill. 2004)).

172 *Id.* (citing Vernon v. Schuster, 688 N.E.2d 1172 (Ill. 1997)).

173 *Id.* at 1050.

174 *Id.* at 1051-52.

175 *Id.* at 1052.

176 *Marshall*, 856 N.E.2d at 1052.

177 *Id.* at 1052-53.

178 *Id.*

179 *Id.* at 1053-54.

by the breach.[180] The Court found that there was a sufficient basis in Illinois law to bring the claims against both Burger King and Davekiz, and that the plaintiff had provided enough facts to show a theory of liability for each count.[181] *Burger King* illustrates that under the Illinois Civil Procedure Rules, each claim must be analyzed to determine if it is one recognized under Illinois law and whether there are sufficient facts provided to establish the potential claim—no matter how unlikely they may be to succeed.[182] Under Illinois law, when analyzing whether a complaint should survive a motion to dismiss, the motion should be granted only when it is apparent that under no set of facts would the claim succeed.[183]

The Illinois Supreme Court reaffirmed this standard in 2015 and 2019, when it reiterated that a cause of action should not be dismissed unless there is no set of facts that would allow the plaintiffs to recover.[184] These decisions are especially notable because they came after the United States Supreme Court had made clear that the federal plausibility test requires more than the notice pleading that had been used prior to *Iqbal* and *Twombly*.[185] Because the Illinois Supreme Court has determined that Illinois Civil procedure only requires that the cause of action support recovery under some set of facts and the Federal Rules of Civil Procedure requires that the claims be plausible, the difference between the procedures can be compared by analyzing what claims will survive motions to dismiss in each system. Since there are many causes of action that can be brought in either state or federal court, one fact pattern can be used to show the difference between federal and state procedure including the difference in outcome.

VI. CLAIMS IN BOTH FEDERAL AND ILLINOIS COURTS

One of the hallmarks of the U.S. legal system is the many different forums individuals can choose to bring a claim.[186] The difference between the federal and state systems may be small and technical, thus making it difficult, but extremely important, to identify the impact of choosing one court over another.[187] Employment discrimination claims provide an example

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180 *Id.* at 1054.

181 *Id.* at 1062-65.

182 *Marshall*, 856 N.E.2d at 1052-53.

183 *Id.* at 1053 (citing Canel v. Topinka, 818 N.E.2d 311 (Ill. 2004)).

184 *See* Henderson Square Condo. Ass'n v. LAB Townhomes, L.L.C., 2015 IL 118139, ¶ 61 (reiterating the standard found in *Marshall v. Burger King Corp*); *see also* Bueker v. Madison County, 2016 IL 120024, ¶ 6 (upholding the standard found in *Marshall v. Burger King Corp*).

185 Bell Atl. Corp. v. Twombly, 550 U.S. 544, 561 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2008).

186 FED. JUD. CTR., THE U.S. LEGAL SYSTEM: A SHORT DESCRIPTION (2016).

187 *See* Scott Dodson, *The Challenge of Comparative Civil Procedure*, 60 ALA. L. REV. 133, 142 (2008) (explaining that, while comparative civil procedure can be taught utilizing both federal and state civil procedures that coexist throughout the country, it generally is not taught in American law schools or is only taught as an upper-level seminar).

of how the same claim, filed in either federal or Illinois court, might fare under each forum's pleading requirement.[188] By comparing the outcomes of the same fact pattern in federal and Illinois court, the difference between the two standards can be demonstrated.

A. Employment Discrimination Claims

Employment discrimination claims in federal court have posed a unique challenge in meeting the plausibility test.[189] Within the federal court system, motions to dismiss on the pleadings were granted at a 2.1% higher rate after the *Twombly/Iqbal* decisions in employment discrimination cases.[190] By comparing the outcome of the same fact pattern in federal and Illinois court, the difference between the two standards can be illustrated.

1. Federal Anti-Discrimination in Employment

Generally, today, cases of sex discrimination are based on a facially neutral policy that results in discrimination or hiring managers that have personal biases which shine through in their hiring decisions.[191] This type of sex discrimination can often only be shown by accessing company records that show a pattern of discriminatory behavior disadvantaging one gender over the other.[192] A plaintiff must be able to access the discovery process to get access to those records.[193]

Unfortunately for Ms. Doe, in order to reach the discovery phase of a lawsuit in federal court, the complaint must be able to survive a motion to dismiss for failure to state a claim, requiring the complaint to satisfy the plausibility test.[194] Because the plausibility test refuses to allow plaintiffs with mere legal conclusions to access the discovery process, Ms. Doe's complaint must include information that cannot be labeled a legal conclusion.[195] The hypothetical states that Ms. Doe was the most qualified applicant and that there are very few female managers, which could point to discrimination based on sex. However, Big Corporation can state that

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188 The claims used in the federal and Illinois systems are not identical for this analysis. While there may be claims with identical elements, utilizing an area that has been impacted by the *Twombly/Iqbal* decision illustrates the real-world implication of the difference in civil procedure.

189 Seiner, *supra* note 6, at 1117.

190 CECIL ET AL., *supra* note 54, at 9.

191 Locke, *supra* note 32.

192 Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a); *See* Price Waterhouse v. Hopkins, 490 U.S. 228, 241 (1989) (establishing a mixed motive claim under Title VII, finding that "because of" does not mean "solely because of").

193 *How Courts Work*, supra note 34.

194 FED. R. CIV. P. 12(b)(6); *see also* Ashcroft v. Iqbal, 556 U.S. 662 (2008) (establishing the plausibility test).

195 *Iqbal*, 556 U.S. at 678-79.

quantifiable qualifications are only part of the hiring process, and the candidate hired had other important qualities that Ms. Doe lacked. Since Ms. Doe cannot point to a particular policy or action of the employer that would state a plausible claim of sex discrimination, Big Corporation can argue that the complaint has failed to state any claim for which relief can be sought because there are only legal conclusions present. As her allegations would most likely not satisfy the plausibility test, Ms. Doe's claim would be dismissed for failure to state a claim under the Federal Rules of Civil Procedure.[196]

In this case, Ms. Doe may very well have been discriminated against because of her sex, which is illegal under the 1964 Civil Rights Act.[197] Prior to the *Twombly/Iqbal*[198] decisions, Ms. Doe's case would have satisfied the notice pleading requirements, which would have resulted in access to discovery.[199] Once Ms. Doe had access to discovery, her attorneys would have been able to request access to company records regarding Ms. Doe's interview, as well as information about any other women who had been turned down for promotions.[200] All of this information would then be available for Ms. Doe to make her case of discrimination based on sex to the court. However, when the plausibility test is applied in employment discrimination cases, the case fails almost immediately due to the very nature of the employee/employer relationship.[201] Employers always have access to far more information than individual employees, which results in a distinct disadvantage to employees in lawsuits.[202] This particular problem that the plausibility test represents to employment discrimination claims has been the topic of many academic articles, where authors argue that the plausibility test was never meant to apply to employment law claims.[203] While the argument continues among both academic and legal circles, the current circumstance is that individuals like Ms. Doe are unlikely to prevail in federal court because they lack access to the records that their employer possess that could prove their case.[204] With only the information provided in the hypothetical, Big Corporation can simply state that quantifiable qualification are only part of the hiring process, and that the complaint has failed to state any claim for

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196 FED. R. CIV. P. 12(b)(6).

197 § 2000e-2(a).

198 Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); *Iqbal*, 556 U.S. 662.

199 Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

200 *How Courts Work*, supra note 34.

201 Seiner, *supra* note 6, at 1119.

202 *Id.*

203 *See id.*; Sullivan, *supra* note 5; Suja A. Thomas, *Oddball Iqbal and Twombly and Employment Discrimination*, 2011 U. ILL. L. REV. 215 (2011) (examining the challenges that the plausibility test presents to employment discrimination claims).

204 Seiner, *supra* note 6, at 1119.

which relief can be sought because there are only legal conclusions present. Ms. Doe's case would most likely be dismissed for failure to state a claim.[205]

2. Illinois Anti-Discrimination in Employment

The Human Rights Act[206] became law in the state of Illinois in 1980, replacing an earlier version of the law, the Illinois Equal Employment Opportunity Act.[207] The Humans Rights Act declared that all people within Illinois are free from "discrimination against any individuals because of his or her race, color, religion, sex, national origin, ancestry."[208] These anti-discrimination laws had become more common in the 1970s and 1980s as more and more women entered the workplace.[209] The process for filing a discrimination claim in Illinois is a little different than the federal process.[210] There are two different paths to getting a judgment for discrimination based on sex in Illinois.[211]

The first process is similar to the federal process. A claim is filed with the Illinois Human Rights Commission, which holds administrative hearings, and an administrative law judge issues findings.[212] However, unlike the federal process that ends with no decision from an administrative body and permission to bring the case to district court, the Illinois Human Rights Commission generally issues a finding that can be appealed.[213] During the administrative hearings, the same type of testimony is given that would be collected during discovery in federal district court.[214] This process does not avoid the possibility of a motion to dismiss for failure to state a claim.[215] The commission still allows for a dismissal for failure to state a claim, and the administrative law judge can recommend to the commission that the complaint is dismissed.[216]

The second process is to file a complaint in Illinois state court. In Illinois, the tort of retaliatory discharge allows a former employee to sue their

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205 775 ILL. COMP. STAT. 5/1-102 (2021).

206 *Id.*

207 Susan Marie Connor, *A Survey of Illinois Employment Discrimination Law*, 31 DEPAUL L. REV. 323, 323 (1982).

208 § 1-102.

209 THOMAS, *supra* note 13, at 230-32.

210 Sherman v. Hum. Rts. Comm'n, 564 N.E.2d 203, 203 (Ill. App. Ct. 1990).

211 *See id.* (outlining the process of the Illinois Human Rights Commission and administrative law judges); *see also* Buckner v. Atl. Plant Maint., Inc., 694 N.E.2d 565 (Ill. 1998) (outlining the process for bringing a claim of retaliatory discharge).

212 *Sherman*, 564 N.E.2d at 203.

213 *Id.* at 210.

214 *Frequently Asked Questions–The Illinois Human Rights Acts: Coverage and Enforcement, How the Process Works*, ST. OF ILL. HUM. RTS. COMM'N, https://www2.illinois.gov/sites/ihrc/process/Pages/FAQs.aspx (last visited Apr. 15, 2022).

215 *Id.*

216 *Id.*

employer if they were fired in a clear violation of public policy.[217] Firing an employee for asserting their rights under the state's anti-discrimination law qualifies under the tort of retaliatory discharge and is a valid claim under state law.[218] Under Illinois law, claims will be allowed to continue so long as there is a set of facts that would entitle the plaintiff to relief.[219] In Ms. Doe's case, there are sets of facts that would result in relief. For example, the manager that fired her could have decided that women were bad managers and that he would not hire any women as managers. The manager could have taken notes during Ms. Doe's interview that complained that Ms. Doe was not very pleasant and wore pants far too often for a woman. Either of these hypotheticals would probably qualify as discrimination based on gender and be a violation of the Human Rights Act.[220]

Ms. Doe does not have to show in her complaint how she believes the company discriminated against her. Rather, the complaint just needs to show elements of the claim and that it is possible to recover for the claim being brought.[221] Unlike in Ms. Doe's federal case, Big Corporation will be unable to simply state that quantifiable qualifications are only part of the hiring process, and that the complaint has failed to state any claim for which relief can be sought because there are only legal conclusions present. Under Illinois civil procedure, because there are sets of facts from which Ms. Doe can recover, the motion to dismiss will not be granted. Ms. Doe will now have access to discovery and materials from the company that can be used during her case because of the pleading standard used in Illinois.[222]

B. The Effect Differences in Federal and Illinois Civil Procedure Have on Claims

As illustrated in the example above, the difference between a plaintiff's day in court and dismissal could be as simple as the court where the claim is filed. Employment law is only one area where this problem can be demonstrated. Financial instrument cases were dismissed at rates 5.3%

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217 Buckner v. Atl. Plant Maint., Inc., 694 N.E.2d 565, 568-69 (Ill. 1998).

218 *Id*. at 568.

219 *See* Henderson Square Condo. Ass'n v. LAB Townhomes, L.L.C., 2015 IL 118139, ¶ 61 (reiterating the standard found in *Marshall v. Burger King Corp*); *see also* Bueker v. Madison County, 2016 IL 120024, ¶ 6 (upholding the standard found in *Marshall v. Burger King Corp*).

220 775 ILL. COMP. STAT. 5/1-102 (2021).

221 *See generally* Marshall v. Burger King Corp., 856 N.E.2d 1048, 1050-54 (Ill. 2006) (explaining Illinois motion to dismiss standards); *see also Buckner*, 694 N.E.2d 565 (discussing the elements of retaliatory discharge).

222 *How Courts Work*, supra note 34. It should be noted that this claim could also be brought as a federal claim in state court. However, the defendants could potentially get the case removed to federal court, which would still result in the same problem illustrated in the section.

higher in federal court after the *Twombly/Iqbal*[223] decision.[224] Whereas, contract claims were dismissed at rates 2.7% higher in federal courts after the *Twombly/Iqbal*[225] decisions.[226] The change in the standard for motions to dismiss had a measurable impact on the number of cases that were able to access the discovery process.[227]

Employment law cases are ideal to use as an example to show the difference that civil procedure can make because there are comparable employment laws in both the federal and state codes.[228] While other types of claims may also be implicated by the change in motion to dismiss standards, due to a material difference between federal and state law, the comparison is harder.

VII. CONCLUSION

The Federal Rules of Civil Procedure and Illinois Civil Procedure have evolved in parallel since the United States Supreme Court was authorized to create the federal rules.[229] While there are many similarities between the two codes of procedure, knowing the distinguishing components can become extremely important when an attorney is deciding where to file a case. As illustrated by the Ms. Doe's hypothetical case, claims that are factually identical and analyzed under virtually identical laws have yielded different outcomes solely due to a different standard on a motion to dismiss. When applying the plausibility test, federal courts are not considering the merits of the claim. However, in Illinois, Ms. Doe has the opportunity to demonstrate that her claim has merit because the claim will survive the motion to dismiss under Illinois' fact pleading standard.

Understanding the subtle differences in federal and state civil procedure can have an important impact on the outcome of cases. While this note focused only on federal civil procedure and Illinois civil procedure, forty-nine other states that have their own codes of civil procedure and their own unique features. It is important for attorneys to understand the different court systems and how a case in those systems can survive procedural challenges. This will allow more cases to be decided on the merits, as opposed to being decided on technical procedural grounds.

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223 Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007); Ashcroft v. Iqbal, 556 U.S. 662 (2008).

224 CECIL ET AL., *supra* note 54, at 9.

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

226 CECIL ET AL., *supra* note 54, at 9.

227 *Id.*

228 *See* 775 ILL. COMP. STAT. 5/1-102 (2021) (establishing Illinois anti-discrimination in employment laws); *see also* Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (establishing federal anti-discrimination in employment laws).

229 *Federal Rules of Civil Procedure Establish Uniformity*, *supra* note 36.