TRIAL BY JURY OR TRIAL BY MOTION? SUMMARY JUDGMENT, *IQBAL*, AND EMPLOYMENT DISCRIMINATION

Closing Q&A and Final Remarks

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THE NEW SUMMARY JUDGMENT MOTION:
THE MOTION TO DISMISS UNDER IQLBAL AND TWOMBLY

by
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This Symposium Article argues that the motion to dismiss is the new summary judgment motion. In Iqbal v. Ashcroft and Bell Atlantic Corp. v. Twombly, the Supreme Court created a new standard for granting motions to dismiss under Rule 12(b)(6). Under the standard, a court decides whether a claim is plausible. This new plausibility standard is converging with the standard for summary judgment under Rule 56. Not coincidentally, the motion to dismiss appears to be having some of the same effects as summary judgment, including on the dismissal of employment discrimination claims. Moreover, as a result of the similarities between the motion to dismiss and the summary judgment standards, the Supreme Court case of Swierkiewicz v. Sorema N.A., which concerned the standard by which courts dismiss employment discrimination claims under Rule 12(b)(6), effectively may be dead. This Article concludes that the differences between the motion to dismiss and summary judgment call into question the propriety of Iqbal and Twombly.

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I. INTRODUCTION

Civil procedure scholars have extensively discussed the new Rule 12(b)(6) standard articulated by the Supreme Court in Ashcroft v. Iqbal and Bell Atlantic Corp. v. Twombly. In this discourse, however, an
interesting development has not been explored. The standard for the motion to dismiss has evolved in such a way as to make the motion to dismiss the new summary judgment motion. Despite different words in Federal Rules of Civil Procedure 12(b)(6) and 56 and no discovery before dismissal under 12(b)(6), the 12(b)(6) dismissal standard is converging with the standard for summary judgment. Moreover, the motion to dismiss under the new summary judgment-like standard may have effects similar to those experienced under summary judgment, including a significant use of the procedure by courts, a related increased

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3 I briefly concluded after Twombly that “[t]he motion to dismiss is fast becoming the new summary judgment motion.” Suja A. Thomas, Why the Motion to Dismiss Is Now Unconstitutional, 92 MINN. L. REV. 1851, 1890 (2008). Professor Benjamin Spencer also discussed this change, stating that “the Twombly Court effectively has moved the summary judgment evaluation up to the pleading stage.” A. Benjamin Spencer, Plausibility Pleading, 49 B.C. L. REV. 431, 486–87 (2008). Professors Clermont and Yeazell have stated that, with the significant difference that no discovery occurs before the motion to dismiss, the new plausibility test for the motion to dismiss otherwise “appears equivalent to the standard of decision for summary judgment . . . . Both motions ask whether a factual assertion is reasonably possible.” Clermont & Yeazell, supra note 2 (manuscript at 15–16). Professors Clermont and Yeazell also distinguish the two standards stating that the motion to dismiss standard tests only the ultimate liability inference whereas the summary judgment standard also tests the plausibility of alleged facts. See id. (manuscript at 16 n.47).

Professor Richard Epstein has argued differently that prior to discovery, a court should dismiss a case where the claim is based solely on easily accessible public information, the defense relies on like information, and the court finds the claim implausible based on this information. See Richard A. Epstein, Bell Atlantic v. Twombly: How Motions to Dismiss Become (Disguised) Summary Judgments, 25 WASH. U. J.L. & POL’Y 61 (2007). Epstein argued that in Twombly, the motion to dismiss was a disguised summary judgment motion because the information that the Court used to find the claim implausible was publicly available and included information outside of the pleadings. See id. He argued that these types of dismissals before discovery should occur regularly, particularly in complex cases where the claims are based solely on public information. See id. Professor Epstein’s argument can be distinguished from the argument in this Article. This Article argues that the motion to dismiss is the new summary judgment motion because the motions have similar standards and possibly similar effects. I also argue more generally that the new standard is inappropriate for several reasons. See infra Part III.

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

5 FED. R. CIV. P. 56.
role for judges in litigation, and a corresponding increased dismissal of employment discrimination cases. This Article describes the similarities between the motion to dismiss and the motion for summary judgment, and also explains how, as a result of these similarities, Swierkiewicz v. Sorema N.A. effectively may be dead. This Article further proposes that convergence of the standards at the same time that there are significant differences in the motions, including discovery, cost, and the role of the courts, calls into question the propriety of the changes under Iqbal and Twombly.

II. THE NEW SUMMARY JUDGMENT MOTION

The motion to dismiss is the new summary judgment motion. To understand how this metamorphosis has occurred, this Part discusses the standard for the motion for summary judgment and the standard for the motion to dismiss, and then compares the two standards. Next, this Part describes how the motion to dismiss may have some of the same effects as summary judgment. Finally, this Part shows how employment discrimination pleading may be affected by this shift to a summary judgment-like standard.

A. Similar Standards Under Summary Judgment and the Motion to Dismiss

1. The Motion for Summary Judgment

Scholars previously have described the history of the development of summary judgment in the United States. Briefly, the American procedure has been said to take its roots from a mid-nineteenth century English procedure. To expedite the collection of debt owed to the plaintiff by the debtor defendant, the plaintiff could move for summary judgment against the defendant where no dispute existed regarding the existence of an agreement between the plaintiff and the defendant. American summary judgment significantly expanded the English procedure, among other things, to permit all parties to move for summary judgment and to permit summary judgment in all types of cases. Under Federal Rule of Civil Procedure 56(c), adopted in 1938, a court orders summary judgment “if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material

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9 See, e.g., Burbank, supra note 7, at 592.
fact and that the movant is entitled to judgment as a matter of law.\footnote{FED. R. CIV. P. 56(c). Professor Burbank has described Rule 56 as a “radical new rule” and as “an experiment backed up by little relevant experience, let alone data.” Burbank, supra note 7, at 592, 602. Although the defendant may move for summary judgment at any time until thirty days after the close of all discovery, courts have tended to entertain the motion after discovery. See FED. R. CIV. P. 56(c); cf. Epstein, supra note 3, at 70.}

In describing summary judgment prior to 1986, the year when the Supreme Court decided the trilogy of summary judgment cases,\footnote{Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Celotex Corp. v. Catrett, 477 U.S. 317 (1986).} Judge Wald stated that:

> The prevailing wisdom for many decades was that summary judgment was the exception, not the rule, and courts were expected to be tougher on the movants than on the parties resisting it. A movant was required to point to actual evidence in the record showing an absence of a disputed issue of material fact.\footnote{Patricia M. Wald, Summary Judgment at Sixty, 76 Tex. L. Rev. 1897, 1905 (1998) (footnote omitted) (citing CHARLES ALLEN WRIGHT ET AL., 10A FEDERAL PRACTICE AND PROCEDURE § 2728, at 178–93 (2d. ed. 1983)); see, e.g., Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970) (holding that the moving party has the burden to show the absence of a disputed issue of material fact).}

This wisdom seemed to change in 1986, when the trilogy of Supreme Court cases on summary judgment began to guide summary judgment.\footnote{See Wald, supra note 12, at 1907.}

While scholars disagree on the path that procedure was already taking when the trilogy was decided in 1986,\footnote{See Suja A. Thomas, Why Summary Judgment Is Unconstitutional, 93 Va. L. Rev. 139, 140 n.3 (2007) (comparing Professor Redish’s argument that the trilogy was at least responsible in part for the reduction in the number of trials with Professor Burbank’s argument that summary judgment began to affect the reduction in trials prior to the trilogy, and with Joseph Cecil’s data that the trilogy has not had the effect on the increase of summary judgment that was previously thought).} courts use the standards set forth in the trilogy on a daily basis.\footnote{See, e.g., Adam N. Steinman, The Irrepressible Myth of Celotex: Reconsidering Summary Judgment Burdens Twenty Years After the Trilogy, 63 Wash. & Lee L. Rev. 81 (2006) (discussing the impact of the trilogy on federal litigation).} In the first case, Matsushita Electric Industrial Co. v. Zenith Radio Corp., the plaintiffs alleged that defendants had conspired, in violation of the antitrust laws, to sell televisions in Japan for artificially high prices and also to sell televisions in the United States for low prices to drive the plaintiffs from the television market.\footnote{475 U.S. at 577–78.}

The district court granted the defendants’ motion for summary judgment, and the Third Circuit reversed.\footnote{See id. at 578–80.} The Supreme Court established that after the party moving for summary judgment has satisfied its burden, the non-movant “must do more than simply show that there is some metaphysical doubt as to the material facts.”\footnote{Id. at 586.} The
Court emphasized the language in Rule 56(e) that the non-movant “must come forward with ‘specific facts showing that there is a genuine issue for trial.’” The Court held that no genuine issue for trial exists if, when looking at all of the evidence, “a rational trier of fact” could not find for the non-moving party. A claim cannot be “implausible” and must be more than simply “consistent” with illegal behavior. When reviewing the motion, the court must look at “the inferences to be drawn from the underlying facts . . . in the light most favorable” to the non-moving party. However, the inferences favoring the non-movant must be viewed “in light of the competing inferences.” In the absence of other evidence that would make the conspiracy plausible, the Court decided that the motion for summary judgment should be granted on remand.

Under the evidence presented, conspiracy by the defendants was not plausible because defendants had no rational motive to conspire. Moreover, the Court stated that the defendants’ conduct was consistent with “equally plausible” legal action. In the dissent, Justice White, joined by Justices Brennan, Blackmun, and Stevens, criticized the plausibility standard set forth by the majority stating that the standard permitted the weighing of evidence which the Court had not previously accepted as part of the standard for summary judgment. The dissent further described the plausibility standard as one whereby judges improperly determined whether inferences of conspiracy were “more probable than not.”

In the next case, *Anderson v. Liberty Lobby, Inc.*, the plaintiff sued the defendants for libel in connection with the defendants’ publication of two articles that described the plaintiff as, among others things, a neo-Nazi. The defendants moved for summary judgment, arguing that the plaintiff could not prove actual malice. The district court granted the motion, and the D.C. Circuit affirmed in part and reversed in part. In its review of the decision below, the Supreme Court stated that “some alleged factual dispute” was insufficient for the plaintiff to survive summary

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19 Id. at 587 (quoting Fed. R. Civ. P. 56(e) (2006) (amended 2007) (emphasis added)).
20 Id.
21 Id. at 587–88.
22 Id. at 587 (quoting United States v. Diebold, Inc., 369 U.S. 654, 655 (1962)).
23 Id. at 588. The district court had found that the inferences of conspiracy were not reasonable because evidence showed that the plaintiffs were not injured. Moreover, the defendants’ behavior more plausibly was to compete, not to monopolize. See id. at 579. The court of appeals reversed, finding evidence of a conspiracy though the Supreme Court noted in its review that the court of appeals did not decide whether legal behavior was as likely as illegal behavior. See id. at 581.
24 See id. at 597–98.
25 Id. at 596–97.
26 Id. at 598–607 (White, J., dissenting).
27 Id. at 600–01.
29 Id. at 245.
30 Id. at 246–47.
There must be a genuine issue of material fact, and such an issue exists if “a reasonable jury could return a verdict for the nonmoving party.” If the plaintiff’s evidence was “not significantly probative,” summary judgment could be granted. The Court further stated that “the ‘genuine issue’ summary judgment standard [was] ‘very close’ to the ‘reasonable jury’ directed verdict standard.” The difference was mainly “procedural,” with summary judgment occurring on documentary evidence and the directed verdict occurring after evidence had been admitted at trial. The question under both was “whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.”

The Court further stated that “the judge must ask himself not whether he thinks the evidence unmistakably favors one side or the other but whether a fair-minded jury could return a verdict for the plaintiff on the evidence presented.” The Court also stated that the facts of the plaintiff were to be taken as true, and “justifiable inferences” were to be drawn for the plaintiff. The Court held that the plaintiff must prove actual malice by clear and convincing evidence at the summary judgment stage in First Amendment cases, just as the plaintiff was required to do at trial, and the Court vacated and remanded the case. In his dissent, Justice Brennan criticized the summary judgment standard set forth by the majority, including that a judge decides whether a reasonable jury could find for the plaintiff or whether the evidence is one-sided for a party or significantly probative. Justice Brennan stated that the standard established by the majority was more difficult than the requirement in Matsushita of only “more than ‘some metaphysical doubt as to the material facts.’” He concluded that:

In my view, the Court’s result is the product of an exercise akin to the child’s game of “telephone,” in which a message is repeated from one person to another and then another; after some time, the message bears little resemblance to what was originally spoken. In the present case, the Court purports to restate the summary

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31 Id. at 247–48.
32 Id. at 248.
33 Id. at 249–50.
34 Id. at 251 (quoting Bill Johnson’s Restaurants, Inc. v. NLRB, 461 U.S. 731, 745 n.11 (1983)).
35 See id.
36 Id. at 251–52.
37 Id. at 252. Thus, “a scintilla of evidence” is not enough to survive summary judgment. Id.
38 Id. at 255.
39 Id. at 255–56.
40 See id. at 257.
41 See id. at 258–68 (Brennan, J., dissenting).
judgment test, but with each repetition, the original understanding is increasingly distorted.\textsuperscript{43}

He stated that while the majority said that courts were not to weigh evidence, the standard established by the majority required courts to perform such an analysis.\textsuperscript{44} Justice Rehnquist, joined by Chief Justice Burger, also dissented. He criticized the application of the clear and convincing standard to the summary judgment stage, including that courts would have difficulty applying this standard.\textsuperscript{45}

In the third case in the trilogy, \textit{Celotex Corp. v. Catrett}, the plaintiff sued the defendant asbestos company, among others, for the wrongful death of her husband who had been exposed to asbestos.\textsuperscript{46} The district court granted the defendants’ motion for summary judgment, and the D.C. Circuit reversed.\textsuperscript{47} In reviewing the decision below, the Supreme Court stated that the moving party was not required to “negat[e]” the non-moving party’s claim.\textsuperscript{48} The non-moving party had the burden to show the essential elements of her claim for which she had the burden of proof at trial, and where she did not, there was no genuine issue of material fact.\textsuperscript{49} The Court quoted language from \textit{Anderson} that the “standard [for granting summary judgment] mirrors the standard for a directed verdict.”\textsuperscript{50} Here, the Court remanded the case for a determination of whether the plaintiff had met her burden.\textsuperscript{51} The Court emphasized that the “[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed ‘to secure the just, speedy and inexpensive determination of every action.’”\textsuperscript{52} It further stated that given notice pleading, summary judgment was the procedure by which “factually insufficient” claims could be dismissed before trial.\textsuperscript{53} In the dissent, Justice Brennan, joined by Chief Justice Burger and Justice Blackmun, criticized that it was unclear what the

\textsuperscript{43} Id. at 264–65.

\textsuperscript{44} See \textit{id.} at 266–67. Justice Brennan also stated his concern that the jury trial right may be violated. \textit{See id.} at 267–68. Additionally, Justice Brennan discussed the difficulty of distinguishing between the preponderance and the clear and convincing standards. \textit{See id.} at 267–68.

\textsuperscript{45} See \textit{id.} at 268–73 (Rehnquist, J., dissenting).

\textsuperscript{46} 477 U.S. 317, 319 (1986).

\textsuperscript{47} \textit{id.}

\textsuperscript{48} \textit{id.} at 322–23.

\textsuperscript{49} \textit{See id.} Judge Wald discussed the “prevailing wisdom” prior to the trilogy regarding the burdens of summary judgment motions. \textit{See supra} text accompanying note 12. Judge Wald was a part of the panel that decided \textit{Celotex} in the D.C. Court of Appeals and whose opinion was reversed by the Supreme Court. \textit{Catrett v. Johns-Manville Sales Corp.}, 756 F.2d 181 (D.C. Cir. 1985), \textit{rev’d sub nom. Celotex Corp.}, 477 U.S. 317.

\textsuperscript{50} \textit{Celotex Corp.}, 477 U.S. at 323 (alteration in original) (quoting \textit{Anderson v. Liberty Lobby, Inc.}, 477 U.S. 242, 250 (1986)).

\textsuperscript{51} \textit{id.} at 326–28.

\textsuperscript{52} \textit{id.} at 327 (quoting \textit{Fed. R. Civ. P.} 1).

\textsuperscript{53} \textit{id.}
majority required the party moving for summary judgment to prove. Justice Brennan also stated that the defendant had not met its burden in moving for summary judgment. The plaintiff had presented evidence that the decedent was exposed to the defendant’s asbestos, and the defendant did not show the inadequacy of this evidence.

2. The Motion to Dismiss

Prior to the promulgation of the Federal Rules of Civil Procedure, various pleading rules existed under English law, state law and federal law that included technical pleading and code pleading. Under English law, plaintiffs were required to plead the correct form of the action, and under the subsequent code pleading in the United States, plaintiffs were required to plead the cause of action and facts specific to the elements of the cause of action. These pleading standards were criticized, and under the Federal Rules, the pleading requirements were changed to require only notice of a claim. Under Rule 8(a)(2), “[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief,” and under Rule 12(b)(6), the defendant may move to dismiss by asserting that the plaintiff has “fail[ed] to state a claim upon which relief can be granted.”

Conley v. Gibson governed the interpretation of the motion to dismiss under Rules 8 and 12(b)(6) for fifty years prior to the decisions in Iqbal and Twombly. In Conley, the plaintiffs, who were black employees of a railroad, alleged that the railroad had illegally discharged them and that the defendant union had breached its duty of fair representation under the Railway Labor Act. By not helping them as they did white employees, the defendant discriminated against them because of their

54 See id. at 329–37 (Brennan, J., dissenting).
55 Id.
56 Id. at 334–37. Justice Stevens dissented separately on the basis of the defendant’s original reason for moving for summary judgment regarding whether the plaintiff could prove exposure. See id. at 337–39 (Stevens, J., dissenting).

After studying summary judgment under the trilogy in her Circuit, Judge Wald expressed concern regarding summary judgment “being stretched far beyond its originally intended or proper limits.” Wald, supra note 12, at 1917. She argued that both the purpose of the rule as well as the text bring into question the interpretation of summary judgment. Id. at 1897–98, 1917. See also generally Edward Brunet & Martin H. Redish, Summary Judgment: Federal Law and Practice (3d ed. 2006) (discussing summary judgment).
58 See, e.g., 5 Wright & Miller, supra note 57, § 1202, at 93.
59 See, e.g., id. § 1202, at 93–94.
63 See 5 Wright & Miller, supra note 57, at 93–94.
64 See Conley, 355 U.S. at 43.
race. The district court granted the defendant’s motion to dismiss, and the Fifth Circuit affirmed. Among other things, the Supreme Court considered whether the plaintiffs had failed to state a claim upon which relief could be granted under Rule 12(b)(6). The Court stated:

In appraising the sufficiency of the complaint we follow, of course, the accepted rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

The Court also stated that “specific facts” in support of the general allegations were not required because Rule 8 did not require more than notice. The Court quoted the “short and plain statement of the claim” language of Rule 8 requiring that defendant be given only fair notice of the claim, and the Court cited the forms appended to Rule 8 as illustrative of this simple notice requirement. The Court also mentioned “the liberal opportunity for discovery” as a way by which disputed issues could be narrowed later in a case and, in support, cited, among other things, the summary judgment rule. Quoting Rule 8(f) that “all pleadings shall be so construed as to do substantial justice,” the Court concluded that Rule 8 had been satisfied, and the motion to dismiss under 12(b)(6) should not be granted.

Under the precedent of Conley, the wisdom was that a case was rarely dismissed upon a motion to dismiss for failure to state a claim. In Bell Atlantic Corp. v. Twombly, fifty years later in 2007, the Supreme Court significantly changed the standard for the motion to dismiss. The

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65 Id.
66 Id. at 43–44.
67 See id. at 45.
68 Id. at 45–46. The Court cited three cases in support of this proposition, including Leimer v. State Mutual Life Assurance Co., 108 F.2d 302 (8th Cir. 1940). In Leimer, the Eighth Circuit explained that a defendant making a Rule 12(b)(6) motion “admit[s] the existence and validity of the claim as stated, but challenges the right of the plaintiff to relief thereunder. Such a motion, of course, serves a useful purpose where, for instance, a complaint states a claim based upon a wrong for which there is clearly no remedy, or a claim which the plaintiff is without right or power to assert and for which no relief could possibly be granted to him, or a claim which the averments of the complaint show conclusively to be barred by limitations.” Id. at 305–06.
69 Conley, 355 U.S. at 47.
70 Id. (quoting Fed. R. Civ. P. 8(a)(2))
71 Id. at 47–48.
73 See 5B Wright & Miller, supra note 57, § 1357, at 557. This wisdom has been called into question by a recent study which suggests that courts granted motions to dismiss much more often than was thought under Conley. Patricia W. Hatamyar, The Tao of Pleading: Do Twombly and Iqbal Matter Empirically?, 59 Am. U. L. Rev. (forthcoming 2010) (manuscript at 31), available at http://ssrn.com/abstract=1487764.
plaintiffs brought a class action suit against defendant telephone companies alleging that the companies had conspired to stay in their own markets and to keep other companies out of their markets in violation of the antitrust laws. The plaintiffs described parallel conduct by the companies in support of their claims. The district court granted defendants’ motion to dismiss, and the Second Circuit reversed the decision. In reviewing the decision below, the Supreme Court stated that while the facts must be “taken as true,” the facts must suggest a “plausible” claim. While no “probability requirement” was imposed to survive a motion to dismiss, the Court stated that there must be “enough fact to raise a reasonable expectation that discovery will reveal evidence of [the claim].” More than facts consistent with the claim were required, and more than the possibility that the claim had occurred was required. The Court stated that the requirement of plausibility was compatible with the text of Rule 8 requiring that the pleader show entitlement to relief. Facts that are only consistent with the allegations did not cross “the line between possibility [or conceivability] and plausibility.” The Court also emphasized the expense of discovery and stated that case management by judges had not proven sufficiently effective. The Court also was concerned that defendants would settle cases that they should not settle to avoid discovery costs. The Court defended the use of the plausibility standard and cited the standard applied in other cases including the summary judgment decision in Matsushita. The Court also criticized the “no set of facts” language in Conley as permitting a complaint with only “a wholly conclusory statement of [the] claim” to survive and specifically “retire[d]” the Conley standard. In analyzing the plausibility of the claims, the Court permitted the use of inferences that it found favored the defendant in addition to those that it found favored the plaintiff. The Court held that the claim was not plausible and should be dismissed, because it lacked additional facts showing agreement beyond parallel conduct. Justice Stevens dissented, writing also for Justice Ginsburg. He described as “well settled” that the courts were to accept the allegations in a complaint as true, but he said that in effect the Court permitted the dismissal of the complaint without accepting the

75 Id. at 1962–63.
76 Id. at 1963.
77 Id. at 1965.
78 Id.
79 Id. at 1966.
80 Id.
81 See id. at 1966–67.
82 Id. at 1967.
83 Id. at 1968 & n.7; see also id. at 1964.
84 Id. at 1968–69.
85 Id. at 1972–73 & n.13.
86 Id. at 1971–74.
87 Id. at 1974–89 (Stevens, J., dissenting).
allegations as true. The companies were not even required to deny the allegations, and the complaint was dismissed “based on the assurances of company lawyers that nothing untoward was afoot.” Moreover, Justice Stevens stated that the parallel conduct by the defendants could show agreement. He opined that the cost of the litigation, in addition to the concern that jurors would decide parallel conduct was sufficient for legal liability, had motivated the majority to assess the plausibility of the facts as opposed to their legal sufficiency under 12(b)(6). He also showed how Conley had been applied consistently over the years by the Court, and that the defendants had not requested its overruling. Justice Stevens noted that if the defendants had moved for summary judgment after discovery and presented only the evidence set forth in the complaint, dismissal would have been appropriate. However, discussing Matsushita, he pointed out the significant difference between decisions on motions for summary judgment and motions to dismiss, and stated that the plausibility standard was inconsistent with Rule 8.

Two years later, in Ashcroft v. Iqbal, the Supreme Court again considered the standard to dismiss a complaint for failure to state a claim upon which relief may be granted. After September 11, 2001, Iqbal was imprisoned by federal authorities for identification fraud. Iqbal was placed in a special detention facility after he was designated a person “of high interest.” After pleading guilty and being removed to Pakistan, from where he originated, Iqbal brought a complaint against several defendants. Two of the defendants, former Attorney General Ashcroft and Federal Bureau of Investigation Director Mueller, moved to dismiss the complaint against them on the basis of qualified immunity. Iqbal, who was a Muslim, had alleged that Ashcroft and Mueller had violated the Constitution by designating him a person of “high interest” and subjecting him to special detention because of his race, religion, and or national origin. He alleged that Ashcroft was the architect of the policy, and Mueller was involved in every stage of the policy. The district court denied the motion based on Conley, and the Second Circuit denied the

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88 Id. at 1975.
89 Id.
90 Id.
91 Id.
92 Id. at 1978–79.
93 Id. at 1983 (after stating that the majority required “competing inferences” to be considered, citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588 (1986), the dissent stated that “[e]verything today’s majority says would therefore make perfect sense if it were ruling on a Rule 56 motion for summary judgment and the evidence included nothing more than the Court has described”).
94 Id. at 1982–83.
96 Id. at 1943.
97 Id.
98 Id. at 1942, 1944.
99 Id.
motion based on *Twombly*, which had been decided after the district court decision. In reviewing the decision of the Second Circuit, the Supreme Court repeated much of the standard set forth in *Twombly*, including that non-conclusory allegations should be taken as true and that a court should decide whether the claim is plausible. The Court stated that a claim is plausible when “the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged,” and the Court added that a court must “draw on its judicial experience and common sense” in making the plausibility determination. Given the facts here where the defendants were government officials, the Court was also concerned about the cost to the government because of the time that such officials would be required to spend on the case. In evaluating the complaint, the Court decided first that certain allegations were conclusory and thus need not be taken as true though the allegations were not rejected on the basis that they were “unrealistic or nonsensical.” The Court then stated that Iqbal’s other allegations, while consistent with illegally designating Iqbal “high interest” because of his race, religion, and/or national origin, did not cross the line to raise a plausible claim given the defendants’ legitimate purpose to arrest and detain those with possible terrorist connections. The Court pointed out that the September 11th attacks were by Arab Muslims so it was likely that many Arab Muslims would be arrested and detained, in the absence of an illegal purpose.

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100 Id. at 1944.

101 Id. at 1949–50. After deciding that it had subject matter jurisdiction, the Supreme Court discussed the standard for official liability under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971), which permits suits against individual government officials. *Iqbal*, 129 S. Ct. at 1945–49. In reviewing the case, the Court stated that officials must purposefully engage in the unconstitutional acts, not just have knowledge of the acts, to be liable. *Id.* at 1949.

102 Id. at 1949–50.

103 Id. at 1953.

104 Id. at 1951. The Court stated that the following allegations were conclusory: “that petitioners ‘knew of, condoned, and willfully and maliciously agreed to subject [him]’ to harsh conditions of confinement ‘as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.’ . . . that Ashcroft was the ‘principal architect’ of this invidious policy, and that Mueller was ‘instrumental’ in adopting and executing it.” *Id.* (alterations in original, citations omitted) (quoting First Amended Complaint and Jury Demand at ¶¶ 10, 11, 96, Elmaghraby v. Ashcroft, No. 04-CV-01809-JG-SMG, 2005 WL 2375202 (E.D.N.Y. Sept. 27, 2005)).

105 See id. at 1952. The Court stated the following allegations were not plausible: “‘the [FBI], under the direction of Defendant MUELLER, arrested and detained thousands of Arab Muslim men . . . as part of its investigation of the events of September 11’ . . . [and] that ‘[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were “cleared” by the FBI was approved by Defendants ASHCROFT and MUELLER in discussions in the weeks after September 11, 2001.’” *Id.* at 1951 (alteration in original) (quoting First Amended Complaint and Jury Demand, supra note 104, at ¶¶ 47, 69).

106 Id. at 1951–52.
even if it was plausible that Iqbal’s arrest was illegal, the plaintiff had not alleged that the arrest was illegal but rather had alleged that the designation as “high interest” and placement in special detention were illegal. 107 With respect to these allegations, however, the plaintiff did not further allege that the defendants purposefully acted because of his race, religion, and/or national origin. 108 At most, the plaintiff had alleged that the defendants had sought to place those suspected of terrorism in secure facilities until they were cleared of such activity. 109 In discussing some of plaintiff’s arguments, the Court specifically rejected that the plausibility pleading requirement in Twombly applied only to antitrust cases. 110 In his dissent, joined by Justices Steven, Ginsburg and Breyer, Justice Souter disagreed that the plaintiff’s allegations were implausible. 111 While the defendants had claimed that “such high-ranking officials ‘tend not to be personally involved in the specific actions of lower-level officers down the bureaucratic chain of command,’” Justice Souter stated that regardless of a court’s skepticism of the plaintiff’s claim, Twombly required the facts to be taken as true, as opposed to deciding whether they were “probably true.” 112 Justice Souter concluded that unlike Twombly, the facts here were not conclusory nor were the facts consistent with legal conduct. 113

3. A Comparison of Summary Judgment and the Motion to Dismiss

On first glance, the standards for summary judgment and the motion to dismiss look very different. Indeed, the actual words in the rules are different. To survive summary judgment, there must be a “genuine issue as to any material fact.” 114 If there is no genuine issue and “the movant is entitled to judgment as a matter of law,” summary judgment is granted. 115 In contrast, only “a short and plain statement of the claim showing that the pleader is entitled to relief” is required to survive a motion under Rule 12(b)(6) and Rule 8. 116 A motion to dismiss is granted if there is a “failure to state a claim upon which relief can be granted.” 117 In addition to different words in the rules, the facts considered for the motions are also different. The facts before a court under summary judgment include information outside of the complaint

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107 Id. at 1952.
108 Id.
109 The Court stated that “his only factual allegation against petitioners accuses them of adopting a policy approving ‘restrictive conditions of confinement’ for post-September-11 detainees until they were ‘cleared’ by the FBI.” Id. (quoting First Amended Complaint and Jury Demand, supra note 104, at ¶ 69).
110 Id. at 1953.
111 Id. at 1954–61 (Souter, J., dissenting).
112 Id. at 1999.
113 Id. at 1958–61.
114 FED. R. CIV. P. 56(c).
115 Id.
116 FED. R. CIV. P. 8(a)(2); see FED. R. CIV. P. 12(b)(6).
117 FED. R. CIV. P. 12(b)(6).
presented by both parties, in contrast to the facts before the court under the motion to dismiss, which includes only facts in the complaint.\textsuperscript{118}

Despite these differences in language and facts considered under the motions, the Court has emphasized the importance of controlling the cost faced by the defendants in litigation as the reason for both motions.\textsuperscript{119} Additionally and as a possible consequence of this similar concern over cost, the Supreme Court has established standards for summary judgment and for the motion to dismiss that are substantially the same. First, under both standards, a court determines the plausibility of the claim.\textsuperscript{120} One might argue, however, that the term “plausible” is not used in all summary judgment decisions by the Court, and thus, “plausible” is not the standard for summary judgment. While \textit{Matsushita} employed “plausible,” \textit{Anderson} and \textit{Celotex} did not explicitly refer to this term. Also Professor Brunet has argued that “plausible” was used substantively as part of antitrust law in \textit{Matsushita},\textsuperscript{121} and in the trilogy, the Court adopted the directed verdict test for summary judgment. With that

\begin{itemize}
\item \textsuperscript{118} See \textit{Fed. R. Civ. P. 56}; \textit{Fed. R. Civ. P. 12(b)(6)}. The facts considered upon a motion to dismiss include those in documents to which the complaint refers and that which may be judicially noticed. See \textit{Tellabs, Inc. v. Makor Issues & Rights, Ltd.}, 127 S. Ct. 2499, 2509 (2007). This is subject to qualification where the courts appear to use inferences from the facts argued for by the defendant.

Despite the similar “plausibility” language for the motions, one might also argue that the standards for the motion to dismiss and summary judgment are not truly similar, because a pleading or motion to dismiss standard is different than an evidentiary or summary judgment standard. \textit{Swierkiewicz v. Sorema N.A.}, decided prior to \textit{Iqbal} and \textit{Twombly}, distinguished pleading and evidentiary standards, and thus this difference between the motion to dismiss and summary judgment. 534 U.S. 506 (2002); see infra Part II.C. While certainly there is no discovery considered under the motion to dismiss, the use of a plausibility analysis is common to both summary judgment and motion to dismiss decisions.

\item \textsuperscript{119} See supra text accompanying notes 52, 81–82. Indeed, in \textit{Twombly}, Justice Stevens emphasized the concern over cost as a reason that the majority adopted the new plausibility standard for the motion to dismiss. See supra text accompanying note 91.

\item \textsuperscript{120} See supra text accompanying notes 18–25, 77–86, 101–10. “[P]lausible” inference was also used in \textit{Galloway v. United States}, a case involving the directed verdict. 319 U.S. 372, 387 (1943).

The Supreme Court has stated that in deciding a summary judgment motion, if no reasonable jury could believe a version of the facts, a court should not accept those facts as true. Scott v. Harris, 127 S. Ct. 1769, 1776 (2007). In \textit{Twombly}, in deciding a motion to dismiss, the Court had stated that it need not accept the conclusory allegations as true. 127 S. Ct. 1955, 1965–66 (2007). As the motion to dismiss becomes the new summary judgment motion, the Court may expand \textit{Iqbal} and \textit{Twombly} and may adopt the language from \textit{Scott} for the motion to dismiss under which a court would assess the allegations in the complaint to determine whether a reasonable jury could believe them, and if not, those allegations would not be taken as true.

\item Thus, Professor Brunet has argued that Justice Souter incorrectly incorporated this standard as a procedural standard in \textit{Twombly}. See Edward Brunet, \textit{Antitrust Summary Judgment and the Quick Look Approach}, 62 SMU L. Rev. 493, 510–11 (2009); BRUNET & REDISH, supra note 56, § 9:6, at 322–35.
said, there is no indication that the Court rejected *Matsushita’s* language of “plausible” in *Anderson* and *Celotex*.

To add to this discussion, several courts have required nonmovants with the burden of production upon motions for summary judgment to show that their claims are plausible. Moreover, the use of “plausible” in *Twombly* and its citation of *Matsushita* confirms the continuing relevance of the plausibility standard to summary judgment.

The second similarity in the motion to dismiss and summary judgment standards is that under both, while it appears that courts should view the facts in the light most favorable to the nonmoving party, in assessing whether a claim is plausible, courts assess both the inferences favoring the moving party and the inferences favoring the nonmoving party.

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122 See *supra* text accompanying notes 28–56.


124 See *supra* text accompanying note 83. The meaning of “plausible” is open to argument. In *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, in deciding what “strong inference” of scienter meant, which was required to plead a securities fraud claim under the Private Securities Litigation Reform Act of 1995 (PSLRA), the Supreme Court stated “[t]o qualify as ‘strong’ within the intendment of § 21D(b)(2), we hold, an inference of scienter must be more than merely plausible or reasonable—it must be cogent and at least as compelling as any opposing inference of nonfraudulent intent.” 127 S. Ct. 2499, 2504–05 (2007) (quoting PSLRA, Pub. L. No. 104-67, § 21D(b)(2), 109 Stat. 737, 743 (codified in scattered sections of 15 U.S.C.)). The majority stated that a strong inference was an inference “at least as likely as any plausible opposing inference.” Id. at 2513. But in their concurrences, Justices Scalia and Alito stated to qualify as a strong inference of scienter, the inference must be “more plausible” than the opposing inference. Id. (Scalia, J., concurring); id. at 2515–16 (Alito, J., concurring). The majority criticized this standard as being summary judgment-like, which did not make sense in the absence of explicit direction from Congress. See id. at 2510 n.5 (majority opinion).

Arguably, then, there is merely conceivable wrongdoing, plausible wrongdoing, and strong wrongdoing. However, both *Iqbal* and *Twombly* refer to the plausibility requirement as more than likely. See *supra* text accompanying notes 77–86, 101–10. This reading would then require more under *Iqbal* and *Twombly* than under heightened pleading under the PSLRA, which would be “ridiculous.” Burbank, *General Rules, supra* note 2, at 551–52. Professor Burbank argues that “[t]he answer to this puzzle lies in *Twombly’s* substantive-law context and in the Court’s reading of the complaint.” Id. at 552. Other decisions had required more than parallel conduct to constitute a conspiracy, and the Court found only parallel conduct in the complaint. *Id.*

125 See *supra* text accompanying notes 22–23, 77-94, 101-113; see also Thomas, *supra* note 3, at 1862.
A final similarity in the standards is that while the Court has held specifically that a court should not use its own opinion of the sufficiency of the evidence to decide whether summary judgment should be granted, it appears now that under both motions, courts do use their own opinions of sufficiency to determine whether a claim is plausible. In a previous article, I argued that upon motions for summary judgment, judges use their own opinions of the sufficiency of the evidence to decide the motions. I have argued that we see judges state why they think the evidence is insufficient to prove a claim, we see judges interchangeably use different terms with different meanings, including whether “a reasonable jury” could find and whether “a reasonable juror” could find, and finally, we see judges disagree about whether summary judgment should be granted, all suggesting that judges are using their own opinions to assess the sufficiency of the evidence. Now, in the determination of whether a claim is plausible, the Supreme Court has explicitly stated that, upon a motion to dismiss, courts are to use their “judicial experience and common sense.” This language in *Iqbal* seems to permit judges to use their own opinions to assess the sufficiency of facts to decide motions to dismiss similar to what we see judges do in deciding summary judgment.

B. Similar Effects of Summary Judgment and the Motion to Dismiss

At the same time that the standards for summary judgment and the motion to dismiss are converging, the motions, not coincidentally, may have some of the same effects. Summary judgment is moved for and granted frequently. Similarly, it seems likely that motions to dismiss will be moved for and granted more frequently. Another related and possible similar effect under summary judgment and the motion to dismiss is an increased role for judges in litigation. As stated above, the standards for summary judgment and the motion to dismiss both now involve judges’ own opinions in assessing the

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128 Thomas, *supra* note 14, at 140 n.3 (citing law review articles regarding general use of summary judgment).
129 See supra Part II.A.3; see also Adam Liptak, *Case About 9/11 Could Lead to a Broad Shift on Civil Lawsuits*, N.Y. TIMES, July 20, 2009, at A10 (“[I]t is much easier for judges to dismiss civil lawsuits right after they are filed”). Tom Goldstein, a lawyer who litigates before the Supreme Court, has predicted that *Iqbal* is “going to be the most cited Supreme Court case in a decade.” Jess Bravin, *New Look at Election Spending Looms in September*, WALL ST. J., July 2, 2009, at A4; Liptak, *supra* (quoting Goldstein); Tony Mauro, *Groups Unite to Keep Cases on Docket*, THE NAT’L L.J., Sept. 21, 2009, at 31 (“With remarkable speed and success, *Iqbal* motions to dismiss because of insufficient pleadings have became commonplace in federal courts, already producing more than 1,500 district court and 100 appellate court decisions according to a Westlaw search. Many more are pending.” (emphasis added)).
plausibility of claims. In discussing the specific language in *Iqbal* that judges should use their “judicial experience and common sense,” Professor Burbank has criticized that “it obviously licenses highly subjective judgments. . . . This is a blank check for federal judges to get rid of cases they disfavor.”

Employment discrimination may be one of the areas most affected by the increased role of judges in deciding motions to dismiss, and this effect of the motion to dismiss on employment discrimination may be similar to the effect of summary judgment on employment discrimination. Judges dismiss employment discrimination cases more often under motions for summary judgment than most other types of cases. In the 1990s, several articles discussed the specific effect of summary judgment on the dismissal of employment discrimination cases. More recently, the Federal Judicial Center found that courts granted 62.6% of summary judgment motions on employment discrimination claims in 2006.

The scholarship on the effect of the motion to dismiss on employment discrimination cases is still developing but looks similar so far. Professor Hatamyar studied the grants of motions to dismiss in a random set of cases in the two-year period before and after *Twombly* and in the period after *Iqbal* from May to August 2009. She found a greater effect of the motion to dismiss on employment discrimination cases than most other types of cases, and “[t]he rate of granting 12(b)(6) motions in Title VII cases went from 42% under *Conley* to 54% under *Twombly* to 53% under *Iqbal*.” Other scholars previously had studied the effect of *Twombly* on employment discrimination cases before *Iqbal* was decided. Professor Seiner studied the dismissal of employment discrimination cases in the years before and after *Twombly* upon a motion to dismiss.
He showed that in the year prior to Twombly, 54.5% of motions to dismiss were granted in Title VII cases, whereas in the year after Twombly, 57.1% of such motions were granted. In another article, Professor Seiner demonstrated that there has been an even more substantial effect after Twombly on disability cases. In the year prior to Twombly, 54.2% of motions were granted, and in the year after Twombly, 64.6% of motions were granted. Kendall Hannon also studied the effect of Twombly on civil rights cases, which included employment discrimination cases under certain statutes and under the Constitution, in the seven month period after Twombly. He found that under Conley, 41.7% of motions to dismiss were granted and under Twombly, 52.9% of motions to dismiss were granted. Hatamyar, Seiner, and Hannon studied both claims that were dismissed with and without prejudice, and thus some of the claims indicated in the statistics ultimately may have survived. Also, they all acknowledged imperfections in their data.

Regardless, given the similarity of the motion to dismiss standard to the summary judgment standard and the propensity of judges to dismiss employment discrimination cases under summary judgment, it seems likely that the trends that Hatamyar, Seiner, and Hannon have found for the motion to dismiss in employment discrimination cases will continue, and that courts may grant motions to dismiss with prejudice with some regularity in employment discrimination cases. Indeed, in Twombly, the Supreme Court did not remand to replead and thus, although not an

supra note 57, at 95–98 & 111 (concluding by discussing potential effect of stricter pleading standards on civil rights cases).

See Seiner, supra note 138, at 1029–31. The study included Title VII federal district court cases that cite Conley in the year before Twombly and those that cite Twombly in the year after Twombly. See id. at 1027–29.


Id. (manuscript at 27, 30).


Hannon, supra note 142, at 1837 tbl.3. For Hannon’s methodology, see id. at 1828–35.

See Hatamyar, supra note 73 (manuscript at 21–24, 38); Seiner, supra note 138, at 1027–29; Seiner, supra note 2 (manuscript at 24–26); Hannon, supra note 142, at 1828–35.

See supra note 144. Such imperfections can also occur because of the data used, including information on Westlaw and LEXIS. For example, grants of motions are reported more often than denials of motions. See, e.g., Burbank, supra note 7, at 603–05.

employment discrimination case, Twombly is some indication that dismissals with prejudice may occur.\(^\text{147}\)

C. Pleading Employment Discrimination

The effect of Iqbal and Twombly on employment discrimination cases, which was discussed in the previous Part, is tied to what courts will now require employment discrimination plaintiffs to plead to survive a motion to dismiss. Prior to Iqbal and Twombly, the Court decided Swierkiewicz v. Sorema N.A.\(^\text{148}\) In Swierkiewicz, the plaintiff alleged that the defendant employer discriminated against him because of his national origin and age.\(^\text{149}\) The district court dismissed the complaint stating that the plaintiff had not alleged facts supporting a prima facie case of discrimination under the McDonnell Douglas test, and the Second Circuit affirmed the decision.\(^\text{150}\) In reviewing the Second Circuit’s decision, the Supreme Court held that the plaintiff need not allege a prima facie case of discrimination to survive a motion to dismiss but need include only “a short and plain statement of the claim showing that the pleader is entitled to relief.”\(^\text{151}\) In deciding this, the Court described McDonnell Douglas as an “evidentiary standard, not a pleading requirement.”\(^\text{152}\) The Court emphasized that employment discrimination cases must be treated in the same manner as other cases upon a motion to dismiss, and the Court relied on the liberal pleading standard for claims, not subject to heightened pleading, that the Court had established in Conley.\(^\text{153}\) The Court stated that the “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.”\(^\text{154}\) Towards the end of the opinion, the Court responded to the defendant’s argument that “conclusory allegations” should not survive.\(^\text{155}\) The Court did not state that the plaintiff’s allegations were not conclusory but rather the Court stated that:

Whatever the practical merits of [the defendant’s] argument, the Federal Rules do not contain a heightened pleading standard for employment discrimination suits. A requirement of greater

\(^{147}\) Antitrust is another area in which summary judgment and the motion to dismiss may have similar effects. Summary judgment has been granted more often in antitrust cases than in many other types of cases, see Thomas, supra note 14, at 141 n.5, and given that Twombly was an antitrust case, motions to dismiss may be granted more in antitrust cases.


\(^{149}\) Id. at 509.

\(^{150}\) Id. (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).

\(^{151}\) Id. at 510–12 (quoting FED. R. CIV. P. 8(a)(2)).

\(^{152}\) Id. at 510. The Court also stated that McDonnell Douglas might not apply to the particular case but instead the mixed motive analysis may apply. Id. at 511–12.

\(^{153}\) Id. at 512–14.

\(^{154}\) Id. at 512.

\(^{155}\) Id. at 514–15.
specificity for particular claims is a result that “must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.”

At least one circuit has held that Swierkiewicz remains good law after Twombly. Upon an interlocutory appeal of a Bivens action that the lower court did not dismiss under Rule 12(b)(6), the Ninth Circuit stated that the Court in Twombly “reaffirmed the holding of Swierkiewicz” by rejecting “heightened fact pleading.” In that case, the panel stated that the plaintiff had pleaded a plausible claim against defendant Attorney General Ashcroft, one of the defendants in Iqbal. Some scholars have weighed in on the issue of whether Swierkiewicz is good law. Professor Seiner and Steinman have stated separately that although Iqbal did not cite Swierkiewicz, it did not overrule it, and indeed Twombly positively cited Swierkiewicz. Professor Steinman also has argued that Swierkiewicz did not rely on Conley’s “no set of facts” language, which Twombly had “retire[d].”

Despite these assertions, it can be reasoned that based on the language in Swierkiewicz, Iqbal, and Twombly, and based on the similarities in the summary judgment and motion to dismiss standards that Swierkiewicz effectively does not survive. As a result, employment discrimination plaintiffs will effectively need to plead a prima facie case and possibly more to survive a motion to dismiss. As to the language in the decisions, first, Swierkiewicz differs from Iqbal and Twombly regarding how conclusory allegations should be treated. Swierkiewicz appeared to permit conclusory pleading, while in Iqbal and Twombly, the Court...
specifically rejected that “conclusory” allegations in a complaint would be sufficient upon a motion to dismiss. 162

Second, the majority’s requirement of plausibility in Iqbal and Twombly was in effect heightened pleading that does not comport with Swierkiewicz. While the Court in Twombly attempted to reconcile Swierkiewicz by stating that “[h]ere, in contrast [to the Court of Appeals opinion in Swierkiewicz which was rejected by the Supreme Court], 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,”163 the dissent stated that this was what the majority had in effect done by establishing a plausibility standard.164 Professor Benjamin Spencer also has asserted that “[t]he plausibility pleading standard announced by the Court in Twombly is no different from the Second Circuit’s heightened pleading standard that the Court rejected in Swierkiewicz.”165

Third, in Iqbal, the Court emphasized that Rule 8 “does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions,” and “does not turn on the controls placed upon the discovery process.”166 This was different from Swierkiewicz, which had emphasized “liberal discovery” citing Conley.167

Fourth, Swierkiewicz discussed the liberal notice pleading requirements and relied on, at least in part, the “no set of facts” language from Conley168 and Hishon v. King & Spalding169 to decide that the complaint in Swierkiewicz satisfied Rule 8.170 As previously stated, Twombly had “retire[d]” this language on which the Court relied.171

For these reasons, while Iqbal and Twombly did not expressly overrule Swierkiewicz, the differences between those cases and Swierkiewicz suggest that Swierkiewicz effectively is dead. The Third Circuit has discussed this issue of whether Swierkiewicz is good law. The court stated that Swierkiewicz “expressly adhered to Conley’s then-prevailing ‘no set of facts’ standard” in deciding heightened pleading was not required.172 The court also stated that Swierkiewicz cited Conley for the proposition that Rule 8 relies on “liberal discovery” and summary judgment.173 The court concluded “that because Conley has been specifically repudiated by both

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162 See supra text accompanying notes 84, 101–110; Seiner, supra note 2 (manuscript at 16–17).
164 Id. at 1983 (Stevens, J., dissenting) (“a heightened pleading burden”).
165 Spencer, supra note 3, at 476.
168 Conley, 355 U.S. 41.
170 Swierkiewicz, 534 U.S. at 514 (citing Conley, 355 U.S. at 48; Hishon, 467 U.S. at 73).
172 Fowler v. UPMC Shadyside, 578 F.3d 203, 211 (3d Cir. 2009).
173 Id.
Twombly and Iqbal, so too has Swierkiewicz, at least insofar as it concerns pleading requirements and relies on Conley.\textsuperscript{174}

In addition to these differences in the language in the decisions that show that Swierkiewicz may not be good law, the similarity between the summary judgment and the motion to dismiss standards under Iqbal and Twombly also tends to show that Swierkiewicz is effectively dead. Because courts perform a plausibility analysis under both standards and assess inferences favoring the plaintiff as well as inferences favoring the defendant, it is likely that courts will use similar analyses for the motion to dismiss as they do for summary judgment. Under Supreme Court case law, plaintiffs have a significant burden to survive summary judgment in employment discrimination cases. Under the McDonnell Douglas test, the plaintiff must prove the prima facie case, and the plaintiff must show that the defendant’s reason for the adverse employment decision was pretext for discrimination.\textsuperscript{175} It seems likely given the similarities between the motion for summary judgment and the motion to dismiss that courts may begin to perform this type of searching analysis at the motion to dismiss stage—whether the courts are explicit that they are doing so or not.\textsuperscript{176}

Indeed, Iqbal and Twombly suggest that this type of extensive analysis of a claim will be conducted by the courts upon a motion to dismiss. In those decisions, the Court appeared to require the plaintiffs to rebut alternative explanations to survive the respective motions to dismiss in the same manner that the Court has required employment discrimination plaintiffs to rebut alternative explanations to survive summary judgment. In Iqbal, the plaintiff was required to and failed to rebut the alternative explanation that the detention policy was to combat terrorism,\textsuperscript{177} and in Twombly, the plaintiff was required to and failed to

\textsuperscript{174} Id.
\textsuperscript{176} See Fletcher v. Phillip Morris USA, Inc., No. 3:09CV284-HEH, 2009 WL 2067807 (E.D. Va. July 14, 2009) (granting motion to dismiss forty-five page first amended complaint holding that plaintiff did not satisfy the McDonnell Douglas prima facie case for neither discrimination or retaliation, and therefore the claims were not plausible); Spencer, supra note 3, at 476–77 ("[P]lausibility pleading is heightened particularized pleading plain and simple."). Professor Spencer has argued that many lower courts did not follow Swierkiewicz prior to Twombly. See A. Benjamin Spencer, Pleading Civil Rights Claims in the Post-Conley Era, 52 How. L.J. 99, 118–24 (2008). At the same time that the Court decided Twombly, the Court decided Erickson v. Pardus, regarding the requirements of pleading for a pro se plaintiff. 551 U.S. 89 (2007). Given that Iqbal confirms that plausibility is required for all complaints, there is now some question what it takes for a pro se complaint to survive a motion to dismiss. Cf. Hatamyar, supra note 73 (manuscript at 45) ("The percentage of 12(b)(6) motions granted in all cases brought by pro se plaintiffs grew from Conley (65%) to Twombly (69%) to Iqbal (85%).").
\textsuperscript{177} See supra text accompanying notes 95–110.
rebut the alternative explanation that the parallel behavior was simply market forces at work. Thus, what has been required under *Iqbal* and *Twombly* suggests that a plaintiff in an employment discrimination suit who is subject to a motion to dismiss will be required to plead facts to rebut the reason offered by the defendant for its employment decision, in addition to pleading the prima facie case, despite the Court’s decision to the contrary in *Swierkiewicz* that a plaintiff need not even plead the prima facie case.

III. THE IMPROPRIETY OF THE NEW SUMMARY JUDGMENT MOTION

In prior work, I have argued that the motion to dismiss under *Twombly* is unconstitutional. Because the Court repeated the *Twombly* standard in *Iqbal*, the analysis for the constitutionality of *Iqbal* is the same, and the *Iqbal/Twombly* standard is unconstitutional. Putting aside these constitutional issues, the question remains whether the change under *Iqbal* and *Twombly* from *Conley*, especially given the resulting similarities of the standards for summary judgment and the motion to dismiss, is appropriate.

With respect to rule construction, this change seems inconsistent with the intentions of the rule-makers given the difference in language in the rules and the complaint forms appended to the Rules. It might be argued though that regardless of the difference in the language of the motion for summary judgment and the motion to dismiss, both are pretrial dismissal standards and thus the same pretrial dismissal standards, albeit at different stages, are appropriate. The Court appeared to support this type of result in *Anderson v. Liberty Lobby, Inc.* There, despite the difference between the Rule 50 directed verdict standard, which included language of whether “a reasonable jury” could find, and the Rule 56 summary judgment standard, which did not include this “reasonable jury” language, the Court emphasized that the rules were different only because the motions occurred at different times in the litigation. Accordingly, the Supreme Court adopted the reasonable jury language for the interpretation of Rule 56. What has happened to the

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176 See supra text accompanying notes 74–86; cf. Seiner, supra note 2 (manuscript at 29–32) (discussing unique role of summary judgment in employment discrimination cases, non-discriminatory alternative reason for policy in *Iqbal*, and alternative explanation for conspiracy allegations in *Twombly*).

177 See Thomas, supra note 3.

178 See id.

179 See supra text accompanying notes 114–117.


181 See supra text accompanying notes 34–35.

182 See supra text accompanying notes 31–40. The text of judgment as a matter of law is as follows: “If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may: (A) resolve the issue against the
motion to dismiss in the last few years looks similar to what happened to summary judgment. In Twombly, despite the obvious difference in the text of the motion to dismiss and summary judgment rules, the Court stated that the same plausibility standard that applied to summary judgment in Matsushita was appropriate at the motion to dismiss stage.\textsuperscript{185}

While the Court has adopted the same standard for the motion to dismiss and summary judgment in the manner that it adopted the same standard for summary judgment and judgment as a matter of law (formerly the directed verdict), summary judgment and judgment as a matter of law are more similar than the motion to dismiss and summary judgment. Discovery has occurred under summary judgment and judgment as a matter of law, as opposed to under the motion to dismiss. As a result, the same evidence is presented under summary judgment and judgment as a matter of law, though sometimes in different forms, for example, live witnesses under judgment as a matter of law versus documentary evidence under summary judgment. In contrast, none of this same evidence is available for the motion to dismiss. 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.\textsuperscript{186}

In addition to different rule constructions, the justifications for the motion for summary judgment and the motion to dismiss also should be viewed differently. While both motions have been justified on the grounds of cost to the defendant,\textsuperscript{187} there are different costs to the defendant under the motions. If a court does not grant summary judgment, the defendant must pay to go to trial or will settle. If a court does not grant a motion to dismiss, the cost is less than when the court does not grant summary judgment; the defendant will pay for discovery but has another opportunity to request that the court dismiss the case before trial upon a motion for summary judgment.\textsuperscript{188} As a side issue

party; and (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.” FED. R. CIV. P. 50(a)(1).

\textsuperscript{185} Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1968 (2007); see supra text accompanying notes 77–86. Indeed, while the Court has not yet adopted the “whether a reasonable jury could find for the nonmoving party” language for Rule 12(b)(6), it may be that this reasonable jury language may also be adopted at some later time for the motion to dismiss as it was for summary judgment, although this Article is not the place to explore this possibility. See supra note 120.

\textsuperscript{186} See Spencer, supra note 3, at 487–88.


regarding cost, the cost of individual employment discrimination cases pale in comparison to cases such as class action antitrust cases, and thus, the same cost justification that has been offered by the Court for the summary judgment and the motion to dismiss standards in class action antitrust cases seems particularly inappropriate for much less costly individual employment discrimination cases.

Cf. Stancil, supra note 188, at 146–55 (recommending notice pleading standards for claims that are “not likely to engender substantial cost disparities favoring plaintiffs”); Herrmann, Beck & Burbank, supra note 2, at 151–52 (Professor Burbank arguing that there is a lack of empirical evidence that cost of discovery has been significant problem and quoting Professor Robert Gordon that “[c]areful studies demonstrate that the ‘litigation explosion’ and ‘liability crisis’ are largely myths” (quoting Robert W. Gordon, The Citizen Lawyer—A Brief History of a Myth with Some Basis in Reality, 50 WM. & MARIL. REV. 1169, 1199 (2009))). But see id. at 146 (Herrmann arguing that “[a]ll fair observers acknowledge the skyrocketing cost of discovery”).

Professor Hylton has addressed cost and the propriety of summary judgment and the motion to dismiss. While he did not address the similarity between the motion to dismiss and summary judgment standards, he nevertheless has a different view regarding the relationship of the motions. He has argued for an interconnection between the treatment of the motion to dismiss and the motion for summary judgment because of cost. See Hylton, supra note 188, at 54. First, he explained that “pleading-stage dismissals should occur more often for more costly claims. . . . For example, if the plaintiff’s claim imposes relatively high costs on the defendant, say by severely damaging his business or by imposing exorbitant discovery costs, the threshold level of merit should be correspondingly high.” Id. at 52. Thus he argued that “[w]here the summary judgment standard is relatively high, in terms of the factual support required, the pleading stage requirements should be relatively high. Conversely, where the summary judgment stage requirements are relatively low, the courts should be liberal at the pleading stage.” Id. at 55–56. Hylton uses employment discrimination and antitrust cases as two examples. He states that discrimination claims do not require much evidence to withstand summary judgment, while on the other hand antitrust claims require significant evidence. As a result, he argues that pleading requirements for discrimination claims should not be as rigorous as pleading requirements for antitrust cases. Id. at 56–62. What Hylton states seems to support in part a difference in the treatment of employment discrimination and antitrust cases upon motions to dismiss. Cf. Epstein, supra note 3, at 62–72, 81–82 (discussing particular expense of antitrust cases and proposing more dismissals at motion to dismiss stage of cases which are based on publicly available information); Spencer, supra note 3, at 488–89 (acknowledging legitimate concern about the cost of modern litigation but arguing that the plausibility requirement is not the right standard to properly address this concern because some claims with merit will not survive).

Antitrust and employment discrimination, more generally, may be viewed differently. Antitrust law assumes rational conduct on behalf of the actors. Much has been written, however, that argues that this same rational conduct cannot be assumed in the employment context. According to this literature, employers discriminate regularly. See, e.g., Samuel R. Bagenstos, Implicit Bias, “Science,” and Antidiscrimination Law, 1 HARV. L. & POL’Y REV. 477 (2007); Anthony G. Greenwald & Linda Hamilton Krieger, Implicit Bias: Scientific Foundations, 94 CAL. L. REV. 945 (2006). Of course, other literature disputes this finding. See, e.g., Gregory Mitchell & Philip E. Tetlock, Antidiscrimination Law and the Perils of Mindreading, 67 OHIO ST. L.J. 1023 (2006). In any event, the former literature calls into question whether the same standard used in an antitrust context is appropriate in an employment discrimination context.
In addition to differences in rule construction and cost justification, summary judgment and the motion to dismiss are dissimilar based on the role of the courts, though both motions, as stated previously, increase the role of courts in litigation. At the summary judgment stage, courts examine the evidence developed by the parties to determine whether the claim is plausible. On the other hand, at the motion to dismiss stage, courts have only the facts set forth in the complaint to determine whether the claim is plausible. This type of inquiry at the pleading stage gives the courts themselves more power over the parties than at the summary judgment stage where the parties themselves have developed the evidence in the cases, which the courts use to decide the motions.

Moreover, courts wield more power in relationship to the legislature under the motion to dismiss than under summary judgment. Now, using Iqbal and Twombly, courts will likely dismiss more cases based on statutes that the legislature has enacted before additional evidence has been developed. For example, in the area of employment discrimination, Congress has prohibited discrimination on the basis of various traits. Now, it may be that some claims of discrimination, which were created under Congress’s legislative authority, will be dismissed on motions to dismiss, some of which again may not have been dismissed upon summary judgment.

IV. CONCLUSION

A new time is upon the federal rules after Iqbal and Twombly. The motion to dismiss is now the new summary judgment motion, in standard and possibly effect. Under both dismissal standards, courts assess the plausibility of a claim, using inferences favoring the plaintiff and inferences favoring the defendant, and under both, courts use their own opinions of the evidence to decide the plausibility question. As a result of the similarity in the standards, the summary judgment motion and the motion to dismiss may have similar effects, including the significant use of the procedures by courts, a related increased role of judges in litigation, and a corresponding increased dismissal of employment discrimination cases. These similarities of the standards and possibly the effects of the motions call into question whether Iqbal and Twombly were decided properly. It may not be appropriate to treat summary judgment

Putting aside the comparison of summary judgment and the motion to dismiss, the new plausibility standard will not necessarily save costs for defendants overall. While a defendant may save costs if the defendant prevails on a motion to dismiss, to determine whether there is an overall cost saving, one would also need to examine the cost of bringing the motions and the probability of winning the motions.


Cf. Notice and Pleading Restoration Act of 2009, S. 1504, 111th Cong., (2009); Bone, Pleading Rules, supra note 2 (arguing that rule-makers or Congress, not Supreme Court should resolve pleading issue).
and the motion to dismiss similarly because of the difference in the availability of discovery under the motions, the difference in cost surrounding the motions, and the difference in the role of the courts under the motions, both in relationship to the parties as well as in relationship to the legislature.
Inferences in Employment Law Compared to Other Areas of the Law: Turning the Rules Upside Down
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I. JUDGES AND INFERENCES IN EMPLOYMENT LAWSUITS: A CASE STUDY

The date: December 6, 2011.


The players: Plaintiff’s attorney Alex Caffarelli, name partner of Caffarelli & Siegel, a plaintiff’s side employment law boutique in Chicago and at that time the President of NELA/Illinois, the Illinois affiliate of the National Lawyers Employment Association.

The Seventh Circuit panel: Judges Richard Posner, Joel Flaum, and Diane Sykes.

The case: Nicholson v. Pulte Homes, a Family and Medical Leave Act case in which Donna Nicholson, an employee with an excellent record whose elderly father had developed leukemia and whose elderly mother had developed chronic kidney disease. Ms. Nicholson took a day off to take her father to the oncologist, and the next day the employer put her on a Performance Improvement Plan. Two months later, Nicholson’s mother needed to be taken to the Emergency Room. Ms. Nicholson called into work, explained the situation, and said she would miss that day of work. Later that day, the employer fired Ms. Nicholson. Summary judgment was granted in favor of the defendant, and plaintiff appealed.

The law on inferences: “[T]he court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence. ... ‘Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not...

1 The authors would like to acknowledge Brandon Brooks, Chicago-Kent College of Law, J.D. 2011, for his help in researching this paper. An earlier version of this article was published as “Using Cases from Criminal and Other Areas of the Law to Help Prove Knowledge and Intent,” NELA 2011 Annual Convention.
2 J.D. magna cum laude, Northwestern University 1977.
3 J.D. University of Michigan 2003.
those of a judge.’ … Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe. … That is, the court should give credence to the evidence favoring the nonmovant as well as that ‘evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent that’ that evidence comes from disinterested witnesses.’”

Drawing inferences?: We take up the oral argument as Mr. Caffarelli has gone through the above evidence and presents an additional piece of evidence from which, he argues, the jury could infer the employer’s prohibited intent:

Mr. Caffarelli: “We also have the testimony of Juan Chiadez, an impartial co-worker – the only impartial witness that we had in this case whose deposition was taken. He specifically asked Maria Wilhelm, the decision-maker, why Donna Nicholson had been terminated after Donna Nicholson’s termination, and she told him that ‘Well, I can’t say, but Donna’s dealing with personal family issues that she needs to attend to’ so she ….”

Judge Posner: “Well, what would you expect her to say?”

Mr. Caffarelli: “She could say nothing for example, but if Donna Nicholson’s.”

Judge Posner: “But it’s natural to say, yeah ‘personal reasons.’ That’s more polite than saying, well ‘She was fired for incompetence’ or ‘Not doing her job,’ right? I wouldn’t attach any weight to that.”

Mr. Caffarelli: “Well, she didn’t say ‘personal reasons’ though, Your Honor; she said ‘family matters’ and she did talk about her father being sick. And so I think a reasonable jury can infer that if the decision-maker is talking in the context of why Donna Nicholson was terminated about Donna Nicholson’s father being sick. …”

Judge Posner: “That is very unrealistic. The point is you say something

which is designed to be polite to the person who’s left, right? It’s much nicer to say ‘Well, she left, she had to leave because of family, she couldn’t hold the job because of family reasons’, is a lot nicer than saying ‘Well, she’s rude to customers and she doesn’t work hard enough and so on and we’re going down the drain, this company’. So, no. And I …”

Mr. Caffarelli: “Granted. And she didn’t say ‘Well, she’s rude to customers’ but she could have said ‘Look, it’s for personal reasons we’re not...’”

Judge Posner: “That’s not how people react. Come on.”

Mr. Caffarelli “Well, finally ….”

Judge Posner: “It’s not planning. What if someone asks me why Maria isn’t here? What shall be my formula for protecting the company and protecting her feelings and this and that? No, I don’t think that’s realistic.”

Mr. Caffarelli: “Well, finally, Your Honor, the last piece of evidence. And again, this is a summary-judgment case. If a jury decides that, we’re prepared to live with it.”

II. DO JUDGES PERMIT JURIES IN OTHER AREAS OF THE LAW TO DRAW INFERENCES THAT THEY DO NOT PERMIT THEM TO DRAW IN EMPLOYMENT CASES?

The laws of inference should be the same in employment cases as they are in other civil cases and even in criminal cases. For example, in Desert Palace, Inc., v. Costa,7 the Supreme Court unanimously and expressly analogized between the adequacy of circumstantial evidence in employment cases and in criminal ones:

[W]e should not depart from the “conventional rule of civil litigation [that] generally applies in Title VII cases.” That rule requires a plaintiff to prove his case “by a preponderance of the evidence,” using “direct or circumstantial evidence[.]” ... The adequacy of circumstantial evidence also extends beyond civil cases; we have never questioned the sufficiency of circumstantial evidence in support of a criminal conviction, even though proof beyond a reasonable doubt is required. And juries are routinely instructed that ‘[t]he

law makes no distinction between the weight or value to be given to either direct or circumstantial evidence.”

Despite such observations from the Supreme Court, decades of experiences like Alex Caffarelli’s in the Nicholson oral argument and exposure to decisions from other areas of the law have led plaintiff’s employment lawyers to believe that the inferences judges would not permit juries to draw in employment cases would be common-place inferences in other areas of the law. And, occasionally, plaintiff’s employment lawyers let their suspicions leak into print. For example, *Shorter v. ICG Holdings, Inc.*[^9] was a race-discrimination firing case in which the defendant won summary judgment. The Tenth Circuit summarized some of the evidence as:

> Once, while eating lunch with Shorter, Dughman [Shorter’s supervisor] asked Shorter [a black female] about black men’s sex organs. On another occasion, Dughman told another ICG employee that Shorter talked like people of her culture, race, or color. During a confrontation with Shorter about Shorter’s job performance, Dughman told her, “You are just on the defensive because you are black. ...” One or two days after firing Shorter, Dughman, apparently in a fit of anger at not being able to locate an important document in Shorter’s office, referred to Shorter as an “incompetent nigger.”[^10]

The Tenth Circuit discounted this evidence in affirming summary judgment, because “[a]lthough some of the remarks were directed at Shorter, there is nothing in the statements that link them to Dughman’s decision to terminate her. ... The fact that Dughman was Shorter’s supervisor does not automatically establish the requisite nexus.”[^11]

Richard T. Seymour, an eminent plaintiff’s attorney, commented as follows on the Tenth Circuit’s discounting of that evidence:

> There are none so blind as those who refuse to see. ... Decisions like *Shorter*, which presume that proven bigots always act nondiscriminatorily unless they either link their bigoted statements at the time to specific future job actions they intend to take against their victims, or announce their bigotry while their feet are figuratively planted on the chests of their victims, violate ... elementary common sense. ... *Nor do such decisions*

[^10]: Id. at 1206 (citation omitted).
[^11]: Id. at 1210 (citations omitted).
recognize the stark division they create between civil rights cases and the rest of the law. In a criminal prosecution for murder, for example, the majority here would doubtless find it bizarre if a lower court granted a defense motion in limine barring from evidence repeated statements of the defendant a short time before the murder, to the effect that he hated the decedent and lay awake nights thinking of painful things to do to him, simply because the defendant did not at the time say that he would therefore murder the deceased, or did not repeat these statements at the very moment of the murder... A jury should have had the opportunity to evaluate all the evidence.\textsuperscript{12}

Thomas A. Newkirk of Des Moines, Iowa, another eminent plaintiff’s attorney, explicitly compared the types of inferences that judges permit juries to draw in criminal cases to how judges cabin jury in employment cases:\textsuperscript{13}

What is it about purchasing an insurance policy for example that would provide a basis to assign motive to kill to that simple act? The fact at issue is purchasing the insurance coverage, or being jealous of your wife’s affair, but the requested inference is resulting motive to kill. A court will assign motive for murder from the very innocent and common event of purchasing an insurance policy on the deceased. The Court simply trusts a jury to wend its way through actions that are on their face legitimate or actions that are entirely within the right of a person to choose to engage in or not engage in and to place weight on those actions where appropriate. The Court is not going to second guess the jury on whether they felt that “purchasing an insurance policy on your wife over one million dollars is a good idea.” In short, there is no logical reason to allow an employer more freedom from scrutiny than a Court would give a criminal defendant.\textsuperscript{14}

III. BARRIERS TO DRAWING INFERENCES IN EMPLOYMENT CASES

A. Anti-Inference Doctrines

One barrier to drawing inferences in employment cases is the continual and continuous proliferation in employment law of “anti-inference” doctrines that do not exist in other areas of the law. For example, in 2010 the National Employment Lawyers

\textsuperscript{12}Seymour and Aslin, \textit{Comment by Richard Seymour on Shorter v. ICG Holdings}, \textit{EQUAL EMPLOYMENT LAW UPDATE} at 17-762 (Summer 2003) (emphasis added).
\textsuperscript{13}Newkirk, \textit{Modern Discrimination Cases: Identifying the Problem and Finding the Solution}, 2006 NELA Annual Convention 1340, 1346-1347 (emphasis in original).
\textsuperscript{14}Id. (emphasis in original).
Association surveyed its membership and ranked the following doctrines, among others, that hindered the drawing of inferences on summary judgment in employment cases:

1. Testimony is characterized as “undisputed” even if it espoused only by employer witnesses.

2. Potentially damning evidence is discounted as a “stray remark.”

3. Comparator must be virtually identical to the plaintiff.

4. “Severe or pervasive” is treated as a matter of law, not as a matter of fact.

5. Suspicious timing does not give rise to an inference of discrimination nor to an inference of retaliation.

6. Alleged “business judgment’ is deferred to – courts are not “super-personnel departments.”

7. Plaintiff’s testimony is disregarded as irrelevant and/or “self-servin.”

8. Employer’s statement that it would have made the same decision even without discrimination or retaliation is treated as dispositive.

9. Employer’s belief was wrong/foolish/etc., but was “honest.”

Let’s examine in detail just one of these anti-inference doctrines, the last one listed above: “honest belief.” Many courts follow this “honest belief” doctrine and require employees to disprove an employer’s alleged “honest belief” to survive an employer motion for summary judgment. Perhaps the paradigm “honest belief” case is Kariotis

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15 See NELA, Survey of Problem Doctrines (2010), on file at the National Employment Lawyers Association and used with the permission of the National Employment Lawyers Association. The ranking of the problem doctrines varied depending on various metrics used. Other problem doctrines receiving votes included same-actor inference (a pro-movant inference in the typical employment-case motion for summary judgment), equating “pretext” with “a lie,” “must bowl a strike” (i.e., employee must disprove each and every employer alleged legitimate reason in a long litany of reasons), narrow definition of “direct evidence,” excluding “me, too” evidence, “cat’s paw” doctrine (which, after this survey was taken, was limited by the Supreme Court’s decision in Staub, see text accompanying notes 50-60, infra).

16 See, e.g., Woodruff v. Peters, 482 F.3d 521, 531 (D.C. Cir. 2007) (“[w]e review not ‘the correctness or desirability of the reasons offered but whether the employer honestly
believes in the reasons it offers”) (quoting Fischbacj v. D.C. Dep’t of Corrections, 86 F.3d 1180, 1183 (D.C. Cir. 1996); Piercy v. Maketa, 480 F.3d 1192, 1200-1201 (10th Cir. 2007) (the relevant issue is the employer’s good faith beliefs regarding the employee’s performance, not what the employee believes about his own performance) (citations omitted); Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1063 (9th Cir. 2002) (“[i]n judging whether ... proffered justifications were ‘false,’ it is not important whether they were objectively false ... [r]ather, courts ‘only require that an employer honestly believed its reasons for its actions ... ‘”) (quoting Johnson v. Nordstrom, Inc., 260 F.3d 727, 733 (7th Cir. 2001)); Bacchus v. Tubular Textile LLC, No. 1:01CV00621, 2003 U.S. Dist. LEXIS 7308, at *18 (M.D.N.C. Mar. 19, 2003) (employer’s decision need not be “objectively correct in all its particulars;” the decision only needs to be “made in good faith and without discriminatory animus.”); Crim v. Board of Educ., 147 F.3d 535, 541, 1998 U.S. App. LEXIS 10723, **16 (7th Cir. 1998) (even if the reasons were mistaken, ill-considered or foolish, as long as the employer honestly believed in those reasons then pretext has not been proven); Wolf v. Buss Am., Inc., 77 F.3d 913, 919 (7th Cir. 1996) (an employer acting incorrectly does not demonstrate pretext; the employee must show that the employer did not honestly believe in the reason for the termination) (citation omitted); Ragland v. Rock-Tenn Co., 955 F. Supp. 1009 (N.D. Ill. 1997) (“[h]owever, unlike Wohl, [plaintiff] has produced no affirmative, objective evidence to refute the defendants’ honest belief in the reasons for her termination.”); Walker v. Reith-Riley Constr. Co., et al., 2006 U.S. Dist. LEXIS 9608,*14 (N.D. Ind. 2006) (“[a] reason might be ‘mistaken, ill considered or foolish,’ but as so long as it reflects the honest belief of the employer, it is legitimate”); Clay v. Holy Cross Hosp., 253 F.3d 1000, 1005-1006 (7th Cir. 2001) (“even if [the employer’s] reasons ... were ‘mistaken, ill considered or foolish,’ so long as [the employer] honestly believed those reasons, pretext has not been shown.”) (citation omitted); Bituin v. Supervalu Holdings, Inc., 274 F. Supp. 2d 977 (N.D. Ill. 2003) (“[i]n other words, there is no Title VII [of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000e et seq.,] violation ‘if [an employer] honestly believed in the nondiscriminatory reasons it offered, even if the reasons are foolish or trivial or even baseless.’”) (citing Jackson v. E.J. Branch Corp., 176 F.3d 971, 984 (7th Cir. 1999)); Winding v. Pier Mgmt. Serv., 1998 U.S. Dist. LEXIS 13770, **11-12 (N.D. Ill. 1998) (“Title VII [of the Civil Rights Act of 1964] does not vest a federal court with the authority to ‘sit as a super-personnel department that reexamines an entity’s business decisions.’ ‘The issue of pretext does not address the correctness or desirability of reasons offered for employment decisions. Rather, it addresses the issue of whether the employer honestly believes in the reasons it offers. Therefore [a former employee] must lose if the company honestly believed in the nondiscriminatory reasons it offered, even if the reasons are foolish or trivial or even baseless.’”) See also Rebecca Michaels, Legitimate Reasons for Firing: Must They Honestly be Reasonable?, 71 FORDHAM L. REV. 2643, 2658 n.101 (2003) (listing cases), available at http://ir.lawnet.fordham.edu/flr/vol71/iss6/7; Noam Glick, Towards an “Honest Belief Plus” Standard in California Employment Discrimination Cases, 39 LOY. L.A. REV. 1369 (2006), available at: http://digitalcommons.lmu.edu/llr/vol39/iss4/9.
Ms. Kariotis, who was 57 years old at the time, underwent knee-replacement surgery and, after the surgery, took longer to return to work than the ten weeks her physician had anticipated. While Ms. Kariotis was off work recovering from her knee-replacement surgery, she received extended disability benefits. The company claimed to have been suspicious of Ms. Kariotis’s extended leave because, two years earlier, Ms. Kariotis had been accused of unethical conduct and because her disability allegedly was “inconsistent with observations made by some [] employees.” The Human Resources manager and his boss claimed that they had decided to investigate Ms. Kariotis based on those suspicions. Rather than approaching Ms. Kariotis or her doctor, however, they hired investigators who put Ms. Kariotis under surveillance and videotaped her while she was off duty. The investigators, who were not medical experts, reported that Ms. Kariotis did not appear physically impaired and had engaged in “walking, driving, sitting, bending, and shopping (pushing a grocery cart).” Rejecting suggestions from other managers as to how to handle the situation (such as asking Ms. Kariotis’s physician about the activities depicted in the videotape), the Human Resources manager met with Ms. Kariotis and handed her a letter stating that Ms. Kariotis was being fired because she had dishonestly claimed disability benefits and had been absent from work for five days without a good reason. In response, Ms. Kariotis provided, among other things, a letter from her physician stating that, given Ms. Kariotis’s physical condition, the company’s charges of disability fraud were “preposterous.” Nevertheless, the company informed Ms. Kariotis that the decision to terminate her employment was final. Eventually, the company replaced the 57-year-old Ms. Kariotis with a 32-year-old woman.

Ms. Kariotis sued under many statutes, including the ADA, the ADEA, ERISA, COBRA, the FMLA, and the Illinois Health Insurance Claim Filing Act. The company moved for summary judgment, contending that while it may have erred in believing that Ms. Kariotis’s receipt of disability benefits after her knee replacement surgery had been fraudulent, it had honestly believed so. The district court granted summary judgment for the company on all counts.

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18 Id. at 674-675.
19 Id. at 674.
20 Id. at 675.
21 Id.
22 Id.
23 Id.
24 Id.
25 Id.
26 Id.
27 Id.
28 Id. at 677.
29 Id.
On appeal, the company conceded that the plaintiff had established a *prima facie* case of discrimination.\(^{30}\) Hence, the Seventh Circuit Court of Appeals viewed the only issue as being whether or not Ms. Kariotis “successfully called into question [the company’s] reasons for firing her.”\(^{31}\) The Seventh Circuit said that Ms. Kariotis could not meet her burden by simply criticizing the company’s evaluation process or its judgment regarding her job performance.\(^{32}\) Instead, Ms. Kariotis had to adduce evidence showing that the company’s alleged reasons for its decision were false, “thereby implying (if not actually showing) that the real reason [was] illegal discrimination.”\(^{33}\) The key issue was “not whether the employer’s reasons for a decision [were] ‘right but whether the employer’s description of its reasons [was] honest.’”\(^{34}\)

The Seventh Circuit acknowledged that the company had never discussed the matter with Ms. Kariotis’s physician – even though one of its own managers had suggested that course of action – nor showed the videotape to the company doctor.\(^{35}\) The Seventh Circuit acknowledged that the company’s investigation could be considered “imprudent, ill-informed, and inaccurate,” that the investigation “hardly look[ed] world class,” and that there were “better ways” to investigate Ms. Kariotis than to put her under surveillance and secretly videotape her.\(^{36}\) Nonetheless, the Seventh Circuit reasoned that federal law did not “require[ ] just cause for discharges” and that a “poorly founded” but an “honestly described” reason for discharge was not an illegal pretext for discrimination.\(^{37}\) According to the Seventh Circuit, Ms. Kariotis had not provided any evidence that the company investigated other (younger or non-disabled) employees in a different manner.\(^{38}\) The Seventh Circuit saw no evidence that the company had made the termination decision because of Ms. Kariotis’s age or because Ms. Kariotis had physical problems that could have financially burdened the company.\(^{39}\) The Seventh Circuit, therefore, affirmed the district court’s grant of summary judgment.\(^{40}\)

As noted, the Seventh Circuit framed the issue in *Kariotis* as “not whether the employer’s reasons for a decision [were] ‘right but whether the employer’s description of

\(^{30}\) *Id.* at 676.

\(^{31}\) *Id.* at 676.

\(^{32}\) *Id.* at 677.

\(^{33}\) *Id.*

\(^{34}\) *Id.* (quoting *Gustovich v. AT&T Commc’ns, Inc.*, 972 F.2d 845, 848 (7th Cir. 1992)) (italics omitted).

\(^{35}\) *Id.*

\(^{36}\) *Id.*

\(^{37}\) *Id.*

\(^{38}\) *Id.*

\(^{39}\) *Id.*

\(^{40}\) *Id.* at 674. The Seventh Circuit reversed summary judgment on the COBRA claim because that claim did not require proof of the company’s intent.
its reasons [was] honest.”41 Implicit in the Seventh Circuit’s affirmance of summary judgment was that a reasonable jury would have had to have accepted that the company “honestly believed” its “imprudent, ill-informed and inaccurate” investigation. Notably lacking from the Seventh Circuit’s analysis was whether a jury, as a matter of law, would have had to have accepted the company’s own testimony as to the company’s own motives. Equally lacking from the Seventh Circuit analysis was whether the company’s conducting such an “imprudent, ill-informed and inaccurate” investigation could in itself be evidence of the company’s illegal motive on the theory that the company conducted such an obviously shoddy investigation because it was not looking for the truth but, rather, because it was looking to fire Ms. Kariotis. Such an inference would be reasonable: the theory that the company conducted an obviously shoddy investigation because it was not looking for the truth but, rather, because it was looking to fire Ms. Kariotis would explain why the company rejected internal advice that it talk to Ms. Kariotis’s physician; it would also explain why the company refused to rescind the firing even after Ms. Kariotis’s physician wrote the company that the company’s charges of disability fraud were “preposterous.” Over fifteen years before Kariotis, the Supreme Court had noted that “[t]he fact that a court may think that the employer misjudged the qualifications of the applicants does not in itself expose him to Title VII liability, although this may be probative of whether the employer’s reasons are pretexts for discrimination.”42 If “misjudging qualifications” is “probative of whether the employer’s reasons are pretexts,” why would not conducting an “imprudent, ill-informed and inaccurate” investigation be similarly probative evidence of pretext? Finally, surveillance has been held to be evidence of a search for a pretext to fire.43

In short, in Kariotis, a reasonable jury would have had a choice between deciding whether the company had been stupid or whether the company had been evil. The Seventh Circuit, without any analysis why “evil” was not a valid choice based on the evidence and the reasonable inferences from that evidence, firmly – but non-analytically – put its judicial thumb on the scales on the side of “stupid” and thereby deprived Ms. Kariotis of her day in court.

B. “Inference Blindness”44

Cases like Kariotis with their doctrines like “honest belief” are clear barriers to drawing inferences in employment cases. But just as often the federal courts decide

41 Id. (quoting Gustovich v. AT&T Commc’ns Inc., 972 F.2d 845, 848 (7th Cir. 1992)).
43 “[S]urveillance ‘strongly suggests the possibility of a search for a pretextual basis for discipline, which in turn suggests that subsequent discipline was for purposes of retaliation.’” Hairston v. Gainesville Sun Publ’g Co., 9 F.3d 913, 921 (11th Cir. 1993) (quoting B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 554 (2d ed. 1983 & supp. 1987)).
44 As far as I know, the term “inference blindness” was coined by Tom Newkirk in his paper at the 2006 NELA annual convention. See supra notes 13, 14.
cases that do not explicitly rely on any such anti-inference doctrine. Rather, what seems to be involved in these cases is “inference blindness” on the part of the judges: a simple refusal to see what is plainly there or to permit a jury to draw an inference that is waiting there to be drawn. As Richard Seymour stated in discussing Shorter (the Tenth Circuit case in which, among other things, the firing supervisor had asked Shorter [a black female] about black men’s sex organs, had told Shorter “You are just on the defensive because you are black,” and, one or two days after firing Shorter, referred to her as an “incompetent nigger”) “There are none so blind as those who refuse to see.”

These cases often result in federal appellate judges saying astonishing things about what inferences cannot be drawn or – even more contrary to the law of summary judgment – what inference must be drawn in favor of the movant-employer. For example:


_Nagle_ was a discrimination and retaliation case. The plaintiff was a police officer, and part of plaintiff’s retaliation case was that shortly after he had filed an EEOC Charge, the police chief took an adverse action against him. In upholding summary judgment for the employer, the Seventh Circuit stated:

> The EEOC charge was mailed to the department on January 27, 2005, and the correspondence indicated that it should be given to “Chief David” rather than Chief Davis. Additionally, the envelope was addressed to “Personnel Manager, Human Resources Department, Village of Calumet Park.” The district court surmised from this evidence that no jury could reasonably conclude that Chief Davis was aware of the EEOC charge at the time of the February 2005 suspension. We agree.”

Another part of Nagle’s case was that he had been retaliated against by being assigned to less favorable duties. The Seventh Circuit analyzed as follows the evidence for that claim:

> While one can imagine situations in which reassignment to less desirable details or positions would dissuade a reasonable worker from making a charge of discrimination, here the senior liaison position was posted for other officers to apply, and after no one applied, Nagle was assigned to the position. This fact arguably

45 See text accompanying notes 12-14, supra.
46 *Nagle v. Village of Calumet Park*, 554 F.3d 1106 (7th Cir. 2009).
47 *Id.* at 1122 (italics supplied).
cuts both ways: the senior liaison position had to be filled by someone and an employer is entitled to fill the position. In the alternative, an employer is not entitled to be punitive in his assignments – he cannot assign an employee to a less favored position because that employee has exercised his statutory rights.48

Despite observing that “[t]his fact arguably cuts both ways,” the Seventh Circuit affirmed summary judgment for the employer.49


*Staub* was reversed by the Supreme Court, so the facts are well-known, but just to refresh your memory: *Staub* was a USERRA case in which the employee, an Army reservist who had been fired won a jury trial against his former employer.51 The evidence showed that the second-in-command of the Hospital department for which the employee worked had called military duties ‘bullshit’ and said she had assigned the employee extra shifts as a “‘way of paying back the department for everyone else having to bend over backwards to cover [his] schedule for the Reserves.”52 The head of the Hospital department for which the employee worked had characterized drill weekends as ‘Army Reserve bullshit’ and ‘a b[u]nch of smoking and joking and [a] waste of taxpayers[’] money.”53

Upon the employee’s return from a tour of duty in 2003, the head of the department said that the second-in-command of the department was “out to get” the employee, and the second-in-command of the department told one of the employee’s co-workers that the employee’s “military duty had been a strain on the [ ] department” and that “she did not like him as an employee,” whereupon the second-in-command asked the co-worker “to help her get rid of [the employee].”54

In January 2004, the employee received another order to report for active duty and deployment.55 In response, the second-in-command of the Hospital department called the employee’s Commanding Officer and asked if the employee could be excused from

48 *Id.* at 1120 (italics supplied).
49 *Id.*
50 *Staub v. Proctor Hosp., 560 F.3d 647 (7th Cir. 2009).*
51 See generally *id*.
52 *Id* at 652.
53 *Id.*
54 *Id.*
55 *Id.*
some of his military duties. Summing up this evidence, the Seventh Circuit stated, “[a]fter all this, there can be little dispute that [the second-in-command of the department] didn’t like [the employee] and that part of this animus flowed from [the employee’s] membership in the military.”

Despite this evidence and despite concluding that the jury had been properly instructed, the Seventh Circuit reversed the jury verdict in favor of the employee and ordered that judgment be entered for the hospital, because “[t]he story told by the evidence is really quite plain.”

Apart from the friction caused by his military service, the evidence suggests that [the employee], although technically competent, was prone to attitude problems ... . So, when [the employee] ran into trouble in the winter and spring of 2004, he didn’t have the safety net of a good reputation. Even if [the employee] behaved reasonably on the day of his discharge and the January 27 write-up was exaggerated by [the second-in-command of the department], his track record nonetheless supported [the alleged decision-maker]’s action. ... We admit that [the alleged decision-maker]’s investigation could have been more robust, e.g., she failed to pursue [the employee]’s theory that [the second-in-command of the department] fabricated the write-up; had [the alleged decision-maker] done this, she may have discovered that [the second-in-command of the department] indeed bore a great deal of anti-military animus .... Viewed the evidence reasonably, it simply cannot be said that [the alleged decision-maker] did anything other than exercise her independent judgment, following a reasonable review of the facts, and simply decide that [the employee] was not a team player. We do not mean to suggest by all this that we agree with [the alleged decision-maker]’s decision – it seems a bit harsh given [the employee]’s upsides and tenure – but that is not the issue. The question for us is whether a reasonable jury could have concluded that [the employee] was fired because he was a member of the military. To that question, the answer is no.

56 Id. at 653.
57 Id.
58 Id. at 657-658.
59 The legal standard for reversing a jury verdict is the same as the legal standard for granting summary judgment. Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 150 (2000).
60 560 F.3d at 659.

Hemsworth was an age-discrimination case in which one of the plaintiff’s pieces of evidence was that defendant’s HR Director, who had been given a list containing the ages of the employees being laid off in a RIF, told defendant’s General Counsel that the RIF’s eliminating a large percentage of the employees over age forty “was a problem.”62 The Seventh Circuit noted this conversation in its recitation of the facts,63 and, of course, stated that “all justifiable inferences must be drawn in the nonmovant’s favor,”64 but later in the opinion analyzed as follows the significance of this conversation:

[T]he comment by the Quotesmith employee about laying off a large number of employees over forty years old was not made by a Quotesmith decision maker (and also demonstrates that Quotesmith was aware of its legal obligation under the ADEA) ...65


Townsend-Taylor was an FMLA case in which the defendant had fired the plaintiff because it allegedly had not timely received the FMLA certification forms for the illness of the plaintiff’s child.67 The pediatrician testified that he had “‘filled out FMLA papers for this occurrence on at least 3 separate occasions and either faxed them to the [Ameritech] office or gave them directly to the parents.’”68 In upholding summary judgment for the employer, the Seventh Circuit stated:

Although the doctor said not that he had faxed the form but that he had either faxed it or given it to Mr. Taylor, it is hardly likely that he handed the same form to the parents three times. So why was a copy of the completed form never found in FPU’s files? And did the doctor really fax the same form three times? Why would he do that? Was his fax machine broken? Was the fax line at FPU continuously busy?

61 Hemsworth v. Quotesmith.Com, Inc., 476 F.3d 487 (7th Cir. 2007).
62 Id. at 489.
63 Id.
64 Id. at 490 (citation omitted).
65 Id. at 491 (italics supplied).
66 Townsend-Taylor v. Ameritech Servs., Inc., 523 F.3d 815 (7th Cir. 2008).
67 Id. at 815.
68 Id. at 816-817.
No explanation is suggested for the miscommunication. It is a great mystery; but Taylor does not contend that he complied with Ameritech’s procedures for applying for FMLA leave within the 15-day period. For he gave the doctor the wrong form, and the doctor’s “three faxes” letter did not explain or justify the delay.  

5. Coolidge v. Consolidated City of Indianapolis, 505 F.3d 731 (7th Cir. 2007) (Williams, J., Posner, and Flaum, JJ.).

Coolidge was a sexual-harassment and retaliation case in which the plaintiff, a crime-lab employee, had won a prior sexual-harassment case against her employer. After that prior trial victory, plaintiff continued to work at the crime lab, where one of her job duties was cataloging materials as possible evidence. Among the materials left for her to catalog was a videotape that “depicted necrophilia as well as other violent and disturbing images.” Plaintiff started viewing the video, became nauseous, turned the video off, and reported what she had seen. In a subsequent lawsuit, plaintiff alleged that this videotape had been deliberately left for her to catalog as retaliation and as further sexual harassment. In upholding summary judgment for the employer, the Seventh Circuit stated:

Crime Lab employees frequently worked with corpses, so pornography depicting necrophilia might not have the same shocking overtones there as it would in another setting.

Now, let’s review this: In Nagle, the court held, as a matter of law, that a jury could not infer that an addressee had received an official government notice from the EEOC when the address contained a minor typo in the last letter of the recipient’s last name. The court in Nagel also affirmed summary judgment despite observing that “[t]his fact arguably cuts both ways.” In Staub, the court overturned the verdict of a properly-instructed jury as to how to weigh the evidence of anti-military bias against the self-serving statements of the defendant as to how much of the biased subordinates’ information was taken into account in the decision to fire the plaintiff. In Hemsworth, the company’s General Counsel gives the company’s HR Director a list of the ages of the

\[69\] Id. at 817 (citation omitted).
\[70\] Coolidge v. Consolidated City of Indianapolis, 505 F.3d 731 (7th Cir. 2007).
\[71\] Id. at 732-733.
\[72\] Id. at 733.
\[73\] Id.
\[74\] Id.
\[75\] Id. at 734 (citation omitted).
\[76\] 554 F.3d at 1122.
\[77\] Id. at 1120
\[78\] 560 F.3d at 659.
employees the company is laying off in its RIF, the HR Director reports back that there’s “a problem,” and the company ignores it, which apparently shows (as a matter of law) that the company “was aware of its legal obligation under the ADEA.”79 In Townsend-Taylor, the doctor’s testimony that he had faxed the FMLA form three times did not create an issue of fact.80 Why, because there were questions (like “was the fax line at FPU continuously busy?”) that pose “a great mystery.”81 So, of course, if the facts are a “mystery,” then summary judgment is affirmed. In Coolidge, the plaintiff has to catalog a videotape that “depicted necrophilia as well as other violent and disturbing images” and, upon viewing it, becomes nauseous.82 Which establishes nothing because — also apparently as a matter of law — “Crime Lab employees frequently worked with corpses.”83

These cases do not reflect instances of poor argumentation or legal representation for the plaintiff(s) in each matter, for these cases were argued by well-respected, seasoned plaintiffs’ attorneys. These cases, however, do reflect what is unfortunately all too typical: judges apparently being blind to reasonable inferences and deciding that various pieces of evidence simply are not evidence of knowledge or intent.

A similar problem is the hypothetical reasons that some judge may dream up to excuse the employer’s actions. Unfortunately, there is an entire jurisprudence devoted to hypothetical reasons as a defense.84 As the Seventh Circuit explained this “hypothetical-reason” jurisprudence:

79 476 F.3d at 491.
80 523 F.3d at 817-818.
81 Id.
82 505 F.3d at 734.
83 Id.
84 This “hypothetical reason” jurisprudence is well-established in the Seventh Circuit. In addition to Wallace, discussed in the text, see, e.g., Pollard v. Rea Magnet Wire Co., 824 F.2d 557, 559 (7th Cir. 1987) (“Showing that the employer dissembled is not necessarily the same as showing ‘pretext for discrimination’... . [I]t may mean that the employer is trying to hide some other offense, such as a violation of a civil service system or collective bargaining agreement.”) (emphasis in original); Benzies v. Illinois Dept of Mental Health, 810 F.2d 146, 148 (7th Cir. 1987) (“The judge may conclude after hearing all the evidence that neither discriminatory intent nor the employer's explanation accounts for the decision ... . A public employer may feel bound to offer explanations that are acceptable under a civil service system, such as that one employee is more skilled than another, or that ‘we were just following the rules.’ The trier of fact may find, however, that some less seemly reason — personal or political favoritism, a grudge, random conduct, an error in the administration of neutral rules — actually accounts for the decision. Title VII does not compel every employer to have a good reason for its deeds; it is not a civil service statute”). Other Circuits have also discussed hypothetical reasons as a defense. See, e.g., Woods v. Friction Materials, Inc., 30 F.3d 255, 260 n.3 (1st Cir. 1994) (discussing hypothetical case in which employer claimed to
The defendant’s failure to persuade the jury that its proffered reason was its real reason ... does not compel [an inference of discrimination]. The true reason for the action of which the plaintiff is complaining might be something embarrassing to the employer, such as nepotism, personal friendship, the plaintiff’s being a perceived threat to his superior, a mistaken evaluation, the plaintiff’s being a whistle-blower, the employer's antipathy to irrelevant but not statutorily protected personal characteristics, a superior officer’s desire to shift blame to a hapless subordinate – conceivably a factor here – or even an invidious factor but not one outlawed by the statute under which the plaintiff is suing; or the true reason might be unknown to the employer; or there might be no reason.85

C. Playing “Whack-A-Mole” – the hidden assumption of employer good faith86

Employee advocates debate the importance of the “problem doctrines” in Section A, supra:87 are the problem doctrines a cause of the current summary-judgment crisis in

have fired employee for lack of skills but that alleged reason was a lie to cover up employer’s own embezzlement); Foster v. Dalton, 71 F.3d 52 (1st Cir. 1995) (affirming judgment for the defendant whose articulated reason that best-qualified applicant had been selected was rejected as false, but the real reason was found to be hypothetical cronyism); Weston-Smith v. Cooley Dickinson Hosp., Inc., 282 F.3d 60, 69 (1st Cir. 2002) (affirming summary judgment against plaintiff who was RIF’ed while on maternity leave and rejecting the timing of plaintiff’s firing as showing pretext on the hypothetical ground that defendant “might easily have wished to avoid the awkward situation of informing [the subordinate who was retained] of the decision to lay [plaintiff] off before [plaintiff] herself found out.”); Fisher v. Vassar College, 114 F.3d 1332, 1337-1338 (2d Cir. 1997) (en banc). 85 Wallace v. SMC Pneumatics, Inc., 103 F.3d 1394, 1399 (7th Cir. 1997).
86“‘Whac-a-mole’ or ‘Whack-a-mole’ in colloquial usage is that of a repetitious and futile task: each time the attacker is ‘whacked’ or kicked off a service, he only pops up again from another direction. The term has been used in the computer and networking industry to describe the phenomenon of fending off recurring spammers, vandals, or miscreants. It is also used in the military to refer to opposing troops who keep re-appearing. This use has been common in the Iraq War in reference to the difficulty of defeating the Iraqi insurgency. Nuclear scientist Edwin Lyman compared the multiple simultaneous crises at Fukushima I to a game of ‘whack-a-mole.’” See http://en.wikipedia.org/wiki/Whac-A-Mole#Colloquial_usage (citations omitted).
87 See text accompanying notes 12-15, supra.
employment cases or are they a symptom of a deeper problem? In the authors’ view, the type of basic reasoning and jurisprudential errors that show up as “inference blindness” 88 are strong evidence that the problem doctrines are just a symptom of something deeper. If that diagnosis is true, then fighting the problem doctrines may be like a game of “Whack-A-Mole”: shoot down one problem doctrine and another springs up to take its place. 89

Perhaps, the problem is that judges give employers a hidden presumption of good faith. This hidden presumption comes out in ways large and small. Employee advocates are often flummoxed by the propensity of judges to discount the employee’s testimony as “self-serving” while taking anything a company witness says as gospel – a stance that is exactly contrary to the law of summary judgment. 90

This hidden presumption of good faith leads to illogical results. From the earliest days of Title VII and the ADEA, it was well-established that the employer’s self-serving “affirmations of good faith” was something the jury had to weigh and not something that

88 See text accompanying note 44, supra.
89 This diagnosis is not meant in any way to minimize the difficulties caused by the problem doctrines or to denigrate the efforts of all those employee advocates, academics, and judges who are fighting the problem doctrines. Fighting symptoms can be crucial, especially when those symptoms can kill you.
90 Company witnesses usually have an interest in the outcome of the case. Indeed, the typical company witness has many interests in the outcome of the case: financial (his or her income depends on being paid by the company), reputational (the company witness is often personally accused of discriminating or retaliating), occupational (things might not go well for the witness’s career if he or she is found to have discriminated or retaliated), etc. Crediting witnesses with such interests on summary judgment is contrary to the black-letter law that, on summary judgment, the court “must disregard all evidence favorable to the moving party that the jury is not required to believe” Reeves, 530 U.S. 133 at 151 (emphasis added). Juries are routinely instructed that they can disregard the testimony of interested witnesses. See, e.g., Seventh Circuit Civil Pattern Jury Instruction 1.13 Testimony of Witnesses (Deciding What to Believe), available at www.ca7.uscourts.gov/Pattern_Jury_Instr/7th_civ_instruc_2009.pdf See also Lust v. Sealy, Inc., 383 F.3d 580, 582-583 (7th Cir. 2004) (“Sealy’s contention that ‘the jury cannot be permitted to simply choose to disbelieve the evidence offered by Sealy’ is a misleading half-truth. It is true that a plaintiff cannot prevail without offering any evidence of his own, simply by parading the defendant’s witnesses before the jury and asking it to disbelieve them. That would be ‘a no-evidence case, and [in] such a case a plaintiff must lose, because he has the burden of proof.’ But if the plaintiff offers evidence of her own, as she did here, the jury is free to disbelieve the defendant’s contrary evidence. There is no presumption that witnesses are truthful.”) (citations omitted),
would get an employer summary judgment. However, if self-serving affirmations of good faith do not get an employer summary judgment, then, logically, the following two typical summary-judgment arguments should equally not get an employer summary judgment:

1. An affirmation of good faith combined with a recitation of an alleged reason that is in and of itself suspicious or, possibly, even evidence of pretext, like the “imprudent, ill-informed and inaccurate” investigation in Kariotis, supra. If the affirmation of good faith alone is not sufficient for summary judgment, then how can it be strengthened by adding something that really makes no sense? This reasoning alone should get rid of the “honest belief” doctrine on summary judgment.

2. A recitation of an alleged reason without an affirmation of good faith, leaving the good faith hidden. However, if the employer was not acting in good faith, then summary judgment should be denied. And if the employer is claiming to have acted on the facts it set forth in its motion, then summary judgment should be denied unless and until no reasonable jury could disbelieve that the employer acted based on those facts.

This conclusion takes us full-circle back to the basic law of summary judgment: in an employment case, a court should not grant a defendant-employer summary judgment unless and until no reasonable jury could find from the evidence and the reasonable inferences from that evidence that the employer had not discriminated or retaliated and, in making that determination, the court cannot take into account any evidence that a reasonable jury would be entitled to reject. Although courts seem to have forgotten that in employment cases, they do remember that in other areas of the law, and it is to such other areas of the law that this paper now turns.

91 See, e.g., International Bhd. of Teamsters v. U.S., 431 U.S. 324, 342, n.24 (1977) (“affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion”) (citation omitted); Loeb v. Textron, Inc., 600 F.2d 1003, 1011, n.5 (1st Cir. 1979) (insufficient for employer “to offer vague, general averments of good faith”) (ADEA), disapproved of by Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985). For a more recent example, see Dyer v. Community Mem’l Hosp., 2006 WL 435721 at *11 (E.D. Mich. 2006) (“self-serving statement by the defendant’s representative that no illegal discrimination animated the defendant’s actions is insufficient to put the plaintiffs to their proofs at the summary judgment stage of the proceedings”) (dictum).
92 See text accompanying notes 17-43, supra.
93 See generally, Reeves, 530 U.S. 133 at 150-151.
IV.  INFERENCES OF KNOWLEDGE AND INTENT IN OTHER AREAS OF THE LAW

A. Murder Cases:

As noted, Tom Newkirk’s paper from the 2006 NELA Annual Convention pointed out that juries are permitted to draw inferences of criminal guilt from facts that could have a very innocent explanation, such as buying an insurance policy on one’s spouse.94 Newkirk’s comparison to a criminal jury being permitted to draw an inference of murder from the quite legal and commonplace act of purchasing an insurance policy on a spouse is no mere idle speculation from detective fiction. In fact, many cases in many different jurisdictions have this fact pattern.95

Perhaps the most instructive comparison found between the inferences judges prohibit juries from drawing in employment cases and the inferences of murder that juries are permitted to draw from the purchase of an insurance policy was Rhodes v. State,96 a murder case in which the most important evidence was the wife’s purchase of a $100,000 insurance policy on her husband’s life.97 The insurance policy had a suicide exclusion,98 the husband apparently committed suicide, and the wife never made a claim against the policy.99 This notwithstanding, the jury was allowed to infer the wife’s intent to murder from her purchase of the insurance policy because defense counsel could and did argue to the jury that the wife’s profit motive was obviated by the suicide exclusion and that she therefore had no motive at all to kill her husband in the manner alleged.100 (The prosecution’s theory was that the wife intended to kill her husband for the insurance benefits and, when that failed, she killed him and made his death appear to be a suicide.)101

The purchase of insurance is not the only type of innocent and commonplace fact from which a jury is permitted to draw an inference of murder:

i. a jury can infer premeditation from the victim’s having encroached upon the “home turf” of a motorcycle gang and defendant’s association with that gang;102

94 See Newkirk, supra notes 13, 14.
95 See generally Annotation: ADMISSION IN HOMICIDE PROSECUTION FOR PURPOSE OF SHOWING MOTIVE OF EVIDENCE AS TO INSURANCE POLICIES ON LIFE OF DECEASED NAMING ACCUSED AS BENEFICIARY, 28 A.L.R.2d 857 (1953).
96 Rhodes v. State, 676 So. 2d 275 (Miss. 1996).
97 Id. at 279.
98 Id.
99 Id. at 284.
100 Id.
101 Id.
ii. a jury can infer malice aforethought from the accused’s having “had a difficulty with ... a near relative of [the victim] immediately before the killing;”\textsuperscript{103} and

iii. a jury is permitted to infer premeditation from such matters as (1) previous difficulties between the parties, (2) the manner in which the homicide was committed, and (3) the nature and manner of the wounds inflicted.\textsuperscript{104}

Were judges to apply analogous standards in employment cases, the incidence of summary judgments in employment cases would be transformed. If we take the standard in \textit{Phippen} and transpose it from murder to retaliation, for example, then a jury should be permitted to infer retaliation from “(1) previous difficulties between the parties, (2) the manner in which the [retaliation] was committed,” and (3) “the nature and manner of the [harms] inflicted.”\textsuperscript{105}

B. Drug Cases:

The Eleventh Circuit seemingly will not approve any inference in an employment case, but that same court permitted a jury to draw an inference that each and every member of a boat’s crew were participants in a conspiracy to import marijuana into United States from the following evidence: the boat’s cargo hold contained a volume of marijuana that had a high street value (millions of dollars), the marijuana odor was noticeable from the boat’s aft deck even when the cargo hatch was closed, and the boat’s crew consisted of eight people.\textsuperscript{106} The Eleventh Circuit permitted the jury (apparently without any evidence on these points) to assume in drawing the inference of membership in a conspiracy that drug smugglers are unlikely to employ outsiders to work a boat carrying millions of dollars worth of marijuana and that the crew must have had close relationship with each other given that there were only eight of them.\textsuperscript{107}

Similarly, in the Ninth Circuit case, \textit{U.S. v. Heredia},\textsuperscript{108} the defendant was the driver of a borrowed car that had “a very strong perfume odor” that, upon a search, was discovered to be coming from dryer sheets wrapped around almost 350 pounds of marijuana in the trunk.\textsuperscript{109} The driver was prosecuted for possessing a controlled substance with intent to distribute, and the defense was that the car was not the

\textsuperscript{103} \textit{Turner v. Commonwealth}, 167 Ky. 365, 381, 180 S.W. 768, 774 (KY 1915).

\textsuperscript{104} \textit{Phippen v. State}, 389 So. 2d 991, 993, 1980 Fla. LEXIS 4398, **7 (Fla. 1980).

\textsuperscript{105} 389 So. 2d at 993.

\textsuperscript{106} \textit{U.S. v. Gonzalez}, 810 F.2d 1538, 1543 (11th Cir. 1987).

\textsuperscript{107} \textit{Id.} at 1543.

\textsuperscript{108} \textit{U.S. v. Heredia}, 483 F.3d 913 (9th Cir. 2007) (\textit{en banc}), \textit{cert. denied}, 552 U.S. 1077 (2007).

\textsuperscript{109} \textit{Id.} at 917.
defendant’s and she did not know what was in the trunk.\textsuperscript{110} The \textit{en banc} Ninth Circuit analyzed as follows the possible jury inferences:

Taking the evidence in the light most favorable to the government, a reasonable jury could certainly have found that [defendant] actually knew about the drugs. Not only was she driving a car with several hundred pounds of marijuana in the trunk, but everyone else who might have put the drugs there – her mother, her aunt, her husband – had a close personal relationship with [defendant]. Moreover, there was evidence that [defendant] and her husband had sole possession of the car for about an hour prior to setting out on the trip to Tucson. Based on this evidence, a jury could easily have inferred that [defendant] actually knew about the drugs in the car because she was involved in putting them there.\textsuperscript{111}

Note also that this inference goes not merely to possession, but to possession \textit{with intent to distribute}.\textsuperscript{112} The \textit{en banc} Ninth Circuit did not clarify where the inference of intent to distribute came from; apparently, it is just inherent in the situation.

The prosecution in \textit{Heredia}, covering all its bases, had requested the “deliberate ignorance” jury instruction, which was given, as follows:

You may find that the defendant acted knowingly if you find beyond a reasonable doubt that the defendant was aware of a high probability that drugs were in the vehicle driven by the defendant and deliberately avoided learning the truth. You may not find such knowledge, however, if you find that the defendant actually believed that no drugs were in the vehicle driven by the defendant, or if you find that the defendant was simply careless.\textsuperscript{113}

The \textit{en banc} Ninth Circuit’s approval of this instruction led to a discussion between the majority and the concurrence that was very enlightening on what judges accept as evidence of knowledge or intent in other areas of the law compared to what judges

\textsuperscript{110} \textit{Id.} at 923.

\textsuperscript{111} \textit{Id.}

\textsuperscript{112} \textit{Id.}

\textsuperscript{113} \textit{Id.}

\textit{Heredia} was convicted of possession with intent to distribute, as the panel opinion makes clear. \textit{U.S. v. Heredia}, 429 F.3d 820, 822 (2005), \textit{amended by} 483 F.3d 913 (9th Cir. 2007).

\textsuperscript{113} 483 F.3d at 917.
accept as evidence of knowledge or intent in our area of the law.\textsuperscript{114} The concurrence objected to the majority’s approval of this instruction on the grounds that, among other things, it could turn FedEx into a criminal for being “deliberately ignorant” of the contents of its packages.\textsuperscript{115} The majority responded to that point as follows:

Of course, if a particular package leaks a white powder or gives any other particularized and unmistakable indication that it contains contraband, and [FedEx] fails to investigate, it may be held liable – and properly so.\textsuperscript{116}

Thus, in the view of the \textit{en banc} Ninth Circuit, a jury is entitled to infer that FedEx had sufficient knowledge that it possessed drugs if FedEx (\textit{i.e.}, some low-level underling at a loading dock) ignored a “package leak[ing] white powder.”\textsuperscript{117} Compare that inference the Ninth Circuit would let the jury draw in the area of criminal law to the amount of evidence needed before a jury could draw a similar inference as to knowledge in an employment case.\textsuperscript{118}

C. “\textit{Innocent Owner}” Drug-forfeiture Cases:

i. Knowledge on the part of an owner who did not live on the property can be inferred because it was “obvious” to an ordinary person that the property was used for drugs, based on the extensive foot traffic and the presence of home-protection devices typically used by large-scale drug dealers.\textsuperscript{119}

ii. Knowledge on the part of the allegedly innocent owner can be inferred from the owner having often visited the subject property, on which marijuana was openly and extensively cultivated, posting bond for her son on two prior occasions for marijuana-related

\textsuperscript{114} Id. at 926-927.
\textsuperscript{115} Id. at 928-929.
\textsuperscript{116} Id. at 920, n.10.
\textsuperscript{117} Id.
\textsuperscript{119} U.S. v. North 48 Feet of Lots 19 & 20, 138 F.3d 1268, 1269 (8th Cir. 1998).
offenses, and allegedly admitting to the police knowledge of her son’s continuing marijuana use.\textsuperscript{120}

D. “\textit{Innocent Spouse}” Tax Cases:

In “innocent spouse” tax cases, courts permit juries to infer knowledge on the type of circumstantial evidence that often gets employment law cases kicked out of court. For example:

i. The wife testified that she did not look at the tax return, but the court refused to credit her testimony and instead inferred knowledge on her part from (1) unusual or lavish expenditures; (2) participation in the guilty spouse’s business affairs; (3) evasiveness by the guilty spouse in explaining the deductions.\textsuperscript{121}

ii. Knowledge on the part of the allegedly innocent spouse can be inferred from the records of the transactions at issue having been sent to her attorney during divorce proceedings.\textsuperscript{122}

iii. Knowledge on the part of the allegedly innocent spouse can be inferred because the allegedly innocent spouse “had reason to know.” The facts are telling: H was foreign; W understood marriage in H’s culture to demand unquestioning subservience. H told wife that money from sale of properties in Thailand, tax not necessary on foreign sale. Money actually came from drug trafficking. W believed H. Tax court found for wife. Fourth Circuit reversed.\textsuperscript{123}

iv. A spouse has “reason to know” if, when the tax return was signed, a reasonably prudent taxpayer in his or her position could be expected to know that the stated tax liability was erroneous or that further investigation was warranted.\textsuperscript{124}

v. The wife had no knowledge of her husband’s income, and she and her husband did not maintain a joint checking account. The wife


\textsuperscript{121} \textit{U.S. v. Flomenhoft}, No. 86 C 1588, 1987 U.S. Dist. LEXIS 1607, at *10 (N.D. Ill. Feb. 27, 1987), aff’d, 843 F.2d 500 (7th Cir. 1988) (citations omitted).

\textsuperscript{122} Bliss v. Commissioner, 59 F.3d 374, 378 (2d Cir. 1995).

\textsuperscript{123} Ratana v. Commissioner, 662 F.2d 220 (4th Cir. 1981).

\textsuperscript{124} Park v. Commissioner, 25 F.3d 1289, 1298 (5th Cir. 1994).
testified that she did not look at her husband’s Schedule C before she signed the tax return, but rather just “looked at the bottom line” to ascertain whether they were getting a refund. Court found that the wife had reason to know of the omitted income.125

vi. The wife did not participate in the preparation of the tax return, did not review the tax return, and did not question her husband regarding the tax return. The wife testified that she had no actual knowledge of the return grossly understating the husband’s significant gambling income. The court held that the wife’s awareness of the extent of her husband’s gambling activities and the fact that the wife’s income was too low to support the family’s lifestyle “should have put her on sufficient notice to review the return before it was completed and mailed.”126

E. Jury-Selection Cases:

In the jury-discrimination cases Miller-El v. Dretke,127 and Miller-El v. Cockrell,128 the Supreme Court used evidence of discrimination going back almost 50 years, which was probably before any alleged discriminator in these cases had been born.129 In addition, the principle of the movant’s self-serving averments of its own good-faith being of no value on summary judgment is well-established in jury-exclusion cases.130

F. Redistricting and Gerrymandering Cases:

In the North Carolina redistricting case Hunt v. Cromartie,131 the Supreme Court came out with one of the great sound-bites for employment law cases: “[M]otivation is itself a factual question.”132

125 Chandler v. Commissioner, 66 T.C.M. (CCH) 1366 (Tax 1993), aff’d, 46 F.3d 1131 (6th Cir. 1995).
129 See Dretke, 545 U.S. at 264-266; Cockrell, 537 U.S. at 334-335.
130 See, e.g., Alexander v. Louisiana, 405 U.S. 625, 632 (1972) (“affirmations of good faith in making individual selections are insufficient to dispel a prima facie case of systematic exclusion”) (citations omitted).
132 Id. at 549.
V. A TOOLKIT FOR USING OTHER AREAS OF THE LAW TO ARGUE FOR INFERENCE AND FOR EVIDENCE OF KNOWLEDGE OR INTENT.

So how can plaintiffs’ employment lawyers use the more favorable law in other areas to help themselves? The following are the authors’ suggestions for a toolkit:

A. Keep A Research File Of “Knowledge And Intent” Cases From Other Areas Of The Law. The ALR annotations cited in this article are a good start. In addition, when you are reading your local legal newspaper or an on-line advance sheet, do not skip over those cases – stick them in your research file. Cases for which the headline is something like “Criminal Law – sufficiency of evidence” are pure gold.

B. Explicitly Argue To The Judge How The Proof Of Knowledge Or Intent In Your Case Would Be Treated In Other Areas Of The Law. Take Nagle above – the case in which the court held that no reasonable jury could find that the police chief had received notice when the EEOC’s letter was addressed to “Chief David” rather than to “Chief Davis.” With hindsight, the plaintiff’s lawyer should have explicitly argued in the summary-judgment response that the view of evidence of knowledge that the defendant was pushing would never be adopted in other areas of the law. Here is an attempt to write a posthumous argument for that case, explicitly analogizing to the criminal law:

Defendant’s argument that no reasonable jury could find that Chief Davis knew of the EEOC Charge because of a minor typo in the last letter of the last name (‘Chief David’ rather than to ‘Chief Davis’) is simply not the law as to what constitutes evidence of knowledge. Were our case a criminal case – had Chief Davis, for example, been accused of stealing for his own use drugs seized by his police department and had the misaddressed letter had been mailed by the DEA or the U.S. Attorney rather than by the EEOC – is there any doubt that a court would permit a jury to infer Chief Davis’s knowledge of the letter? Apparently, defendant believes that the jury must be required as a matter of law to believe that a mail-clerk would react as follows upon receiving mail from the EEOC:

‘Wow, this is a letter from the EEOC. That’s a government agency! This could be really important! I better deliver it quickly to who it’s going to! Oh, wait, the letter’s addressed to Chief ‘David’. Now, that’s a puzzle: we have a Chief ‘Davis’, and if the

133 See generally Nagle, 554 F.3d 1106.
letter was addressed to him, I’d get the letter right up to him. But this letter is addressed to Chief ‘David’. I have no clue who that is! I guess I should just throw this official letter from the EEOC into the garbage!”

Considering that such a rule of evidence would be laughed out of court in a criminal case – in which the standard proof is beyond a reasonable doubt – in employment law cases, which require only a preponderance of the evidence, such a rule of evidence would be even more laughable.

C. Expressly Analogize The “Rule” The Defendant Is Arguing For To How Such A “Rule” Would Be Treated In Other Areas Of The Law. For example, look at the question of whether an arbitration agreement between private parties can preclude a government agency from obtaining relief for one of the parties to that agreement. That question was, of course, decided negatively by the Supreme Court in *EEOC v. Waffle House, Inc.*, in which the Court, reversing the Fourth Circuit, ruled 6-3 that a Complainant’s having agreed to arbitration with the Respondent did not preclude the EEOC from seeking in-court relief specific to that Complainant. But in what other area of the law would the theory be taken seriously that a government agency was prohibited from seeking relief for an individual claimant because of a private arbitration agreement that claimant had signed? Would the Court take seriously the argument that the SEC was prevented from seeking restitution or disgorgement in court because the brokerage house’s agreement with its customers had a form arbitration clause (which they all do)? Would a form arbitration clause between a business and its customers prevent the Department of Justice from seeking restitution or disgorgement in court in an anti-trust case? Microsoft mounted a vigorous defense to the government’s anti-trust prosecution, but neither author recalls Microsoft claiming that the Anti-Trust Division of the Department of Justice could not seek victim-specific relief because its software licenses have an arbitration clause (which they all do). Is a judge’s power to order restitution in certain criminal cases abrogated if the criminal and the victim had a private arbitration agreement (as could happen in a criminal anti-trust case, a criminal RICO case, a criminal securities case, etc.)?

D. Research And Argue Jury Instructions. Jury instructions from other areas of the law can be a source of good arguments.\textsuperscript{135}

\textsuperscript{134} *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002).

\textsuperscript{135} See, e.g., Ninth Circuit “willful blindness” criminal jury instruction, discussed in text accompanying notes 113 - 117, supra; Sixth Circuit pattern criminal jury instruction 1.05 “Consideration of Evidence” (“[y]ou should use your common sense in weighing the evidence. Consider it in light of your everyday experience with people and events, and give it whatever weight you believe it deserves. If your experience tells you that certain evidence reasonably leads to a conclusion, you are free to reach that conclusion”), available at www.ca6.uscourts.gov/internet/crim_jury_insts/pdf/07_Chapter_1.pdf;
E. In Drafting The Complaint, Arguing Motions, Etc. Use The Active Verb “Chose” To Focus On The Defendant’s Actions Or Omissions. Using the active verb “chose” continually (and almost subliminally) reminds the reader that the defendant was making choices – choices on which that reader will connect the dots and come on his or her own to the conclusion that defendant’s choices were discriminatory or retaliatory. Using the language of choice is particularly effective in turning omissions into actions. The language of choice is also helpful with those audiences – like judges, judges’ law clerks, and the business people who will decide whether or not to settle – who are predisposed to think that defendant had no “choice” in performing its discriminatory and/or retaliatory acts.

F. Avoid Arguing McDonnell-Douglas And Avoid Arguing What Type Of Evidence (Direct, Circumstantial, etc.) You Have – Just Argue The Evidence. Through years of judicial interpretation, McDonnell-Douglas has become a trap for plaintiffs. Accordingly, just argue the evidence – do not argue McDonnell-Douglas. In the Seventh Circuit, the jury is not even instructed on McDonnell-Douglas.136

When you are avoiding arguing McDonnell-Douglas, also avoid arguing what type of evidence you have (direct, circumstantial, etc.) – again, just argue the evidence. As one commentator stated, “[t]he point is that any evidence is fair game – any, at all. Some will be direct, some indirect, some circumstantial, some not.”137 The Seventh Circuit has

Seventh Circuit pattern criminal jury instruction 3.03 “Silence in the Face of an Accusation” (“[y]ou have heard evidence that ______ accused the defendant of a crime, and that the defendant did not deny or object to the accusation. If you find that the defendant was present and heard and understood the accusation, and that it was made under circumstances that the defendant would deny it if it were not true, then you may consider whether the defendant’s silence was an admission of the truth of the accusation.”), available at www.ca7.uscourts.gov/Pattern_Jury_Instr/pjury.pdf; Eighth Circuit pattern criminal jury instruction 7.05 “Proof of Intent or Knowledge” (“[i]ntent or knowledge may be proved like anything else. You may consider any statements made and acts done by the defendant, and all the facts and circumstances in evidence which may aid in a determination of the defendant’s knowledge or intent.] [You may, but are not required to, infer that a person intends the natural and probable consequences of acts knowingly done or knowingly omitted”), available at www.juryinstructions.ca8.uscourts.gov/crim_man_2011.pdf (footnote omitted).


been moving towards this position that it does not matter whether you call the evidence direct, circumstantial, etc.\textsuperscript{138} What matters is that the evidence supports:\textsuperscript{139}

\begin{quote}
The distinction between direct and circumstantial evidence is vague, but more important it is irrelevant to assessing the strength of a party’s case. From the relevant standpoint – that of probative value – “‘direct’ and ‘circumstantial’ evidence are the same in principle.”\textsuperscript{140}
\end{quote}

Also, when you are arguing the evidence, remember that “pretext” is not merely a step in a \textit{McDonnell-Douglas} analysis; pretext is itself circumstantial evidence of discrimination, as the U.S. Supreme Court has twice unanimously and recently stated:

\begin{quote}
[E]vidence that a defendant’s explanation for an employment practice is ‘unworthy of credence’ is ‘one form of \textit{circumstantial evidence} that is probative of intentional discrimination.’\textsuperscript{141}
\end{quote}

\section{VI. CONCLUSION}

Judges should treat inferences in employment cases the same as they treat inferences in cases in other areas of the law, and employee advocates should look to other areas of the law for analogies and precedents to argue for inferences and for evidence of knowledge or intent.

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\textsuperscript{139} \textit{See}, e.g., \textit{Sylvester v. SOS Children’s Vills. Illinois, Inc.}, 453 F.3d 900 (7th Cir. 2006).  
\textsuperscript{140} \textit{Id.} (citations omitted).  
\textsuperscript{141} \textit{Costa}, 539 U.S. at 99-100 (quoting \textit{Reeves}, 530 U.S. at 147) (emphasis in original). \textit{See also Griffith v. City of Des Moines}, 387 F.3d 733, 746 (8th Cir. 2004) (Magnuson, J., concurring) (“Of course, pretext is circumstantial evidence that may sufficiently demonstrate that an employer was motivated by an improper consideration.”)