

ARTHUR S. LEONARD

Introduction: Trial by Jury or Trial by Motion? Summary Judgment, *Iqbal*, and Employment Discrimination

57 N.Y.L. SCH. L. REV. 659 (2012–2013)

ABOUT THE AUTHOR: Professor of Law, New York Law School.

INTRODUCTION: TRIAL BY JURY OR TRIAL BY MOTION?

The *New York Law School Law Review's* Spring 2012 symposium, *Trial by Jury or Trial by Motion? Summary Judgment, Iqbal, and Employment Discrimination*, was planned jointly with The Employee Rights Advocacy Institute For Law & Policy ("The Institute"). This collection of articles drawn from the symposium focuses on pretrial motion practice in employment discrimination cases, with particular emphasis on the impact of U.S. Supreme Court decisions making it more likely that cases would be dismissed in response to pretrial motions. The event brought together practitioners, judges, and academic scholars to consider the litigation landscape at a time of heightened pleading requirements, particularly in light of two Supreme Court decisions, *Bell Atlantic Corp. v. Twombly*¹ and *Ashcroft v. Iqbal*.² Although neither of these was an employment discrimination case, they appeared to establish new "plausibility" pleading standards for federal civil litigation that could make it more difficult for cases to survive a motion to dismiss, and thus less likely that plaintiffs would be able to engage in pretrial discovery.³ These developments followed earlier Supreme Court decisions that encouraged federal trial courts to dispose of more cases in response to pretrial motions for summary judgment,⁴ and seemed inconsistent with the Court's unanimous decision in *Swierkiewicz v. Sorema N.A.*,⁵ which arguably described a more liberal pleading standard.

1. 550 U.S. 544 (2007).

2. 556 U.S. 662 (2009). In *Iqbal*, the Court clarified that the plausibility standard established in *Twombly* was not limited to the antitrust context of that decision, but applied generally as a construction of Federal Rule of Civil Procedure 8 to all federal civil litigation. *Id.* at 684.

3. In *Twombly*, the Court stated that an antitrust case

requires a complaint with enough factual matter (taken as true) to suggest that an agreement was made. Asking for plausible grounds to infer an agreement does not impose a probability requirement at the pleading stage; it simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of illegal agreement.

550 U.S. at 556.

In *Iqbal*, the Court amplified this, in the context of a suit concerning the personal liability of high officials for the allegedly unconstitutional acts of underlings, as a more general interpretation of the requirements of Rule 8. The Court insisted that the plaintiff's complaint must include factual allegations from which a court could infer that the allegation of discriminatory intent by the defendant was more than merely possible; although probability need not be shown, an intermediate level of plausibility was required. 556 U.S. at 678–79.

4. *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).

5. 534 U.S. 506 (2002). The central holding of *Swierkiewicz* was that a plaintiff in a Title VII case need not allege all the factual prerequisites of a prima facie case in order to survive a dismissal motion, emphasizing that Rule 8 established a "notice pleading system." *Id.* at 511. Quoting from a prior case, the Court in *Swierkiewicz* observed that the factual statement in a complaint "must simply 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests,'" emphasizing that this "simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims." *Id.* at 512 (citation omitted). The Court also observed that this "simplified pleading standard applies to all civil actions." *Id.* at 513. Furthermore, the words "plausible" and "plausibility" do not appear anywhere in the Court's opinion.

A member of the *Law Review's* 2010–2011 editorial board, Eirik Cheverud, suggested building a symposium around these developments. His determined efforts, including enlisting me as a faculty advisor, bringing in The Institute as a coplanner and cosponsor, and persuading the *Law Review's* editorial board of the importance of the topic, resulted in a wide-ranging, full-day program of panelists⁶ and a distinguished keynote speaker, the Honorable Denny Chin of the U.S. Court of Appeals for the Second Circuit.

This collection of articles continues the effort begun by the symposium planners to bring together diverse viewpoints—albeit viewpoints from the judicial and plaintiff perspectives, not the defendant perspective—on the current situation facing employment discrimination plaintiffs in the federal courts. How should employment discrimination cases be decided? Why do unsettled employment discrimination cases suffer dismissal at a high rate as a result of pretrial motions?⁷ The symposium participants suggest varied answers to these questions, and their different perspectives should make a useful contribution to the ongoing debate. They document through statistics and anecdotal evidence that the Supreme Court's rulings have arguably licensed federal district judges to play the role of a virtual jury, weighing evidence, drawing inferences (including some that seem biased towards defendants), and cutting off the plaintiff's case by determining, based on the *court's* conclusions as to plausibility, whether a jury would find the legal claim to be proven. While some contend that this was already occurring pervasively in summary judgment decisions prior to *Twombly*,⁸ *Twombly* has imported this approach into the earlier stage of pre-discovery dismissal motions and motions for judgment on the pleadings. The Supreme Court's construction of Rule 8 of the Federal Rules of Civil Procedure now arguably requires more than mere "notice pleading," instead requiring factual assertions sufficient to make a discrimination claim appear "plausible" to the trial judge before the plaintiff has had an opportunity to conduct discovery, based on the limited knowledge that the plaintiff and his or her counsel may have at that stage.⁹

6. Panelists and speakers included the Honorable Mark W. Bennett, the Honorable Denny Chin, the Honorable Bernice B. Donald, Deborah Thompson Eisenberg, the Honorable Nancy Gertner, Elizabeth Grossman, Rebecca M. Hamburg, Diane S. King, Minna J. Kotkin, David L. Lee, Suzette M. Malveaux, Ann C. McGinley, Scott A. Moss, the Honorable Lee H. Rosenthal, Elizabeth M. Schneider, Joseph A. Seiner, Richard T. Seymour, and Suja A. Thomas.

7. Articles in this symposium issue can be found at 57 N.Y.L. SCH. L. REV. 653–986 (2012–2013). Several of the symposium articles present statistics documenting that employment discrimination cases suffer pretrial dismissal at higher rates than other categories of federal civil claims. *See, e.g.*, Hon. Denny Chin, *Summary Judgment in Employment Discrimination Cases: A Judge's Perspective*, 57 N.Y.L. SCH. L. REV. 671, 672–73 (2012–2013); Hon. Mark W. Bennett, *From the "No Spittin', No Cussin' and No Summary Judgment" Days of Employment Discrimination Litigation to the "Defendant's Summary Judgment Affirmed Without Comment" Days: One Judge's Four-Decade Perspective*, 57 N.Y.L. SCH. L. REV. 685, 697–701 (2012–2013).

8. *See generally* Bennett, *supra* note 7.

9. *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 553–63 (2007).

I. SOME HISTORICAL PERSPECTIVE

Congress did not enact Title VII of the Civil Rights Act of 1964¹⁰ in a vacuum. As early as the 1940s, state legislators began to propose statutes addressing the problem of employment discrimination, and states began to enact them. David Freeman Engstrom's account of the early history of legislation in this field documents the unfolding debate about how best to enforce statutory policies against employment discrimination.¹¹ He identifies a bill introduced in the Michigan state legislature in 1943 as "the first fully enforceable law prohibiting job discrimination ever proposed in any legislature in the United States."¹² This bill, which was *not* enacted, would have prohibited employment discrimination on the basis of race or color, creed, sex, or national origin. It made employment discrimination a misdemeanor, a criminal offense, and authorized fines of up to \$500 and imprisonment of up to six months for discriminatory actions by employers. It also created a private civil right of action for back pay, and authorized class actions. It empowered what was then the Michigan Department of Labor and Industry to hold public hearings and to issue cease-and-desist orders, as well as orders to take "affirmative action including the hiring, re-hiring or training of employees discriminated against."¹³

Under this early legislative proposal, there was a mix of judicial and administrative remedies. Criminal law enforcement authorities were authorized to act upon complaints. Individuals were authorized to sue for make-whole relief. Groups of employees were authorized to form classes and to bring suit collectively, making back pay actions against large employers feasible. A state executive branch agency was authorized to undertake the function of administrative hearings and to order administrative remedies. Although the legislators had proposed an array of remedial pathways, a central feature of the bill was the right to sue and have a day in court, albeit with limited relief.¹⁴

Engstrom reports that state legislatures and Congress were literally flooded with proposals to enact employment discrimination statutes after World War II, with the first being enacted in New York in 1945. By the time Title VII was enacted in 1964, "nearly two dozen nonsouthern states that were home to more than ninety percent of African Americans outside the South had already enacted legislation mandating equal treatment in employment."¹⁵

The major focus of Professor Engstrom's article is on the tension—a heated and intense debate among civil rights advocates—over how employment discrimination cases should be handled. There was a significant divide between those who favored

10. 42 U.S.C. §§ 2000e–2000e-17 (2006).

11. David Freeman Engstrom, *The Lost Origins of American Fair Employment Law: Regulatory Choice and the Making of Modern Civil Rights, 1943–1972*, 63 STAN. L. REV. 1071 (2011).

12. *Id.* at 1073.

13. *Id.* at 1072–73.

14. *See id.* at 1072.

15. *Id.* at 1079.

enlisting the courts as the main battleground and those who preferred an administrative approach, usually through the establishment of a Fair Employment Practices Commission (FEPC) that would be authorized to investigate, conciliate, hold hearings, and issue cease-and-desist orders, following the model for adjudicatory administrative agencies such as the National Labor Relations Board. Advocates of the FEPC approach feared that the costs and delays inherent in litigation would pose significant barriers to vindicating plaintiffs' rights, and many of the pre-Title VII enactments embraced the administrative approach. A government-funded agency, designed to investigate, conciliate, award remedies, and seek enforcement in the courts under a deferential standard of review looked to some like the preferred mechanism, and this was an approach of many early statutes. But such a method could only be satisfactory with a well-funded administrative effort equal to the case load, and early statutes that embraced this approach have not lived up to the theoretical promise.¹⁶

When Congress passed Title VII, it emphasized the administrative approach by creating the Equal Employment Opportunity Commission (EEOC),¹⁷ by requiring that claims under Title VII be filed first with the EEOC or a state or local agency with comparable jurisdiction and remedial powers,¹⁸ and by providing for administrative investigation and conciliation as prerequisites to court action.¹⁹ The EEOC was not empowered to initiate litigation; rather, the statute authorized the U.S. Attorney General to initiate litigation at the request of the EEOC, but the statute also authorized private lawsuits by parties who had exhausted their administrative remedies.²⁰ Relief was limited to equitable remedies (including make-whole relief reduced by mitigation requirements) so jury trials were not provided. Congress subsequently amended the statute to authorize the EEOC to bring some cases on its own, and eventually, in 1991, Congress authorized jury trials for allegations of intentional discrimination and possible compensatory and punitive damages (subject to a statutory cap).²¹

II. THE *TWOMBLY* AND *IQBAL* DECISIONS

The 1991 amendments authorizing jury trials and expanding remedial relief would appear to have been intended to enhance the availability of a day in court for plaintiffs. These developments would naturally contribute to an increase in federal court filings under Title VII, but at the same time the Supreme Court's "trilogy" of

16. *Id. passim*.

17. Civil Rights Act of 1964, Pub. L. 88-352 § 705, 78 Stat. 258 (codified as amended at 42 U.S.C. § 2000e-4 (2006)).

18. *See id.* § 706(e), 78 Stat. 260 (codified as amended at 42 U.S.C. § 2000-e5(f)(1) (2006)).

19. *Id.*

20. *Id.* §§ 705(g)(6), 706(b), (e), 78 Stat. 258–60 (codified as amended at 42 U.S.C. §§ 2000-e4(g)(6), 2005-e5(b) (2006)).

21. Civil Rights Act of 1991, Pub. L. 102-166 § 102, 105 Stat. 1072 (codified as amended in scattered sections of 42 U.S.C.).

INTRODUCTION: TRIAL BY JURY OR TRIAL BY MOTION?

summary judgment cases from the 1980s²² would encourage employers to file more motions for summary judgment and trial courts to grant them. As the proportion of the federal district court caseloads devoted to employment discrimination claims grew, pretrial motion practice accelerated as well, and the rate of summary judgments granted to employers grew. The Supreme Court, already very conservative in the 1980s and 1990s, became more conservative in the new century with the appointments by President George W. Bush of Chief Justice John Roberts to replace Chief Justice William Rehnquist and Associate Justice Samuel Alito to replace Associate Justice Sandra Day O'Connor. This Supreme Court majority seems dedicated to further narrowing plaintiffs' access to federal trials, the key cases being *Twombly* and *Iqbal*, decided after these appointments had changed the composition of the Court that decided *Swierkiewicz*.²³

At first glance, it would be difficult to see the relevance of *Twombly* to an employment discrimination claim. The case concerned a class action by consumers under the federal antitrust laws, contending that there was a conspiracy among local telephone and Internet service providers to avoid competition through agreements to allocate territory and customers.²⁴ When they filed suit, the plaintiffs asserted that such a conspiracy existed and recited instances of parallel business conduct by the defendants as supporting the conspiracy allegation.²⁵ The Supreme Court decided these factual allegations were not enough to state a "plausible" case.²⁶ A majority of the Court found that because the parallel business conduct could be simply explained as an instance of competitors independently arriving at their own decisions about how to price and market their services, it was not enough for the plaintiffs to allege a conspiracy in order to put the defendants to the burden of submitting to discovery.²⁷ The Court saw the allegation of a conspiracy or agreement as "conclusory"—not a factual allegation entitled to the presumption of being true that a trial court would normally apply in determining a motion to dismiss—and rejected the lower court's reliance on a prior Supreme Court decision stating that a case should not be dismissed "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."²⁸ In order to survive such a motion,

22. *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).

23. *Twombly* was a 7–2 decision, with Justices John Paul Stevens and Ruth Bader Ginsburg dissenting. *Iqbal* was 5–4, with the *Twombly* dissenters being joined in dissent by Justice David Souter (the author of the majority opinion in *Twombly*) and Justice Stephen Breyer. The Justices appointed after *Swierkiewicz* was decided helped make up the majority in *Twombly* and *Iqbal*, decisively so in *Iqbal* given the division of the Court over extending *Twombly*—with its particular focus on the context of antitrust litigation—more generally as an across-the-board rule of federal civil litigation.

24. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 548–50 (2007).

25. *Id.* at 550–51.

26. *Id.* at 556–57.

27. *Id.* at 557–60.

28. *Id.* at 557, 561 (quoting *Conley v. Gibson*, 355 U.S. 41, 45–46 (1957)).

the plaintiffs now had to allege facts from which a plausible inference could be drawn that there was an actual agreement among the defendants, not just the appearance of an agreement suggested by their overt business conduct. These facts would necessarily have to be based on the plaintiffs' own investigations, without the benefit of discovery. Justices John Paul Stevens and Ruth Bader Ginsburg, dissenting, objected to the idea that a complainant had to do much more under Rule 8 than to give notice to the defendants of the legal theory under which they were being sued.²⁹

Twombly seemed inconsistent with the Federal Rules themselves. Rule 8 requires "a short and plain statement of the claim showing that the pleader is entitled to relief."³⁰ Should not an allegation that defendants conspired to eliminate competition in a particular market and acted in a manner consistent with such an allegation be enough to survive a motion to dismiss under a rule providing that a complaint must offer "a short and plain statement of the claim"? If the signs of parallel conduct would be consistent with the existence of an agreement, should not the parties have an opportunity to conduct discovery in search of evidence? Does Rule 8's requirement that the plaintiff's allegations must show "that the pleader is entitled to relief"³¹ mean that the plaintiff's complaint must set forth the evidentiary basis for the plaintiff's claim, before the plaintiff has had an opportunity to conduct discovery?³² As plaintiffs in an antitrust case are seeking to vindicate not only their own interests as competitors or consumers but also the public interest, as articulated by Congress in the antitrust laws, should not an allegation of the existence of smoke be sufficient to authorize discovery in search of an underlying fire? A reader of the Court's opinion could conclude that the Court's emphasis on the antitrust context of the case and the particular burdens of discovery that would be imposed in a nationwide class action against a huge industry might mean that the Court was setting up a special pleading requirement for antitrust class actions.

But *Iqbal* exploded that possibility. Like *Twombly*, *Iqbal* was not an employment discrimination case. But in *Iqbal*, this time by a bare 5–4 majority, the Court indicated that *Twombly*'s factual pleading standard applied broadly to all pleadings under the Federal Rules of Civil Procedure.³³ *Iqbal* was another case in which the

29. *Id.* at 570–97 (Stevens, J., dissenting). Justice Stevens voiced "fear that the unfortunate result of the majority's new pleading rule will be to invite lawyers' debates over economic theory to conclusively resolve antitrust suits in the absence of any evidence." *Id.* at 595.

30. FED. R. CIV. P. 8(a)(2) (emphasis added).

31. *Id.*

32. This would surely be inconsistent with *Swierkiewicz*, where the Court rejected the contention that the plaintiff must make sufficient factual allegations to meet the test for a prima facie case under its seminal Title VII decision, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 510–11 (2002).

33. *Ashcroft v. Iqbal*, 556 U.S. 662, 684 (2009). Rejecting the argument that *Twombly* should be limited to pleadings in antitrust cases, the Court stated:

Though *Twombly* determined the sufficiency of a complaint sounding in antitrust, the decision was based on our interpretation and application of Rule 8. 550 U.S., at 554. That Rule in turn governs the pleading standard "in all civil actions and proceedings in

INTRODUCTION: TRIAL BY JURY OR TRIAL BY MOTION?

particular issues in dispute might have signaled a ruling confined to the factual setting: a person rounded up in the security panic after the 9/11 terror attacks asserted a claim of unconstitutional treatment in detention, naming as defendants, among others, the U.S. Attorney General and the Director of the Federal Bureau of Investigation (FBI).³⁴ These defendants sought dismissal on grounds of qualified immunity. Instead of relying on the qualified immunity doctrine, the Supreme Court invoked *Twombly* and said that it was not enough for the plaintiff to allege that Attorney General John Ashcroft and FBI Director Robert Mueller shared responsibility for the mistreatment that the plaintiff had suffered in custody. The Court characterized such allegations as “conclusory”—the epithet it had attached to the plaintiffs’ allegations in *Twombly*—and, thus, not entitled to be assumed to be true for purposes of a motion to dismiss.³⁵ Instead, the Court said, only factual assertions about the specific role alleged to have been played by those named defendants were entitled to be taken as true for purposes of a motion to dismiss, and then the trial court would have to decide whether, if those factual assertions were assumed to be true, they gave rise to a “plausible inference” of discriminatory intent towards the plaintiff.³⁶

This sounds very much like telling lower federal courts that they are to apply something akin to the summary judgment standard for evaluating factual allegations in deciding whether the defendant is entitled to dismissal of a complaint as a matter of law. Our symposium participants suggest that some federal courts have taken it that way—that the courts have applied this heightened standard in employment discrimination cases, even though the Court did not expressly overrule its own precedent, *Swierkiewicz v. Sorema N.A.*,³⁷ which had described a less demanding notice pleading approach under Rule 8, and had emphasized authorization of liberal pretrial discovery under the Federal Rules in the context of employment litigation.

III. THE SYMPOSIUM ARTICLES

So, we come back to the underlying policy question: Who should decide employment discrimination cases, and how?

According to the federal employment discrimination statutes read in light of the Federal Rules of Civil Procedure, what should the process and standard be for determining whether a plaintiff gets his or her day in court? Does the federal

the United States district courts.” Fed. Rule Civ. Proc. 1. Our decision in *Twombly* expounded the pleading standard for “all civil actions,” *ibid.*, and it applies to antitrust and discrimination suits alike. See 550 U.S., at 555–556, and n. 3.

Id. (parallel citations omitted).

34. *Id.* at 666–68.

35. *Id.* at 681.

36. *Id.* at 682–83.

37. 534 U.S. 506 (2002); see *supra* text accompanying note 5. Of course, Justice Kennedy did state in *Iqbal* that the *Twombly* construction of Rule 8 applied to all federal civil litigation, including discrimination cases. *Iqbal*, 556 U.S. at 684; see *supra* text accompanying note 33.

litigation record of the recent past accord with congressional intent expressed in Title VII, as amended by the Civil Rights Act of 1991, about how these cases should be decided? And, if not, what can be done about it?

In constructing this program, the planners decided to begin with a view from the bench, to bring together federal trial and appellate judges who have had the difficult task of presiding over employment discrimination cases over the period of these evolving interpretations of Title VII and the Federal Rules. Several of the judicial participants in the symposium's first panel (*A View from the Bench—The Judges' Perspective on Summary Judgment in Employment Discrimination Cases*)³⁸ and the keynote speaker for the symposium,³⁹ all of whom had served as federal trial judges for some or all of this period, have authored or coauthored articles published in this symposium.

Judge Denny Chin of the U.S. Court of Appeals for the Second Circuit, who served from 1994 through 2010 in the U.S. District Court for the Southern District of New York, offers an overall judicial perspective on summary judgment in employment discrimination cases, reflecting both his trial and appellate experience, drawn from his keynote remarks.⁴⁰ While acknowledging the statistics showing the high rate of discrimination cases lost through pretrial motions, Judge Chin suggests that the large proportion of pro se litigants, together with shortcomings in advocacy on behalf of plaintiffs, have contributed to the problem.⁴¹ The Honorable Mark W. Bennett of the U.S. District Court for the Northern District of Iowa, an outspoken proponent of allowing more employment discrimination cases to go to trial, documents the stark decline in trials and a general judicial bias in favor of granting summary judgment in employment discrimination cases, arguing that allowing more cases to go to trial would not only be fairer to plaintiffs, but would also be more closely in accord with the intent of the Framers of the Constitution as well as the framers of Rules 8 and 56 of the Federal Rules of Civil Procedure.⁴² The Honorable Bernice B. Donald, of the U.S. Court of Appeals for the Sixth Circuit, who previously served as a trial judge in the Western District of Tennessee and as a Bankruptcy Judge, has collaborated with her former clerk, J. Eric Pardue, who is now practicing with Vinson & Elkins LLP, in Houston.⁴³ Their article focuses on the allegation that the federal judiciary is

38. N.Y. Law Sch. Law Review, *Summary Judgment and Employment Discrimination Symposium – Panel I* (Apr. 23, 2012), YouTube (Aug. 10, 2012), <http://www.youtube.com/watch?v=8c8rrleRpxc>.

39. The Honorable Denny Chin, U.S. Circuit Judge for the Second Circuit, Keynote Address at the New York Law School Law Review Symposium: Trial by Jury or Trial by Motion? Summary Judgment, *Iqbal*, and Employment Discrimination (Apr. 23, 2012), available at <http://www.youtube.com/watch?v=Vc-HZAA1Mrk&feature=youtu.be>.

40. See Chin, *supra* note 7.

41. *Id.* at 675.

42. Bennett, *supra* note 7. Indeed, Judge Bennett suggests that if he were able to change the Federal Rules of Civil Procedure, his “first edict would be to eliminate summary judgment altogether. . . . for a five- to ten-year period to evaluate the pros and cons of our federal justice system without summary judgment.” *Id.* at 710.

43. Hon. Bernice B. Donald & J. Eric Pardue, *Bringing Back Reasonable Inferences: A Short, Simple Suggestion for Addressing Some Problems at the Intersection of Employment Discrimination and Summary Judgment*, 57 N.Y.L. SCH. L. REV. 749 (2012–2013).

biased against employment discrimination plaintiffs, with a particular focus on inferences that many courts draw in favor of defendants in the context of deciding pretrial motions. They find this allegation to be borne out by the evidence of certain “doctrines” that courts summon to explain away factual allegations suggestive of discriminatory intent. They suggest that courts should take much more seriously “the Supreme Court’s instruction to draw all reasonable inferences in favor of the non-moving party” in deciding summary judgment motions.⁴⁴ Harvard Law Professor and former U.S. District Judge Nancy Gertner and Professor Elizabeth M. Schneider of Brooklyn Law School,⁴⁵ focus on the “substantive law dimensions” of the procedural decisions that federal courts make in employment discrimination cases, taking the Supreme Court’s narrowing of the availability of class actions in *Wal-Mart Stores, Inc. v. Dukes*⁴⁶ as the starting point for their argument.

The other articles from the symposium mix commentary from practitioners and academics. Professor Suzette M. Malveaux of the Catholic University of America, Columbus School of Law, examines whether *Twombly* and *Iqbal* have actually changed the direction of employment discrimination litigation.⁴⁷ After reviewing empirical studies, Malveaux concludes that the impact of these cases “remains elusive.” “[E]mpirical data alone” cannot answer the question whether the heightened pleading standard under Rule 8 announced in these cases has made a major difference, she writes, in light of the strong trend towards granting employers’ summary judgment motions that predated these cases.⁴⁸ Professor Deborah Thompson Eisenberg of the University of Maryland School of Law turns the focus to summary judgment in Equal Pay Act cases, documenting the steady increase of dispositions by summary judgment on claims that are heavily based on factual disputes and shining a light on the practices of trial courts in dealing with these cases to figure out why summary judgment is being so frequently granted in an area where the parties typically sharply dispute the facts.⁴⁹ Professor Ann C. McGinley of the William S. Boyd School of Law, University of Nevada, focusing on one of the most significant “reverse discrimination” cases under Title VII, *Ricci v. DeStefano*,⁵⁰ explores the theory of “cognitive illiberalism” as an explanation for the Supreme Court’s decision

44. *Id.* at 762–63.

45. Elizabeth M. Schneider & Hon. Nancy Gertner, “Only Procedural”: *Thoughts on the Substantive Law Dimensions of Preliminary Procedural Decisions in Employment Discrimination Cases*, 57 N.Y.L. SCH. L. REV. 767 (2012–2013). Judge Gertner served in the District of Massachusetts.

46. 131 S. Ct. 2541 (2011).

47. Suzette M. Malveaux, *The Jury (or More Accurately the Judge) Is Still Out for Civil Rights and Employment Cases Post-Iqbal*, 57 N.Y.L. SCH. L. REV. 719 (2012–2013).

48. *Id.* at 722.

49. Deborah Thompson Eisenberg, *Stopped at the Starting Gate: The Overuse of Summary Judgment in Equal Pay Cases*, 57 N.Y.L. SCH. L. REV. 815 (2012–2013).

50. 557 U.S. 557 (2009). A “reverse discrimination” case is a claim of discrimination in favor of minorities; in this case, white firefighters in New Haven, Connecticut, claimed that the city set aside the results of a promotion examination because minority firefighters did not score highly enough to be promoted. *Id.* at 561.

to grant summary judgment to the plaintiffs rather than to remand that case for trial, despite the sharply contested facts of why the employer acted as it did in setting aside the results of a promotion test that appeared to produce a significant disparate impact on the basis of race.⁵¹ Professor Scott A. Moss of the University of Colorado Law School contributes a searching critique of the briefs submitted by counsel for employment discrimination plaintiffs in opposition to Rule 12 dismissal motions and Rule 56 summary judgment motions, suggesting that one of the contributing factors to the high rate of pretrial judgments in favor of employers may be significant shortcomings in advocacy—a point that Judge Chin also makes in his article.⁵²

Finally, two Chicago employment law practitioners, David L. Lee and Jennifer C. Weiss, have collaborated on an article that contrasts how the process of drawing inferences from facts in employment discrimination cases substantially differs from judicial inference-drawing in other areas of federal litigation, again showing judicial predisposition to give employers the benefit of the doubt in cases where disputes over the meaning of facts should arguably be left to jurors.⁵³ They launch their inquiry with a fascinating look at the oral argument before the U.S. Court of Appeals for the Seventh Circuit in *Nicholson v. Pulte Homes Corp.* and the subsequent decision by that court,⁵⁴ providing startlingly direct evidence for their thesis. They then show how federal courts employ a long list of standard “anti-inference doctrines” (previously identified in a survey of plaintiff employment lawyers)⁵⁵ to justify granting pretrial rulings against employment discrimination plaintiffs, developing in detail how those doctrines run counter to the approach of federal courts in other kinds of cases.

Taken together, the articles published as part of this symposium issue provide an in-depth look at pretrial motion practice in employment discrimination cases from the perspective of those on the front lines as well as in the academy, together with many practical suggestions that should be useful to counsel for plaintiffs and instructive for judges seeking to provide fair consideration to plaintiffs when ruling on such motions.

51. Ann C. McGinley, *Cognitive Illiberalism, Summary Judgment, and Title VII: An Examination of Ricci v. DeStefano*, 57 N.Y.L. SCH. L. REV. 895 (2012–2013).

52. Scott A. Moss, *(In)competence in Appellate and District Court Brief Writing on Rule 12 and 56 Motions*, 57 N.Y.L. SCH. L. REV. 841 (2012–2013); see also Chin, *supra* note 7, at 677, 680–81.

53. David L. Lee & Jennifer C. Weiss, *Inferences in Employment Law Compared to Other Areas of the Law: Turning the Rules Upside Down*, 57 N.Y.L. SCH. L. REV. 781 (2013).

54. 690 F.3d 819 (7th Cir. 2012).

55. The survey was conducted by the National Employment Lawyers Association (NELA), an organization of lawyers who specialize in representing employee plaintiffs. Lee and Weiss list nine inferences pervasively drawn by trial judges in employment discrimination cases to justify ruling in favor of defendants. Lee & Weiss, *supra* note 53, at Part III.A.