Grossly Restricted Pleading: Twombly/Iqbal, Gross and Cannibalistic Facts in Compound Employment Discrimination Claims

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GROSSLY RESTRICTED PLEading: TWOMBLY/IQBAL, GROSS, AND CANNIBALISTIC FACTS IN COMPOUND EMPLOYMENT DISCRIMINATION CLAIMS

Brian S. Clarke*

I. INTRODUCTION

Over its last three terms, the United States Supreme Court has drastically altered the pleading standards for civil actions. Beginning in *Bell Atlantic Corp. v. Twombly*,¹ and concluding with *Ashcroft v. Iqbal*,² the Court redefined the requirements of notice pleading under Federal Rule of Civil Procedure 8(a)(2) and the standard of review on motions to dismiss under Federal Rule of Civil Procedure 12(b)(6). The Court jettisoned the notion that a complaint which merely gave the defendant notice of the plaintiff’s claim and the basis thereof was sufficient under Rule (8)(a)(2) and also jettisoned the “any set of facts” standard for motions to dismiss from *Conley v. Gibson*.³ In place of the long-standing principles, the Court created so-called “plausibility” pleading and held that a plaintiff in a civil action must plead facts—as opposed to conclusions—sufficient to state a claim that is plausible on its face.⁴

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The author would like to dedicate this Article to his wife Chrissy and his four wonderful children—Noah, Lilah, Rowan, and Laney—who heard, “Daddy is working,” far more frequently than he would have liked as he endeavored to write this Article while also carrying on a full-time law practice. The author wishes to thank Professor Joan Shaughnessy and Dean Mark Grunewald of the Washington & Lee University School of Law, Professor Joseph Seiner of the University of South Carolina School of Law, and Jonathan Harkavy for taking the time to review and comment on earlier drafts of this Article. Their comments and insights were invaluable.

In requiring the parties to plead facts sufficient to render a claim facially plausible, the Supreme Court in both *Twombly*\(^5\) and *Iqbal*\(^6\) recognized and applied the traditional rule that a court reviewing a party’s pleadings on a motion to dismiss pursuant to Rule 12(b)(6) “must accept as true all of the factual allegations contained in the complaint.”\(^7\) By requiring a party to plead more facts in order to state a facially plausible claim, while reaffirming and applying the “assumption of truth” rule, it is axiomatic that the Court ensured that the lower courts would assume the truth of more pleaded facts. For many types of claims, this result would cause no great difficulty. However, in situations where the facts necessary to support different claims in the same complaint conflict, a problem emerges.

Traditionally, this has not been a major concern with claims brought under the federal employment antidiscrimination statutes. But the Supreme Court recently changed this with its decision in *Gross v. FBL Financial Serv., Inc.*,\(^8\) when it required that a plaintiff must prove “but-for” causation to prevail on an Age Discrimination in Employment Act\(^9\) (ADEA) claim.\(^10\) In short, the Court held in

Gross that relief is available under the ADEA only where “age was the reason” for the adverse employment action. The lower federal courts have extended the holding of Gross to other antidiscrimination statutes that, like the ADEA, prohibit discrimination “because” of a protected characteristic. Further, Gross likely applies to other federal employment antidiscrimination and antiretaliation statutes that contain the same “because of” language as the ADEA (I refer to these statutes collectively as the “But-For Statutes”).

After Gross, a problem emerges in situations where an employment discrimination plaintiff pleads that his employer discriminated against him based on two or more protected categories, under two or more separate employment discrimination statutes (i.e., age, which is protected by the ADEA, and race, which is protected by Title VII). I call these “compound employment discrimination claims.” This problem flows from the combination of the general

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10 Gross v. FBL Fin. Servs., Inc., 129 S. Ct. at 2350. Interestingly, Gross was decided on June 18, 2009, exactly one month after Iqbal was decided. See discussion of Gross infra Part V.

11 Gross, 129 S. Ct. at 2350 (emphasis added) (internal quotation marks omitted).


13 For example, the Family Medical Leave Act (FMLA), 5 U.S.C. §§ 6381–6387, 29 U.S.C. §§ 2611–2619, 2631–2636, 2651–54 (2006); the Fair Labor Standards Act (FLSA), 29 U.S.C. §§ 201–219 (2006); and the Genetic Information Nondiscrimination Act (GINA), 42 U.S.C.A. §§ 2000ff to 2000ff-11 (West 2010), all have antidiscrimination or antiretaliation provisions that use the same “because of” language as the ADEA. Further, the Seventh Circuit has held that the reasoning and rule of Gross apply to “all suits under federal law.” Fairley, 578 F.3d at 525–26 (“[U]less a statute (such as the Civil Rights Act of 1991) provides otherwise, demonstrating ‘but-for’ causation is part of the plaintiff’s burden in all suits under federal law.” (emphasis added)); Serwatka, 591 F.3d at 961 (citing favorably the language quoted from Fairley).

14 A claim which asserts discrimination based on two or more of the categories protected by Title VII (i.e., sex, race, religion, and national origin) does not fall within this rubric. This rubric also encompasses the situation where a plaintiff alleges a claim for discrimination under one statute and a claim for retaliation under another. For example, a claim for age discrimination and a claim for retaliation under Title VII for complaining about sexual harassment.

15 This is my term and not a legal term of art (at least not yet). Although there are no statistics readily available on how frequently plaintiffs plead compound employment discrimination claims, anecdotal evidence suggests that such claims are common.

16 Briefly, the problem is that in order to plead facially plausible compound employment discrimination claims, a plaintiff must plead facts detailing the protected categories of which she is a member, the adverse employment action she suffered, and the factual basis for the allegation that the adverse employment action was the result of the relevant decision-maker’s discriminatory intent. On a motion to dismiss, the assumption of truth rule mandates that the court assume the truth of all of these facts, it cannot pick and choose. See Erickson v. Pardus, 551 U.S. 89, 94 (2007). To illustrate, suppose a female
Twombly/Iqbal requirement that a plaintiff plead facts sufficient to render each claim in her complaint facially plausible,17 Iqbal’s specific requirement that a plaintiff must plead facts sufficient to make an inference of discriminatory intent facially plausible,18 the assumption of truth rule,19 traditional bases for dismissal under Rule 12(b)(6),20 and the causation requirement articulated in Gross.21

This problem has already surfaced in the district courts with conflicting results.22 Unfortunately, these cases do not analyze the issues; rather, they simply state conclusions without analytical support.

plaintiff wishes to bring claims of age and sex discrimination against her employer. Accepting all of the pleaded facts as true—including those that support her sex discrimination complaint—the plaintiff’s complaint asserts that her employer discharged her based on both her age and her sex. However, in light of Gross, the plaintiff can prevail on her age discrimination only if her age was the reason for her discharge. Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2350 (2009). Because the plaintiff’s sex motivated her employer just as much as her age (based on the facts pleaded in her complaint), her age could not have been the reason her employer discharged her. Thus, the plaintiff’s assertion that her age was, in fact, the reason for her discharge, is not facially plausible under Twombly/Iqbal in light of all of the facts pleaded in her complaint. In this manner, the facts pleaded to support the Title VII claim cannibalize the ADEA claim. This interaction is discussed in detail in Part VI, infra.

18 Iqbal, 129 S. Ct. at 1952; see also infra Part II.B.
19 Erickson, 551 U.S. at 94; see also infra Part IV.
20 See infra Part III.
21 Gross, 129 S. Ct. at 2350; see also infra Part V.
22 Compare Pekar v. U.S. Steel/Edgar Thomson Works, No. 09-844, 2010 U.S. Dist. LEXIS 7481, at *27–29 (W.D. Pa. Jan. 29, 2010) (dismissing plaintiff’s allegations that his employer’s decision to discharge him was motivated by his participation in a particular pension plan and by the employer’s desire to replace him with a younger employee who would not be eligible for that pension plan, and reasoning that plaintiff’s ADEA claim was insufficient to overcome the new pleadings standards of Iqbal and Gross), Speer v. Mountaineer Gas Co., No. 5:06CV41, 2009 U.S. Dist. LEXIS 65088, at *22 n.6 (N.D. W. Va. July 28, 2009) (dismissing plaintiff’s allegations that his employer had discriminated against him based on both his age and his union activities, reasoning that the employee’s age discrimination claims were subject to dismissal based on Gross’s requirement that age be the but-for cause of the challenged adverse employment action), and Culver v. Birmingham Bd. of Educ., 646 F. Supp. 2d 1270, 1271–72 (N.D. Ala. 2009) (“The only logical inference to be drawn from Gross is that an employee cannot claim that age is a motive for the employer’s adverse conduct and simultaneously claim that there was any other proscribed motive involved.”), with Houchen v. Dall. Morning News, Inc., No. 3:08-CV-1251-L, 2010 U.S. Dist. LEXIS 33389, at *7–8 (N.D. Tex. Apr. 1, 2010) (denying summary judgment based on Twombly/Iqbal and Gross and stating that plaintiffs are entitled to plead alternative theories even if they are inconsistent, that the mere fact of pleading sex and age discrimination claims together is not a basis for dismissing the age discrimination claims, and additionally, that Gross was a jury instruction case rather than a pleading case), Chacko v. Worldwide Flight Servs., Inc., No. 08-CV-2363 (NGK) (JO), 2010 U.S. Dist. LEXIS 9103, at *12 (E.D.N.Y. Feb. 1, 2010) (rejecting defendant’s motion
Unlike such cases, this Article analyzes the complex interaction of Twombly/Iqbal, traditional bases for dismissal under Rule 12(b)(6), the assumption of truth rule and Rule 8(d)(2) and (3), and Gross. Part II discusses Twombly and Iqbal, plausibility pleading, and the changes wrought on Rules 8(a)(2) and 12(b)(6). Part III discusses traditional bases for dismissal under Rule 12(b)(6) which are relevant to the consideration of the impact of Gross. Part IV examines the nature of facts pleaded in a complaint and how courts must, by necessity, rethink the nature of pleaded facts in light of Twombly/Iqbal and the assumption of truth rule. Part V analyzes the Court’s decision in Gross as well as the extension of the holding in Gross to other federal employment statutes. Part VI discusses the impact of the confluence of Twombly/Iqbal, traditional bases for dismissal, the assumption of truth rule and Gross on pleading in employment discrimination cases, and how this combination could result in “cannibalistic facts” that would kill compound employment discrimination claims. Part VII evaluates this effect on compound employment discrimination claims in light of the congressional intent and public policy considerations embodied in the But-For Statutes. Finally, Part VIII considers ways to fix the problems caused by the combination of the confluence of Twombly/Iqbal, the assumption of truth rule and Gross, including an analysis of pending legislation designed to overturn Gross and, most significantly, a new proposal to amend the Federal Rules of Civil Procedure to ensure that courts construe pleadings in employment discrimination cases in accordance with the congressional intent embodied in the ADEA and the other antidiscrimination statutes impacted by Gross.

II. TWOMBLY, IQBAL, AND PLAUSIBILITY PLEADING

For more than fifty years, the standard for evaluating the sufficiency of a pleading under Rule 12(b)(6) was taken from the Supreme Court’s 1957 decision in Conley v. Gibson. The standard was so familiar that most civil litigators and federal judges could recite it from memory: “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 “no set of facts” standard from Conley was so ubiquitous that it was cited in to dismiss the plaintiff’s ADEA and Title VII claims, stating that Gross “concerned a plaintiff’s ultimate burden of proof, as conveyed in a jury instruction,” not in the pleadings), Griffin v. United Parcel Serv., Inc., No: 08-2000, 2010 U.S. Dist. LEXIS 47081, at *1–2 (E.D. La. Jan. 8, 2010) (stating plaintiff’s allegations of discrimination based either wholly or partly on age, race, and disability were sufficient to overcome the but-for pleading standard set forth in Gross because alternatively alleging “in whole” includes an allegation of but-for causation), and Riley v. Vilsack, 665 F. Supp. 2d 994, 1006 (W.D. Wis. 2009) (stating that “Gross . . . had nothing to do with pleading, but rather the proper standard of proof under the ADEA,” and thereby refusing to dismiss an ADEA claim despite the presence of a disability discrimination claim).

24 Id.
sixteen opinions from the Supreme Court and had been adopted by twenty-six states and the District of Columbia as their standard for dismissal of a complaint. Nevertheless, on May 21, 2007, the Court issued its opinion in *Twombly* and announced that the *Conley* standard was “best forgotten.” In its place, the Court laid the foundation for what has become known as “plausibility pleading.”

**A. Bell Atlantic Corp. v. Twombly**

The pleading at issue in *Twombly* was filed by two individual plaintiffs representing “a putative class consisting of all subscribers of local telephone and/or high speed internet services . . . from February 8, 1996 to present” against the four largest providers of long distance telephone service and alleging violations of Section 1 of the Sherman Act. In their complaint, the *Twombly* plaintiffs asserted that the defendants engaged in “parallel conduct” by acting to thwart competition by new entities in their respective market areas and by avoiding one another’s market areas. The plaintiffs sought to have the court infer the existence of a contract, combination, or conspiracy in restraint of trade from this alleged parallel conduct and, accordingly, pleaded the existence of a contract, combination, or conspiracy in restraint of trade upon information and belief.

The district court dismissed the complaint for failure to state a claim upon which relief could be granted. The Second Circuit reversed, based on the “any set of facts” standard from *Conley*. The Supreme Court “granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct.” The Court framed the specific issue before it as whether a putative class action complaint asserting a claim under Section 1 of the Sherman Act “can survive a motion to dismiss when it alleges that major telecommunications providers engaged in certain parallel conduct unfavorable to

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26 Id. at 563 (majority opinion).
27 Id. at 550. Section 1 of the Sherman Act prohibits “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.” 15 U.S.C. § 1 (2006).
29 Id. at 551 (relating the language of the plaintiffs’ allegations from the complaint: “In the absence of any meaningful competition between the [defendants] in one another’s markets, and in light of the parallel course of conduct that each engaged in to prevent competition from [new competitors] within their respective local telephone and/or high speed internet services markets and the other facts and market circumstances alleged above, Plaintiffs allege upon information and belief that [the defendants] have entered into a contract, combination or conspiracy to prevent competitive entry in their respective local telephone and/or high speed internet services markets and have agreed not to compete with one another and otherwise allocated customers and markets to one another.” (internal quotation marks omitted)).
30 Id. at 552.
31 Id. at 553.
32 Id. at 553.
competition, absent some factual context suggesting agreement, as distinct from identical, independent action.\textsuperscript{33}

In addressing this issue, the Court examined the requirements of a claim under Section 1 and then turned to the pleading requirements of Rule 8(a) of the Federal Rules of Civil Procedure.\textsuperscript{34} The Court noted that Rule 8(a)(2) requires “a short and plain statement of the claim showing that the pleader is entitled to relief in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.”\textsuperscript{35} In order to satisfy this requirement, a plaintiff must provide “more than labels and conclusions.”\textsuperscript{36} The complaint must contain “[f]actual allegations” sufficient “to raise a right to relief above the speculative level.”\textsuperscript{37} and “plausibly suggest[]” that the plaintiff “is entitled to relief.”\textsuperscript{38} According to the Court, this plausibility requirement “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” to support the plaintiff’s claim.\textsuperscript{39} The rationale for the requirement is that “when the allegations in a complaint, however true, could not raise a claim of entitlement to relief, ‘this basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court.’”\textsuperscript{40}

\textsuperscript{33} \textit{Id.} at 548–49.

\textsuperscript{34} \textit{Id.} at 554–57. According to the Federal Rules of Civil Procedure, a claim for relief must contain:

(1) a short and plain statement of the grounds for the court’s jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;
(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and
(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

\textbf{FED. R. CIV. P. 8(a)}

\textsuperscript{35} \textit{Twombly}, 550 U.S. at 555 (quoting Conley v. Gibson, 355 U.S. 41, 47, 78 (1957)) (internal quotation marks omitted).

\textsuperscript{36} \textit{Id.} (citations omitted).

\textsuperscript{37} \textit{Id.} (citing 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1216, at 235–36 (3d ed. 2004)).

\textsuperscript{38} \textit{Id.} at 557.

\textsuperscript{39} \textit{Id.} at 556.

\textsuperscript{40} \textit{Id.} at 558 (quoting 5 WRIGHT & MILLER, supra note 37, § 1216, at 233–34). The cost of litigation, and of discovery in antitrust litigation in particular, was a significant factor in the Court’s decision as it emphasized a number of times that the plausibility test was designed to weed out meritless claims without requiring the defendant to expend time and money on what amounts to a fishing expedition by the plaintiff. \textit{Id.} at 558–59.
B. Ashcroft v. Iqbal

At the time of the September 11, 2001 terrorist attacks, Javaid Iqbal, a Pakistani and a Muslim, was living illegally in the United States.\(^{41}\) Following the attacks, the Federal Bureau of Investigation (FBI) and other entities within the Department of Justice began a far-reaching investigation to identify the assailants and prevent them from attacking anew.\(^{42}\) The FBI questioned more than 1,000 people with suspected links to the attacks in particular, or to terrorism in general.\(^{43}\) Of those questioned, 184—including Iqbal—were detained on immigration-related charges and deemed to be of high interest to the investigation.\(^{44}\) These high-interest detainees “were held under restrictive conditions designed to prevent them from communicating with the general prison population or the outside world.”\(^{45}\)

In November 2001, agents of the FBI and INS arrested Iqbal on charges of fraud in relation to identification documents and conspiracy to defraud the United States.\(^{46}\) As a person of high interest, Iqbal was placed in the Administrative Maximum Special Housing Unit (ADMAX SHU) of the Metropolitan Detention Center in Brooklyn,\(^{47}\) which “incorporates the maximum security conditions allowable under Federal Bureau of Prison regulations,” with detainees kept in lockdown twenty-three hours a day and spending the remaining hour outside their cells in handcuffs and leg irons, accompanied by a four-officer escort.\(^{48}\)

Iqbal pleaded guilty to the criminal charges, served a term of imprisonment, and was deported to Pakistan.\(^{49}\) He then filed a \textit{Bivens} action\(^ {50}\) in the United States District Court for the Eastern District of New York against, among others, former Attorney General John Ashcroft and FBI Director Robert Mueller.\(^ {51}\) The complaint contended that Ashcroft and Mueller designated Iqbal “a person of high interest on account of his race, religion, or national origin, in contravention of the First and

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\(^{42}\) \textit{Iqbal}, 129 S. Ct. at 1943.

\(^{43}\) Id.

\(^{44}\) Id.

\(^{45}\) Id.

\(^{46}\) Id.

\(^{47}\) Id.

\(^{48}\) Id.

\(^{49}\) Id.


\(^{51}\) \textit{Iqbal}, 129 S. Ct. at 1943–44.
Fifth Amendments to the Constitution." The complaint alleged that “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.” It further alleged 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.” Lastly, the complaint posited that Ashcroft and Mueller “each knew of, condoned, and willfully and maliciously agreed to subject” Iqbal 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.” The complaint “name[d] Ashcroft as the ‘principal architect’ of the policy, and identify[ed] Mueller as ‘instrumental in [its] adoption, promulgation, and implementation.’

Ashcroft and Mueller “moved to dismiss the complaint for failure to state sufficient factual allegations [] show[ing] their personal involvement in clearly established unconstitutional conduct.” The district court denied their motion, holding that “it cannot be said that there [is] no set of facts on which [Iqbal] would be entitled to relief as against” Ashcroft and Mueller. Ashcroft and Mueller filed an interlocutory appeal to the United States Court of Appeals for the Second Circuit. The Second Circuit held that Iqbal’s complaint adequately alleged that Ashcroft and Mueller were personally involved in discriminatory decisions “which, if true, violated clearly established constitutional law.” The Supreme Court granted certiorari.

As it did in Twombly, the Supreme Court began its analysis in Iqbal by “taking note of the elements a plaintiff must plead to state a claim of unconstitutional discrimination against officials entitled to assert the defense of qualified immunity.” In order to state a Bivens claim, a plaintiff must plead, among other things, that “the defendant acted with [an intentionally] discriminatory purpose,” which “requires more than ‘intent as volition or intent as awareness of consequences’” and “instead involves a decisionmaker’s undertaking a course of action “‘because of,’” not merely “in spite of,” [the action’s] adverse effects upon an identifiable group.” Therefore, “to state a claim based on a violation of a clearly established right, [Iqbal] must plead sufficient factual matter to show that [Ashcroft and Mueller] adopted and implemented the detention

52 Id. at 1944.
53 Id. (citation omitted) (internal quotation marks omitted).
54 Id. (citation omitted) (internal quotation marks omitted).
55 Id. (citation omitted) (internal quotation marks omitted).
56 Id. (citation omitted).
57 Id.
58 Id. (citation omitted) (internal quotation marks omitted).
59 Id. (citing Iqbal v. Hasty, 490 F.3d 143, 174 (2d Cir. 2007)).
61 Iqbal, 129 S. Ct. at 1947.
62 Id. at 1948 (citation omitted).
policies at issue not for a neutral, investigative reason but for the purpose of discriminating on account of race, religion, or national origin. Reiterating its interpretation of Rule 8(a)(2) from Twombly, the Court stated, the pleading standard Rule 8 announces does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement.

In short, after Twombly, “[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.” “Facial plausibility” exists when a complaint contains “factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” The plausibility standard “asks for more than a sheer possibility that a defendant has acted unlawfully.” In other words, if a “complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’”

The Court’s decision in Twombly rested on two “working principles”: (1) the requirement “that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions”; and (2) “only a complaint that

63 Id. at 1948–49.
64 Id. at 1949 (citations omitted) (internal quotation marks omitted).
65 Id. (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)).
66 Id. (citing Twombly, 550 U.S. at 556).
67 Id. (quoting Twombly, 550 U.S. at 556).
68 Id. (quoting Twombly, 550 U.S. at 557) (internal quotation marks omitted).
69 Id. (quoting Twombly, 550 U.S. at 555). The Court noted that “Rule 8 marks a notable and generous departure from the hyper-technical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.” Id. at 1950. In his spirited dissent in Twombly, Justice Stevens argues vehemently against this proposition. Justice Stevens argued that Rule 8(a)(2) “did not come about by happenstance, and its language is not inadvertent.” Twombly, 550 U.S. at 573 (Stevens, J., dissenting). Justice Stevens explained that Rule 8(a)(2)’s pleading standard was in direct response to the pleading difficulties parties encountered under the Field Code and its progeny, “which required ‘[a] statement of the facts constituting the cause of action, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended.’” Id. at 574 (quoting An Act to Simplify and Abridge the Practice, Pleadings and Proceedings of the Courts of this State, ch. 379, § 120(2), 1848 N.Y. Laws 497, 521). One of the specific difficulties encountered under the Field Code was the requirement that a plaintiff plead “facts” rather than “conclusions,” a distinction that proved far easier to say than to apply.” Id. As commentators on the Field Code noted:
states a plausible claim for relief survives a motion to dismiss." 70 These two working principles, suggest a two-pronged inquiry in determining whether to dismiss a complaint pursuant to Rule 12(b)(6): first, a court should determine which allegations in a complaint are facts and which are conclusions and disregard the latter; 71 second, accepting the pleaded facts as true, the court must then determine whether those facts "plausibly give rise to an entitlement to relief." 72

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70 Iqbal, 129 S. Ct. at 1950 (quoting Twombly, 550 U.S. at 556). The Court calls upon the lower courts to "draw on [their] judicial experience and common sense" in considering motions to dismiss, but to be mindful that "where the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" Id. (quoting Fed. R. Civ. P. 8(a)(2)).

71 Id.

72 Id.
Applying the first prong of this analysis, the Court first identified “the allegations in the complaint that are not entitled to the assumption of truth.” The Court concluded that virtually all of the allegations in the complaint that dealt with the defendants’ discriminatory intent were conclusory and not entitled to an assumption of truth. The Court reasoned that these were merely “bare assertions” that “amount[ed] to nothing more than a ‘formulaic recitation of the elements’ of a constitutional discrimination claim.”

The Court then turned to the second prong of its analysis and considered whether the facts in the complaint, accepted as true, “plausibly suggest an entitlement to relief.” The Court focused on two primary factual allegations in the complaint: (1) that “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 (2) 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 A[shcroft] and M[ueller] in discussions in the weeks after September 11, 2001.” As “facts,” these statements are entitled to the assumption of truth and “are consistent with [Ashcroft and Mueller] purposefully designating detainees ‘of high interest’ because of their race, religion, or national origin.” However, the Court then concluded that “given more likely explanations, they do not plausibly establish” that Ashcroft and Mueller purposefully designated detainees “of high interest” because of their race, religion, or national origin.

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73 Id. at 1951.
74 Id. Specifically, the Court concluded that the following allegations were conclusory: (1) that Ashcroft and Mueller “‘knew of, condoned, and willfully and maliciously agreed to subject [Iqbal]’ 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’”; (2) that Ashcroft was the “principal architect” of this policy; and (3) that Mueller was “‘instrumental’ in adopting and executing” this policy. Id. (citation omitted). These certainly seem to be factual allegations—or what most lawyers would consider factual allegations—rather than “legal conclusions.” See A. Benjamin Spencer, Iqbal and the Slide toward Restrictive Procedure, 14 LEWIS & CLARK L. REV. 185, 192–93 (2010) (discussing the nature of the allegedly conclusory allegations rejected by the Court in Iqbal).
75 Iqbal, 129 S. Ct. at 1951 (citation omitted). The Court made clear that it did not characterize these “bald allegations” as conclusory because they were “unrealistic or nonsensical” or because the “claim [was] too chimerical to be maintained.” Id. It was “the conclusory nature of respondent’s allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth.” Id. The Court’s extremely derisive language readily illustrates how the majority felt about Iqbal’s claims.
76 Id.
77 Id. (citation omitted) (internal quotation marks omitted).
78 Id. (citation omitted) (internal quotation marks omitted).
79 Id.
80 Iqbal, 129 S. Ct. at 1951 (emphasis added). This conclusion is extremely odd and indicates, in fairly unambiguous terms, that the Court is considering matters beyond the
Instead, the Court considered it more likely that the policy at issue was “a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks [which] produce[d] a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims” because of their race, religion or national origin and that the arrests at issue “were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts.”

The Court therefore concluded that “[a]s between th[e] ‘obvious alternative explanation’ for the arrests and the purposeful, invidious discrimination [Iqbal] asks [the Court] to infer, discrimination is not a plausible conclusion.” The plaintiff needed “to allege more by way of factual content to ‘nudge’ his claim of purposeful discrimination ‘across the line from conceivable to plausible.’”

Of importance to employment discrimination claims, the Court rejected Iqbal’s argument that the Federal Rules of Civil Procedure, specifically Rule 9(b), allow plaintiffs to allege discriminatory intent “generally.” In rejecting this argument, the Court noted that “‘generally’ is a relative term” and, as used in Rule 9(b), “generally” means that it merely excuses a party from pleading discriminatory intent under an elevated pleading standard . . . [but i]t does not give him license to evade the less rigid—though still operative—strictures of Rule 8 . . . [a]nd Rule 8 does not empower [a party] to plead the bare elements of his cause of

four corners of the Complaint—which is contrary to the mandate of Rule 12—in considering the plausibility of the plaintiff’s claim. See FED. R. CIV. P. 12(d). Further, it appears the Court did not draw all reasonable inferences in the plaintiff’s favor. Instead, the Court seems to have considered the possible inferences and chosen the one that appeared to it the most likely, despite the fact that the inference sought by the plaintiff was also a reasonable one. Additionally, this conclusion appears to violate the explicit statement in Twombly that the plausibility standard “does not impose a probability requirement at the pleading stage.” Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007). By considering “more likely explanations,” the Court seems to be explicitly considering the plaintiff’s “probability” of success rather than simply the plausibility of the plaintiff’s position. Iqbal, 129 S. Ct. at 1950–51. Although the wisdom of Iqbal is beyond the scope of this Article, the Court’s decision appears to be an example of outcome driven decision-making. The majority appears to believe Iqbal should not be able to pursue his claims against Ashcroft and Mueller and crafted a legal analysis to defeat his claim. Unfortunately, the Court painted with a very broad brush to do so.

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81 Iqbal, 129 S. Ct. at 1951.
82 Id. at 1951–52 (citation omitted).
83 Id. at 1952 (quoting Twombly, 550 U.S. at 570).
84 Rule 9(b) provides: “In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person’s mind may be alleged generally.” FED. R. CIV. P. 9(b) (emphasis added).
85 Iqbal, 129 S. Ct. at 1954.
action, affix the label “general allegation,” and expect his complaint to survive a motion to dismiss.\textsuperscript{86}

\textbf{C. Plausibility Pleading Post-Twombly/Iqbal: The Necessity of Pleading Facts to Support Claims}

Although the exact contours of plausibility pleading after \textit{Twombly/Iqbal} continue to evolve, the fundamental requirements are clear. The complaint must contain facts.\textsuperscript{87} Those facts, taken as true, “must be enough to raise a right to relief above the speculative level,”\textsuperscript{88} and must sufficiently “state a claim to relief that is plausible on its face.”\textsuperscript{89} A claim is plausible on its face if the facts pleaded are sufficient to “allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”\textsuperscript{90} Conclusory allegations, unlike allegations of “fact,” are not entitled to the assumption of truth and cannot help establish the plausibility of a claim.\textsuperscript{91}

\textbf{III. TRADITIONAL BASES FOR DISMISSAL UNDER RULE 12(B)(6)}

In addition to the new plausibility standard under \textit{Twombly} and \textit{Iqbal}, there remain traditional bases for dismissal under Rule 12(b)(6). Two traditional bases particularly relevant to the discussion herein are Rule 12(b)(6) dismissals based on (A) an affirmative defense that is disclosed in the complaint, and (B) the existence of an insurmountable bar to recovery apparent on the face of the complaint.

\textit{A. Affirmative Defenses}

It is well established in the majority of federal circuits that a complaint may be dismissed pursuant to Rule 12(b)(6) based on an affirmative defense “so long as (i) the facts establishing the defense are definitively ascertainable from the complaint and the other allowable sources of information [i.e., documents attached to the complaint, matters of judicial notice, and the like], and (ii) those facts suffice to establish the affirmative defense with certitude.”\textsuperscript{92} Affirmative defenses most common on the face of a complaint are the statute of limitation\textsuperscript{93} and res judicata.\textsuperscript{94}

\textsuperscript{86} Id.
\textsuperscript{87} Id. at 1949 (quoting \textit{Twombly}, 550 U.S. at 570).
\textsuperscript{88} \textit{Twombly}, 550 U.S. at 555.
\textsuperscript{89} Id. at 570.
\textsuperscript{90} \textit{Iqbal}, 129 S. Ct. at 1949 (citing \textit{Twombly}, 550 U.S. at 556).
\textsuperscript{91} Id. (citing \textit{Twombly}, 550 U.S. at 555).
\textsuperscript{92} Rodi v. S. New Eng. Sch. of Law, 389 F.3d 5, 12 (1st Cir. 2004); see also Goodman v. Praxair, Inc., 494 F.3d 458, 464 (4th Cir. 2007) (holding that dismissal under \textit{Fed. R. Civ. P. 12(b)(6)} may be appropriate when a successful affirmative defense appears on the face of the pleadings); Flight Sys., Inc. v. Elec. Data Sys. Corp., 112 F.3d 124, 127–28 (3d Cir. 1997) (same); Kansa Reinsurance Co. v. Cong. Mortg. Corp. of Tex., 20 F.3d 1362, 1366 (5th Cir. 1994) (same); Kahn v. Kohlberg, Kravis, Roberts & Co.,
B. Insurmountable Bar to Recovery

Similar to an affirmative defense that appears on the face of a complaint, a complaint containing facts that present an “insurmountable bar”\(^95\) or “insuperable barrier”\(^96\) to recovery is subject to dismissal under Rule 12(b)(6). In this situation, “the complaint is said to have a built-in defense and is essentially self-defeating.”\(^97\)

The Seventh Circuit has the most established case law on the dismissal of complaints due to an insurmountable bar to recovery. As explained by Judge Posner, “a plaintiff can plead himself out of court by alleging facts which show that he has no claim, even though he was not required to allege those facts. . . . If plaintiffs’ lawyers want to live dangerously—or want to find out sooner rather than later whether they have a claim—they can.”98 The Seventh Circuit rationalized this approach by saying that “although the rule smacks of legalism, judicial efficiency demands that a party not be allowed to controvert what it has already unequivocally told a court by the most formal and considered means possible.”99

IV. THE NATURE OF PLEADED FACTS

One of the unresolved issues after Twombly and Iqbal is the nature of the facts pleaded in a complaint and, more specifically, the degree to which they bind the pleader. While this may appear, at first blush, to be a nonexistent issue, it becomes very real when you consider Rule 8(d) of the Federal Rules and the cases interpreting this rule over the years.100 Of critical importance to the discussion herein, is whether, under the auspices of Rules 8(d)(2) and (3), a plaintiff can plead alternative and inconsistent facts or whether a plaintiff is bound by the facts pleaded in her complaint, even if those facts defeat one or more of her claims.

A. Rules 8(d)(2) and (3)

Rule 8(d)(2) permits pleading “[two] or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one

98 Jackson v. Marion Cnty., 66 F.3d 151, 153–54 (7th Cir. 1995) (citations omitted). Of course, after Twombly and Iqbal, a plaintiff no longer has a choice as to whether to plead facts.

99 Soo Line R.R. v. St. Louis Sw. Ry., 125 F.3d 481, 483 (7th Cir. 1997). The Second, Sixth, Eighth, Ninth, and D.C. Circuits have followed the Seventh Circuit’s lead on this issue and held, even pre-Twombly, that the facts pleaded by a plaintiff can defeat his claims. See Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP, 322 F.3d 147, 167 (2d Cir. 2003) (holding that the facts pleaded by the plaintiff necessarily defeated the claim); Hensley Mfg. v. ProPride, Inc., 579 F.3d 603, 613 (6th Cir. 2009) (holding that the facts pleaded in the plaintiff’s complaint defeated its claim as a matter of law and that plaintiff’s speculation to the contrary was insufficient under Twombly); Romine v. Acxiom Corp., 296 F.3d 701, 706 (8th Cir. 2002) (noting that a plaintiff who offers specific facts in her complaint can plead herself out of court); Wright v. Or. Metallurgical Corp., 360 F.3d 1090, 1098 (9th Cir. Or. 2004); Trudeau v. FTC, 456 F.3d 178, 193 (D.C. Cir. 2006) (noting that it “is possible for a plaintiff to plead too much: that is, to plead himself out of court by alleging facts that render success on the merits impossible” (internal quotation marks omitted)); Browning v. Clinton, 292 F.3d 235, 242 (D.C. Cir. 2002) (“Rule 12(b)(6) dismissal is appropriate where the allegations contradict the claim asserted.”).

100 This issue is not limited to employment related claims.
of them is sufficient.” 101 Further, Rule 8(d)(3) provides that “[a] party may state as many separate claims or defenses as it has, regardless of consistency.” 102 Neither Rule 8(d)(2) nor (3) say anything about facts; rather, they only mention “statements” of “claim[s]” and “defense[s].” 103 As Justice Stevens pointed out in his vigorous dissent in *Twombly*, the drafters of Rule 8 “intentionally avoided any reference to ‘factual’ or ‘evidence’ or ‘conclusions’” in direct response to the technical pleading requirements of so-called “code pleading.” 104 “[T]he pleading standard the Federal Rules meant to codify does not require, or even invite, the pleading of facts.” 105 Justice Stevens illustrated this point by reference to the exceedingly simple and conclusory model complaint contained in the original Appendix to the Federal Rules as Form 9: “[T]he Form 9 complaint states only: ‘On June 1, 1936, in a public highway called Boylston Street in Boston, Massachusetts, defendant negligently drove a motor vehicle against plaintiff who was then crossing said highway.’” 106 Justice Stevens explained

> The asserted ground for relief—namely, the defendant’s negligent driving—would have been called a “conclusion of law” under the code pleading of old. But that bare allegation suffices [to state a claim] under a system that “restricts the pleadings to the task of general notice-giving and invests the deposition-discovery process with a vital role in the preparation for trial.” 107

In light of the purposes of the Federal Rules, the intent of the drafters in crafting Rule 8, and the sample complaints set out in the Appendix to the Federal Rules, it is unsurprising that federal courts have universally understood Rule 8(d) to permit the pleading of alternative and inconsistent claims or defenses. 108 The courts have been far less consistent in their treatment of facts pleaded by a party. 109

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101 FED. R. CIV. P. 8(d)(2).
102 Id. at (d)(3).
103 Id. at (d)(2)–(3).
105 Id. at 580; see also supra note 69.
106 Twombly, 550 U.S. at 576 (quoting Form 9, Complaint for Negligence, Forms App., FED. RULES CIV. Proc., 28 U.S.C. App., p. 829). The original Form 9 complaint for negligence has been updated and is now denominated Form 11 in the Appendix to the Federal Rules of Civil Procedure.
107 Id. (citation omitted) (quoting Hickman v. Taylor, 329 U.S. 495, 501 (1947)) (internal quotation marks omitted).
108 See 5 WRIGHT & MILLER, supra note 97, § 1283, at 532–42 & nn.8–12.
109 Compare, e.g., Rodriguez-Suris v. Montesinos, 123 F.3d 10, 30 (1st Cir. 1997), with Jackson v. Marion Cnty., 66 F.3d 151, 153 (7th Cir. 1995) (Posner, J.).
B. Pre-Twombly/Iqbal Treatment of Plead ed Facts

Prior to Twombly/Iqbal, there were two primary schools of thought regarding the nature of pleaded facts. Some courts considered pleaded facts mere assertions that did not bind the pleader at the motion to dismiss stage. Other courts held that pleaded facts were binding judicial admissions.

1. Pleading Alternative and Inconsistent Facts

A number of courts have specifically held that facts pleaded are not “to be read as a judicial or evidentiary admission against an alternative or inconsistent pleading.” The Eighth Circuit put it more concisely, saying “under the federal rules, a claimant may plead inconsistent facts in support of alternative theories of recovery.” Some courts have applied this rule, even where, if taken as true, pleaded facts would necessarily defeat one of the plaintiff’s claims.

These decisions were based on the language of Rule 8(d)(2) and its authorization to plead alternative claims, as well as on the liberal nature of notice pleading encompassed in the Federal Rules. None of these cases, however, mention the mandate that, in considering a motion to dismiss, the court “must accept as true all of the factual allegations contained in the complaint” or discuss

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110 Rodriguez-Suris v. United States, 757 F.2d 1016, 1019 (9th Cir. 1985); 5 WRIGHT & MILLER, supra note 97, § 1283, at 532–42 & n.7.
111 Jackson v. Dep’t of Army, 947 F.2d 766, 769 (5th Cir. 1991).
112 Molsbergen v. United States, 757 F.2d 1019; see also Rodriguez-Suris, 123 F.3d at 30 (“Especially at the early stages of litigation, a party’s pleading will not be treated as an admission precluding another, inconsistent, pleading.”).
113 Babcock & Wilcox Co. v. Parsons Corp., 430 F.2d 531, 536 (8th Cir. 1970).
114 See Laurence v. Atzenhoffer Chevrolet, 281 F. Supp. 2d 898, 900–01 (S.D. Tex. 2003) (refusing to dismiss plaintiff’s claims for termination for failing to commit illegal acts under Tex. Penal Code Ann. § 32.42(b) (West 2003), which required that an employee allege that his failure to commit an illegal act was the sole cause of his termination, despite plaintiff’s pleading that he was also terminated because of his age in violation of the ADEA).
whether factual allegations are, in fact, necessary to support the party’s claim. Accordingly, none of these courts discussed the tension between the plaintiff’s ability to plead unnecessary and inconsistent facts and the court’s obligation to accept as true all factual allegations in the complaint.

2. Plead Facts Are Binding Admissions

Other courts held that facts pleaded in a complaint “are binding admissions.”116 Prior to Twombly and Iqbal, while plaintiffs were not generally required to plead facts in support of their claims, they were nevertheless bound by whatever facts they actually pleaded.117 As Judge Posner pointed out, “admissions can of course admit the admitter to the exit from the federal courthouse.”118 This position is justified by the rationale that “judicial efficiency demands that a party not be allowed to controvert what it has already unequivocally told a court by the most formal and considered means possible.”119 The Second,120 Sixth,121 Seventh,122 Eighth,123 Ninth124 and D.C.125 Circuits have followed this approach (at least occasionally), although the Seventh Circuit is its chief proponent and most consistent adherent.126

29] was addressed to the sufficiency of the allegations of the bill. For the purpose of that motion, the facts set forth in the bill stood admitted.”); Sheets v. Selden, 74 U.S. 416, 419 (1869) (“Assuming, as we have the right to assume (the case being on a demurrer), that the facts alleged in the bill of complaint are true . . . .”).

116 Jackson, 66 F.3d at 153; see also Morales v. Dep’t of Army, 947 F.2d 766, 769 (5th Cir. 1991). As a result of this view of facts, many of these courts also dismiss complaints due to an insurmountable bar to recovery appearing on the face of the complaint. See supra note 99.

117 Jackson, 66 F.3d at 153–54.

118 Id. at 154. Prior to Jackson, the Seventh Circuit and Judge Posner repeatedly “expressed [their] puzzlement that lawyers insist on risking dismissal by filing prolix complaints. But nothing in the federal rules forbids the filing of prolix complaints. If plaintiffs’ lawyers want to live dangerously—or want to find out sooner rather than later whether they have a claim—they can.” Id. (citation omitted).


120 See Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP, 322 F.3d 147, 167 (2d Cir. 2003).

121 See Hensley Mfg. v. ProPride, Inc., 579 F.3d 603, 613 (6th Cir. 2009) (decided post-Twombly, but pre-Iqbal).

122 See Soo Line R.R., 125 F.3d at 483; Jackson, 66 F.3d at 153–54.

123 See Romine v. Axiom Corp., 296 F.3d 701, 706 (8th Cir. 2002).

124 See Wright v. Or. Metallurgical Corp., 360 F.3d 1090, 1098 (9th Cir. 2004).


126 See, e.g., Jackson, 66 F.3d at 153–54; Soo Line R.R., 125 F.3d at 483.
C. The Nature of Plead Facts After Twombly/Iqbal: Attempting to Reconcile Rule 8(d) with Twombly/Iqbal

Twombly and Iqbal fundamentally changed the pleading requirements of Rule 8(a)(2) by requiring that a plaintiff plead facts sufficient to render his asserted claim or claims plausible. Plausibility pleading, combined with the requirement that courts accept as true all factual allegations in a complaint, renders an interpretation of Rule 8(d) to permit a plaintiff to plead inconsistent facts in support of his various claims untenable.

After Twombly and Iqbal, a plaintiff must plead “sufficient factual matter” which, “accepted as true,” makes the plaintiff’s claims facially plausible. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Inconsistent facts inherently make the plaintiff’s claim less plausible. As a court must accept all the pleaded facts as true, pleaded facts that contradict a claim necessarily weaken the claim, potentially to the point that it is not plausible on its face. The Supreme Court has been crystal clear on this point: on a motion to dismiss, a court “must accept as true all the factual allegations in the complaint.” This assumption of truth rule leaves no room for a lower court to pick and choose which pleaded facts to accept as true; it must accept them all, regardless of the consequences to the pleader. If pleaded facts are inconsistent with one of the claims in the complaint and, taken as true, render that claim implausible, then that claim must be dismissed under Twombly/Iqbal, regardless of whether the inconsistent facts support a different claim in the complaint. This is the most logical result.

In short, allowing a plaintiff to plead inconsistent facts in her complaint—even if those facts support separate claims—is inconsistent with Twombly/Iqbal and the assumption of truth rule, which requires courts to accept as true all factual allegations contained in the complaint. The only interpretation of Rule 8(d) that is consistent with the Court’s current case law is that a pleader may pursue alternative and inconsistent legal theories in a single complaint, but cannot plead inconsistent facts. It follows that all facts pleaded in a complaint are binding on the pleader, at least for purposes of a motion to dismiss under Rule 12(b)(6).

It is well-established that a plaintiff is the “master” of her complaint. Prior to filing a lawsuit, the plaintiff or the plaintiff’s counsel should consider the facts alleged and the impact that those facts, taken as true, will have on all of the claims

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127 As distinct from inconsistent legal theories.
129 Id.
130 Meaning facts pleaded that do not support a claim and, in fact, contradict pleaded facts that do support the claim.
132 See Caterpillar Inc. v. Williams, 482 U.S. 386, 392 (1987) (stating “the plaintiff [is] the master of the claim” and may plead her claims any way she sees fit).
pleaded. As the Seventh Circuit explained, pre-Twombly/Iqbal, “a party [must] not be allowed to controvert what it has already unequivocally told a court by the most formal and considered means possible.”133 Once pleaded, a plaintiff should be bound by the facts in her complaint, at least for purposes of the court ruling on a motion to dismiss.

V. THE GROSS DECISION

In the context of the foregoing discussion of Twombly and Iqbal, the traditional basis for the dismissal of actions under Rule 12(b)(6), and the nature of facts pleaded in a complaint, we turn to the Supreme Court’s decision in Gross v. FBL Financial Services, Inc.

A. Gross v. FBL Financial Services, Inc.

Jack Gross began working for FBL Financial in 1971.134 As of 2001, Gross held the position of claims administration director.135 In 2003, when he was fifty-four-years-old, Gross was reassigned to the position of claims project coordinator.136 When Gross was reassigned, many of his responsibilities were transferred to the newly created position of claims administration manager, which was given to Lisa Kneeskern, a woman in her early forties that Gross had formerly supervised.137 While Gross received the same compensation after his reassignment as Kneeskern, he felt that the reassignment was a demotion because FBL had reallocated his prior job responsibilities to Kneeskern’s newly created position.138

In April 2004, Gross filed suit in the U.S. District Court for the Southern District of Iowa, alleging that his reassignment to the position of claims project coordinator violated the ADEA,139 which makes it unlawful for an employer to take adverse action against an employee “because of such individual’s age.”140 At trial, Gross introduced evidence suggesting that his reassignment was based at least in part on his age . . . . [T]he District Court instructed the jury that it must return a verdict for Gross if he proved, by a preponderance of the evidence, that FBL “demoted [him] to claims projec[t] coordinator” and that his “age was a motivating factor” in FBL’s decision to demote him. The jury was further instructed that Gross’ age would qualify as a

133 Soo Line RR. v. St. Louis Sw. Ry., 125 F.3d 481, 483 (7th Cir. 1997).
135 Id.
136 Id.
137 Id. at 2346–47.
138 Id. at 2347.
139 Id.
“motivating factor,” if [it] played a part or a role in [FBL]’s decision to demote [him].

Finally, the court instructed the jury that “the verdict must be for [FBL] . . . if it has been proved by the preponderance of the evidence that [FBL] would have demoted [Gross] regardless of his age.” The jury found in favor of Gross and FBL appealed.

On appeal, the Eighth Circuit reversed and remanded the case for a new trial, “holding that the jury had been incorrectly instructed under the standard established in Price Waterhouse v. Hopkins,” which “addressed the proper allocation of the burden of persuasion in cases brought under Title VII of the Civil Rights Act of 1964” (Title VII), “when an employee alleges that he suffered an adverse employment action because of both permissible and impermissible considerations—i.e., a ‘mixed-motives’ case.” Applying the Price Waterhouse standard, the Eighth Circuit found that Gross needed to present “[d]irect evidence

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141 Gross, 129 S. Ct. at 2347 (alterations in original) (citations omitted).
142 Id. (alterations in original).
143 Id.
144 Id.; see Price Waterhouse v. Hopkins, 490 U.S. 228, 244–47 (1989) (plurality opinion).
146 Gross, 129 S. Ct. at 2347 (quoting Price Waterhouse, 490 U.S. at 244–47). As the Supreme Court noted in Gross, “[t]he Price Waterhouse decision was splintered” with “[t]our Justices join[ing] a plurality opinion, Justices White and O’Connor separately concur[ing] in the judgment, and three Justices dissent[ing].” Id. (citations omitted). “Six Justices ultimately agreed that if a Title VII plaintiff shows that discrimination was a ‘motivating’ or a ‘substantial’ factor in the employer’s action, the burden of persuasion should shift to the employer to show that it would have taken the same action regardless of that impermissible consideration.” Id. (quoting Price Waterhouse, 490 U.S. at 258); Price Waterhouse, 490 U.S. at 259–60 (White, J., concurring); id. at 276 (O’Connor, J., concurring)). “Justice O’Connor further found that to shift the burden of persuasion to the employer, the employee must present ‘direct evidence that an illegitimate criterion was a substantial factor in the [employment] decision.’” Gross, 129 S. Ct. at 2347 (quoting Price Waterhouse, 490 U.S. at 276 (O’Connor, J., concurring)). Justice O’Connor’s concurring opinion in Price Waterhouse is generally considered the “controlling” opinion in the case. See Gross v. FBL Fin. Servs., Inc., 526 F.3d 356, 359 (8th Cir. 2008).

After Price Waterhouse, Congress passed the Civil Rights Act of 1991 and amended Title VII to explicitly authorize discrimination claims in which a discriminatory improper consideration was “a motivating factor” for an adverse employment decision. See 42 U.S.C. §2000e–2(m) (“[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”). However, no similar amendment was made to the ADA, the Americans with Disabilities Act (ADA), or any other federal employment antidiscrimination statute. See Gross, 129 S. Ct. at 2349.
... sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated the adverse employment action."\(^\text{147}\) On appeal, the Supreme Court explained,

\[
[D]irect\ evidence\ is\ only\ that\ evidence\ that\ show[s]\ a\ specific\ link\ between\ the\ alleged\ discriminatory\ animus\ and\ the\ challenged\ decision.\ Only\ upon\ a\ presentation\ of\ such\ evidence,\ the\ Court\ of\ Appeals\ held,\ should\ the\ burden\ shift\ to\ the\ employer\ to\ convince\ the\ trier\ of\ fact\ that\ it\ is\ more\ likely\ than\ not\ that\ the\ decision\ would\ have\ been\ the\ same\ absent\ consideration\ of\ the\ illegitimate\ factor.\ .\ .\ .\ Because\ Gross\ conceded\ that\ he\ had\ not\ presented\ direct\ evidence\ of\ discrimination,\ the\ Court\ of\ Appeals\ held\ that\ the\ District\ Court\ should\ not\ have\ given\ the\ mixed-motives\ instruction.\ Rather,\ Gross\ should\ have\ been\ held\ to\ the\ burden\ of\ persuasion\ applicable\ to\ typical,\ non-mixed-motives\ claims.\ .\ .\ .\ ^{148}\]

Given the issues addressed by the Eighth Circuit, the narrow issue before the Supreme Court in \textit{Gross} was “whether a plaintiff must present direct evidence of age discrimination in order to obtain a mixed-motives jury instruction in a suit brought under the” ADEA.\(^\text{149}\) However, the Court made a much broader ruling, concluding that a mixed-motive theory is not available under the ADEA because an ADEA plaintiff must establish that his age was the but-for cause of the employer’s adverse employment decision.\(^\text{150}\)

The Court quickly rejected the contention that its Title VII jurisprudence was equally applicable to the ADEA, stating that Title VII was “materially different” from the ADEA and, thus, its Title VII decisions were not controlling.\(^\text{151}\) Instead, the Court turned to the specific language of the ADEA.\(^\text{152}\)

In beginning its analysis of the ADEA, the Court noted that the ADEA, unlike Title VII, “does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor.”\(^\text{153}\) Further, “Congress neglected to add” a “mixed-motive” provision to the ADEA “when it amended Title VII to add §§ 2000e-2(m) and 2000e-5(g)(2)(B), even though it contemporaneously amended the ADEA in several ways.”\(^\text{154}\) Congress’ failure in this regard was significant, as the Court reasoned that it “cannot ignore Congress’ decision to amend Title VII’s relevant provisions but not make similar changes to the ADEA.

\(^{147}\) \textit{Gross}, 526 F.3d at 359 (internal quotation marks omitted).

\(^{148}\) \textit{Gross}, 129 S. Ct. at 2348 (citations omitted) (internal quotation marks omitted).

\(^{149}\) \textit{Id.} at 2346.

\(^{150}\) \textit{Id.} at 2350–52.

\(^{151}\) \textit{Id.} at 2348. The Court noted, “[w]hen conducting statutory interpretation, we must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.” \textit{Id.} at 2349 (quoting Fed. Express Corp. v. Holowecik, 128 S. Ct. 1147, 1153 (2008)).

\(^{152}\) \textit{Id.} at 2350.

\(^{153}\) \textit{Id.} at 2349.

\(^{154}\) \textit{Id.}
When Congress amends one statutory provision but not another, it is presumed to have acted intentionally.\textsuperscript{155} Thus, the only relevant inquiry is whether the “text of the ADEA . . . authorizes a mixed-motives age discrimination claim.”\textsuperscript{156} The Court concluded that it does not.\textsuperscript{157}

In reaching this discussion, the Court explained, “[t]he ADEA provides, in relevant part, that ‘[i]t shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, \textit{because of} such individual’s age.’”\textsuperscript{158} Presuming “the ordinary meaning” of the statute’s language “accurately expresses the legislative purpose,” the Court looked to the “ordinary meaning” of the “because of” phrase in the ADEA.\textsuperscript{159} The Court explained that “[t]he words ‘because of’ mean ‘by reason of: on account of.’”\textsuperscript{160} The Court went on to say

Thus, the ordinary meaning of the ADEA’s requirement that an employer took adverse action “because of” age is that \textit{age was the “reason”} that the employer decided to act. To establish a disparate-treatment claim under the plain language of the ADEA, therefore, a plaintiff must prove that age was the \textit{but-for cause} of the employer’s adverse decision. It follows, then, that under § 623(a)(1), the plaintiff retains the burden of persuasion to establish that age was the but-for cause of the employer’s adverse action.\textsuperscript{161}

\section*{B. Application of Gross to Other Federal Employment Law Statutes}

In the year since the Court issued its opinion in \textit{Gross}, the lower federal courts have extended the Court’s analysis beyond the confines of the ADEA.\textsuperscript{162} For example, in \textit{Serwatka v. Rockwell Automation, Inc.}, the Seventh Circuit applied \textit{Gross} to claims under the Americans with Disabilities Act (ADA).\textsuperscript{163} The Seventh Circuit reasoned that

\begin{footnotes}
\footnote{155 \textit{id.}}
\footnote{156 \textit{id. at 2350}.}
\footnote{157 \textit{id.}}
\footnote{159 \textit{id.} (quoting Engine Mfrs. Ass’n v. S. Coast Air Quality Mgmt. Dist., 541 U.S. 246, 252 (2004)) (internal quotation marks omitted).}
\footnote{160 \textit{id.} (citing dictionary definitions of “because of”).}
\footnote{161 \textit{id. at 2350–52} (emphasis added) (citations omitted).}
\footnote{162 \textit{See, e.g., Serwatka v. Rockwell Automation, Inc., 591 F.3d 957, 959 (7th Cir. 2010).}}
\footnote{163 \textit{id.} The ADA is codified at 42 U.S.C. §§ 12101–12213 (2006).}
[Like the ADEA, the ADA\textsuperscript{164} renders employers liable for employment decisions made “because of” a person’s disability,\textsuperscript{165} and Gross construes “because of” to require a showing of but-for causation. Thus, in the absence of a cross-reference to Title VII’s mixed-motive liability language or comparable stand-alone language in the ADA itself, a plaintiff complaining of discriminatory discharge under the ADA must show that his or her employer would not have fired him but for his actual or perceived disability; proof of mixed motives will not suffice.\textsuperscript{166}

The Seventh Circuit painted with an even broader brush in \textit{Fairley v. Andrews}, holding that, “unless a statute (such as the Civil Rights Act of 1991) provides otherwise, demonstrating but-for causation is part of the plaintiff’s burden in all suits under federal law.”\textsuperscript{167}

Other federal employment antidiscrimination and antiretaliation statutes contain the same “because of” language as the ADEA. For example, the Genetic Information Nondiscrimination Act (GINA)\textsuperscript{168} prohibits employment discrimination against any individual “because of genetic information with respect to” that individual.\textsuperscript{169} Similarly, the antiretaliation provision of the Family Medical Leave Act (FMLA)\textsuperscript{170} prohibits retaliation against an individual “because” she filed a charge or participated in an investigation regarding alleged violations of the FMLA.\textsuperscript{171} Likewise, the antiretaliation provisions of the Fair Labor Standards Act (FLSA)\textsuperscript{172} and the ADEA prohibit retaliation against an individual “because” she

\textsuperscript{164} \textit{Serwatka} dealt with the ADA as it existed prior to January 1, 2009, the effective date of the Americans with Disabilities Act Amendments Act of 2008 (ADAAA), which substantially revised the language of the ADA. \textit{Serwatka}, 591 F.3d at 961 n.1. Among other things, the ADAAA changed the language of 42 U.S.C. § 12112, prohibiting discrimination “because of” a disability to prohibiting discrimination “on the basis of” a disability. Compare 42 U.S.C. § 12112(a) (2006) (effective through Dec. 31, 2008), with 42 U.S.C.A. § 12112(a) (2010) (effective as of Jan. 1, 2009). This change in language does not appear to alter the application of \textit{Gross} to the ADA, as amended by the ADAAA, as the terms “because of” and “on the basis of” are essentially identical. Further, the ADAAA did not add a “mixed motive” framework comparable to Title VII to the ADA and did not incorporate the Title VII “mixed motive” framework into the ADA. The lack of a statutory “mixed motive” framework in the ADEA was central to the Court’s decision in \textit{Gross}. \textit{Gross v. FBL Fin. Servs., Inc.}, 129 S. Ct. 2343, 2346–47 (2009). Accordingly, the Court’s reasoning in \textit{Gross} and its views on congressional intent make its decision just as applicable to the post-ADAAA ADA as it was to the ADA prior to January 1, 2009.

\textsuperscript{165} 42 U.S.C. § 12112(a) (effective through Dec. 31, 2008).

\textsuperscript{166} \textit{Serwatka}, 591 F.3d at 962.

\textsuperscript{167} 578 F.3d 518, 525–26 (7th Cir. 2009) (applying \textit{Gross} to a claim under 42 U.S.C. § 1983); \textit{id.} at 521.


\textsuperscript{169} \textit{Id.} § 2000ff-1(a) (emphasis added).


\textsuperscript{171} \textit{Id.} § 2615(b) (emphasis added).

\textsuperscript{172} \textit{Id.} § 215(a)(3).
engaged in activity protected by those statutes. Further, none of these statutes incorporate the mixed-motive framework of Title VII or contain their own mixed-motive framework. *Gross* likely applies with full force to each of these statutes. For example, a plaintiff claiming genetic discrimination under GINA would have to prove that her genetic information was the but-for cause of the adverse employment action, or, to use the Supreme Court’s phrase from *Gross*, the plaintiff would have to prove her genetic information “was the ‘reason’ that [her] employer decided to act.”

### VI. TWOMBLY/IQBAL, GROSS AND THE RISE OF CANNIBALISTIC FACTS

As discussed below, the combination of the fact pleading requirements under *Twombly/Iqbal*, *Gross*’s but-for causation requirement, the traditional rules regarding affirmative defenses appearing on the face of the complaint, the nature of pleaded facts after *Twombly/Iqbal*, and the assumption of truth rule give rise to “cannibalistic facts” and should result in the failure of any claim under a But-For Statute pleaded as part of a compound employment discrimination claim.

#### A. The Facts that Must Be Plead to Support Compound Discrimination Claims Under Twombly/Iqbal

Prior to the Court’s decision in *Twombly*, it was not difficult to plead a claim for employment discrimination that was sufficient to survive a motion to dismiss under Rule 12(b)(6). Based on the Supreme Court’s decision in *Swierkiewicz v. Sorema N.A.*, little more was required to satisfy Rule 8(a)(2) and the *Conley* test than allegations that the plaintiff was a member of a protected class, that she suffered an adverse employment action, and that, upon information and belief, the adverse employment action was motivated by discriminatory intent. This began to change with *Twombly* and unequivocally changed with *Iqbal*.

One of the most jarring lessons from *Twombly/Iqbal* generally—and from *Iqbal*, in particular—was that the virtually universal allegation of discriminatory intent was no longer sufficient to support a claim for employment discrimination.

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173 Id. § 623(d).
176 *See id.* at 513–14.
177 In *Iqbal*, the Supreme Court concluded that the following allegation of discriminatory intent was conclusory and thus not entitled to the assumption of truth enjoyed by facts: “Respondent pleads that petitioners [Ashcroft and Mueller] ‘knew of, condoned, and willfully and maliciously agreed to subject [Iqbal]’ 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.’” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1951 (2009) (quoting First Amended Complaint and Jury Demand ¶ 96, *Iqbal* v. *Ashcroft*, No. 04 CV 1809 (JG)(JAA) (E.D.N.Y. Sept. 30, 2004), *appendix D* in Petition for a Writ of Certiorari at 172a, *Iqbal*, 129 S. Ct. 1937 (No. 07-1015)). In a typical employment discrimination case, the plaintiff must prove that her genetic information was the but-for cause of the adverse employment action.
discrimination. Instead, as we have seen, the Twombly/Iqbal plausibility pleading mandates that a complaint for discrimination contain “factual content” which, when accepted as true, is sufficient to “allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.”

In the context of a claim for employment discrimination, the complaint must contain facts detailing the protected category of which the plaintiff is a member, the adverse employment action he suffered, and critically, the factual basis for the conclusory allegation that the adverse employment action was the result of the discriminatory intent of the relevant decision maker. Facts sufficient to support the inherently conclusory allegation of discriminatory intent may include, among other things, the following:

(1) In disparate discipline action, a similarly situated employee from outside the plaintiff’s protected category engaged in the same (or worse) conduct as the plaintiff but was not disciplined as severely as the plaintiff.180

discrimination complaint, a plaintiff—pre-Iqbal at least—would have included similar allegations regarding the discriminatory intent of the employer. For example, in Swierkiewicz, the Court took a far broader view of Rule 8(a)(2) than in Twombly/Iqbal and held the plaintiff’s allegations were sufficient to survive a motion to dismiss, 534 U.S. at 515, even though the plaintiff pleaded the employer’s intent to discriminate against him based on his national origin and age: “[Employer] demoted Mr. Swierkiewicz on account of his national origin (Hungarian) and his age (he was 49 at the time).” Amended Complaint at ¶ 20, Swierkiewicz v. Sorema N.A., No. 99-cv-12272-LAP (S.D.N.Y. Apr. 19, 2010). This allegation of discriminatory intent is, without question, a conclusory allegation not entitled to the presumption of truth under Twombly/Iqbal. The inherent tension between Swierkiewicz and Twombly/Iqbal is discussed in depth by Professor Seiner. See generally Joseph A. Seiner, The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases, 2009 U. ILL. L. REV. 1011. In my view, the essential holding in Swierkiewicz was overruled by Twombly/Iqbal and it is not possible to harmonize Swierkiewicz with Twombly/Iqbal. Swierkiewicz is “effectively . . . dead.” See Suja A. Thomas, The New Summary Judgment Motion: The Motion to Dismiss under Iqbal and Twombly, 14 LEWIS & CLARK L. REV. 15, 36 (2010).


179 See, e.g., Mitchell v. Project Renewal, No. 09 Civ. 1958, 2010 U.S. Dist. LEXIS 8323, at *7–8 (S.D.N.Y. Jan. 29, 2010) (dismissing plaintiff’s race discrimination claim because plaintiff failed to plead facts in support of her conclusory allegation that she believed her termination was because of her race).

(2) In a failure to promote action, the successful applicant for the position at issue was from outside the plaintiff’s protected category and was objectively less qualified for the position than the plaintiff;\(^{181}\)

(3) In a termination action, that the plaintiff was replaced by someone outside the plaintiff’s protected category with equal or inferior qualifications;\(^{182}\) or

(4) In a discrimination action, that the employer treated those outside the plaintiff’s protected category better than it treated the plaintiff under similar circumstance.\(^{183}\)

Critically, the plaintiff’s complaint must contain these facts in support of each claim in a compound employment discrimination claim.\(^{184}\) Only in this way can each claim be plausible under Twombly/Iqbal.

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181 Under current law in many jurisdictions, a plaintiff in a failure to promote claim need not plead or prove the objective superiority of her qualifications in order to prevail. See, e.g., Anderson v. Westinghouse Savannah River Co., 406 F.3d 248, 269 (4th Cir. 2005). However, after Iqbal, factual allegations that the plaintiff was equally qualified or less qualified than the successful applicant should be insufficient as the “obvious alternative explanation” that the employer simply selected the most qualified applicant for the position renders an inference of unlawful discrimination “not a plausible conclusion.” Iqbal, 129 S. Ct. at 1951–52.

182 See Alexander v. San Diego Unified Sch. Dist., No. 08-CV-1814 JLS, 2010 U.S. Dist. LEXIS 59037, at *14–15 (S.D. Cal. June 15, 2010) (dismissing plaintiff’s ADEA termination claim under Rule 12(b)(6) because plaintiff did not state facts sufficient to show that she was replaced by someone substantially younger with equal or inferior qualifications).

183 See Longariello v. Phx. Union High Sch. Dist., No. CV-09-1606-PHX-LOA, 2009 U.S. Dist. LEXIS 121127, at *10–11 (D. Ariz. Dec. 15, 2009) (dismissing plaintiff’s claims of age and sex discrimination because plaintiff did not plead facts which showed that defendant treated women, who were under forty years of age, more favorably by hiring them to fill the vacant positions that plaintiff allegedly sought).

184 See, e.g., Doverspike v. Int’l Ordinance Techs., No. 09-CV-00473F, 2010 U.S. Dist. LEXIS 25629, at *15–17 (W.D.N.Y. Mar. 17, 2010) (dismissing plaintiff’s Title VII and ADEA claims because “Plaintiff fail[ed] to allege any facts that could plausibly be construed as establishing Plaintiff’s discharge was based on her membership in any of the protected classes of race, national origin, religion or age”); plaintiff specifically failed to allege any facts that any other employee, not a member of a protected class, “was permitted to continue working for defendant despite being unable to work at the requisite pace”; or that “Plaintiff was subjected to work conditions different than other employees, such as shorter breaks, or being separated from the rest of Defendant’s employees during work breaks such as at lunch”); Gompers Rehab. Ctr., 2010 U.S. Dist. LEXIS 411, at *5–7 (dismissing plaintiff’s ADEA claim because plaintiff failed to allege any facts showing who, if anyone, was hired for the position instead of him; also, dismissing plaintiff’s ADA claim because plaintiff failed to plead facts that demonstrated a causal connection between any purported disability and defendant’s refusal to hire him).
B. The Effect of Gross’s But-For Causation Requirement Combined with the Mandate to Accept All Facts in the Complaint as True

If sufficient facts are pleaded to render each claim in a compound employment discrimination claim plausible under Twombly/Iqbal and one of the claims asserts discrimination under the ADEA or one of the other But-For Statutes to which Gross’s but-for causation rule likely applies (i.e., the ADA, the GINA, the FMLA, the FLSA) then the claim under the But-For Statute is subject to dismissal under Rule 12(b)(6).

For the sake of clarity, let us consider compound employment discrimination claims in which the plaintiff—we will call her Jane—asserts that she was discriminated against based on her age (fifty-four) and her sex (female) when her employer fired her. Jane pleaded facts in her complaint that, in isolation from each other, would render her claim of age discrimination in violation of the ADEA and her claim for sex discrimination in violation of Title VII individually and separately plausible. However, in considering her employer’s motion to dismiss, the court cannot consider the pleaded facts in isolation from each other. Rather, it is bound by the assumption of truth rule and “must accept as true all of the factual allegations contained in the complaint.” The court does not have the discretion to accept some facts as true when considering the plausibility of her Title VII claim, but ignore those facts when considering the plausibility of her ADEA claim.

Under Gross, Jane can prevail on her age discrimination claim only if her “age was the reason that [her] employer decided to act.” Accepting all of Jane’s pleaded facts as true—including those that support her sex discrimination complaint—Jane’s complaint asserts that her employer discharged her based on both her age and her sex. Because Jane’s sex motivated her employer just as much as her age (based on the facts pleaded in her complaint), Jane’s age was not “the reason” her employer discharged her. Jane’s assertion that her age was, in fact, “the reason” for her discharge, is not facially plausible in light of all of the facts.

185 See supra Part V.B.
186 For the sake of clarity, I will refer only to the ADEA and age; however, this discussion applies equally to any of the other But-For Statutes.
188 The Court’s statement in Erickson, that a court “must accept as true all of the factual allegations contained in the complaint,” is clear and unambiguous. 551 U.S. at 94 (emphasis added). It requires a court to accept as true “all” facts pleaded in the entire complaint—not simply those facts pleaded in support of a particular claim. Id.
189 Gross v. FBL Fin. Servs., Inc., 129 S. Ct. 2343, 2350 (2009) (emphasis added) (internal quotation marks omitted). However, Jane can prevail on her sex discrimination claim under Title VII on a “mixed motive” theory even if her sex was only a motivating factor in her employer’s decision to fire her. See 42 U.S.C. § 2000e-2(m) (2006). Her employer would escape liability if it is able to prove that it would have taken the same action absent its consideration of her sex. See 42 U.S.C. § 2000e-5(g)(2)(B).
pleaded in her complaint. Additionally, the face of Jane’s complaint reveals both
an affirmative defense and an insurmountable bar to recovery as to Jane’s claim for
age discrimination, namely lack of causation. In short, the facts Jane pleaded to
support her Title VII claim cannibalized her ADEA claim by rendering causation
implausible. Accordingly, the court should dismiss Jane’s age discrimination
claim pursuant to Rule 12(b)(6).190

The result is even more extreme if the plaintiff pleads claims under two
separate But-For Statutes. Assume that instead of a claim under the ADEA and a
claim under Title VII, Jane asserts a claim under the ADEA and a claim for genetic
information discrimination under GINA. As before, Jane pleads facts that, in
isolation, render each of these claims separately plausible. Both of these statutes
prohibit discrimination “because of” Jane’s protected characteristic and, under
Gross, both require but-for causation.192 Accepting as true all the facts pleaded in
Jane’s complaint,193 it is inescapable that both Jane’s age and her genetic
information cannot be “the reason”194 for the adverse employment action.
Each claim cannibalizes and defeats the other by rendering causation implausible.

The most extreme scenario involves two claims under the same But-For
Statute. Assume, for example, that Jane asserted two claims under the ADEA, one
623(d) for retaliation from complaining about alleged age discrimination in
the workplace. Assume also that both claims relate to Jane’s termination195 and, as
before, that Jane pleaded facts in her complaint sufficient to render each claim
separately plausible. The discrimination claim requires that the adverse
employment action be “because of” Jane’s age. Likewise, the retaliation claim
requires that the adverse employment action be “because” Jane engaged in
protected activity. Under Gross, both claims require but-for causation.198

190 Jonathan Harkavy, who reviewed an early draft of this Article, was the first to
describe this combination as creating cannibalistic facts. The description is apt, as the facts
that support one claim effectively “eat” the other claim.

191 Jane’s claim for sex discrimination under Title VII survives this analysis and
should not be dismissed. Arguably, Jane should be limited to a “mixed motive” theory on
her sex discrimination claim, which would significantly limit her remedies if she was
successful. See 42 U.S.C. § 2000e-5(g)(2)(B). Whether, under the pleading requirements of
Twombly/Iqbal, Jane would be bound to her pleaded facts to such a degree that she would
be prevented from ultimately proving her claim for sex discrimination without resorting to
a “mixed motive” theory, is beyond the scope of this Article.

192 Gross, 129 S. Ct. at 2350.


194 Id. (emphasis added).

195 If the claims related to separate adverse employment actions—e.g., a failure to
promote for the discrimination claim and termination for the retaliation claim—then both
claims would survive because “but for” causation would still plausibly exist as to the
employer’s two separate adverse actions.


197 Id. § 623(d).

Accepting the facts pleaded to support each claim under Twombly/Iqbal as true, Jane’s complaint asserts that her employer discharged her based on both her age and her protected activity. Because Jane’s age motivated her employer just as much as her protected activity—and vice versa—neither Jane’s age nor her protected activity was “the reason” her employer discharged her. Jane’s assertions that her age and her protected activity were both, separately, “the reason” for her discharge, are not facially plausible in light of all of the facts pleaded in her complaint. Again, each claim defeats (or cannibalizes) the other. 199

These conclusions are difficult to accept. 200 Among other things, they require one to reconsider the nature of pleaded facts and jettison the notion that a plaintiff can plead inconsistent facts under Rule 8(d). 201 However, “[t]he only logical inference to be drawn from Gross is that an employee cannot claim that age is a motive for the employer’s adverse conduct and simultaneously claim that there was any other proscribed motive involved.” 202

VII. EVALUATING THE IMPACT OF TWOMBLY/IQBAL, THE ASSUMPTION OF TRUTH RULE AND GROSS ON COMPOUND EMPLOYMENT DISCRIMINATION CLAIMS

Examining the impact that Twombly/Iqbal, the assumption of truth rule, and Gross have on compound employment discrimination claims leads us to question whether the rise of cannibalistic facts and the potential death of compound employment discrimination claims would be such a bad thing. For practitioners and parties, the answer often depends on which side of the courtroom they sit. For plaintiffs/employees, something that leads (or requires) them to forego the pleading of potentially viable claims or that results in routine motions to dismiss is subjectively “bad.” For practitioners and parties, the answer often depends on which side of the courtroom they sit. For plaintiffs/employees, something that leads (or requires) them to forego the pleading of potentially viable claims or that results in routine motions to dismiss is subjectively “bad.” It leaves valid and potentially meritorious claims unlitigated, significantly slows the progress of the case through the courts, and simultaneously increases litigation costs and decreases potential settlement value. For defendants/employers, a theory that results in fewer claims in an action focuses and streamlines the litigation process by narrowing the issues subject to discovery. It decreases litigation costs (despite the possibility of a motion to dismiss) and drives down the potential settlement value of the case, while at the same time significantly slowing the progress of the case. All of this is subjectively “good.”

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199 This is a particularly perverted result and surely not what Congress intended when it crafted the ADEA.

200 The death of compound employment discrimination claims would likely be a slow one. Initially, there may be more motions to dismiss filed by defendants. Over time, plaintiffs may seek to avoid the expense and delay caused by these motions by avoiding compound employment discrimination claims and, instead, focusing on their strongest facts and their strongest claims.

201 See supra Part IV.

202 Culver v. Birmingham Bd. of Educ., 646 F. Supp. 2d 1270, 1271–72 (N.D. Ala. 2009) (requiring plaintiff to abandon either this ADEA claim or his race discrimination claim under Title VII because he could not, consistent with Gross, pursue both).
However, there are far broader considerations at issue, including, among others, the deference owed to congressional intent, the recognition and implementation of sound public policy, and even the purpose of employment antidiscrimination laws. Simply put, the death of compound employment discrimination claims based on the combination of Twombly/Iqbal, Gross, and the assumption of truth rule would significantly undermine congressional intent and erode important protections for employees.

Congress passed the ADEA, the ADA, the GINA, and the other But-For Statutes to combat discrimination in the workplace. For example, Congress specifically declared in the ADEA that “older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs”; that “the setting of arbitrary age limits regardless of potential for job performance has become a common practice[;]” and that “unemployment, especially long-term unemployment . . . is, relative to the younger ages, high among older workers[,] their numbers are great and growing[,] and their employment problems grave[.]” Accordingly, Congress specifically stated that “the purpose of [the ADEA is] to promote employment of older persons based on their ability rather than age; [and] to prohibit arbitrary age discrimination in employment.” Congress made similar findings when passing the ADA, the ADA Amendments Act, and GINA, among other statutes. As remedial statutes, all of these statutes, traditionally, must be broadly construed so as to effectuate the remedial purposes for which Congress enacted them. Further, the


204 See supra note 203 and accompanying text; see infra notes 205–209 and accompanying text.


206 Id. § 621(b).


210 See, e.g., Disabled in Action of Pa. v. Se. Pa. Transp. Auth., 539 F.3d 199, 208–09 (3d Cir. 2008) (“[W]e note that ‘[t]he ADA is a remedial statute, designed to eliminate discrimination against the disabled in all facets of society,’ and as such, ‘it must be broadly construed to effectuate its purposes.’” (quoting Kinney v. Yerusalim, 812 F. Supp. 547,
long-standing policy of the Federal Rules of Civil Procedure, at least prior to *Twombly/Iqbal*, was “to focus litigation on the merits of a claim,”211 rather than to treat pleading as a “game of skill in which one misstep by counsel may be decisive to the outcome.”212

However, as discussed in this Article, the combination of *Twombly/Iqbal*, the assumption of truth rule, traditional bases for dismissal, and *Gross* leads to a result that is contrary to the remedial purposes of the But-For Statutes and elevates the form of the pleadings over the merits—or potential merits—of the plaintiff’s claims. As we have seen, this iniquitous result may manifest in several ways. A plaintiff may decline to pursue an otherwise meritorious compound employment discrimination claim in order to avoid the delay and expense of defending against a motion to dismiss. A plaintiff’s meritorious claim under a But-For Statute may be cannibalized by—and dismissed as a result of—the facts pleaded to support her Title VII claim. A plaintiff who pleads claims under two But-For Statutes may see the facts required to support each claim cannibalize the other claim, destroy her ability to establish causation on either claim, and lead to the dismissal of the entire action.213

Prior to *Twombly/Iqbal*, it was difficult for a plaintiff in an employment discrimination action to prevail on the merits of her claims.214 But, at least the plaintiff had the opportunity to engage in discovery and have a court review the merits of her claims, whether at the summary judgment stage or at trial. The

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551 (E.D. Pa. 1993)); Zinn v. McKune, 143 F.3d 1353, 1360 (10th Cir. 1998) (Briscoe, J., concurring) (“Because Title VII is a remedial statute, it must be interpreted liberally to effectuate its purpose of eradicating employment discrimination.” (citations omitted)); EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1282 (7th Cir. 1995) (“[T]he employment discrimination statutes have broad remedial purposes and should be interpreted liberally . . . .”); see also H.R. Rep. No. 102-40, pt. 2, at 34 (1991), reprinted in 1991 U.S.C.C.A.N. (105 Stat.) 727 (stating that “remedial statutes, such as civil rights law, are to be broadly construed”).


213 As previously discussed, the same would be true for two claims (i.e., discrimination and retaliation) under the same But-For Statute.

214 According to the 2009 Annual Report of the Director: Judicial Business of the United States Courts, in fiscal year 2009 (October 1, 2008 through September 30, 2009), the U.S. District Courts closed a total of 12,739 cases, which were classified either as “ADA-Employment” or “Employment.” Of these case closures, 2,609 (20.48%) were closed without court action (i.e., stipulations of dismissal filed by the parties); 9,743 (76.48%) were closed by court action prior to trial (i.e., dismissal by the court, granting of summary judgment, and the like); and only 355 (2.62%) were closed as the result of a trial. See James C. Duff, Admin. Office of the U.S. Courts, 2009 Annual Report of the Director: Judicial Business of the U.S. Courts 167–68 tbl. C-4 (2010), available at http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2009/JudicialBusinesspdfversion.pdf. Even if employees prevailed at trial more than 50% of the time and some percentage of the pretrial closures were judgments for the plaintiff as a matter of law, employees prevailed on the merits in a very small percentage of cases.
combination of \textit{Twombly/Iqbal}, the assumption of truth rule, and \textit{Gross} raises a substantial risk that a plaintiff’s compound employment discrimination claim will fail at the motion to dismiss stage—even if meritorious. Given the findings and purposes Congress articulated in passing these statutes, this cannot be what Congress intended.

VIII. AMELIORATING THE IMPACT OF \textit{TWOMBLY/IQBAL}, THE ASSUMPTION OF TRUTH RULE, AND \textit{GROSS} ON COMPOUND EMPLOYMENT DISCRIMINATION CLAIMS

Given the congressional intent to eliminate discrimination articulated in conjunction with the enactment of the various But-For Statutes, ameliorating the impact of \textit{Twombly/Iqbal}, the assumption of truth rule, and \textit{Gross} on compound employment discrimination claims is a necessity. There are a number of ways to potentially eliminate this impact. These “fixes” are primarily within the power of three groups: (A) the federal courts; (B) Congress; and (C) the Advisory Committee on Civil Rules of the Judicial Conference of the United States.

A. The Federal Courts: Saving Compound Employment Discrimination Claims One at a Time

Given that the Supreme Court is unlikely to abandon plausibility pleading and reverse (or severely limit) \textit{Twombly/Iqbal}, at least in the near future, the lower courts are largely on their own in seeking to ameliorate the combined effects of \textit{Twombly/Iqbal}, the assumption of truth rule, and \textit{Gross} on compound employment discrimination claims. In order to do this, however, lower courts will have to ignore the underlying problem. For example, lower courts could continue to simply disregard motions to dismiss that raise \textit{Gross} concerns by concluding either that \textit{Gross} “concerned a plaintiff’s ultimate burden of proof, as conveyed in a jury instruction,” and not the pleadings, or that a plaintiff is entitled to plead

\footnotesize{\begin{itemize}
  \item[215] See supra notes 203–208 and accompanying text.
  \item[216] The courts and Congress can implement some fixes independently. However, all three groups must work together to implement what is arguably the best and most elegant fix: an amendment to the Federal Rules of Civil Procedure.
  \item[217] Discussing all the various ways to cure the ills wrought by \textit{Twombly/Iqbal} is beyond the scope of this Article. This issue has been and continues to be written about and analyzed by many respected academics. See, e.g., Joseph A. Seiner, \textit{After Iqbal}, 45 WAKE FOREST L. REV. 179 (2010); Joseph A. Seiner, \textit{The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases}, 2009 U. ILL. L. REV. 1011 (2009); Adam Steinman, \textit{The Pleading Problem}, 62 STAN. L. REV. 1293 (2010).
  \item[218] Chacko v. Worldwide Flight Servs., Inc., No. 08-CV-2363 (NGG) (JO), 2010 U.S. Dist. LEXIS 9103, at *12 (E.D.N.Y. Feb. 1, 2010); see also Riley v. Vilsack, 665 F. Supp. 2d 994, 1006 (W.D. Wis. 2009) (stating that “\textit{Gross} . . . had nothing to do with pleading, but rather the proper standard of \textit{proof} under the ADEA” and refusing to dismiss an ADEA claim despite the presence of a disability discrimination claim). In reality, this rationale offers scant support for refusing to dismiss the but-for claim at issue. The issue of
alternative and inconsistent claims under Rule 8(d).

While such decisions do not solve the larger problem, they remedy any iniquities for individual plaintiffs on a case-by-case basis—at least until defendants begin to raise this issue on appeal.

B. Congress: Amending the Antidiscrimination Statutes

Congress can remedy some of the effects of Twombly/Iqbal, the assumption of truth rule, and Gross on compound employment discrimination claims by amending or supplementing the language of the But-For Statutes in a way that would overturn Gross.

To this end, during the 111th Congress, Democrats introduced the Protecting Older Workers Against Discrimination Act (POWADA) in both the House and the Senate. POWADA purports to overturn Gross by making a mixed-motive theory available under the ADEA and other unidentified antidiscrimination statutes. In causation—and specifically the plaintiff's inability to establish it—only becomes more important after the pleading stage. Allowing the plaintiff to conduct discovery on a doomed claim will only waste the parties' resources. See Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558–59 (2007). As the Twombly Court specifically stated, such a "basic deficiency should . . . be exposed at the point of minimum expenditure of time and money by the parties and the court." Id. at 558 (emphasis added) (quoting 5 Wright & Miller, supra note 37, § 1216, at 233–34). Allowing compound employment discrimination claims to proceed past the motion to dismiss stage, only to see the but-for claim fail for a lack of causation at summary judgment or at trial, is a waste of the resources of the parties and the court, a result the Supreme Court specifically sought to avoid in Twombly. Id. at 558–59.

219 Griffin v. United Parcel Serv., Inc., No: 08-2000, 2010 U.S. Dist. LEXIS 47081, at *4–5 (E.D. La. Jan. 8, 2010). A court could plausibly drill down into the rationale a little deeper and articulate a rule where courts consider the facts pleaded in support of separate and distinct claims independently when considering a motion to dismiss. However, such a rule would clearly conflict with the assumption of truth rule as currently articulated by the Supreme Court.

220 As the problem described in this Article is the result of the combination of Twombly/Iqbal, the assumption of truth rule, and Gross, simply fixing the causation standard in the ADEA and the other But-For Statutes would not completely correct the problem. However, it would be a very good start.

221 In addition to POWADA, Senator Arlen Specter of Pennsylvania introduced the Notice Pleading Restoration Act of 2009 in the Senate during the 111th Congress. See S. 1504, 111th Cong. (2009). This bill sought to reverse Twombly/Iqbal by mandating that "a Federal court shall not dismiss a complaint under rule 12(b)(6) or (e) of the Federal Rules of Civil Procedure, except under the standards set forth by the Supreme Court of the United States in Conley v. Gibson, 355 U.S. 41 (1957)." S. 1504, 111th Cong. § 2. For an analysis of this bill by Professor Michael Dorf, see Michael C. Dorf, Should Congress Change the Standard for Dismissing a Federal Lawsuit?, FINDLAW (July 29, 2009), http://writ.news.findlaw.com/dorf/20090729.html. The Senate did not vote on this bill during the 111th Congress and no similar bill has been introduced during the 112th Congress.
pertinent part, POWADA would add a new subsection (g) to 29 U.S.C. § 623, which is the antidiscrimination provision of the ADEA. This new subsection (g) would provide in relevant part:

(1) For any claim brought under this Act . . . a plaintiff establishes an unlawful employment practice if the plaintiff demonstrates by a preponderance of the evidence that—

(A) an impermissible factor under that Act or authority was a motivating factor for the practice complained of, even if other factors also motivated that practice; or

(B) the practice complained of would not have occurred in the absence of an impermissible factor.

(5) This subsection shall apply to any claim that the practice complained of was motivated by a reason that is impermissible, with regard to that practice, under—

(A) this Act, including subsection (d);

(B) any Federal law forbidding employment discrimination;

(C) any law forbidding discrimination of the type described in subsection (d) or forbidding other retaliation against an individual for engaging in, or interference with, any federally protected activity including the exercise of any right established by Federal law (including a whistleblower law); or

(D) any provision of the Constitution that protects against discrimination or retaliation.222

POWADA is a good starting point for legislation designed to overturn Gross. It corrects Congress’s failure to add a mixed-motive scheme to the ADEA in the Civil Rights Act of 1991 and makes the ADEA consistent with Title VII’s remedial framework for mixed-motive cases.223 While some, most notably former EEOC General Counsel Eric S. Dreiband, have criticized POWADA for not being protective enough of employee’s rights,224 the act would bring consistency to

222 H.R. 3721, 111th Cong. § 3 (2009).
223 See 42 U.S.C. § 2000e–2(m) (2006) (“[A]n unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.”); id. § 2000e–5(g)(2)(B) (limiting remedies in mixed-motive cases).
employment discrimination law by applying Title VII’s mixed-motive framework to other antidiscrimination statutes. However, to accomplish this goal, a glaring ambiguity in POWADA’s language must be corrected.

In subsections (5)(B) and (C), POWADA generically refers, respectively, to “any Federal law forbidding employment discrimination” and “any law forbidding” retaliation. Yet, POWADA does not identify specific statutes, other than the ADEA, to which it is intended to apply. Congress must identify which statutes it is amending via POWADA. At a minimum, these should include the But-For Statutes and the various federal whistle-blower protection statutes.

C. The Advisory Committee on Civil Rules: Amending the Federal Rules of Civil Procedure

While POWADA225 would eliminate some of the Gross-specific impact by allowing plaintiffs to pursue a mixed-motive theory under the But-For Statutes, a simpler and more complete fix for the impact of Twombly/Iqbal, the assumption of truth rule, and Gross on compound employment discrimination could be to amend the Federal Rules of Civil Procedure. This process starts with the Advisory Committee on Civil Rules.226 Specifically, the Advisory Committee on Civil Rules should recommend amending Rule 8(e) to clarify its meaning and instruct courts to construe the facts pleaded in a complaint in addition to drafting Rule 12(j) to articulate standards of consideration for motions to dismiss, which would completely correct the issues discussed in this Article.

Under the heading “Construing Pleadings,” Rule 8(e) currently provides: “Pleadings must be construed so as to do justice.”227 Unfortunately, after Twombly/Iqbal, in particular, this simple statement no longer provides sufficient

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POWADA would bring consistency to this area of the law by having the same mixed-motive framework apply to virtually all employment discrimination claims. Further, Mr. Drieband’s comments on the lack of value of the mixed-motive theory to plaintiffs ignores the settlement value any valid claim holds. Any claim that can get the plaintiff to a jury will place significant settlement pressure on the defendant because it costs well in excess of $100,000 to take virtually any employment discrimination matter to trial in federal court.

225 The legislative prospects for POWADA are unclear. Congress is mired in partisan wrangling over virtually every piece of legislation. Neither the House nor the Senate voted on POWADA during the 111th Congress. To date, POWADA has not been reintroduced during the 112th Congress.


227 FED. R. CIV. P. 8(e).
guidance regarding Rule 8’s requirements for construing pleadings. The following revision of Rule 8(e) would, in large part, correct this inadequacy:

**Construing Pleadings.** Pleadings must be construed so as to do justice. In order to construe pleadings so as to do justice, the court must be mindful of the nature of pleadings embodied in this Rule and the long-standing policy of the Federal Rules of Civil Procedure to focus litigation on the merits of a claim, not on the technical forms of pleading. As required by this Rule and the Forms contained in the Appendix to these Rules, a pleading need only contain a short and plain statement of the claim showing that the pleader is entitled to relief. Pleading specific facts in support of a claim or defense is not required if the pleading otherwise contains a short and plain statement of the claim or defense sufficient to give the opposing party notice of the claim against it. To the extent that a pleading contains specific facts, a party is permitted to plead alternative or inconsistent facts in support of separate claims or defenses contained in the party’s pleading pursuant to Rule 8(d). Provided that the pleader indicates in the pleading the specific claim or defense to which the alternative or inconsistent facts relate, the court may not construe such alternative or inconsistent facts as a basis for concluding that the pleading does not state a claim upon which relief can be granted. Allegations of malice, intent, knowledge, and other conditions of a person’s mind are allegations of fact to which the assumption of truth applies, even if alleged generally or upon information and belief, subject only to the requirements of Rule 11.

In order to reinforce this revised Rule 8(e) and ensure its application as intended in the context of a motion to dismiss under Rule 12(b)(6), the Advisory Committee on Civil Rules should also recommend adding a new section to Rule 12, designated as Rule 12(j), which would read:

**Construing Pleadings Under Rule 12(b)(6).** As stated in Rule 8(e), pleadings must be construed so as to do justice. In considering a motion to dismiss for failure to state a claim upon which relief can be granted under Rule 12(b)(6), a court must generally accept as true all facts contained in the complaint and draw all reasonable inferences in favor of the nonmoving party. Allegations of malice, intent, knowledge, and other conditions of a person’s mind are allegations of fact to which the assumption of truth applies, even if alleged generally or upon information and belief. If there are multiple claims stated in a pleading, a party is permitted to plead alternative or inconsistent facts in support of separate claims or defenses contained in the pleading. Accordingly, if the pleader clearly designates in the pleading that some facts relate only to a

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particular claim or defense, then the court shall assume the truth of those facts only for the purpose of considering whether the claim to which they relate states a claim upon which relief can be granted. Any facts so designated shall have no effect on any other claim or defense asserted in the pleading and may not be used as a basis for concluding that any other claim, or the pleading as a whole, does not state a claim upon which relief can be granted.

With this guidance on how to construe pleadings “so as to do justice,” plaintiffs are free to plead alternative or inconsistent facts in support of separate claims in a complaint without those facts affecting other claims. These revisions of Rules 8 and 12 would cure the iniquitous effect of the combination of Twombly/Iqbal, the assumption of truth rule, and Gross on compound employment discrimination claims by allowing a plaintiff to essentially compartmentalize her pleaded facts (and the operation of the assumption of truth rule) so that facts pleaded to support one claim would not cannibalize another claim.

With these revisions, our erstwhile plaintiff, Jane, would be able to plead both that she was discriminated against based on her age (fifty-four) and her sex (female) when her employer fired her. Provided that Jane specifically designates which facts relate to which claim by way of headings in her complaint such as “Facts Relevant To Plaintiff’s Claim Under Title VII Only” and “Facts Relevant To Plaintiff’s Claim Under the ADEA Only,” the facts Jane pleaded to support her Title VII claim would remain separate from the facts she pleaded to support her ADEA claim. On a motion to dismiss the ADEA claim pursuant to Gross, the court would not consider the facts Jane pleaded in support of her Title VII claim. Accepting only Jane’s general facts and those specifically relevant to her ADEA claim, Jane’s complaint asserts that her employer discharged her based on her age. At least at the pleading stage, Jane’s age can still be “the reason” for her discharge and her ADEA claim survives the motion to dismiss.

Amending the Federal Rules of Civil Procedure, a process governed by the Rules Enabling Act, is not a simple endeavor. According to the Administrative Office of the U.S. Courts, the “rulemaking process is time consuming and involves

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230 While I said that I would not attempt to rectify Twombly/Iqbal, my proposed amendment to Rule 8(e) and Rule 12(j) would correct at least one critical aspect of Iqbal, namely its holding that an allegation of discriminatory intent is conclusory rather than factual and, therefore, not entitled to the assumption of truth.

231 This formulation would not disturb the traditional rules regarding a pleading which contains an affirmative defense or an insurmountable bar to recovery. A complaint that contains facts which are applicable to all claims, anticipates a defense in an overly prolix manner, or otherwise pleads the party out of court, would still fail unless the prolix facts relate specifically and exclusively to an alternative or inconsistent claim or defense and are clearly designated as such in the pleading.

a minimum of seven stages of formal comment and review” and usually “takes two to three years” to complete.233

The Advisory Committee on Civil Rules initially considers proposed changes in the Rules.234 If the Advisory Committee on Civil Rules approves a proposed amendment, it must then seek permission from the Standing Committee on Rules of Practice and Procedure to publish the proposed amendment for public comment.235 If the Standing Committee approves publication, the Secretary of the Standing Committee arranges for printing and distribution of the proposed amendment to the bench and bar, to publishers, and to the general public.236 The public is normally given six months to submit written comments.237 During the comment period, the Advisory Committee will also schedule one or more public hearings on the proposed amendment, at which it will hear live testimony.238

At the conclusion of the public comment period, the Advisory Committee “takes a fresh look at the proposed rule changes in light of the written comments and testimony.”239 If the Advisory Committee decides to proceed, it submits the proposed amendment to the Standing Committee for approval.240 If the Standing Committee approves, the proposed amendment must then be approved by the Judicial Conference of the United States, the Supreme Court, and Congress.241

Given that the purpose of these proposed amendments is to lessen the impact of several Supreme Court opinions, it is not clear whether the Supreme Court would be any more likely to approve such amendments than it would be to simply reverse Twombly/Iqbal or Gross. However, if amendments such as those proposed above made it through the Advisory Committee, the Standing Committee, and the Judicial Conference—all of which are comprised of eminent jurists, attorneys and law professors—to come before the Supreme Court, it would be difficult for the Court to simply reject the amendments out of hand. The approval of such

234 See id.
235 Id.
236 Id. More than 10,000 persons and organizations are on this mailing list, including federal judges, United States attorneys, federal government agencies and officials, state chief justices and attorneys general, legal publications, law schools, bar associations, and others. Id.
237 Id.
238 Id.
239 Id.
240 Id. At the same time, the Advisory Committee must also submit a report summarizing the comments received from the public, explaining any changes made following the original publication, and reporting minority views of any members of the Advisory Committee who wanted their separate views recorded. Id.
241 See id. (“Congress has a statutory period of at least 7 months to act on any rules prescribed by the Supreme Court. If the Congress does not enact legislation to reject, modify, or defer the rules, they take effect as a matter of law on December 1.”); see also 28 U.S.C. § 2074 (2006).
amendments by the Advisory Committee, the Standing Committee, and the Judicial Conference would send a strong message to the Court that there are problems with the operation of Twombly/Iqbal, Gross, and the assumption of truth rule that need to be addressed. This message would be difficult to ignore. As the amendments proposed herein are not a direct, frontal assault on Twombly/Iqbal, plausibility pleading, or Gross, the Court would have the opportunity to take a step back from the Twombly/Iqbal standard and fine-tune the operation of Gross and the assumption of truth rule without overruling any of these cases outright.

Despite the time and difficulty inherent to amending the Federal Rules of Civil Procedure, the amendments described above would be the most effective means of ameliorating the impact of Twombly/Iqbal, the assumption of truth rule, and Gross on compound employment discrimination claims.

IX. CONCLUSION

As discussed in this Article, the combination of Twombly/Iqbal, traditional bases for dismissal, the assumption of truth rule, and Gross could create cannibalistic facts that virtually destroy the viability of compound employment discrimination claims. This result is contrary to congressional intent and the public policy considerations inherent in the But-For Statutes.

At present, however, only a dramatic reversal by the Supreme Court, action by Congress, or the enactment of amendments to the Federal Rules of Civil Procedure can fully correct the impact on compound employment discrimination claims caused by the combination of Twombly/Iqbal, the assumption of truth rule, and Gross. However, none of these corrective actions is likely in the near future. Until one (or all) of these groups act, only the lower federal courts, acting on a case-by-case basis, can save compound employment discrimination claims. As a result, employment discrimination plaintiffs will be dealing with the effects of Twombly/Iqbal, the assumption of truth rule, and Gross on compound employment discrimination claims for the foreseeable future.