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## When the Music Stops, Why Not Require Certain Title VII Plaintiffs to Find a Chair on Which to Rest Their Complaint?, 42 J. Marshall L. Rev. 505 (2009)

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# WHEN THE MUSIC STOPS, WHY NOT REQUIRE CERTAIN TITLE VII PLAINTIFFS TO FIND A CHAIR ON WHICH TO REST THEIR COMPLAINT?

CATHERINE R. CAIFANO\*

## I. INTRODUCTION

“If you puke on a piece of paper and sign it, you’ve satisfied notice pleading.”<sup>1</sup>

### A. *The Problem*<sup>2</sup>

Suppose that an individual has filed a lawsuit against their former employer alleging gender discrimination.<sup>3</sup> As required by law, prior to filing the lawsuit, the individual filed a charge of discrimination with the Equal Employment Opportunity Commission (hereinafter the “EEOC”).<sup>4</sup> The EEOC advised the employer of the charge, and the employer prepared a response and

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I would like to thank my father, Richard B. Caifano, for teaching me to be passionate about the law—you are a true role model and inspiration to all you mentor. I would also like to thank my mother and sister for always believing in me. A special thanks to my fiancé, Joseph F. Locallo III, for reading the drafts of my Comment countless times, and for always offering guidance and encouragement. I would also like to thank Judge Peter Flynn and the editors and staff of *The John Marshall Law Review* for their insight and assistance. Finally, I would not be where I am today without the support of Leonard Amari—I am forever grateful to you, Leonard.

1. See Interview with Judge Peter Flynn, First District Circuit Court Judge, Chancery Division, and Professor of Illinois Civil Procedure, The John Marshall Law School, in Chicago, Illinois (Aug. 28, 2007) (recalling a quote by his Civil Procedure professor, James WM. Moore).

2. This hypothetical was created by the author for illustrative purposes only. To the best of the author’s knowledge, this hypothetical has not been used in any other publication.

3. See *infra* note 36 (listing other bases for asserting a claim of discrimination in addition to “gender” discrimination).

4. See *Infra* note 45 (describing the procedure for filing a complaint and receiving a response).

participated in the EEOC's investigation<sup>5</sup> by answering a request for documents, filing a response, and allowing interviews of its employees. After its investigation, the EEOC concludes that there was no reasonable cause to find a violation of the law and the individual's charge is dismissed.<sup>6</sup> The employer believes the process is over, but it is not. The individual requested and received a "Right to Sue" letter from the EEOC and sued the employer in federal court.<sup>7</sup> Now all the individual has to do is satisfy the notice pleading requirement under Federal Rule of Civil Procedure 8,<sup>8</sup> and the employer has to defend a lawsuit.

This Comment will address the disparity between an individual's right to file a lawsuit after the EEOC has determined that there has been no violation of the law, and the low threshold of notice pleading in the federal courts. It will also examine the dilemma of an employer having to decide whether to defend a lawsuit through at least the pre-trial discovery process because of the lenient pleading standard or to settle the case and pay an undeserving plaintiff money in lieu of the expense of litigating the case. This Comment will propose that Federal Rule 8 be supplemented by statute<sup>9</sup> to provide for a heightened pleading standard (from notice pleading to fact pleading), specifically for, and limited to, only those individuals who file lawsuits pursuant to Title VII after the EEOC has dismissed their charge finding no reasonable cause to support a violation of the law.

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5. EEOC, EEOC Investigations – What an Employer Should Know, <http://www.eeoc.gov/employers/investigations.html> (last visited Aug. 27, 2007). During the EEOC's investigation, the employer may be asked to submit a statement of position; respond to a Request for Information by submitting copies of personnel policies, the former employee's personnel files, the personnel files of other individuals, and other information; permit an on-site visit by the EEOC investigator; and provide contact information for or have employees available for witness interviews. *Id.*

6. EEOC, EEOC's Charge Processing Procedures, [http://www.eeoc.gov/charge/overview\\_charge\\_processing.html](http://www.eeoc.gov/charge/overview_charge_processing.html) (last visited Aug. 27, 2007).

7. *Id.* When a charge of discrimination is dismissed, a notice is issued in accordance with the law, 42 U.S.C. § 2000, which gives the charging party ninety days in which to file a lawsuit on his or her behalf. *Id.*

8. FED. R. CIV. P. 8(a). The portion of Rule 8 relevant to this Comment is: A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new ground of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several difference types may be demanded.

*Id.*

9. JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE ¶ 8.04(b) (3d ed. 1997); see also 28 U.S.C. § 2071(a) (2006) (stating that federal courts' rules "shall be consistent with Acts of Congress").

## B. *The Reasons for “The Problem”*

In order to understand the reasons for “the problem,” this Comment will first explore the Federal Rules, specifically Rule 8, and the distinction between notice pleading and fact pleading (which is required by some states, including Illinois). After examining the Federal Rules, this Comment will survey the history and policy reasons behind the enactment of Title VII of the Civil Rights Act of 1964. The next focal point of this Comment will be the EEOC, the laws it enforces, the charge filing and investigation process, what employers are required to do, and the infamous “Right to Sue” letter. This Comment will then address the U.S. Supreme Court’s position that there should be no heightened pleading standard for civil rights cases. Finally, it will review the law which allows an individual to file a lawsuit after the EEOC has dismissed a charge of discrimination.

### 1. *The History of the Federal Rules of Civil Procedure*

#### a. *Scope and Purpose of the Rules*

At common law, to come before a royal court, the aggrieved party had to first obtain a writ from the king, which conferred jurisdiction on a particular court.<sup>10</sup> The parties were then required to exchange pleadings that narrowed the issue before the court to a single question of law or fact.<sup>11</sup> This process prompted the first major procedural reform, the Field Code, which was promulgated in 1848.<sup>12</sup> Field Code pleading required plaintiffs to plead facts supporting each and every element of their claim before discovery without access to materials necessary to do so.<sup>13</sup> But further change was needed.

In response to the continued need for change, the Federal Rules of Civil Procedure (hereinafter the “Rules”) were promulgated pursuant to the Rules Enabling Act in 1938.<sup>14</sup> The

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10. Elizabeth Roseman, Comment, *A Phoenix from the Ashes? Heightened Pleading Requirements in Disparate Impact Cases*, 36 SETON HALL L. REV. 1043, 1046 (2006) (citing GENE R. SHREVE & PETER RAVEN-HANSEN, UNDERSTANDING CIVIL PROCEDURE 45[A] (3d ed. 2002)).

11. See *id.* (citing BARBARA A. BABCOCK & TONI M. MASSARO, CIVIL PROCEDURE 272 (2d ed. 2001)).

12. See *id.* (citing Act of Apr. 8, 1847, ch. 59, § 8, 1848 N.Y. Laws 66, 67-68); see also LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 341 (3d ed. 2005) (stating that adoption of Field Code “meant the end of all special pleading, forms of action and writs, the closing of the chasm between equity and law, the destruction of one blow of the paraphernalia of this most recondite, most precious, most lawerly area of law”).

13. See Roseman, *supra* note 10, at 1047 (citing Act of Apr. 12, ch. 379, § 120(2), 1848 N.Y. Laws 497, 521).

14. See 28 U.S.C. §§ 2072-2074 (1934) (giving the Supreme Court power to prescribe “general rules of practice and procedure” and “rules of evidence” for

Rules govern procedure in the U.S. District Courts in all suits of a civil nature, and have been revised numerous times.<sup>15</sup> Guidelines have been established for construction of the Rules by the federal courts.<sup>16</sup>

“Congress has the general power to regulate courts and . . . specific power to authorize the imposition of sanctions.”<sup>17</sup> Congress can, and has, enacted Rules of Practice and Procedure of Evidence directly.<sup>18</sup>

b. Welcome to Notice Pleading: Federal Rule of Civil Procedure 8

Among other things, Rule 8 sets forth the general rules of pleading claims for relief in federal court.<sup>19</sup> Pleadings must contain only a short and plain statement sufficient to give notice to the defendant.<sup>20</sup> “Rule 8(a)’s simplified pleading standard applies to all civil actions, with limited exceptions.”<sup>21</sup> Additionally, “pleadings shall be construed so as to do justice.”<sup>22</sup>

Federal Rule 8 is “fashioned in the interest of fair and reasonable notice, not technicality.”<sup>23</sup> A complaint satisfies notice pleading if it “outlines the law claimed to be violated and connects defendants with the alleged violation.”<sup>24</sup> This simplified notice

cases in the U.S. district courts and court of appeals).

15. FED. R. CIV. P. 1. “These rules govern the procedure in all civil actions and proceedings in the U.S. district courts, except as stated in Rule 81.” *Id.*

16. “They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.” *Id.* The Rules shall also be construed to create a uniform system of procedure, to favor decisions on the merits of a case, and to eliminate “the sporting” theory of justice. MOORE ET AL., *supra* note 9, ¶ 121(1)(a), (c).

17. See *Willy v. Coastal Corp.*, 503 U.S. 131, 136-37 (1992) (referring to the variety of circumstances where sanctions can be imposed); see U.S. CONST. art. I § 8, cl. 1 and 18 (authorizing Congress to establish federal courts); see also U.S. CONST. art. I § 8, cl. 18 (authorizing Congress to “make all laws necessary and proper to establish those courts”).

18. See MOORE ET AL., *supra* note 9, ¶ 1.04(1)(d) (referring to the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 320935, 108 Stat. 1796 (1994)).

19. See *supra* note 8 (explaining the requirements of FED. R. CIV. P. 8(a)).

20. See *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (standing for the proposition that the illustrative forms appended to the Rules plainly demonstrate that the Rules do not require a complainant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is “a short and plain statement of the claim” that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests).

21. See *Swierkiewicz v. Sorema*, 534 U.S. 506, 513 (2002) (holding that FED. R. CIV. P. 8(a) applies to all civil actions unless specified in other rules, under maxim “[e]xpressio unius est exclusio alterius”).

22. See FED. R. CIV. P. 8(e) (describing how federal courts construe pleadings).

23. MOORE ET AL., *supra* note 9, ¶ 8.04(1)(a).

24. See *id.* (referencing the Court’s decision in *Brownlee v. Conine*, 957 F.2d

pleading standard relies on liberal discovery rules<sup>25</sup> and summary judgment motions<sup>26</sup> to define disputed facts and issues and to dispose of unmeritorious claims.<sup>27</sup> Rule 8 is subject to Rule 11.<sup>28</sup>

## 2. *Show Me Your Facts*<sup>29</sup>

Under fact pleading, a claimant must plead the cause of action, the elements of the claim and facts to support the cause of action.<sup>30</sup> Under fact pleading, a judge determines up front whether the claimant has pled enough facts to present the case to a jury.<sup>31</sup>

There is a significant difference between what a claimant is required to plead in state court versus federal court. It is the position of the federal courts that detailed information about a claim is gained through discovery and other procedures.<sup>32</sup> However, state courts also have rules regarding the discovery process and summary judgment.<sup>33</sup> Fact pleading draws a line at the beginning of the case (immediate dismissal) rather than at the

353, 354 (7th Cir. 1992), which held that a “conclusory” complaint is “not automatically fatal”).

25. See FED. R. CIV. P. 26(b)(1) (stating that any relevant, non-privileged matter is subject to discovery).

26. See FED. R. CIV. P. 56(a)-(b) (stating that either party can move for summary judgment at any time, but that a plaintiff must wait for twenty days to expire after commencing the lawsuit).

27. *Swierkiewicz*, 534 U.S. at 512-13.

28. See FED. R. CIV. P. 11(b) (stating generally that when an attorney or unrepresented party presents a pleading to the court, he is certifying that to the best of the person’s knowledge, information and belief, formed after an inquiry reasonable under the circumstances, the allegations and other facts have evidentiary support or will likely be supported by evidence after further investigation). If not, the attorney or unrepresented party may be subject to sanctions. FED. R. CIV. P. 11(c).

29. The State of Illinois will be used as an example of how fact pleading works.

30. 735 ILL. COMP. STAT. 5/2-603 (2007).

31. Judge Peter Flynn, Lecture at The John Marshall Law School, Illinois Civil Procedure class (Aug. 25, 2007). The “cause of action” is the legal construction of the dispute, the “elements of the claim” are like the bones of a skeleton, and the “facts to support the cause of action” are like the flesh of the skeleton. *Id.* Judge Flynn further informed the class that a claimant needs enough facts to say to the judge that if I prove all of these facts, I should get to the jury, and the more complicated the cause of action, the more facts a claimant will be required to plead. *Id.* If the claimant has not pled enough facts, everyone should go home. *Id.*

32. *Swierkiewicz*, 534 U.S. at 512-13.

33. See 735 ILL. COMP. STAT. 5/2-1003(a)(2007) (stating that all discovery shall be in accordance with the rules); see also 735 ILL. COMP. STAT. 5/2-1005(b)-(c)(2007) (stating that a defendant may move for a summary judgment in his or her favor as to all or any part of the complaint and judgment shall be entered in his favor if there is no genuine issue of material fact).

middle (summary judgment) or end (jury or bench trial) as in federal court.

### 3. Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 (hereinafter the “Act”) prohibits discrimination in the workplace by employers against any employee.<sup>34</sup> Under Title VII, it is illegal to discriminate in any aspect of employment.<sup>35</sup> Among others, discriminatory practices include harassment and retaliation.<sup>36</sup> Title VII also protects against an unlawful employment practice based on disparate impact.<sup>37</sup>

34. 42 U.S.C. § 2000e-2(a) (1964). The relevant portion of this Section states:

It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual’s race, color, religion, sex, or national origin . . . .

*Id.*

Under the Act, the term “employee” is defined as:

an individual employed by an employer, except that the term “employee” shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer’s personal staff, or an appointee on the policy making level or an immediate advisor with respect to the exercise of the constitutional or legal powers of office. . . .

*Id.* at 2000e(f). The term “employer” is defined as “a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . .” *Id.* at 2000e(b).

35. Aspects of employment include: hiring and firing; compensation, assignment, or classification of employees; transfer, promotion, layoff, or recall; job advertisements; recruiting; testing; use of company facilities; training and apprenticeship programs; fringe benefits; pay, retirement plans, and disability leave; or other terms and conditions of employment. EEOC, Discriminatory Practices, [http://www.eeoc.gov/abouteeoc/overview\\_practices.html](http://www.eeoc.gov/abouteeoc/overview_practices.html) (last visited Aug. 27, 2007).

36. *See id.* (including: harassment on the basis of race, color, religion, sex, national origin, disability, or age; retaliation against an individual for filing a charge of discrimination, participating in an investigation, or opposing discriminatory practices; employment decisions based on stereotypes or assumptions about the abilities, traits, or performance of individuals of a certain sex, race, age, religion, or ethnic group, or individuals with disabilities; and denying employment opportunities to a person because of marriage to, or association with, an individual of a particular race, religion, national origin, or an individual with a disability. Title VII also prohibits discrimination because of participation in schools or places of worship associated with a particular racial, ethnic, or religious group).

37. 42 U.S.C. § 2000e-2(k)(2006).

An unlawful employment practice based on disparate impact is established under [Title VII] only if a complaining party demonstrates that a [employer] uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national

Title VII created the agency known as the EEOC.<sup>38</sup> Congress intended the EEOC to be “the lead enforcement agency in the area of workplace discrimination.”<sup>39</sup> The EEOC is empowered to prevent any person from engaging in any unlawful employment practice.<sup>40</sup> Title VII dictates that all laws enforced by the EEOC require the filing of a charge of discrimination with the EEOC before filing a private lawsuit.<sup>41</sup> It further prescribes that the EEOC is responsible for processing the charge.<sup>42</sup>

4. *Proceed Directly to the EEOC (If You Pass Go, Do Not Collect \$200)*<sup>43</sup>

The EEOC is the regulatory body charged with enforcing Title VII.<sup>44</sup> The EEOC’s job begins once an individual files a charge of discrimination (hereinafter the “Charge”) with its office.<sup>45</sup> Between FY 2001 and FY 2006, the EEOC received, on average, 58,437 Title VII Charges per year.<sup>46</sup> After the Charge has been

origin and the [employer] fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or the complaining party makes the demonstration . . . [of] an alternative employment practice and the [employer] refuses to adopt [it].

*Id.*

38. *Id.* § 2000e-4. The EEOC has become a respected advocate for the communities it was created principally to serve. EEOC, Pre 1965: Events Leading to the Creation of EEOC, <http://www.eeoc.gov/abouteeoc/35th/pre1965/index.html> (last visited Sept. 22, 2007). Those communities include all people of the nation because discrimination can occur to anyone of any race, color, religion, national origin, age, disability, and of either sex. *Id.* “EEOC recognizes that as an agency of the government, it has a role of fairness not only to those protected classes whose forebears helped forge the alliances that resulted in the passage of civil rights legislation, but also to the employers and unions that are subject to EEOC jurisdiction.” *Id.*

39. *Id.*

40. 42 U.S.C. § 2000e-5 (2006).

41. *Id.* § 2000e-5(f)(1).

42. *Id.* § 2000e-5(b).

43. A reference to the game of MONOPOLY, Parker Brothers (1935).

44. 42 U.S.C. § 2000e-4.

45. EEOC, Filing a Charge of Employment Discrimination, [http://www.eeoc.gov/charge/overview\\_charge\\_filing.html](http://www.eeoc.gov/charge/overview_charge_filing.html) (last visited Aug. 27, 2007). Any individual who believes that his or her employment rights have been violated may file a charge of discrimination with the EEOC. *Id.* Generally, a charge must be filed with the EEOC within 180 days from the date of the alleged violation. *Id.* However, the 180-day filing deadline is extended to 300 days if the charge is also covered by a state or local anti-discrimination law. *Id.* In order to file a charge, an individual must provide his/her name, address, and telephone number; the name, address and telephone number of his/her employer that is alleged to have engaged in discrimination, and the number of employees, if known; a short description of the alleged violation(s); and the date(s) of the alleged violation(s). *Id.*

46. EEOC, Title VII of the Civil Rights Act of 1964 Charges, <http://www.eeoc.gov/stats.vii.html> (last visited Sept. 8, 2007). During FY



filed and the employer has been notified,<sup>47</sup> Title VII requires the EEOC to investigate the Charge to determine whether there is reasonable cause to believe that the statute was violated.<sup>48</sup> Title VII provides that the EEOC's investigation can be broad.<sup>49</sup>

The EEOC has discretion to handle the processing of a Charge in a number of ways before issuing some form of resolution.<sup>50</sup> The EEOC assesses whether there is "reasonable cause" to believe that the Charge is true<sup>51</sup> by examining whether the evidence "establishes under the appropriate legal theory, a prima facie case, whether the employer has provided a viable defense, and whether there is evidence of pretext."<sup>52</sup> Between FY 2001 and FY 2006, the EEOC made a "reasonable cause" determination seven percent of the time on average per year.<sup>53</sup> If

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2001, the EEOC received a total of 59,631 Title VII charges of discrimination. *Id.* During FY 2002, the EEOC received a total of 61,459 Title VII charges of discrimination. *Id.* During FY 2003, the EEOC received a total of 59,075 Title VII charges of discrimination. *Id.* During FY 2004, the EEOC received 58,328 Title VII charges of discrimination. *Id.* During FY 2005, the EEOC received 55,976 Title VII charges of discrimination. *Id.* During FY 2006, the EEOC received 56,155 Title VII charges of discrimination. *Id.*

47. EEOC, *supra* note 6.

48. See 3-82 LABOR AND EMPLOYMENT LAW § 82.02 (MB 2005) (citing 42 U.S.C. § 2000e-5(b) and EEOC v. Michael Constr. Co., 706 F.2d 244, 248 (8th Cir. 1983)).

49. 42 U.S.C. § 2000e-8(a); see, e.g., EEOC, *supra* note 6 (stating that the EEOC has the right to make written requests for information, interview people, review documents, and visit the facility where the alleged discrimination occurred).

50. See, e.g., EEOC, *supra* note 6 (providing that the EEOC may assign a charge for priority investigation if the initial facts appear to support a violation of the law). The EEOC can seek to settle a charge. *Id.* A charge may also be dismissed at any point if, in the agency's best judgment, further investigation will not establish a violation of the law. *Id.* When a charge is dismissed, a notice is issued in accordance with the law which gives the charging party ninety days in which to file suit. *Id.*

51. 42 U.S.C. § 2000e-5(b); EEOC, Definition of Terms, <http://www.eeoc.gov/stats/define.html> (last visited Sept. 8, 2007).

52. EEOC Compliance Manual (CCH) § 40.2.

53. EEOC, *supra* note 46. During FY 2001, the EEOC made a reasonable cause determination 5,014 times out of the 59,631 total charges received, or nine percent of the time on average. *Id.* During FY 2002, the EEOC made a reasonable cause determination 4,380 times out of the 61,459 total charges received, or eight percent of the time on average. *Id.* During FY 2003, the EEOC made a reasonable cause determination 3,181 times out of the 59,075 total charges received, or six percent of the time on average. *Id.* During FY 2004, the EEOC made a reasonable cause determination 2,630 times out of the 59,631 total charges received, or five percent of the time on average. *Id.* During FY 2005, the EEOC made a reasonable cause determination 2,890 times out of the 59,631 total charges received, or six percent of the time on average. *Id.* During FY 2006, the EEOC made a reasonable cause determination 2,426 times out of the 59,631 total charges received, or six percent of the time on average. *Id.*

there is reasonable cause, the EEOC may file suit on an individual's behalf or decide to close its case and issue a "Right to Sue" letter upon request.<sup>54</sup> It is important to note that if the EEOC does not find "reasonable cause," the charging party can still file a lawsuit in federal court.<sup>55</sup> Between FY 2001 and FY 2006, the EEOC made a "no reasonable cause" determination sixty-one percent of the time on average per year.<sup>56</sup> If there is no reasonable cause, the charging party simply requests a "Right to Sue" letter from the EEOC.<sup>57</sup> No action alleging a violation of Title VII may be brought unless the alleged discrimination has been made the subject of a Charge.<sup>58</sup>

### 5. *The Supremes Have Spoken: We Will Not Raise the Bar*

If the EEOC did not find reasonable cause to support a violation of Title VII, why should a court or jury hear the case? The U.S. Supreme Court has answered this seemingly logical question. An employer's argument that an EEOC determination of "no reasonable cause" should create a bar to filing a lawsuit has been rejected by the courts.<sup>59</sup>

In *Swierkiewicz v. Sorema*, the U.S. Supreme Court granted writ of certiorari to review a judgment of the U.S. Court of Appeals for the Second Circuit, which affirmed the dismissal of plaintiff's employment discrimination claim against his employer because the employee's complaint did not allege facts constituting a prima facie case of discrimination under the burden shifting method<sup>60</sup> of

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54. See EEOC, *supra* note 6 (stating that before filing suit or issuing a "Right to Sue" letter, the EEOC will first attempt to conciliate the case).

55. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 798 (1973).

56. EEOC, *supra* note 46. During FY 2001, the EEOC found no reasonable cause in 32,075 charges of the 59,631 total charges received, or fifty-nine percent of the time on average. *Id.* During FY 2002, the EEOC found no reasonable cause in 34,671 charges of the 61,459 total charges received, or sixty-one percent of the time on average. *Id.* During FY 2003, the EEOC found no reasonable cause in 32,418 charges of the 59,075 total charges received, or sixty-two percent of the time on average. *Id.* During FY 2004, the EEOC found no reasonable cause in 32,646 charges of the 58,328 total charges received, or sixty-four percent of the time on average. *Id.* During FY 2005, the EEOC found no reasonable cause in 29,344 charges of the 55,976 total charges received, or sixty-three percent of the time on average. *Id.* During FY 2006, the EEOC found no reasonable cause in 27,178 charges of the 56,155 total charges received, or sixty-one percent of the time on average. *Id.*

57. EEOC, *supra* note 6.

58. 42 U.S.C. § 2000e-5(f)(1).

59. See *Fekete v. U.S. Steel Corp.*, 424 F.2d 331, 336 (9th Cir. 1970) (holding that Congress' intent in enacting Title VII was to outlaw unlawful employment practices; to require an aggrieved person to first resort to the EEOC's processes before filing suit; and after an aggrieved person satisfies the statutory requirement of first resorting to the EEOC, he has the right to a judicial determination as to whether he has been the victim of a violation).

60. See *McDonnell Douglas Corp.*, 411 U.S. at 800 (describing the burden

*McDonnell Douglas*.<sup>61</sup> The respondent-employer in *Swierkiewicz* argued that plaintiff's complaint merely stated conclusory allegations and that allowing lawsuits based on conclusory allegations of discrimination to go forward would burden the courts and encourage disgruntled employees to bring unsubstantiated lawsuits.<sup>62</sup> The U.S. Supreme Court said "whatever the practical merits of this (respondent's) argument, the Federal Rules do not contain a heightened pleading standard for employment discrimination suits."<sup>63</sup> The federal circuits have followed the Supreme Court's holding in *Swierkiewicz*.<sup>64</sup>

The Supreme Court in *Swierkiewicz* recognized the "practical merit" of respondent's argument.<sup>65</sup> Such practical merit could be

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shifting framework as follows: A plaintiff must first show (1) membership in a protected group, (2) qualification for the job in question, (3) an adverse employment action, and (4) circumstances supporting an inference of discrimination). If the plaintiff establishes a *prima facie* case of discrimination, the burden then shifts to the defendant to establish a legitimate, non-discriminatory reason for the adverse employment action. *Id.* at 801. Then the burden shifts back to the plaintiff to show that the defendant's proffered reason is pretext for discrimination. *Id.*

61. *Swierkiewicz*, 534 U.S. at 506. The plaintiff was a native of Hungary and fifty-three years of age. *Id.* He filed a lawsuit against his former employer claiming that he was fired based on his national origin in violation of Title VII and his age in violation of the Age Discrimination in Employment Act of 1967. *Id.* Prior to filing the lawsuit, plaintiff filed a charge of discrimination with the EEOC, and the EEOC's investigation resulted in a dismissal of the charge. Brief for Respondent at 32, *Swierkiewicz v. Sorema*, No. 00-1853 (U.S. Feb. 2, 2002), 2002 WL 384241.

62. *Swierkiewicz*, 534 U.S. at 514; Brief for Respondent, *supra* note 61, at 34-40.

63. See *Swierkiewicz*, 534 U.S. at 514-15 (answering the question of whether a complaint must contain factual allegations establishing each of the elements of a *prima facie* case of discrimination under *McDonnell Douglas Corp.*). The Supreme Court held that the *prima facie* case under *McDonnell Douglas Corp.* was an evidentiary standard, not a pleading requirement. *Id.* at 506. The Supreme Court further stated that *Swierkiewicz's* complaint satisfied Rule 8 because it gave the employer fair notice of the basis for the claim. *Id.*

64. *Gregory v. Dillard's Inc.*, 494 F.3d 694, 710 (8th Cir. 2007); *Amron, et al. v. Morgan Stanley Inv. Advisors Inc.*, 464 F.3d 338 (2d Cir. 2006); *Moore v. Greenwood Sch. Dist.* No. 52, 195 F. App'x. 140 (4th Cir. 2006); *Kolupa v. Roselle Park Dist.*, 438 F.3d 713 (7th Cir. 2006); *Waters v. Home Depot, U.S.A., Inc.*, 159 F. App'x. 943 (11th Cir. 2005); *Maduka, M.D., v. Sunrise Hosp.*, 375 F.3d 909 (9th Cir. 2004); *Educadores Puertorriquenos En Accion, v. Cesar Rey Hernandez*, 367 F.3d 61 (1st Cir. 2004); *Pringle v. Am. Red Cross*, 79 F. App'x. 184 (6th Cir. 2003); *Gavura v. Pa. State House of Representatives, et al.*, 55 F. App'x 60 (3d Cir. 2002); *Bookman v. Royal Ambulance Serv., Inc.*, 3:06-CV-0632-M, 2006 WL 2506980, at \*3 (N.D. Tex Aug. 16, 2006); *Benham v. Rice*, No. 03-01127, 2005 WL 691871, at \*6 (D.D.C. Mar. 24, 2005); *Sheets v. CTS Wireless Components, Inc.*, 213 F. Supp. 2d 1279 (D.N.M. 2002).

65. *Swierkiewicz*, 534 U.S. at 515.

related to the number of civil rights related complaints filed with the U.S. District Courts.<sup>66</sup>

## II. ANALYSIS

The current state of Federal Rule 8 affects parties to Title VII litigation differently if a plaintiff's Charge was dismissed by the EEOC. In order to fully comprehend the effects, it is necessary to compare and contrast Federal Rule 8 as viewed by plaintiffs and defendants in a Title VII litigation setting, and then examine the connection to Federal Rule 11. It is also important to review the U.S. District Court's judicial caseload docket. In addition, it is necessary to assess statistics that show that an adverse employment action does not always constitute unlawful discrimination. An exploration of the procedures under the Illinois Human Rights Act (hereinafter "IHRA") is important as well. Central to comprehending these effects, is research that suggests that Title VII enables the "professional plaintiff."<sup>67</sup> Furthermore, other areas of the law have attempted to thwart abuse of the judicial system once it is recognized.

### A. *The Federal Rules as Viewed by Plaintiffs and Defendants*

Rule 8 simply requires a plaintiff to plead a short and plain statement of the claim.<sup>68</sup> The U.S. Supreme Court has determined that a pleading under Rule 8 must provide the defendant with "fair" notice.<sup>69</sup> What constitutes "fair" notice depends on which

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66. Judicial Caseload Profile Report, <http://www.uscourts.gov/cgi-bin/cmsd.pl> (last visited Sept. 5, 2007). In 2001, there were 40,910 civil rights cases filed in all district courts. *Id.* In 2002, there were 40,420 civil rights cases filed in all district courts. *Id.* In 2003, there were 40,516 civil rights cases filed in all district courts. *Id.* In 2004, there were 40,239 civil rights cases filed in all district courts. *Id.* In 2005, there were 36,096 cases filed in all district courts. *Id.* In 2006, there were 32,865 cases filed in all district courts. *Id.*

67. See *infra* Part II.E (describing how a "professional plaintiff" can manipulate Title VII).

68. FED. R. CIV. P. 8.

69. See *Swierkiewicz*, 534 U.S. at 513 (citing *Conley*, 355 U.S. at 47, for the proposition that a complaint need only "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests."). The question of what constitutes "fair" notice has been answered by the federal appellate courts. For example, the Second Circuit has held that a complaint must contain enough information for a defendant to have a fair understanding of what the plaintiff is complaining about and to know whether there is a legal basis for recovery. *Kittay v. Kornstein*, 230 F.3d 531, 541 (2d Cir. 2000). The Third Circuit has determined that a plaintiff will not be thrown out of court for lack of detailed facts. *In re Tower Air, Inc.*, 416 F.3d 229, 236-38 (3d Cir. 2005). The Fourth Circuit found that a complaint is sufficient as long as it provides enough information to allow a defendant to answer; a complaint does not need to provide all information necessary for a defendant to prepare a

side of the “v” you are on.<sup>70</sup>

1. *Perspectives on “Fair Notice”: An Examination of Swierkiewicz v. Sorema*<sup>71</sup>

In *Swierkiewicz*, the defendant argued that plaintiff’s complaint did not satisfy Rule 8 because it only offered conclusory allegations and did not reference any specific facts.<sup>72</sup> Essentially, the defendant argued that the complaint must show some inference of discrimination in order to survive a motion to dismiss.<sup>73</sup> Plaintiff’s position, and ultimately that of the U.S. Supreme Court, was that the complaint gave “fair” notice to defendant because it detailed the events leading to his termination, provided relevant dates, and included the ages and

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defense. *Chao v. Rivendell Woods, Inc.*, 415 F.3d 342, 346-49 (4th Cir. 2005). In *GE Capital Corp. v. Posey*, 415 F.3d 391, 395-97 (5th Cir. 2005), the court determined that a complaint was sufficient to state a claim under the more lenient notice pleading rules even though it did not contain separate allegations as to each element and contained allegations that could be characterized as conclusory. The Seventh Circuit has determined that a complaint was sufficient to put the defendant on notice even though it contained superfluous matter. *Davis v. Ruby Foods, Inc.*, 269 F.3d 818, 819-21 (7th Cir. 2001). The Eleventh Circuit’s position is that plaintiffs do not have to plead with great specificity. *In re Se. Banking Corp.*, 69 F.3d 1539, 1551 (11th Cir. 1995).

70. For example, in terms of a typical case caption: John Doe, Plaintiff v. Jane Doe Corporation, Defendant, the plaintiff appears on one side of the “v” and the defendant appears on the other side.

71. 534 U.S. 506. The trial court’s decision to dismiss plaintiff’s complaint because it did not state a *prima facie* case of discrimination was affirmed by the appellate court. *Id.* However, on February 26, 2002, the Supreme Court reversed the decision of the appellate court. *Id.* The case was returned to the trial court, where a stipulated order to dismiss was entered on Oct. 21, 2002. Civil Docket for Case No. 1:99-cv-12272-LAP (S.D.N.Y. Oct. 21, 2002). Apparently, the parties ended up resolving this matter out of court.

72. See Brief for Respondent, *supra* note 61, at 1-3, 10-12 (identifying the allegations contained in plaintiff’s complaint: Defendant was a New York-based reinsurance company. Plaintiff, a forty-two year old of Hungarian descent, was hired by the defendant in April 1989 as a senior vice president. At the time, defendant’s chief executive officer, Chavel, was a French national of the same age. In February 1995, plaintiff alleged that Chavel made changes that affected his job duties. Chavel had stated that he wanted to “energize” the underwriting department. In April 1997, plaintiff sent a memo to Chavel. The memo outlined his grievances with the company and also demanded a severance package. The memo made no reference to complaints about discrimination based on his age or national origin. After sending the memo and meeting with Chavel, plaintiff chose to be terminated instead of resigning. In July 1997, plaintiff filed a charge of discrimination with the EEOC, and in August 1999, he filed this action for national origin discrimination under Title VII and for age discrimination under the Age Discrimination in Employment Act of 1967 in connection with the termination of his employment).

73. Brief for Respondent, *supra* note 61, at 5.

nationalities of at least some of the relevant persons involved with his termination.<sup>74</sup>

## 2. *Debating Federal Rule 8 from the Perspective of Opposing Parties*

Consider for a moment a fight between young siblings and the parent saying to one sibling after “tattling” on the other sibling: “There are two sides to every story.”

### a. It Isn’t Broken so You Have Nothing to Fix<sup>75</sup>

The Federal “notice” pleading standard does not require the pleading of “facts” or “causes of action.”<sup>76</sup> Moreover, the U.S. Supreme Court has rejected the idea that courts should measure a pleading’s adequacy by the elements of a claim.<sup>77</sup> This simplified notice pleading standard relies on liberal discovery rules and summary judgment motions to define disputed facts and issues and to dispose of unmeritorious claims.<sup>78</sup>

The federal rules favor a decision on the merits rather than procedure.<sup>79</sup> Courts rely on the uniformity of the federal rules as applied to all civil cases.<sup>80</sup> Also, if the Title VII action is filed pro se, the federal courts construe pro se complaints liberally.<sup>81</sup>

Finally, why make the problem introduced herein a pleading problem? If anything, the focus should be on the EEOC, its procedures and Title VII.<sup>82</sup>

### b. Rule 8 Calls for Factual Information and Title VII Plaintiffs Have Access to Facts

In 1952, the Advisory Committee on the Federal Rules rejected an amendment to Rule 8 to require plaintiffs to plead facts on the basis that it was unnecessary.<sup>83</sup>

74. *Swierkiewicz*, 534 U.S. at 514.

75. The voice of supporters of the federal “notice” pleading standard regarding claims brought under Title VII.

76. *Dioguardi v. Durning*, 139 F.2d 774, 775 (2d Cir. 1944).

77. *Swierkiewicz*, 534 U.S. at 515.

78. *Id.* at 512-13.

79. MOORE ET AL., *supra* note 9, ¶ 1.21 (1)(c); *Schiavone v. Fortune*, 477 U.S. 21, 27 (1986).

80. MOORE ET AL., *supra* note 9, ¶ 1.21 (1)(a). So, one could argue that a change to one category of civil actions would work against this purpose.

81. *See id.* § 8.04 (6) (citing *Hughes v. Rowe*, 449 U.S. 5, 9-10 (1980)). A pro se complaint should be held to a less stringent standard because the federal courts already construe a pro se litigant’s pleadings liberally. *Id.*

82. Question posed to the author by Judge Peter Flynn on Aug. 28, 2007.

83. Brief for Respondent, *supra* note 61, at 11. The amendment would have added to the “short and plain statement of the claim,” a requirement that it “contain facts constituting a cause of action.” *Id.* The Advisory Committee explained that the rule already requires the pleader to disclose adequate information as to the basis of his claim for relief as distinguished from a bare

The purpose in allowing a simplified pleading standard is dependent upon a liberal discovery procedure.<sup>84</sup> However, in federal discrimination cases, detailed information has already been provided to the EEOC, so specific facts are available to a Title VII plaintiff at the pleading stage.<sup>85</sup> Thus, a Title VII plaintiff has access to facts to show an inference of discrimination, and it would not be an unfair burden to plead facts that show that a plaintiff is entitled to relief.<sup>86</sup> This would resolve the issue of “fair” notice for purposes of discrimination cases.<sup>87</sup>

### 3. *The Rule 11 Connection*

Rule 11 is applicable to any paper filed with the court.<sup>88</sup> This Rule requires an inquiry by the pleader as to the allegations contained in the pleading.

Title VII requires the filing of a charge of discrimination with the EEOC before filing a lawsuit.<sup>89</sup> If the EEOC has the opportunity to investigate, its findings would be the reasonable inquiry under the circumstances. After all, the EEOC is charged with the power to enforce Title VII.<sup>90</sup> If the EEOC makes a finding of “no reasonable cause,” what rationale does a plaintiff have for filing a lawsuit based on the same information without more

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avertment that he wants relief and is entitled to it. *Id.* at 11-12.

84. See FED. R. CIV. P. 26(b)(1) (maintaining that relevant, non-privileged materials must be submitted for discovery).

85. EEOC, *supra* note 45; see also Brief for Respondent, *supra* note 61, at 6 (discussing the type of information provided to the EEOC at the charge processing and investigation stages).

86. The allegations of a complaint must indicate some probability that the transaction, if it occurred as stated, supports a right to relief. Jack B. Weinstein & Daniel H. Distler, *Comments on Procedural Reform*, 57 COLUM. L. REV. 518, 523 (1957).

87. A Title VII plaintiff has to show that he/she is a member of a protected class and that he/she has suffered an adverse employment action because of his membership in a protected class. EEOC, *supra* notes 35 and 36. For example, if I were to plead a complaint for sex discrimination, I could state: Plaintiff is a female. A female is protected from sex discrimination under Title VII. EEOC, *supra* note 36. On October 6, 2007, Plaintiff was fired from her job and a male is now employed in her position. *Id.* Plaintiff's employer discriminated against her because of her sex. *Id.* This complaint is an example of conclusory allegations. *Id.* Now, if a plaintiff were required to plead facts in the complaint to infer discrimination, a defendant-employer would not have to defend this complaint because it would not survive a motion to dismiss. *Id.* If a plaintiff wanted to survive a motion to dismiss, she would have to plead facts to show the court that the defendant has received fair notice because plaintiff pled facts in her complaint to support her cause of action and to show that she is entitled to relief. *Id.*

88. See FED. R. CIV. P. 11 (maintaining that an attorney or unrepresented party may be subject to sanctions if the person certifies pleadings that are not supported by evidence).

89. EEOC, *supra* note 45.

90. 42 U.S.C. § 2000e-4.

evidence of discrimination or facts to support a prima facie case for discrimination? A technical reading of Rule 11 would find that the plaintiff does not have a basis for asserting a claim under Title VII. However, if the EEOC makes a reasonable finding, then the plaintiff has more than satisfied the reasonable inquiry requirement and can include facts as determined by the EEOC in its complaint to put the defendant on notice of the complaint and the right to relief.

### *B. The Congestion of the U.S. District Court Judicial Caseload Docket*

There is no doubt that “discrimination is odious but a frivolous or malicious charge of such conduct . . . is at least equally obnoxious.”<sup>91</sup>

The filing of civil rights related cases rose significantly between 1990 and 2000.<sup>92</sup> The most recent statistics show that civil rights related cases make up about eight percent of the total civil filings in the U.S. District Courts.<sup>93</sup> In addition, recent statistics evidence that the total number of civil rights related case filings is second only to prisoner petitions.<sup>94</sup> Federal district courts that deal with discrimination cases on a regular basis recognize that anti-discrimination laws are frequently misused by disgruntled employees.<sup>95</sup> Logically, this results in over burdened

91. *Carrion v. Yeshiva Univ.*, 535 F.2d 722, 728 (2d Cir. 1976).

92. See Brief for Respondent, *supra* note 61, at 35 (citing the U.S. Dept. of Justice, Bureau of Justice Statistics, Special Report: *Civil Rights Complaints in U.S. District Courts*, 1990-1998, Fig. 1 (Jan. 2000, updated Dec. 12, 2001)). Civil rights cases have increased from nine percent in 1990 to sixteen percent in 2000. *Id.* Of this increase, fifty-seven percent of the cases were related to employment issues. *Id.*

93. Judicial Caseload Profile Report, <http://www.uscourts.gov/cgi-bin/cmsd2006.pl> (last visited Sept. 5, 2007).

94. See *id.* (listing types of civil code filing in addition to prisoner petitions and civil rights cases: “social security,” “recovery of overpayments and enforcement of judgment,” “forfeitures and penalties and tax suits,” “real property,” “labor suits,” “contracts,” “torts,” “copyright, patent, and trademark,” “antitrust,” and “all other civil”).

95. See Brief for Respondent, *supra* note 61, at 35-36 (referring to the District Court Judge’s statement in *Cicero v. Borg-Warner Auto., Inc.*, 163 F. Supp. 2d 743, 751-52 (E.D. Mich. 2001):

If a terminated employee wishes to file a discrimination lawsuit, he must have rational reasons that could reasonably support a conclusion that he was a member of a protected class, not just dissatisfaction at being fired, confusion as to the reason, and a hope that discovery will pull something out of the water that could be “spun” as evidence of invidious discrimination. The anti-discrimination laws exist for the important but narrow purpose of preventing employment decisions from being made on the basis of mindless prejudice against irrelevant and immutable characteristics, such as race, gender, and age. They do not exist to provide an alternative means of unemployment compensation, to



federal courts.

*C. An Adverse Employment Action Does Not Always Equal  
Discrimination*

Under Title VII, an adverse employment action is defined as an action taken by an employer that has an effect on terms and conditions of employment.<sup>96</sup> The act of an employer taking an adverse employment action against an employee is not always for an illegal purpose,<sup>97</sup> and statistics show that the overall rate of overturn of employees can be high.<sup>98</sup>

On average, between FY 2001 and FY 2006, the EEOC dismissed sixty-one percent of the Title VII charges filed with its agency based on a “no reasonable cause” finding.<sup>99</sup> Hence, the EEOC’s own statistics prove that not every adverse employment action constitutes discrimination. Yet, the complaining party still gets another bite at the apple after requesting a “Right to Sue” letter from the EEOC.<sup>100</sup>

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require employers to treat members of protected classes differently than other employees, or to effect transfers of wealth to the legal profession and disgruntled former employees).

96. 42 U.S.C. § 2000e-2(1)(a). Some examples of adverse employment actions include termination of employment, demotion, transfer to a different job with significantly different responsibilities, or significant change in benefits. *Id.*

97. See *McDonnell Douglas Corp.*, 411 U.S. at 802-03 (holding that employer may articulate some nondiscriminatory reason for the employer’s rejection).

98. See Bureau of Labor Statistics, *Table 9: Layoffs and Discharges Levels and Rates by Industry and Region, Not Seasonally Adjusted*, <http://www.bls.gov/news.release/jolts.t09.htm> (last visited Oct. 13, 2007) (listing the preliminary number of layoffs and discharges in both private industry and government as 1,800 for the month of August 2007). For the month of July 2007, the number of layoffs and discharges totaled 1,471. *Id.* For the month of August 2006, the number of layoffs and discharges totaled 1,626). *Id.*

99. EEOC, *supra* note 46.

100. In FY 2001, the number of Right to Sue letters issued by the EEOC at complaining party’s request totaled 12,063. Letter from Stephanie D. Garner, EEOC, to Catherine R. Caifano, J. MARSHALL L. REV. (Sept. 4, 2007) (outlining charges resolved by EEOC where notice of Rights to Sue (NRTS) could have been issued, Oct. 1, 2000 through Sept. 30, 2006) (on file with author). In FY 2002, the EEOC issued 12,503 Right to Sue letters upon request. *Id.* In FY 2003, the number of Right to Sue letter issued upon request totaled 8,742. *Id.* That number declined in FY 2004 to 8,533 and decreased again to 7,073 in FY 2005. *Id.* In FY 2006, the number of Right to Sue letters issued upon request totaled 6,811. *Id.*

*D. The State's Anti-Discrimination Equivalent to Title VII  
and Why Its Process Makes Sense<sup>101</sup>*

The Illinois Department of Human Rights (hereinafter "IDHR") is charged with enforcing the IHRA.<sup>102</sup> Similar to the EEOC's role in the federal context, the IDHR intakes and investigates charges of discrimination.<sup>103</sup> Recently, the IHRA was amended to provide an aggrieved individual with the opportunity to bring an action in circuit court.<sup>104</sup> This opportunity is also available to those individuals whose charge is dismissed by the IDHR based on a determination of "no substantial evidence."<sup>105</sup> Unlike Title VII, if a charge filed under the IDHR is dismissed, there is a reviewing body where a complainant can go for a second opinion or to file suit.<sup>106</sup>

Illinois is a fact-pleading state.<sup>107</sup> While this amendatory act appears to broaden a complainant's rights, it also prevents an unmeritorious lawsuit from continuing beyond a motion to dismiss.<sup>108</sup> Without taking away a complainant's rights, an

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101. IHRA, 775 ILL. COMP. STAT. 5/7A-101 to 104 will be used as an example.

102. IDHR, Charge Processing, [http://www.state.il.us/Charges/Charge\\_1.htm](http://www.state.il.us/Charges/Charge_1.htm) (last visited Oct. 30, 2007). The IHRA prohibits discrimination on the basis of race, color, religion, sex, national origin, ancestry, citizenship (with regard to employment), age forty and over, marital status, physical or mental handicap, military service, unfavorable military discharge, and sexual orientation. *Id.*

103. 775 ILL. COMP. STAT. 5/7A-102(C) (2007). Through its investigation process, the IDHR also determines whether there is substantial evidence that the alleged civil rights violation occurred. *Id.* If there is a lack of substantial evidence, the IDHR will dismiss the charge. *Id.*

104. Pub. Act No. 095-0243, available at <http://www.ilga.gov/legislation/publicacts/95/095-0243.htm>. Prior to this amendatory act, an aggrieved individual could only file a complaint with the Illinois Human Rights Commission. *Id.* Now, an aggrieved individual can access Illinois circuit courts after obtaining a notice from the IDHR similar to the EEOC's Right to Sue letter. *Id.*

105. 775 ILL. COMP. STAT. 5/7A-102(D)(3)(2007). If the IDHR determines that there is no substantial evidence, the Director issues a notice to the complainant of his or her right to seek review of the dismissal order before the Illinois Human Rights Commission, or to file a lawsuit in an Illinois circuit court. *Id.* If the complainant chooses to have the Commission review the determination, he/she cannot later file a lawsuit. *Id.* If the complainant chooses to file a lawsuit, it must be commenced within 90 days after receipt of the determination. *Id.*

106. *Id.*

107. See Discussion *supra* Part I.B.2 (explaining the requirements of fact pleading).

108. First, the new law sets up a reviewing body within the regulatory body charged with enforcing the IHRA. 775 ILL. COMP. STAT. 5/7A-102(D)(3). Second, if a complainant seeks review of the dismissal, he/she is prevented from later filing suit in state court. *Id.* Third, if the complainant files a lawsuit after receiving a dismissal of charge notice, he/she will have to satisfy the "fact pleading" standard which is a heightened standard. See Discussion

employer would not be faced with defending a lawsuit through at least the discovery phase or considering a settlement to avoid the cost of litigation if Title VII's procedure after dismissal of a charge mirrored that of the IHRA.<sup>109</sup>

### *E. Beware of the Professional Plaintiff*

The following excerpt is an example of the difficult position a professional plaintiff can put an employer in:

The payroll clerk you hired a month ago has sued your business for sexual harassment, alleging that her supervisor made unwelcome advances. The EEOC dismissed her claim as having no reasonable cause, but she sued anyway. Just defending the lawsuit could cost you \$50,000 in legal fees, not to mention the time and effort required to gather evidence. If you lose, it could cost far more. The plaintiff has offered to settle for \$10,000. What should you do?<sup>110</sup>

The professional plaintiff expects that you will settle to avoid facing a public lawsuit; this is how they operate. For the workplace professional plaintiff, their job is to seek out potential litigation through their current employment.<sup>111</sup> "It doesn't matter if there's a legitimate claim; the perceived threat alone is often enough to prompt some companies to settle."<sup>112</sup>

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*supra* Part I.B.2.

109. The transcript of debates of the House and Senate addressing the reasons for and against House Bill 1509, which was enacted as P.A. 95-243, focus on the fact that this legislation will provide access the courts. Audio tape: H.R. 1509, H.R. Deb., 95th Ill. Gen. Assembly, (Apr. 17, 2007) (on file with the author). One senator spoke out in opposition to the Bill based on the fact that employers were against this legislation being enacted into law. Audio tape: H.R. 1509, S. Deb., 95th Ill. Gen. Assembly, (May 22, 2007) (on file with the author). Acknowledging that this new law permits a complainant whose charge was dismissed access to the courts, it does not mean that the lawsuit will survive a motion to dismiss when faced with Illinois' fact pleading standard. *Id.* So, while there is a now a second bite at the apple under the IHRA, as with Title VII, the bite may not be a sweet for the state court plaintiff. Plus, the time and expense of litigation for the employer-defendant will likely be less in state court because of the high probability that if the IDHR did not find substantial evidence to support an inference of discrimination, the plaintiff will have a difficult time passing the muster of fact pleading. *Id.*

110. Steven C. Bahls, *Suiting Up – Careful Screening of Job Applicants Will Weed Out Professional Plaintiffs* (May 1999), available at [http://findarticles.com/p/articles/mi\\_m0DTI/is\\_5\\_27/ai\\_54546029](http://findarticles.com/p/articles/mi_m0DTI/is_5_27/ai_54546029).

111. *See id.* (discussing how professional plaintiffs "threaten legal action whenever they think there's the slightest hint of provocation that could result in a cash settlement").

112. *See id.* (quoting Michael D. Karpeles, an employment attorney with Goldberg, Kohn, Bell, Plack, Rosenbloom & Moritz, Ltd. in Chicago, Illinois.) Karpeles further explains that professional plaintiffs change jobs frequently with the chief intent of finding a grievance and threatening to sue. *Id.*

Professional plaintiffs are difficult to track because many agree to a quick settlement without ever filing formal charges.<sup>113</sup> The EEOC's own statistics evidence a growing problem of abuse in the system.<sup>114</sup> While choosing to fight back could cost an employer more money than agreeing to settle an unmeritorious claim, it can also expose the scheme of the professional plaintiff and thwart abuse of the system.<sup>115</sup>

*F. An Example of How to Level the Playing Field When it Comes to "Problem Litigation"*

If the legal system is being abused, there are ways to curb the abuse or at least level the playing field. Although unrelated to Title VII litigation, certain states have enacted statutes aimed at ceasing the filing of "Strategic Lawsuits Against Public Participation" ("SLAPP").<sup>116</sup> These statutes have been nicknamed "Anti-SLAPP" laws.<sup>117</sup>

113. *Id.* People sue knowing it is cheaper for the company to settle and pay \$15,000 rather than spend \$30,000 and win. *Id.*

114. EEOC, *supra* note 46.

115. See Bahls, *supra* note 110 (discussing the outcome of a sexual harassment claim decided by the U.S. Court of Appeals for the Seventh Circuit. In that case, a male loan originator for an Indianapolis mortgage company claimed that a female loan processor he worked with exposed her breasts to him, and made sexual advances toward him at work and over the phone. The woman denied all of his allegations of sexual harassment. During the lawsuit, the plaintiff produced a memo supposedly written by their branch manager to another superior acknowledging that the harassment was going on and suggesting that the easiest way to stop the loan originator's complaints would be to get rid of him. The branch manager denied she wrote the memo. During their investigation, the attorneys for the mortgage company discovered that the plaintiff had sued three former employers. In one case, the plaintiff produced an employment contract granting him favorable terms, bearing the signature of an agent of the company who denied ever seeing the document. Normally, evidence of a plaintiff's history of litigation is not admissible in a subsequent lawsuit, however, the U.S. District Court for the Southern District of Indiana allowed it because it suggested the plaintiff's method of operation – suing his employers and forging incriminating documents to introduce as evidence in the lawsuit. The district court ruled in favor of the employer, and its decision was upheld on appeal).

116. SLAPP lawsuits allege that an injury has been caused by the efforts of individuals or non-government organizations to influence government action on an issue of public interest or concern. Sharon Beder, *SLAPPs—Strategic Lawsuits Against Public Participation: Coming to a Controversy Near You*, CURRENT AFFAIRS BULLETIN, Vol. 72, no. 3, Oct.-Nov. 1995, available at <http://www.uow.edu.au/arts/sts/sbeder/SLAPPS.html>. SLAPPs are filed by one side of a public, political dispute to punish or prevent opposing points of view. *Id.* One judge defines SLAPPs as being a civil court action and are suits brought by private interests to "stop citizens from exercising their political rights or to punish them for having done so." *Id.*

117. See, e.g., California Anti-SLAPP Project, <http://www.casp.net/statutes/cal425.html> (last visited Aug. 27, 2007) (stating "the legislature finds and declares that there has been a disturbing increase in

Anti-SLAPP laws do not prohibit an individual from filing a lawsuit against an individual or entity. Rather, these laws raise the bar to determine if the plaintiff has a legitimate claim. For example, in California, plaintiffs who file a lawsuit against public participation are subject to a special motion to strike.<sup>118</sup> Under the law, a defendant who prevails on a motion to strike is entitled to recover attorneys' fees and costs.<sup>119</sup> So, the playing field can be leveled in certain types of litigation without taking away the right to access the courts.

### III. PROPOSAL

Federal Rule 8 should be supplemented by statute to provide for a heightened pleading standard (from notice pleading to fact pleading), specifically for, and limited to, only those individuals who file lawsuits pursuant to Title VII after the EEOC has dismissed their Charge finding no reasonable cause to find a violation of the law.

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lawsuits brought primarily to chill the valid exercise of constitutional rights of freedom of speech and petition for redress of grievances"). The legislature finds and declares that it is in the public interest to encourage continued participation in matters of public significance, and that this participation should not be chilled through the abuse of the judicial system. *Id.* To this end, this section must be construed broadly. Other states that have enacted Anti-SLAPP laws include Arkansas, Delaware, Florida, Georgia, Guan, Hawaii, Indiana, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Utah and Washington. California Anti-SLAPP Project, <http://www.casp.net/statutes/menstate.html> (last visited Aug. 27, 2007).

118. See CAL. CIV. PROC. § 425.16(b)(1)-(3) (2005) (stating that:

a cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim. In making its determination, the court shall consider the pleadings and supporting and opposing affidavits stating the facts upon which the liability or defense is based).

119. *Id.* In the alternative:

if the plaintiff established a probability that he or she will prevail on the claim, neither that determination nor the fact of that determination shall be admissible in evidence any later stage, or in any subsequent action, and no burden of proof or degree of proof otherwise applicable shall be affected by that determination in any later stage of the case or in any subsequent proceeding.

*Id.*

### A. *Using the Federal Rules to Engage in a Fishing Expedition*

Currently, Federal Rule 8 can be used by certain Title VII plaintiffs as a fishing expedition.<sup>120</sup> An individual whose Charge was dismissed by the EEOC and who then requests a “Right to Sue” letter is saying to the Court, “I’m going to bring a lawsuit against my employer based on mere speculation that I may have been discriminated against, and then use the federal discovery procedures to see whether there is any basis for my speculation.”<sup>121</sup> Using the Rules in this manner is an example of abusing the judicial system. Moreover, the Federal Rules do not permit an individual to use the discovery process in order to find out if he has a claim.<sup>122</sup>

A Title VII plaintiff should not be allowed to see if he can deduce a claim of discrimination against an employer after engaging in discovery because Title VII plaintiffs have the benefit of access to information before filing a complaint, whereas other types of civil litigants do not. Title VII plaintiffs must file a Charge with the EEOC and obtain a “Right to Sue” letter prior to filing a lawsuit in federal court.<sup>123</sup> A Title VII plaintiff who allowed the EEOC to complete its investigation knows whether the EEOC concluded that the information contained in the Charge and obtained during its investigation established a violation of Title VII before he filed a complaint in federal court.<sup>124</sup> If the EEOC determined that there was no violation of Title VII, an individual should not then be allowed to step into federal court armed with information other civil litigants do not have access to before filing a lawsuit, and proceed through at least the discovery phase of federal pre-trial procedure because of the notice pleading standard.

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120. See *supra* Part I.B.4 (discussing the reasons for the problem an employer is faced with if an employee files a federal lawsuit pursuant to Title VII after the EEOC has dismissed the Charge based on a “no reasonable cause” finding).

121. See Brief for Respondent, *supra* note 61, at 31 (discussing what the petitioner proposed to the Supreme Court after his complaint was dismissed pursuant to Federal Rule 12(b)(6) for failing to state a claim upon which relief can be granted).

122. *Id.* at 49 (citing 8 *Charles Alan Wright, Arthur R. Miller et al., Federal Practice & Procedure* § 2071, at 651 n.5 (2d ed. 1994)). “The type of fishing which the rules do not tolerate is fishing before action to try to discover some ground for bringing suit”. *Id.*

123. See *supra* Part I.B.3 (discussing Title VII’s prerequisites before filing a lawsuit in federal court). The EEOC is charged with investigating the charge, and then informing the parties of its determination at the conclusion of its investigation. *Id.*

124. See 29 C.F.R. § 1610.7(a)(4) (2009) (providing that individuals may obtain from the EEOC “materials in field office investigative files related to charges under: Title VII. . .”).

### B. Knowledge is Power?

A Title VII plaintiff must have a good faith basis for his claim of discrimination prior to filing a lawsuit.<sup>125</sup> Knowing whether the EEOC found a violation of Title VII prior to filing a lawsuit in federal court can be a very powerful tool.<sup>126</sup> Because of the low threshold of the federal notice pleading standard, the determination made by the EEOC is essentially rendered meaningless.

An employer armed with the knowledge that the EEOC found no violation of the law when it investigated a Charge does not have the upper-hand if the individual who filed the Charge decides to file a lawsuit. Even though the individual who filed the Charge knows of the EEOC's determination, all he has to do is request a "Right to Sue" letter and file a complaint against the employer that simply contains a short and plain statement of the claim.<sup>127</sup> The employer will then be faced with proceeding through the discovery phase of the pre-trial process or settling with an undeserving plaintiff, both of which can be costly.

### C. Hit the Road Jack, and Don't You Come Back Without Facts

As evidenced above, in some circumstances, knowledge does not equal power for an employer-defendant in a Title VII lawsuit. Because a Title VII plaintiff who allowed the EEOC to conduct an investigation of his Charge has access to facts and the EEOC's findings as to the Charge, he should be not be allowed to plead his claim under the notice pleading standard if the Charge was dismissed based on a "no reasonable cause" finding, without more evidence of discrimination or facts to support a prima facie case for discrimination.<sup>128</sup> Rather, the prospective plaintiff should be required to plead as follows:

1. the plaintiff must state in his complaint that the EEOC found no reasonable cause for a violation of Title VII;<sup>129</sup>

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125. FED. R. CIV. P. 11(b)(3). This is required even if the facts upon which a plaintiff bases his/her belief can only be alleged upon the plaintiff's own "information and belief." *Id.*

126. If the EEOC determined that the employer did violate Title VII, the plaintiff-employee would be in a better position than the defendant-employer if a lawsuit were filed. The opposite would be true if the EEOC determined that the information did not support a violation of the law.

127. See *supra* Parts I.B.1.b and II.A.2 (addressing the pleading standard of Federal Rule 8).

128. See EEOC, *supra* note 46 (detailing that between FY 2001 and FY 2006, the EEOC made a "no reasonable cause" finding approximately sixty-one percent of the time, with respect to charges of discrimination filed under Title VII).

129. Title VII plaintiffs are required to file a copy of the "Right to Sue" with

2. the plaintiff must identify the cause of action in the complaint;
3. the plaintiff must identify the elements of the claim in the complaint; and
4. the plaintiff must identify facts to support his cause of action in the complaint.<sup>130</sup>

If the plaintiff is able to satisfy the “fact pleading-like” style described above,<sup>131</sup> then his complaint will proceed through the normal federal pre-trial and trial procedure as any other complaint would.

If, after the EEOC has dismissed the Charge, the plaintiff is unable to show the court that he can plead the cause of action, the elements of the complaint, and facts to support a cause of action, then the complaint should be stricken and the defendant-employer should be allowed to request that the court enter an award of attorneys’ fees and costs in its favor.<sup>132</sup>

#### *D. The Benefits of a “Hit the Road Without Facts” Mentality*

Policy reasons support the notion that certain Title VII plaintiffs should be required to plead facts from which discrimination can be inferred in order to proceed in federal court.

First, a heightened pleading standard would reduce the dockets of overburdened federal courts.<sup>133</sup> Second, it would level the playing field between plaintiffs and defendants.<sup>134</sup> Third, it

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the court to show that they satisfied the prerequisite to filing suit under Title VII. *See Stanley v. Ind. Civil Rights Comm’n*, 557 F. Supp. 330, 333 (N.D. Ind. 1984), *aff’d*, 740 F.2d 972 (7th Cir. 1984) (holding that the action would not be dismissed for failure to allege receipt of “Right to Sue” letter as long as plaintiff filed letter with the court later). The author proposes that this be taken a step further to require an individual whose charge of discrimination was dismissed by the EEOC to plead this fact in his/her complaint.

130. *See supra* Part I.B.2 (describing what is required when the standard is fact pleading).

131. The heightened pleading standard described by the author is similar to that of Illinois’ fact pleading requirement. *Id.*

132. *See CAL. CIV. PROC.* § 425.16 (providing an example of such a motion to strike). California’s Anti-SLAPP law does not prohibit an individual from filing a lawsuit; rather, it merely raises the bar to determine if the plaintiff has a legitimate claim. *See supra* Part II.F (discussing how to level the playing field between plaintiffs and defendants).

133. *See Cicero*, 163 F. Supp. 2d at 758 (standing for the proposition that overburdened federal dockets mean that years may pass before a truly aggrieved employee is able to present a claim with merit in court).

134. This is especially important for employers who fully participate in the EEOC’s investigation which expends both time and money, only to find out that even though the EEOC found no violation of the law, the employee filed suit and will likely satisfy the low threshold of Federal Rule 8’s “notice” pleading standard. A level playing field in these types of cases, draws a line at the beginning of the case rather than at the middle or end, or before an employer has to determine if it should settle with an undeserving plaintiff.



would provide an employer-defendant with “fair” notice of what the plaintiff believes his claim is based on, after the EEOC has found “no reasonable cause,” thus giving defendant’s more than what they already knew. Fourth, Federal Rule 8 calls for facts that Title VII plaintiffs have access to.<sup>135</sup> Fifth, not every adverse employment action equals discrimination.<sup>136</sup> Finally, it may put the “professional plaintiff” out of business, or at least caution them that they may be required to pay an employer’s attorneys’ fees and costs if they file an unmeritorious claim.

#### IV. CONCLUSION

Without depriving an individual of his constitutional and statutory right to access the federal courts, creating a heightened pleading standard for Title VII plaintiffs whose Charge was dismissed by the EEOC for “no reasonable cause” will level the playing field. Otherwise, this plaintiff gets another bite at the apple in federal court, and actually has to show the court *less* than what he was required to show the EEOC who dismissed the Charge. This second bite at the apple, without requiring a plaintiff to show more by pleading facts, is unfair to an employer who participated in the EEOC investigation. It also puts the employer-defendant in a situation where it must weigh the cost of defending a lawsuit through summary judgment to prove that it did not in fact discriminate against the plaintiff against entering into a settlement to save on the cost and time of litigation.

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135. See *supra* Part II.A.2.b (explaining that because specific information has already been provided to the EEOC, a Title VII plaintiff has access to facts).

136. See *supra* Part II.C (discussing the fact that the EEOC’s own statistics prove that an adverse employment action does not always equal discrimination).