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## **(In)competence in Appellate and District Court Brief Writing on Rule 12 and 56 Motions**

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SCOTT A. MOSS

(In)competence in Appellate and District  
Court Brief Writing on Rule 12 and 56  
Motions

57 N.Y.L. SCH. L. REV. 841 (2012–2013)

ABOUT THE AUTHOR: Associate Professor, University of Colorado Law School. The author thanks the editors of the *New York Law School Law Review* for hosting the wonderful symposium, *Trial by Jury or Trial by Motion? Summary Judgment, Iqbal, and Employment Discrimination*, on April 23, 2012, at which the author presented a draft of this article and received valuable feedback that improved it.

## I. INTRODUCTION

Toward this symposium's goal of examining the causes of the frequency with which employment discrimination cases lose on pretrial dispositive motions, both on appeal and in district courts, this article surveys a limited sample of plaintiffs' briefs on appeals of Rule 12 dismissal motions and on district court Rule 56 summary judgment motions. The results of this survey suggest the following.

1. Most plaintiffs' lawyers file briefs that badly neglect key, on-point circuit authority—precedents supporting their claims and undercutting debatable defenses.<sup>1</sup>
2. Many (though not most) plaintiffs' lawyers literally do not even *try* to rebut key employer arguments, instead just reiterating their factual allegations without noting whether the defense correctly cited the case law supporting dismissal of the claims.<sup>2</sup>
3. A minority but disturbing number of the worst briefs contain only unhelpful boilerplate reiterations of legal standards, with no precedents directly applicable to the case—suggests that those lawyers do no case-specific legal research.<sup>3</sup>

Good briefs do not guarantee success, of course;<sup>4</sup> courts have been known to dismiss seemingly meritorious claims without the assistance of weak plaintiff's lawyering. David Lee, recounting circuit decisions defying summary judgment standards, notes that a number of such decisions came despite collaboration (including, among other things, argument mootings and brainstorming sessions) among lawyers active in the National Employment Lawyers Association (NELA), the most prominent plaintiffs' employment lawyer bar association:

Nor were these cases instances of poor argumentation . . . most of the plaintiffs' lawyers . . . were veteran NELA members—including some very

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1. *See infra* Part II.

2. *See infra* Part III.

3. *See infra* Part III.A.2.

4. *See, e.g.*, Gladwin v. Pozzi, No. 06 Civ. 0650(SCR)(JFK), 2010 WL 245575 (S.D.N.Y. Jan. 22, 2010) (granting defendant's summary judgment motion); Memorandum of Plaintiff in Opposition to Defendants' Motions for Summary Judgment, Gladwin v. Pozzi, 2007 WL 4845955 (S.D.N.Y. Nov. 26, 2007) (No. 06 Civ. 0650(SCR)(LMS)) (excellent plaintiff's brief opposing summary judgment); Stodola v. Finley & Co., No. 2:05-CV-464-PRC, 2008 WL 3992237 (N.D. Ind. Aug. 21, 2008) (granting defendant's summary judgment motion); Memorandum of Plaintiff in Opposition to Defendants' Motion for Summary Judgment, Stodola v. Finley & Co., 2008 WL 900340 (N.D. Ind. Feb. 7, 2008) (No. 2:05 CV 464) (excellent plaintiff's brief opposing summary judgment); Hemsworth v. Quotesmith.com, No. 04 C 5622, 2006 WL 644467 (N.D. Ill. Mar. 10, 2006) (granting defendant's summary judgment motion); Memorandum of Plaintiff in Opposition to Defendant's Motion for Summary Judgment, Hemsworth v. Quotesmith.com, 2005 WL 3286435 (N.D. Ill. Oct. 21, 2005) (No. 04 C 5622) (excellent plaintiff's brief opposing summary judgment). I am certainly not claiming to own any secret formula for success. In the past few years, I've lost two summary judgment motions on briefs that I hope were decent (and that at least were the best I could do).

big names . . . who went through the NELA/Illinois brainstorming program for their briefing and . . . moot-court program . . . . [These cases] were unfortunately all too typical: judges deciding summary judgment in employment cases have an incredible ability to ignore the black-letter law on inferences that they stated . . . pages earlier.<sup>5</sup>

But only a fraction of plaintiffs' lawyers participate in such collaborative efforts, which are typically limited to members of NELA or similar organizations, are often available only in areas with large local chapters (such as the Chicago-based NELA chapter), and are almost always offered for only appellate briefings.

While a good brief is no guarantee of success, a bad brief virtually assures failure: almost all of the worst plaintiffs' briefs reviewed in this study were followed by a grant of summary judgment to the defendant. In several cases, the result was a written judicial decision further strengthening the pro-defense doctrines to which plaintiffs' lawyers rarely respond effectively: the "same-actor" inference<sup>6</sup> and the "stray remarks" doctrine.<sup>7</sup>

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5. DAVID L. LEE, MAKING YOUR CASE SUMMARY JUDGMENT RESISTANT: TENTATIVE STEPS TOWARD A UNIFIED THEORY (5th rev. Nov. 9, 2010), available at <http://www.nylslawreview.com/wordpress/wp-content/uploads/2011/10/Employment-Law.CLE-materials.panel-12.pdf>; see also David L. Lee & Jennifer C. Weiss, *Inferences in Employment Law Compared to Other Areas of the Law: Turning the Rules Upside Down*, 57 N.Y.L. SCH. L. REV. 781 (2012–2013).

6. See *infra* Part II.A.

7. See generally Kerri Lynn Stone, *Taking in Strays: A Critique of the Stray Comment Doctrine in Employment Discrimination Law*, 77 Mo. L. REV. 149 (2012) (discussing and criticizing "stray remarks" doctrine).

Courts often will dismiss a remark offered as evidence of discriminatory intent as "stray" before going on to hold . . . that no reasonable juror could find for the plaintiff in a case and thus summary judgment is warranted. [A] remark an employment discrimination plaintiff proffers to help show that she was discriminated against . . . may . . . be deemed "stray" and deemed insufficient or otherwise ignored for . . . the following reasons: (1) the remark(s) were made by one too removed from the decision making process at issue; (2) the remark(s) were isolated, . . . [and not] part of a broader pattern of comments tending to evince bias; (3) the remark(s) were not made with sufficient temporal proximity to the adverse action . . . ; (4) the remark(s) were too ambiguous . . . ; or (5) the remark(s) were too contextually attenuated from the adverse action . . . .

*Id.* at 158–59.

For a recent example of a decision crediting an employment discrimination defendant's interpretation of disputed, arguably stereotypical, comments on a dispositive motion, and thereby dismissing the plaintiff's claims, see, e.g., *Morales-Cruz v. Univ. of Puerto Rico*, 676 F.3d 220 (1st Cir. 2012) (granting 12(b)(6) motion to dismiss gender discrimination claim).

[Plaintiff] alleges that various officials described [her] as "fragile" . . . [and] "unable to handle complex and sensitive issues," . . . . These descriptors are admittedly unflattering—but . . . apply equally to persons of either gender and, . . . are insufficient to anchor a gender-stereotyping claim. [T]hat the defendants sometimes referred to her as "that girl" during the course of the [employment] extension discussions . . . does not support a reasonable inference of . . . a gender stereotype. . . . [T]hat usage does not amount to more than an offhand comment.

*Id.* at 225.

## (IN)COMPETENCE IN APPELLATE AND DISTRICT COURT BRIEF WRITING

The question this article addresses is this: When defendants make arguments that are rebuttable with strong supporting case law, how often do plaintiffs respond effectively? Part II first frames the issues under examination and the relevant case law. Part III then discusses the survey and its results. I conclude with recommendations as to how the bar can address the concerns raised by the survey's results.

### II. THE ISSUES UNDER EXAMINATION AND THE RELEVANT CASE LAW

To minimize the subjectivity of assessing briefs as good or bad, this article focuses on two issues on which it is easy to look objectively at whether the plaintiff briefed the law well:

1. in district courts, on Rule 56 summary judgment motions, the “same-actor defense” that a “strong presumption” of non-discrimination arises where the person who fired the plaintiff was the same person who had hired the plaintiff; and
2. in appellate courts, on appeals of Rule 12 dismissals, defense arguments that complaints fail to state sufficient plausible fact allegations under *Bell Atlantic Corp. v. Twombly*,<sup>8</sup> and *Ashcroft v. Iqbal*.<sup>9</sup>

These issues are a good focus for studying briefing quality for a pragmatic reason. Unlike a subjective grading of briefs, this survey examines a discrete, objective question based on the fact that varied and conflicting circuit case law exists on these issues (i.e., the merits of the same-actor defense and the breadth of *Twombly/Iqbal* dismissal grounds): where a defendant cites pro-defense case law, one simple test of the plaintiff's brief is whether it cites the available contrary case law in the same circuit and on the same issue.

The district court portion of this article's case law review, described in Part II.A, focuses on two judicial districts—the Southern District of New York and the Northern District of Illinois—that not only exist within circuits featuring conflicting case law on the same-actor defense, but also, being large districts in New York and Chicago, feature a high volume of case law to study. The appellate court portion of this article's case law review, described in Part II.B., similarly focuses on circuits in which, despite the extensive case law dismissing claims pursuant to *Twombly* and *Iqbal*, there also exists circuit case law construing *Twombly* and *Iqbal* narrowly in reversing dismissals of plaintiffs' claims.

#### *A. Case Law that Plaintiffs' Briefings Should Cite: The “Same-Actor” Defense*

Defendants regularly provide string cites of the extensive body of decisions awarding employers summary judgment based, in part, on the inference that “when the person who made the decision to fire . . . [also] made the decision to hire,” that

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8. 550 U.S. 544 (2007).

9. 556 U.S. 662 (2009).

fact “*strongly* suggest[s] that invidious discrimination was unlikely. . . . [I]t is difficult to impute to her an invidious motivation that would be inconsistent with the decision to hire. This is especially so when the firing has occurred only a short time after the hiring.”<sup>10</sup> *Grady v. Affiliated Central, Inc.* is frequently cited for that pro-defense holding on the same-actor inference, as is a similar holding in the Seventh Circuit, *Adreani v. First Colonial Bankshares Corp.*,<sup>11</sup> which affirmed a grant of summary judgment partly because “Mr. Adreani was hired by the same management team that fired him,” despite the lengthy gap—seven years—between the hiring and firing.<sup>12</sup>

But contrary case law exists in the same circuits. Just after *Grady*, *Johnson v. Zema Systems Corp.*<sup>13</sup> rejected the defense with withering criticism:

The psychological assumption underlying the same-actor inference may not hold . . . [in a] particular case. For example, a manager might hire a person of a certain race expecting them not to rise to a position in the company where daily contact with the manager would be necessary. Or an employer might hire an employee of a certain gender expecting that person to act, or dress, or talk in a way the employer deems acceptable for that gender and then fire that employee if she fails to comply with the employer’s gender stereotypes. Similarly, if an employee were the first African-American hired, an employer might be unaware of his own stereotypical views . . . at the time of hiring. If the employer subsequently discovers he does not wish to work with African-Americans and fires the newly hired employee . . . the employee would still have a claim of racial discrimination . . . . It is for these reasons that the same-actor inference is unlikely to be dispositive in very many cases. In fact, we have found no case . . . in which a plaintiff relying on circumstantial evidence to prove an improper motive was able to produce sufficient evidence to otherwise sustain his burden on summary judgment and yet was foreclosed from the possibility of relief by the same-actor inference. This is unsurprising given that the same-actor inference is not itself evidence of nondiscrimination. It simply provides a convenient shorthand for cases in which a plaintiff is unable to present sufficient evidence of discrimination.<sup>14</sup>

As shown in the briefings surveyed (detailed in Part III), the same-actor defense regularly wins the day—but *Johnson* and other similarly pro-plaintiff authorities in the Second and Seventh Circuits sharply limit and criticize that defense. These authorities support a powerful argument either against the very concept of the same-actor defense, or at least against its applicability to particular facts. Good plaintiff briefings cite them to good effect, as detailed below.

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10. *Grady v. Affiliated Cent., Inc.*, 130 F.3d 553, 560 (2d Cir. 1997) (emphasis added).

11. 154 F.3d 389 (7th Cir. 1998).

12. *Id.* at 392, 398 n.5.

13. 170 F.3d 734 (7th Cir. 1999).

14. *Id.* at 745 (citations omitted); *see also* *Kadas v. MCI Systemhouse Corp.*, 255 F.3d 359, 361 (7th Cir. 2001) (affirming defense grant of summary judgment but noting: “We emphatically rejected the ‘same actor inference’ in the race-discrimination setting in *Johnson* . . .”).

(IN)COMPETENCE IN APPELLATE AND DISTRICT COURT BRIEF WRITING

- ***Can't employers change their minds over time?*** The Second Circuit in *Carlton v. Mystic Transportation, Inc.*<sup>15</sup> cited Shakespeare to note that, especially where enough time has passed from hiring to firing, “the enthusiasm with which the actor hired the employee . . . may have waned . . . with the passage of time because the relationship between an employer and an employee, characterized by reciprocal obligations and duties, is . . . subject to time’s ‘wreckful siege of battering days.’”<sup>16</sup>
- ***Inapplicable outside of age discrimination (ADEA)***<sup>17</sup> ***claims?*** The same-actor inference may not even apply at all “outside the . . . ADEA[] context in which it generally is applied,” the Second Circuit noted in *Feingold v. New York*;<sup>18</sup> another Second Circuit decision just under five years later held otherwise,<sup>19</sup> but for years, that *Feingold* quote drew district court attention<sup>20</sup> and was a powerful citation for any non-ADEA plaintiff facing a same-actor defense.
- ***Changed circumstances undercut the defense?*** *Feingold* held that if there is evidence of “changes in circumstances during the course” of employment, the defense “would not necessarily apply.”<sup>21</sup> *Catalano v. Lynbrook Glass & Architectural Metals Corp.* held that “the same-actor inference is further diluted” by relevant events during the course of employment, such as a supervisor’s “alleged [discriminatory] comment and the raises and bonuses received by plaintiff.”<sup>22</sup>
- ***Inapplicable to promotion claims because willingness to hire may not indicate willingness to promote?*** *Harris v. City of New York* rejected the applicability of this defense in a promotion case

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15. 202 F.3d 129 (2d Cir. 2000).

16. *Id.* at 132 (citing WILLIAM SHAKESPEARE, *Sonnet LXV*, in *THE COMPLETE WORKS OF WILLIAM SHAKESPEARE* (W.J. Craig ed., Oxford Univ. Press 1928)).

17. Age Discrimination in Employment Act, 29 U.S.C. § 621 (2006) (barring employment discrimination based on age).

18. 366 F.3d 138, 155 n.15 (2d Cir. 2004).

19. *See Anderson v. Hertz Corp.*, 303 F. App'x 946, 948 (2d Cir. 2008) (applying same-actor inference to race discrimination claim).

20. *See, e.g., Santiago v. Gen. Dynamics Elec. Boat Div.*, No. 3:04-cv-2062 (JCH), 2006 WL 3231413, at \*5 (D. Conn. Nov. 7, 2006) (“[T]he Second Circuit has not yet pass[ed] judgment on the extent to which this inference is either required or appropriate outside the Age Discrimination in Employment Act (ADEA) context in which it generally is applied.”) (citing *Feingold*, 366 F.3d at 155 n.15).

21. *Id.*

22. No. 06-CV-2907 (JFB)(AKT), 2008 WL 64693, at \*10 (E.D.N.Y. Jan. 4, 2008).

because “an employer may be willing to hire a member of a protected class, but unwilling to promote.”<sup>23</sup> *Santiago v. General Dynamics Electric Boat Division* also so held: “most cases dealing with this inference” are about firings, while that plaintiff “alleges incidents of disparate treatment that do not include termination. Thus, this court will not apply the inference.”<sup>24</sup>

- ***Insufficient for summary judgment because the same-actor inference is optional for the jury?*** Numerous appellate and district decisions have held that an employer’s “resort to the ‘same actor inference’ is premature” on summary judgment “because . . . it ‘is just something for the trier of fact to consider.’”<sup>25</sup>

More broadly, contrary to the many decisions granting summary judgment based on the same actor defense, there are important, quotable decisions rejecting the defense aggressively. Paralleling *Johnson v. Zema Systems Corp.* in the Seventh Circuit,<sup>26</sup> *Copeland v. Rosen* in the U.S. District Court for the Southern District of New York gave the following list of reasons not to apply the same-actor defense:

The same actor inference is not a necessary inference, it is only a plausible one, and decisions in this Circuit . . . have warned that its use is not to become a substitute for a fact-intensive inquiry . . . . There are a variety of plausible explanations of such “hire-fire” conduct that may support an inference of discriminat[ion] . . . . [I]t is plausible that a supervisor who has not previously worked with members of a certain protected class would come to realize his or her animus . . . only upon actually hiring and working with such persons. It is further plausible that even a supervisor who previously has worked congenially with members of a protected class would develop a prejudice towards them after, for example, having an experience outside the workplace with other members . . . . There may also exist supervisors who purposefully hire members of a protected class and then fire them in the hope that the act

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23. No. 03 Civ.6167 DLC, 2004 WL 2943101, at \*4 (S.D.N.Y. Dec. 21, 2004).

24. *Santiago*, 2006 WL 3231413, at \*5.

25. *Nwanna v. Ashcroft*, 66 F. App’x 9, 15 (7th Cir. 2002) (quoting *Herrnreiter v. Chi. Hous. Auth.*, 315 F.3d 742, 747 (7th Cir. 2002)); *see also* *Masters v. F.W. Webb Co.*, No. 03-CV-6280L, 2008 WL 4181724, at \*6 (W.D.N.Y. Sept. 8, 2008) (“[T]he inference alone is generally not a sufficient basis to grant summary judgment for the employer, at least when the employee has proffered evidence of pretext.”); *Santiago*, 2006 WL 3231413, at \*5 (“[T]his court will not apply the inference, certainly not in the context of a summary judgment motion.”); *Sklaver v. Casso-Solar Corp.*, No. 02-CV-9928 (WCC), 2004 WL 1381264, at \*10 n.16 (S.D.N.Y. May 15, 2004) (denying summary judgment because whether defendant became discriminatory after hiring was a question of fact: “plaintiff’s assertion that Canfield may have changed his mind about plaintiff’s age is not necessarily as ‘ludicrous’ as defendant suggests”); *Ducharme v. Hall Signs, Inc.*, No. IP99-1756-C-H/G, 2001 WL 1168160, at \*11 n.6 (S.D. Ind. Aug. 6, 2001) (granting summary judgment, but rejecting same actor defense: “[Plaintiff’s] pretext arguments fail on their own and without consider[ing] . . . the so-called ‘same actor inference’ . . . . The Seventh Circuit has made clear that the ‘same actor inference’ cannot support summary judgment”) (citing *Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 745 (7th Cir. 1999)).

26. *See Johnson*, 170 F.3d at 745.



## (IN)COMPETENCE IN APPELLATE AND DISTRICT COURT BRIEF WRITING

of hiring will be the focus of attention and will allay any suspicions . . . . Moreover, situations may arise where a penitent supervisor is involved, one who attempts to assuage his or her guilt in harboring prejudice against other employees by hiring members of the protected class, only later to find himself or herself overcome again by animus . . . . [T]he Court does not underestimate the variety of unlawful motivations which may lurk behind the conduct of a person who hires and then fires an individual . . . . Such motivations, like all issues of intent, are by their very nature difficult to bring to light, especially prior to scrutiny . . . on the stand at trial.<sup>27</sup>

Thus plaintiffs' lawyers easily can rebut a same-actor argument on summary judgment—at least in the Second and Seventh Circuits, but likely in many other circuits, too, because many circuits feature similar case law criticizing the defense.<sup>28</sup> Even in circuits that lack such case law, plaintiffs' lawyers could cite other circuits' precedents (such as those above) criticizing and limiting the defense.

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27. *Copeland v. Rosen*, 38 F. Supp. 2d 298, 305 (S.D.N.Y. 1999); *see also Sklaver*, 2004 WL 1381264, at \*10 n.16.

*Copeland* . . . warned that “[t]he ‘same actor’ inference is not a necessary inference, it is only a plausible one, and decisions in this Circuit addressing it have warned that its use is not to become a substitute for a fact-intensive inquiry into the particular circumstances of the case . . . .” The court offered a variety of “plausible explanations” for conduct by a “same actor” that may “support an inference of discriminatory animus” . . . .

*Id.* (citing *Copeland*, 38 F. Supp. 2d at 305–06).

28. Pro-plaintiff “same actor” authority does exist in various other circuits. For example, a Sixth Circuit en banc opinion strongly rejected the notion of the same actor defense as a basis for awarding summary judgment:

[On] summary judgment, the court must view the evidence and draw all reasonable inferences in favor of the nonmoving party. We therefore reject the idea that a mandatory inference must be applied in favor of a summary-judgment movant whenever the claimant has been hired and fired by the same individual. Such an approach . . . [is] contrary to the Supreme Court’s opinion[,] . . . “[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions . . . . The evidence of the non-movant is to be believed, and all justifiable inferences . . . drawn in his favor.” Although the factfinder is permitted to draw this inference, it is by no means a mandatory one, and it may be weakened by other evidence. We therefore specifically hold that . . . the same-actor inference . . . is insufficient to warrant summary judgment . . . if the employee has otherwise raised a genuine issue of material fact.

*Wexler v. White’s Fine Furniture, Inc.*, 317 F.3d 564, 572–74 (6th Cir. 2003) (en banc) (citing *Buhrmaster v. Overnite Transp. Co.*, 61 F.3d 461, 464 (6th Cir. 1995) (describing how the length of time from hiring to firing an employee may weaken the same actor inference)) (other citations omitted). *Accord Goosby v. Johnson & Johnson Med., Inc.*, 228 F.3d 313, 321 (3rd Cir. 2000) (“[I]t is conceivable that an employer who harbors a discriminatory animus may nevertheless allow one or two females to advance for the sake of appearances.”); *Williams v. Vitro Servs. Corp.*, 144 F.3d 1438, 1443 (11th Cir. 1998) (reversing a grant of summary judgment for the defendant, and declining to afford same actor evidence presumptive value, but opining that such facts may support a permissible inference of nondiscrimination).

*B. Case Law that Plaintiffs' Briefings Should Cite: Circuit Precedents Narrowly Interpreting the Twombly and Iqbal Decisions that Broadened Rule 12 Dismissal Grounds*

In numerous circuits, employment discrimination precedents reject *Twombly/Iqbal* dismissal arguments and offer narrow interpretations of those landmark cases, which broadened the grounds for granting Rule 12 motions to dismiss. The following are examples from several circuits. Given how favorably the below precedents interpret *Twombly* and *Iqbal* for plaintiffs, it is hard to see why a plaintiffs' lawyer facing a *Twombly/Iqbal* Rule 12 motion to dismiss in these circuits would fail to cite one or more of these precedents.

**Second Circuit:** In 2007, just months after *Twombly*, *Patane v. Clark* cited and applied it in reversing a dismissal of a hostile work environment and retaliation claim.<sup>29</sup> *Patane* offers plaintiffs quotable language that complaints need to offer only “notice of the basic events and circumstances” and, without pleading detailed evidence, can simply “assume” necessary inferences from those facts:

[T]he district court erred in dismissing Plaintiff's retaliation [claim.] . . . [She] sufficiently alleged that: (1) Defendants were aware that she complained to Arendacs . . . about [harassment by] Clark and Evans; (2) Clark stripped her of virtually all of her secretarial duties (among other retaliatory actions . . . ); and (3) there was a causal connection . . . .

Defendants contend that Plaintiff *has not pled . . . that Clark knew that she reported* his [harassment] . . . as required by the first prong. . . . [But] Plaintiff does allege facts from which *a reasonable inference of Clark's knowledge could be drawn*: she complained about Clark . . . to a Fordham employee[;] . . . notice pleading rules “do not require a plaintiff to plead the . . . facts . . . underlying his claim[.]” It is not inappropriate at this stage in the litigation to assume that in investigating Plaintiff's complaints, Arendacs [told] Clark . . . .

The district court faulted Plaintiff for not specifying the severity or degree of . . . retaliatory reduction of her job responsibilities, and concluded that, as pled, that reduction [was] not . . . adverse employment action . . . . The district court's conclusion is flawed . . . . *Only a statement of facts so conclusory that it fails to give notice of the basic events and circumstances on which a plaintiff relies should be rejected as legally insufficient under 12(b)(6)* . . . . [The complaint] is detailed enough . . . under this standard. . . . In addition to her allegations about her reduction in job responsibilities, Plaintiff alleges that Clark and Evans specifically conspired to not give [her] work in order to make her leave.<sup>30</sup>

**Third Circuit:** *Fowler v. UPMC Shadyside* in 2009 cited and applied *Iqbal*, decided just months earlier, in reversing a dismissal of a disability discrimination claim.<sup>31</sup> *Fowler* not only details the sort of sparse allegations that can suffice to avoid

29. *Patane v. Clark*, 508 F.3d 106 (2d Cir. 2007).

30. *Id.* at 111–17 (emphasis added) (citations omitted).

31. 578 F.3d 203 (3d Cir. 2009).

(IN)COMPETENCE IN APPELLATE AND DISTRICT COURT BRIEF WRITING

dismissal, but declares that even a discrimination complaint “not as rich with detail as some might prefer” survives *Twombly* and *Iqbal* as long as its averments are sufficient to give defendant notice of the basis for plaintiff’s claim:

Although Fowler’s complaint is not as rich with detail as some might prefer, it need only set forth sufficient facts to support plausible claims. Taking her allegations as true, we find (1) that she was injured at work and . . . [her] employer regarded her as disabled within the meaning of the Rehabilitation Act; (2) that there was an opening for a telephone operator at UPMC, available prior to the elimination of her position and for which she applied; (3) that she was not transferred to that position; (4) that UPMC never contacted her about the telephone operator position or any other open positions; and (5) that Fowler believed UPMC’s actions were based on her disability. Under the plausibility paradigm, these averments are sufficient to give UPMC notice of the basis for Fowler’s claim. The complaint pleads how, when, and where UPMC allegedly discriminated[,] . . . repeatedly references the Rehabilitation Act and specifically claims she was terminated because of her disability. . . .

[S]he has nudged her claims against UPMC “across the line from conceivable to plausible.” The factual allegations in Fowler’s complaint are “more than labels and conclusions” or “a formulaic recitation of the elements of a cause of action.” We have no trouble finding that Fowler has adequately pleaded a claim for relief under the standards announced in *Twombly* and *Iqbal*. “[A] well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts alleged is improbable and that a recovery is very remote and unlikely.”<sup>32</sup>

**Fourth Circuit:** While the Fourth Circuit does not have extensive pro-plaintiff case law on *Twombly* or *Iqbal*, it does have *Ray v. Amelia County Sheriff’s Office*.<sup>33</sup> Decided in 2008, *Ray* held that

[t]he district court erred in dismissing Ray’s ADEA claim based upon its finding that her own complaint produced a legitimate, non-discriminatory reason for the defendants’ termination of her employment that rebutted her prima facie case, while failing to demonstrate that the reasons stated in her own complaint were a pretext.<sup>34</sup>

Citing more pro-plaintiff Rule 12 precedents—such as the *Swierkiewicz v. Sorema N.A.*<sup>35</sup> decision from 2002 that *Twombly* and *Iqbal* arguably abrogated and the 2007 be-liberal-if-plaintiff-is-pro-se case *Erickson v. Pardus*<sup>36</sup>—*Ray* held that neither the

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32. *Id.* at 211–13 (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)) (other citations omitted).

33. 302 F. App’x 209 (4th Cir. 2008).

34. *Id.* at 211.

35. 534 U.S. 506 (2002).

36. 551 U.S. 89 (2007).

existence of a facially apparent non-discriminatory reason nor the lack of pleaded facts warrants Rule 12 dismissal:

*An employment discrimination claim need not include specific facts establishing a prima facie case of discrimination to survive a Rule 12(b)(6) motion, but “instead must contain only ‘a short and plain statement of the claim showing that the pleader is entitled to relief.’” Swierkiewicz . . . . A plaintiff’s statement of her claim “need only give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” Erickson . . . . The district court erred in dismissing Ray’s ADEA claim based upon its finding that her own complaint produced a legitimate, non-discriminatory reason for the defendants’ termination of her employment that rebutted her prima facie case, while failing to demonstrate that the reasons stated in her own complaint were a pretext for discrimination. Ray was not required to plead specific facts establishing a prima facie case of discrimination in her complaint, let alone to plead facts showing that the non-discriminatory reason for termination suggested by her own complaint was pretextual. Ray was required only to state her claim so as to give the defendants fair notice of its nature and the grounds upon which it rests, with enough factual allegations to state a claim to relief that is plausible, not merely speculative.<sup>37</sup>*

**Seventh Circuit:** In 2008, *Tamayo v. Blagojevich* reversed a dismissal of various discrimination and retaliation claims, with multiple pro-plaintiff passages.<sup>38</sup> *Tamayo* stressed that *Twombly* “must not be overread” because it merely “establish[es] ‘two easy-to-clear hurdles’ for a complaint”<sup>39</sup>—and thus the circuit reaffirmed its pre-*Twombly* employment discrimination precedents holding that plaintiffs can “allege these claims quite generally,” need not “allege all, or any, of the facts logically entailed,” “certainly need not include evidence,” and “are entitled to discovery before being put to their proof”:<sup>40</sup>

[An] employment discrimination [plaintiff] . . . may allege these claims quite generally. . . . [and] need not “allege all, or any, of the facts logically entailed by the claim,” and . . . certainly need not include evidence. *Bennett v. Schmidt* . . . (7th Cir. 1998); *Kolupa v. Roselle Park Dist.* . . . (7th Cir. 2006) (“[C]omplaints plead *claims* rather than facts.”). . . . “Litigants are entitled to discovery before being put to their proof, and treating the allegations . . . [as the] *proof* leads to windy complaints and defeats . . . Rule 8.” *Bennett* . . . .

*Bell Atlantic* “must not be overread.” *Limestone Dev. Corp. v. Vill. of Lemont* . . . (7th Cir. 2008). Although the opinion contains some language that could be read to suggest otherwise, . . . *Bell Atlantic* made clear that it did not . . . supplant the basic notice-pleading standard. . . . *Lang v. TCF Nat’l Bank* . . . (7th Cir. 2007) (. . . notice-pleading is still all that is required); *Limestone* . . . (same). . . .

37. *Ray*, 302 F. App’x at 211 (citing *Swierkiewicz*, 534 U.S. at 508; *Erickson*, 551 U.S. at 93) (emphasis added).

38. 526 F.3d 1074, 1081 (7th Cir. 2008).

39. *Id.* at 1082–84.

40. *Id.* at 1081.

## (IN)COMPETENCE IN APPELLATE AND DISTRICT COURT BRIEF WRITING

*Bell Atlantic* . . . establish[es] “two easy-to-clear hurdles” . . . “First, the complaint must describe the claim in sufficient detail to give the defendant fair notice of what the claim is and the grounds upon which it rests. Second, its allegations must plausibly suggest . . . a right to relief . . . above a ‘speculative level’” . . . . *Concentra* . . . . Acknowledging that a complaint must contain something more than a general recitation of the elements . . . , we nevertheless reaffirmed the minimal pleading standard for simple claims of race or sex discrimination. . . . “[O]nce a plaintiff alleging illegal discrimination has clarified that it is on the basis of her race, there is no further information that is both easy to provide and of clear critical importance . . . . Requiring a more detailed complaint . . . would have replicated the inefficient chase for facts decried [in pre-*Twombly* precedents.]” *Concentra* . . . . Even after *Bell Atlantic*, . . . [complaints] need only aver that the employer instituted a (specified) adverse employment action . . . on the basis of [plaintiff’s] sex.<sup>41</sup>

There is no excuse for plaintiffs’ lawyers not to rebut defendants’ *Twombly/Iqbal* arguments for dismissal with case law like that above. Even outside of these circuits, plaintiffs’ lawyers certainly could cite other circuits’ cases narrowly construing, or powerfully distinguishing, the defenses’ *Twombly/Iqbal* arguments for dismissal.

### III. SURVEYING PLAINTIFFS’ USE OF CASE LAW IN THEIR APPELLATE AND DISTRICT COURT BRIEFINGS

The survey included thirty-five cases from the Southern District of New York and the Northern District of Illinois in which a plaintiff asserted claims of employment discrimination. For each case, the defendant’s summary judgment brief was available on Westlaw (allowing for a terms-and-connectors search for the relevant arguments), the plaintiff’s was available on either Westlaw or the court’s PACER website, and the court issued a decision either granting or denying summary judgment. Although these cases do not comprise a complete sample, this sample is large enough to yield a sense of the typical quality of plaintiffs’ briefs.<sup>42</sup>

#### *A. An Assessment of Same-Actor Briefings on District Court Summary Judgment Motions*

Bad brief-writers overwhelmingly lose, while good brief-writers at least have a fighting chance. The following is a review of defendants’ summary judgment briefs pressing the “same actor” argument, of how (or whether) plaintiffs’ responsive briefs rebutted the argument, and of what the courts then ruled. Of the briefings in the sample of thirty-five cases, only seven plaintiffs’ briefs argued the same-actor issue

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41. *Id.* at 1081–84 (citing *Limestone Dev. Corp. v. Vill. of Lemont*, 520 F.3d 797, 803–04 (7th Cir. 2008); *EEOC v. Concentra Health Serv., Inc.*, 496 F.3d 773, 781–82 (7th Cir. 2007); *Lang v. TCF Nat’l Bank*, 249 F. App’x. 464, 466–67 (7th Cir. 2007); *Bennett v. Schmidt*, 153 F.3d 516, 518 (7th Cir. 1998); *Kolupa v. Roselle Park Dist.*, 438 F.3d 713, 714 (7th Cir. 1986)).

42. Further, obtaining this sample entailed review of many more than thirty-five cases. In numerous cases, the defendant’s brief was available online, but the plaintiff’s was neither on Westlaw nor on PACER. Moreover, the Westlaw databases are incomplete, as are publicly searchable electronic case dockets, which also sometimes make one side’s brief inaccessible due to a confidentiality order.

plausibly well, three of which met my criteria for a “good” brief. In the other twenty-eight cases, the plaintiffs either failed to rebut the argument at all or rebutted it only with short assertions devoid of any of the available pro-plaintiff case law. Of the seven good plaintiffs’ briefings, three of those plaintiffs survived summary judgment. Of the twenty-eight bad briefings, only four of the plaintiffs survived summary judgment, while twenty-two plaintiffs lost when the court granted summary judgment to the defendants, and two plaintiffs settled.

### 1. *The Good*

Most of the good briefs are quite good at rebutting the same-actor defense with apt case law. Below are key excerpts from the three good briefs.

*Mantia v. The Great Books Foundation*:<sup>43</sup>

TGBF relies on an outdated argument called the “same actor inference” . . . . TGBF argues that because the same person who hired Mantia also “promoted” her . . . he must not be biased against older people. The Seventh Circuit has “emphatically rejected the ‘same actor inference.’” *Kadas v. MC [sic] Systemhouse Corp.* [7th Cir. 2001], citing *Johnson v. Zema Systems Corp.* [7th Cir. 1999]. The inference itself is not “dispositive,” but “simply provides a convenient shorthand for cases in which a plaintiff is unable to present sufficient evidence of discrimination[.] . . . In none of the cases cited by TGBF did the plaintiff present evidence like Mantia’s—evidence of an admitted preference for younger employees, disdain for and disparate treatment of older employees, and serious doubt about the reasons articulated by the employer for the discharge.<sup>44</sup>

*Gladwin v. Pozzi*:<sup>45</sup>

[T]he “same actor” inference is not a necessary inference, it is only a plausible one, and decisions . . . have warned that its use is not to become a substitute for a fact-intensive inquiry into the particular circumstances . . . . *Sklaver v. Casso-Solar Corp.* [S.D.N.Y. 2004]. For a number of reasons, the “same actor” defense should not prevail as a matter of law here. First, unlike in the cases cited by defendants, four and a half years passed between plaintiff’s hiring and firing, thus dampening the . . . inference. See *Carlton v. Mystic Transp.* [2d Cir. 2000] (“Such an inference is strong where the time elapsed between the events of hiring and firing is brief. Here it is not. And, the enthusiasm with which the actor hired the employee . . . may have waned with the passage of time because the relationship between an employer and an employee, characterized by

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43. No. 01 C 8971, 2003 WL 22143255 (N.D. Ill. Sept. 17, 2003).

44. Brief for Plaintiff in Opposition to Summary Judgment at 24, *Mantia v. Great Books Found.*, 2003 WL 22143255 (Apr. 8, 2003) (No. 01 C 8971) (citing *Kadas v. MCI Sys. Corp.*, 255 F.3d 359, 361 (7th Cir. 2007); *Johnson v. Zema Sys. Corp.*, 170 F.3d 734, 745 (7th Cir. 1999)) (other citations omitted) (distinguishing defendants’ cases). Plaintiff’s counsel, Carolyn Shapiro, Esq., was then at Miner, Barnhill & Galland in Chicago, Illinois, but is now a law professor at the Illinois Institute of Technology’s Chicago-Kent School of Law.

45. *Gladwin v. Pozzi*, No. 06 Civ. 0650(SCR)(JFK), 2010 WL 245575 (S.D.N.Y. Jan. 22, 2010).

## (IN)COMPETENCE IN APPELLATE AND DISTRICT COURT BRIEF WRITING

reciprocal obligations and duties, is . . . subject to time's 'wrackful siege of battering days.');

*Nanton v. City of New York* [S.D.N.Y. 2007] ("Since roughly two-and-a-half years passed . . . [the] inference is insufficient . . ."). Second, unlike in the cited cases, plaintiff has adduced evidence of disparate treatment . . . Third, . . . plaintiff complained to Pozzi of disparate treatment and that he responded hostilely . . . within days . . . See *Feingold v. New York* [2d Cir. 2004] ("[The] inference would not necessarily apply here given the changes in circumstances . . .," including plaintiff's complaints . . .). Finally, the fact that Pozzi chose to replace plaintiff with a less qualified white male further negates the . . . inference. *Richards v. Calvet* [S.D.N.Y. 2005].<sup>46</sup>

*Quinby v. WestLB AG*:<sup>47</sup>

[Once] Mr. Parker assumed leadership . . . his role changed materially, rendering . . . the "same actor inference" inappropriate. The Second Circuit has refused to apply the same actor inference . . . where the circumstances of the plaintiff's employment had changed over time. . . . [A]lso . . . [the] Second Circuit has not ruled on whether "same actor inference" applies to Title VII claims at all. [And the] same actor inference does not apply if significant amount of time has passed between hiring and firing. . . . Even if Mr. Parker had been responsible for hiring . . . Ms. Quinby while Mr. Leithhead was in charge, under radically different conditions (e.g., Mr. Parker supplanting Mr. Leithhead as CEO), the "same actor" may take very different actions with respect to a particular employee.<sup>48</sup>

### 2. *The Bad and the Ugly*

This article categorizes briefs as "bad" not based on subtle shortcomings or gray areas in how well they argue a point, but rather on whether the plaintiffs meaningfully rebutted defense same-actor arguments. In all of the "bad" plaintiffs' briefs, the defendants made the "same-actor" argument, but the plaintiffs either failed to rebut the argument at all or rebutted it only with cursory assertions lacking citations to any of the available pro-plaintiff case law. The following discussion details how many plaintiffs in cases from the survey failed to offer an adequate, or any, response to the defendants'

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46. Memorandum for Plaintiff in Opposition to Defendants' Motion for Summary Judgment at 29–30, *Gladwin v. Pozzi*, 2010 WL 245575 (S.D.N.Y. Jan. 22, 2010) (No. 06 Civ. 0650(SCR)(LMS)) (citing *Sklaver v. Casso-Solar Corp.*, No. 02-CV-9928 (WCC), 2004 WL 1381264, at \*10 n.16 (S.D.N.Y. May 15, 2004); *Carlton v. Mystic Transp., Inc.*, 202 F.3d 129, 132 (2d. Cir. 2006); *Nanton v. City of New York*, 05 Civ. 8989 (DLC), 2007 U.S. Dist. LEXIS 58874, at \*14–15 (S.D.N.Y. Aug. 13, 2007); *Feingold v. New York*, 366 F.3d 138, 155 (2d Cir. 2004); *Richards v. Calvet*, 99 Civ. 12172 (RJH) (MHD), 2005 U.S. Dist. LEXIS 5365, at \*24 (S.D.N.Y. Mar. 31, 2005)). Plaintiff's counsel, Michael Sussman and Christopher Watkins, are named partners at Sussman & Watkins, Goshen, New York.

47. No. 04 Civ. 7406 (WHP), 2008 WL 3826695 (S.D.N.Y. Aug. 15, 2008).

48. Memorandum for Plaintiff in Opposition to Defendant's Motion for Summary Judgment at 27–28, *Quinby v. WestLB AG*, 2008 WL 3826695 (S.D.N.Y. Sept. 5, 2006) (No. 04 Civ. 7406 (WHP) (HBP)) (citations omitted). Plaintiff's counsel, Kathleen Peratis & Tammy Marzigliano, are with Outten & Golden LLP, New York, New York.

same-actor argument: (i) offering no rebuttal at all; (ii) offering some rebuttal, but not a meaningful one; or (iii) effectively defaulting by not filing a reply at all.

*i. No Rebuttal at All*

In many cases, plaintiffs' briefings offered literally no rebuttal to the same-actor arguments—not even mentioning “same actor,” the pro-defense cases defendants cited, or any of the pro-plaintiff precedents.

*O'Shields v. Liberty Mutual Insurance*:<sup>49</sup> This memorandum of law consisted of thirty-four numbered paragraphs and cited just six cases offering only unhelpfully general citations to basic, well-known summary judgment standards (*Celotex*, *Liberty Lobby*, *McDonnell Douglas*, etc.).<sup>50</sup> The court granted the defendant summary judgment in an unpublished decision.<sup>51</sup>

*Parker v. City of Elgin*:<sup>52</sup> This brief cited seven cases, including *Liberty Lobby*, two discrimination cases, and four cases on plaintiff's separate Due Process claim.<sup>53</sup> The court granted the defendant summary judgment.<sup>54</sup>

*Rinsler v. Sony Pictures Entertainment, Inc.*:<sup>55</sup> In this particularly awful brief, most cases cited were just in reusable boilerplate form (*McDonnell Douglas*, etc.); the text also contained incorrect grammar and misspellings, such as, “Defendants' suggestion that because Allegra is also Caucasion [sic] is a red herring.”<sup>56</sup> The brief also contained many unreadable, likely dictated sentences, like the following: “Plaintiff had every reason to believe that her employment would continue, as she relied on the course of actions that occurred the year prior, when she was kept on, as she had been hired as a full time employee, as others had not.”<sup>57</sup> The court granted the defendant summary judgment and expressly credited the same-actor defense.<sup>58</sup>

*Hoskins v. Northwestern Memorial Hospital*:<sup>59</sup> This brief not only failed to rebut the “same-actor” argument at all on the law or the facts, but also affirmatively conceded, “Kangas stated that she was the decision-maker in [the plaintiff's] . . . termination” and

49. 1:02-CV-09218 (N.D. Ill. Jun. 4, 2004).

50. Plaintiff's Response to Defendants' Motion for Summary Judgment at 4–7, *O'Shields v. Liberty Mut. Ins. Co.* (N.D. Ill. June 4, 2004) (No. 02 C 9218).

51. *O'Shields*, 1:02-CV-09218 (Docket Entry No. 25).

52. No. 03 C 0171, 2005 WL 2171159 (N.D. Ill. Aug. 30, 2005).

53. Memorandum for Plaintiff in Opposition to Defendant's Motion for Summary Judgment, *Parker v. City of Elgin*, 2005 WL 2171159 (N.D. Ill. Aug. 25, 2004) (No. 03 C 0171).

54. *Parker*, 2005 WL 2171159.

55. No. 02-Civ. 4096 (SAS), 2003 WL 22015434 (S.D.N.Y. Aug. 25, 2003).

56. Memorandum for Plaintiff in Opposition to Defendants' Motion for Summary Judgment, *Rinsler v. Sony Pictures Entm't, Inc.*, 2003 WL 22015434 (S.D.N.Y. July 21, 2003) (No. CV 4096 (SAS)).

57. *Id.*

58. *Rinsler*, 2003 WL 22015434, at \*7.

59. No. 01 C 1116, 2002 WL 1424562 (N.D. Ill. June 28, 2002).



(IN)COMPETENCE IN APPELLATE AND DISTRICT COURT BRIEF WRITING

conceded that the plaintiff “d[id] not have any first-hand knowledge whether Kangas was the decision-maker.”<sup>60</sup> The court granted defendant summary judgment.<sup>61</sup>

*ii. No Meaningful Rebuttal*

The following briefs offered only a short rebuttal, failed to counter the defendant’s same-actor argument meaningfully, and offered none of the available pro-plaintiff case law.

*Lenhoff v. Getty*:<sup>62</sup> In this brief, the plaintiff offered no other cases, conceded that a decision by the same actor yielded a “strong inference” of non-discrimination, cited no pro-plaintiff case law, and simply declared the plaintiff’s factual evidence strong: “*Grady* does not present an un rebuttable presumption, but only a strong inference, against discriminatory intent. Plaintiff respectfully submits that, in light of the circumstances surrounding plaintiff’s termination, she has overcome this strong inference.”<sup>63</sup> The court granted the defendant summary judgment and expressly credited the same-actor defense.<sup>64</sup>

*Isaacs v. City of New York*:<sup>65</sup> The plaintiff’s brief did not cite any same-actor case law or rebut the defense’s argument for a same-actor inference at all.<sup>66</sup> The evidence for the inference was just one manager’s involvement, among a group of decisionmakers, in both the hiring and the firing.<sup>67</sup> The briefing simply declared, with strident verbiage, that the one “same actor” was part of a committee—which the case law holds sufficient for application of the defense:

Defendants also argue that racial discrimination could not have played any role in the decision to terminate Plaintiff, because the same person who ultimately hired Plaintiff is the same person who ultimately terminated him. This argument is disingenuous. . . . [T]he record conclusively establishes that Commissioner Horn did not terminate Plaintiff on his own.<sup>68</sup>

The court granted the defendant summary judgment and expressly credited the same-actor defense.<sup>69</sup>

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60. Plaintiff’s Response to Defendant’s Motion for Summary Judgment at 2, *Hoskins v. Nw. Mem’l Hosp.*, 2002 WL 32604413 (N.D. Ill. Mar. 20, 2002) (No. 01 C 1116) (Kangas was the plaintiff’s direct supervisor).

61. *Hoskins*, 2002 WL 32604413, at \*7.

62. No. 97 CIV. 9458 (LMM), 2000 WL 977900 (S.D.N.Y. July 17, 2000).

63. Memorandum for Plaintiff in Opposition to Defendants’ Motion for Summary Judgment at 5–6, *Lenhoff v. Getty*, 2000 WL 977900 (S.D.N.Y. June 21, 1999) (No. 97 Civ. 9458).

64. *Lenhoff*, 2000 WL 977900, at \*5.

65. No. 04 Civ. 5108(PAC), 2005 WL 3466051 (S.D.N.Y. Dec. 16, 2005).

66. Memorandum for Plaintiff in Opposition to Defendant’s Motion for Summary Judgment, *Isaacs v. City of New York*, 2005 WL 3466051 (S.D.N.Y. Aug. 23, 2005) (No. 04 Civ. 5108).

67. *Id.* at 4.

68. *Id.* at 19.

69. *Isaacs*, 2005 WL 3466051, at \*4.

*De la Cruz v. City of New York*:<sup>70</sup> The plaintiff's brief cited no same-actor case law and, more generally, was a remarkably ungrammatical twelve pages that reads like unedited dictation.<sup>71</sup> The court granted the defendant summary judgment and expressly credited the same-actor defense.<sup>72</sup>

iii. *Defaulting on the Motion*

*Thompson v. American Family Insurance*:<sup>73</sup> Plaintiff's counsel defaulted, filing no opposition papers, despite two deadline extensions.<sup>74</sup> On August 21, 2008, counsel sought and received an extension until September 10, 2008; then, on September 10, counsel sought and received an extension to September 17, citing computer problems.<sup>75</sup> When counsel then defaulted after filing nothing for almost three months, the court granted summary judgment.<sup>76</sup>

*Robinson v. New York City Department of Education*:<sup>77</sup> The plaintiff's counsel defaulted here as well, filing nothing in opposition.<sup>78</sup> The court granted summary judgment.<sup>79</sup>

3. *The Ensuing Case Law*

In four of the losses suffered by plaintiffs who briefed summary judgment badly, the court issued a decision relying upon the same-actor theory as a basis for granting summary judgment.<sup>80</sup> The remaining cases, in which decisions were unavailable, may be examples of "no harm, no foul," because the court did not expressly rely upon the same-actor theory. On the other hand, the plaintiffs' failure to brief the issue may still have affected the outcome: unnecessarily conceding rebuttable points is no way to convince a judge of the merits of the case. This lawyering failure easily could have contributed to the judge's view that the case was too weak to survive summary judgment. Notably, all four pro-"same-actor" decisions came after bad briefings, whereas none of the well-briefed motions yielded a judicial decision adopting the same-actor theory.

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70. 783 F. Supp. 2d 622 (S.D.N.Y. 2011).

71. Memorandum for Plaintiff in Opposition to Defendant's Motion for Summary Judgment, *De la Cruz v. City of New York*, 783 F. Supp. 2d 622 (S.D.N.Y. Sept. 22, 2010) (No. 09 CIV 4905 (FM)).

72. *De la Cruz*, 783 F. Supp. 2d at 642.

73. No. 1:06-CV-04059 (N.D. Ill. dismissed July 31, 2009).

74. *Id.* (Docket Nos. 31, 35).

75. *Id.* (Docket No. 35).

76. *Id.* (Docket No. 38).

77. No. 1:08CV10293 (S.D.N.Y. dismissed Dec. 30, 2010).

78. *Id.* (Docket No. 19).

79. *Id.* (Docket No. 30).

80. The four cases were *Rinsler*, *Lenhoff*, *Issacs*, and *Hoskins*.

(IN)COMPETENCE IN APPELLATE AND DISTRICT COURT BRIEF WRITING

*B. Twombly/Iqbal Appellate Briefings: Again Plaintiffs Too Often Fail to Exploit Available Pro-Plaintiff Case Law—But Less Often than in District Court Briefings*

Plaintiffs' appellate briefings appear to be of higher quality overall than plaintiffs' district court briefings, possibly for a variety of reasons. First, as noted above, plaintiffs draw moot court and briefwriting support from the bar for appellate cases more often than for district cases. Second, perhaps some plaintiffs' lawyers who lost in district court refer their appeals to attorneys with more appellate expertise and experience. Finally, perhaps plaintiffs' lawyers who know they have limited briefwriting skills avoid appealing their losses. This survey did not compile any comprehensive sample of good versus bad appellate briefs addressing *Twombly/Iqbal* issues, partly because far from all employment discrimination cases feature Rule 12 motions, and partly because appellate cases (unlike district court briefings) are not numerous enough to allow general conclusions. The existence of readily available, quality briefings, however, shows that there is less of a pervasive bad-briefing problem at the appellate level than at the district court level, though some appellate briefings are as bad as the typical district briefing in failing to rebut well-established arguments with readily available case law.

The Seventh Circuit's *Tamayo v. Blagojevich*<sup>81</sup> decision may be the single most pro-plaintiff employment discrimination decision, reiterating the modest nature of the notice pleading burden post-*Twombly*. It stressed that *Twombly* "must not be overread" because it merely "establish[es] 'two easy-to-clear hurdles' for a complaint"; it thus reaffirmed pre-existing precedents holding that employment discrimination plaintiffs can "allege these claims quite generally," "need not allege all, or *any*, of the facts logically entailed," "certainly need not include evidence," and "are entitled to discovery before being put to their proof."<sup>82</sup> *Tamayo* dates to May 2008, so even granting a grace period for the decision to draw notice, any Seventh Circuit plaintiffs appealing *Twombly/Iqbal* Rule 12 dismissals as of 2009 really should cite *Tamayo*, unless they have other authority for narrowly interpreting *Twombly/Iqbal*. An excellent use of *Tamayo* appears in the plaintiff's Seventh Circuit brief in *Feinberg v. RM Acquisition, LLC*,<sup>83</sup> a claim of retirement benefits interference under Employee Retirement Income Security Act § 510:

A complaint need only provide a "short and plain statement of the claim showing that the pleader is entitled to relief," [*Iqbal*] . . . and contain "enough facts to state a claim to relief that is plausible on its face." . . . *Twombly* . . . Thus, all that is required is a statement sufficient to provide the defendant with "fair notice" of the claim and its basis.<sup>84</sup> *Tamayo* . . .

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81. 526 F.3d 1074, 1081 (7th Cir. 2008).

82. *Id.*

83. 629 F.3d 671 (7th Cir. 2010).

84. Brief and App'x for Plaintiffs-Appellants at \*7-\*8, *Feinberg v. RM Acquisition, LLC*, 629 F.3d 671 (7th Cir. 2010) (No. 09-cv-695).

Plaintiffs alleged that Defendant RM Acquisition and Rand McNally “entered into an asset purchase agreement to transfer the remaining assets . . . [with] the specific intent of interfering with the Plaintiffs’ rights by attempting to evade their existing and future liability under the [retirement plan].” . . . No more specificity was needed . . . , as Plaintiffs provided Defendant with “fair notice” of the claim and its basis. *Tamayo* . . . (quoting *Twombly* . . . ). Additionally, this Circuit has warned time and again that courts must “construe the complaint in the light most favorable to the plaintiff, accepting as true all well-pleaded facts alleged, and drawing all possible inferences in her favor.”<sup>85</sup>

[T]he district court misstates . . . the plan when it defines the Plan Administrator as “Rand McNally” . . . [not] “the Company,” which includes . . . “any successor[,]” . . . [including defendant] RM Acquisition because of its asset purchase of Rand McNally. . . . The Complaint itself addresses [this] issue of successor liability . . . . [T]he district court failed to “construe the complaint in the light most favorable to the plaintiff. . . .”<sup>86</sup>

But in *Hatmaker v. Memorial Medical Center*,<sup>87</sup> another Seventh Circuit case, the plaintiff’s briefing failed to cite *Tamayo* while instead citing mainly pre-*Twombly* case law in its argument for a narrow interpretation of *Twombly* and *Iqbal*. The district court,

[w]hile recognizing that Hatmaker had plead . . . Title VII retaliation . . . went on to hold that she did not specifically reference the “opposition” clause [and,] . . . [a]s such, . . . effectively waived this claim. This conclusion would seem to mandate that Title VII plaintiffs must plead not only that they had been retaliated against, but also must allege which prong of the statute under which they . . . proceed.<sup>88</sup>

Plaintiff’s appellate brief argued that “[s]uch a conclusion is inconsistent with the tenets of federal notice pleading and ignores the important role that both discovery and summary judgment play in federal civil litigation.”<sup>89</sup> But while the brief could have drawn substantial support from *Tamayo* and other post-*Twombly* Seventh Circuit authority (such as one leading case *Tamayo* cited extensively, *EEOC v. Concentra Health Services*<sup>90</sup>), it unpersuasively cited almost entirely pre-2007 case law

85. *Id.* at \*27.

86. *Id.* at \*29–\*30.

87. 619 F.3d 741 (7th Cir. 2010).

88. Brief and Required Short App’x for Plaintiff-Appellant at \*29, *Hatmaker v. Mem’l Med. Ctr.*, 619 F.3d 741 (Mar. 3, 2010) (No. 09-3002).

89. *Id.*

90. 496 F.3d 773 (7th Cir. 2007). The court in *EEOC v. Concentra Health Servs., Inc.*, explained that

Rule 8(a)(2)’s “short and plain statement of the claim” must contain a minimal level of factual detail, although that level is indeed very minimal. *See Bell Atlantic* . . . . The classic verbal formula is that a complaint need only be sufficiently detailed to “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests.” *Id.* . . . “[T]he intent of the liberal notice pleading system is to ensure that claims are determined on their merits rather than through missteps in pleading.” 2 James Wm. Moore, et al., *Moore’s Federal Practice* § 8.04 (3d ed. 2006); *see also Swierkiewicz*. . . . Requiring a plaintiff to

(IN)COMPETENCE IN APPELLATE AND DISTRICT COURT BRIEF WRITING

that, because it preceded both *Twombly* and *Iqbal*, provides essentially no support for narrowly interpreting *Twombly* and *Iqbal*.<sup>91</sup>

Also instructive is a comparison of plaintiffs' briefings in two cases in the Third Circuit, in which a 2009 appellate decision, *Fowler v. UPMC Shadyside*, offered a similarly pro-plaintiff post-*Twombly/Iqbal* employment discrimination precedent, holding that even a discrimination complaint "not as rich with detail as some might prefer" survives *Twombly* and *Iqbal* as long as its "averments are sufficient to give [defendant] notice of the basis for [plaintiff's] claim."<sup>92</sup> Yet the plaintiff's 2010 brief appealing a dismissal in *Holmes v. Gates*<sup>93</sup> contained only one unhelpful, boilerplate quote from *Fowler* in the "Standard of Review" paragraph: "While '[a] complaint has to 'show' [an entitlement to relief] with its facts . . . [t]his 'plausibility' determination will be 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'"<sup>94</sup> The argument section in the *Holmes* brief was unusually short (barely 2300 words) and lacked any mention that there indeed are post-*Twombly* decisions upholding employment discrimination claims as sufficient under Rule 12.

In contrast, in *Golod v. Bank of America Corp.*,<sup>95</sup> the plaintiff's 2010 appellate brief made strong use of *Fowler* to argue against a district court *Twombly/Iqbal*-based dismissal, effectively contrasting the plaintiff's case and *Fowler* with another precedent that affirmed a dismissal for insufficient fact allegations:

*Fowler* . . . do[es] not require the specific detailed factual particulars of a claim to be pled . . . Even after *Twombly*, and *Iqbal*, . . . all factual allegations are to be considered true, . . . the complaint is to be construed in a light most favorable to the Plaintiff, and . . . the Court must . . . determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief. *Fowler* . . . [*Twombly*] made it clear . . . a court must take the

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plead detailed facts interferes with that goal in multiple ways. First, and most importantly, the number of factual details potentially relevant to any case is astronomical, and requiring a plaintiff to plead facts that are not obviously important and easy to catalogue would result in "needless controversies" about what is required that could serve only to delay or prevent trial. Most details are more efficiently learned through the flexible discovery process. *Swierkiewicz*. . . "Instead of lavishing attention on the complaint until the plaintiff gets it just right, a district court should keep the case moving." . . . Second, a plaintiff might sometimes have a right to relief without knowing every factual detail supporting its right; requiring the plaintiff to plead those unknown details before discovery would improperly deny the plaintiff the opportunity to prove its claim.

*Id.* at 779–80 (some citations omitted).

91. The one post-*Twombly* case cited was a very general snippet about notice pleading—"[l]itigants need not plead legal theories"—from a non-employment case that itself did not cite *Twombly* or *Iqbal*. *Ortiz v. Downey*, 561 F.3d 664, 670 (7th Cir. 2009).
92. *Fowler*, 578 F.3d at 211–12.
93. 403 F. App'x 670 (3d Cir. 2010).
94. Appellant's Brief and App'x Vol. I at 5, *Holmes v. Gates*, 403 F. App'x 670 (July 28, 2012) (No. 10-2059) (citing *Fowler*, 578 F.3d at 210–11).
95. 403 F. App'x 699 (3d Cir. 2010).

allegations as true, no matter how skeptical the Court may be. [Fowler.] . . . [A]t the early pleading stage a Plaintiff need not plead particulars[,] . . . only the nature of their claim. *Fowler* . . . . [Fowler held] a claim under the Rehabilitation Act only required a claim of being disabled, and need not go into particulars about the life activity affected . . . [or] the nature of her substantial limitations. *Fowler* . . . [S]o long as the complaint notifies the defendant of claimed impairment, the substantially limited life activity need not be . . . plead[ed,] . . . *Fowler* . . . , even after *Twombly* and *Iqbal*.

Similarly, Mrs. Golod pled sufficient facts . . . of being denied educational opportunities, the ability to exercise supervision, use her training and skills, as well as denial of promotional opportunities. These . . . [establish] a factual basis to allow . . . discovery to search out the exact times and dates of each . . . [as] the particulars of the factual evidence showing . . . discriminatory intent . . . , just as allowed in *Fowler*. . . Mrs. Golod stated that she was a member of a protected group both by religion, Jewish, and by national origin, Russian, alleged that she had been denied the use of her education, two Masters Degrees, one in Electrical Engineering and one in Applied Mathematics, (Complaint, ¶¶ 16 & 18), forced to use older technology . . . [and] not allowed to work with newer technology, taken out of the Development Area, (¶ 20), denied a promotion in 2004, (¶ 24), put in a position outside her department which did not require her professional or technical expertise, (¶ 24), denied all educational opportunities for which she applied, (¶ 25), and was “continually denied promotions” even though individuals with less experience were being promoted, (¶ 26), and finally denied authority given to other employees . . . (¶ 27). . . Mrs. Golod’s evaluations . . . met or exceeded defendant’s expectations, (¶¶ 21 & 28) . . . [These] allegations would create [a] reasonable expectation . . . [for] further discovery. *Fowler* . . . .

[This] case is significantly different from . . . [cases that] upheld a post *Twombly* and *Iqbal* dismissal. In *Guirguis* [3rd Cir. 2009], . . . the complaint which made only three allegations, the Plaintiff was an Egyptian native of Arab descent, he was discharged, and his termination was in violation of his Civil Rights, did not “cross the threshold established by *Twombly* and *Iqbal*,” since the first two allegations provided no facts supporting inference of discrimination, and the third was “precisely the type of factually unsupported legal conclusion that is inadequate [under] Rule 12(b)(6) . . . .” [*Id.*] By comparison . . . Golod’s allegations . . . are more than the prohibited “formulaic recitation of the elements.” [*Fowler.*]

The lower Court erroneously required that Mrs. Golod plead each promotional or educational and promotional opportunity she was denied. . . . [T]here is no necessity to plead . . . particulars . . . at the “early pleadings stage.” *Fowler* . . . During discovery Mrs. Golod would . . . [have] her personnel file, or other records . . . in the defendant’s possession, to determine the specific details of . . . opportunities she was denied[,] . . . [creating]

## (IN)COMPETENCE IN APPELLATE AND DISTRICT COURT BRIEF WRITING

reasonable expectation that discovery would reveal . . . the necessary element[s.]<sup>96</sup>

### IV. CONCLUSION

Based on a limited survey of appellate and district court briefings in employment discrimination cases, this article finds that, surprisingly, many briefings by plaintiffs' counsel are of extremely poor quality. That finding raises a broad range of questions. Why do clients choose such lawyers, and what can be done to improve clients' efforts to select competent lawyers? How can lawyers filing incompetent, doomed briefs maintain a law practice? Finally, what might be done to improve this state of affairs? As with any complex problem, answers to these questions will require, and hopefully will be the subject of, further study.

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96. Brief of Appellant at \*10–\*22, *Golod v. Bank of Am. Corp.*, 403 F. App'x 699 (Feb. 9, 2010) (No. 09-2907) (some citations omitted).