THE FALLACY OF LIBERAL DISCOVERY: LITIGATING EMPLOYMENT DISCRIMINATION CASES IN THE E-DISCOVERY AGE

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I. INTRODUCTION

As part of the Civil Rights Act of 1964, the United States Congress enacted legislation that protects the employment of those who fall into protected categories of race, color, religion, sex, and national origin.[1] Employees may sue their employers for violating Title VII of the Act if the employers "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."[2] In these cases, the employees are the plaintiffs and have the burden of proving that their protected status was a motivating factor in the adverse employment action.[3] The Federal Rules of Civil Procedure are the framework for discovery, the process by which both parties obtain evidence before trial to prove their cases.[4]

The Supreme Court of the United States relies upon a fallacy of "liberal discovery" when determining that the plaintiff/employee should carry the burden of persuasion throughout the litigation process in employment discrimination cases.[5] The notion of liberal discovery is a fallacy because it

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[1] *See* 42 U.S.C. § 2000e-2 (2012).

[2] *Id*.

[3] *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[4] *See* FED. R. CIV. P. 26 (entitled, "Duty to Disclose; General Provisions Governing Discovery").

[5] *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 253 (1981) ("The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.").

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does not accomplish its intended purpose of cooperative exchange of all relevant information between the parties, but instead has given the party with greater access to information the advantage in costly discovery disputes.[6]

Although the reliance upon the fallacy of liberal discovery has always been problematic for plaintiffs, in the e-discovery age, the problem is magnified because of the substantial cost and complexity of accessing electronic records.[7] The plaintiff in an employment discrimination case carries this heavy burden of proof, even though the defendant/employer has greater access to the relevant information.[8] Because direct evidence of employment discrimination is rare, plaintiffs in the overwhelming majority of cases must rely solely on circumstantial evidence.[9] In *Texas Department of Community Affairs v. Burdine*, the Supreme Court of the United States stated that the plaintiff has the burden of persuasion throughout the litigation process.[10] After the plaintiff establishes a prima facie case for discrimination, the defendant/employer has the minimal burden of production to establish a "legitimate, nondiscriminatory reason"; however, the employer is not required to persuade that this reason is the real reason.[11] The late prominent civil rights Professor Robert Belton[12] keenly noted,

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[6] Mitchell London, *Resolving the Civil Litigant's Discovery Dilemma*, 26 Geo. J. Legal Ethics 837, 854 (2013) ("Though the ethical and procedural rules aspire to 'promote communication and cooperation,' the existence of the liberal discovery regime, combined with litigants' utility-maximizing incentives under the adversary system, provides litigants with too strong an incentive to abuse their informational advantages.").

[7] *See* THE DUKE CONFERENCE AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 22 (LegalPub.com, Inc. ed., 2015).

[8] *See* David A. Green, *Why the African American Community Should Be Concerned About Supreme Court Nominee Samuel A. Alito: His Potential Impact on Title VII Cases*, 33 S.U. L. REV. 425, 430–31 (2006) ("[D]espite the plaintiffs' difficulty in proving the defendants' motive and despite defendants' superior knowledge regarding its employment decision," the Court chose not to accommodate the plaintiffs by shifting the responsibility to the defendants to come forth with an explanation for the adverse employment decision. Therefore, "plaintiffs are left with a daunting task of proving their discrimination cases.").

[9] *See* Terri L. Dill, St. Mary's Honor Center v. Hicks*: Refining the Burdens of Proof in Employment Discrimination Litigation*, 48 ARK. L. REV. 617, 617 (1995).

[10] *See Burdine*, 450 U.S. at 253.

[11] *Id.* at 258.

[12] *Robert Belton, Trailblazing Scholar of Employment Law, Dies*, VANDERBILT UNIV. (Feb. 10, 2012, 2:58 PM), http://news.vanderbilt.edu/2012/02/robert-belton-obituary.

> A trailblazer in civil rights as an activist, attorney and scholar throughout his career, Belton served from 1965 to 1970 as an assistant counsel for the NAACP Legal Defense and Educational Fund Inc. At the Legal Defense Fund, he headed a national civil rights litigation campaign to enforce what was then a new federal law prohibiting discrimination in

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> [T]he Court [in *Burdine*] stated that "[*t*]*he defendant need not persuade the court that it was actually motivated by the proffered reasons*." This statement is perhaps the most disturbing point in the case because it suggests that the defendant need not prove the "real reason" for his action even if improper criteria were used.[13]

The Court reasoned that in responding to the employer's legitimate, nondiscriminatory explanation, the employee, because of the "liberal discovery rules,"[14] would not "find it particularly difficult to prove that a proffered explanation lacking a factual basis is a pretext."[15] The Court's rationale is incorrect and fails to recognize the cumbersome, expensive, and often ineffective discovery process. In the present-day electronic era, the technological quagmire of e-discovery and the associated complex legal issues further compound this reasoning.

This Article begins with an examination of the development and the effect of the discovery rules on civil litigation in the American legal process.[16] Next, the Article reviews the Court's rationale for placing the heavy burden of proof in employment discrimination cases on the plaintiff.[17] Then, the Article discusses the revolution of discovery and advent of e-discovery.[18] Furthermore, the Article looks at the effect of e-discovery on

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> employment because of factors such as race and sex. Belton had a major role in *Griggs v. Duke Power Co.*, the landmark Supreme Court civil rights case the Legal Defense Fund litigated. Other landmark Supreme Court civil rights cases in which he was involved included *Albemarle Paper Co. v. Moody*, which addressed damages in civil rights cases, and *Harris v. Forklift Systems*, which addressed sexual harassment. . . . An expert in employment discrimination law, Belton was the author of numerous law review articles and book chapters, and the lead author of a widely adopted casebook on employment discrimination law that was the first to incorporate critical race and feminist theory. He taught Law of Work, Employment Discrimination Law, Constitutional Tort Litigation, and Race and the Law.

Id.

[13] Robert Belton, *Burden of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice*, 34 VAND. L. REV. 1205, 1242 (1981) (citing *Burdine*, 450 U.S. at 254).

[14] *Burdine*, 450 U.S. at 258.

[15] *Id.* at 254.

[16] *See infra* Part II.

[17] *See infra* Part III.

[18] *See infra* Part IV.

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employment discrimination cases.[19] Finally, the article recommends that the Court revisit its determination of placing the heavy burden of proof on the plaintiff in employment discrimination cases in light of the e-discovery age.[20] The article concludes that the Court should require the defendant to prove that its legitimate, nondiscriminatory reason is its real reason for the employment decision.[21]

II. DEVELOPMENT AND EFFECT OF THE DISCOVERY RULES

Although discovery was historically not an integral part of the American litigation process, today it is the cornerstone; it determines who wins or loses a case.[22] The American litigation process has its roots in English law, but under English common law, pretrial discovery was not part of the litigation system.[23] The English courts relied on the parties' pleadings to narrow the factual issues and to resolve legal disputes.[24] The United States—through the Judiciary Act of 1789—followed the English litigation process where pretrial discovery in federal courts had no role.[25] Although in a court of equity[26] there was a limited means to exchange pretrial information, there

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[19] *See infra* Part V.

[20] *See infra* Part VI.

[21] *See infra* Part VII.

[22] *See* JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 397 (4th ed. 2005); A. Benjamin Spencer, Essay, *The Restrictive Ethos in Civil Procedure*, 78 GEO. WASH. L. REV. 353, 353 (2010); Michael E. Wolfson, *Addressing the Adversarial Dilemma of Civil Procedure*, 36 CLEV. ST. L. REV. 17, 20–21 (1988); *Developments in the Law—Discovery*, 74 HARV. L. REV. 940, 946–49 (1961); Scott A. Moss, *Litigation Discovery Cannot Be Optimal but Could Be Better: The Economics of Improving Discovery Timing in a Digital Age*, 58 DUKE L.J. 889, 892 (2009) (noting that "[m]ost litigators agree that 'discovery . . . is the battleground where civil suits are won and lost'") (quoting Joseph D. Steinfield & Robert A. Bertsche, *Recent Developments in the Law of Access—1998*, 540 PLI/Pat. 53, 107 (1998)).

[23] *See* Wolfson, *supra* note 22, at 21; *Developments in the Law—Discovery*, *supra* note 22, at 946–49.

[24] *See* Wolfson, *supra* note 22, at 21; *Developments in the Law—Discovery*, *supra* note 22, at 946–49.

[25] *See* Wolfson, *supra* note 22, at 27; *Developments in the Law—Discovery*, *supra* note 22, at 946–49.

[26] A court of equity is "[a] court that (1) has jurisdiction in equity, (2) administers and decides controversies in accordance with the rules, principles, and precedents of equity, and (3) follows the forms and procedure of chancery." *Court of Equity*, BLACK'S LAW DICTIONARY (10th ed. 2014). This is distinguished from a court of law, having the jurisdiction, rules, principles, and practice of the common law. *See Court of Law*, BLACK'S LAW DICTIONARY (10th ed. 2014).

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was no similar process in the court of law.[27] Many state courts had developed a means for pretrial discovery prior to the creation of the Federal Rules of Civil Procedure in 1938, but the federal courts continued to limit pretrial discovery.[28] Even after the English system made changes, the United States litigation process "was an oddly varied hodge-podge of antiquated restrictions and procedures struggling with rudimentary concepts of liberalized disclosure."[29] In 1934, Congress granted the Supreme Court of the United States the authority to prescribe the procedural rules for federal courts.[30] Congress referred to the creation of the Federal Rules of Civil Procedure as "a landmark in the history of American jurisprudence."[31] In 1938, the United States took a bold step forward and revolutionized the discovery process for federal litigation.[32] The creation of the Federal Rules of Civil Procedure in 1938 allowed the parties broad-based discovery to assure preservation of information, access to critical information and evidence, and to narrow the issues in dispute.[33] Today, the pretrial discovery process is the heart of litigation practice and affects the ability of the parties

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[27] *See* Wolfson, *supra* note 22, at 27; *Developments in the Law—Discovery*, *supra* note 22, at 949.

[28] *See* Wolfson, *supra* note 22, at 27; FRIEDENTHAL ET AL., *supra* note 22, at 397 ("Although various techniques for obtaining information were developed over the years, it was not until the adoption of Federal Rules of Civil Procedure 26–37, in 1938, that discovery became a vital part of the litigation process.").

[29] Wolfson, *supra* note 22, at 21 ("The federal system, as opposed to that of the states, was the most antiquated, restrictive, and inadequate of them all. It, therefore, was a fertile ground for the reforms introduced by the Federal Rules of Civil Procedure.").

[30] *See id.* at 32.

[31] *Id.* at 33–34.

[32] *See* FRIEDENTHAL ET AL., *supra* note 22, at 397. In 1938, the "discovery rules virtually revolutionized the practice of law in the United States. Of all the Federal Rules, [the discovery rules] have been the most widely copied; nearly every state has adopted a similar set of provisions permitting broad, intensive discovery." *Id. See also* Wolfson, *supra* note 22, at 29 (noting the "[p]romulgation of the Federal Rules of Civil Procedure in 1938 represents possibly the single most important event in the development of discovery practice in the United States"); *Developments in the Law—Discovery*, *supra* note 22, at 950. "With the promulgation by the Supreme Court of the Federal Rules of Civil Procedure in 1938, however, the federal courts took the lead in the liberalization of discovery procedures." *Id. See also* Spencer, *supra* note 22, at 353, 355. "[T]he 1938 Rules [were] generally characterized by a 'liberal ethos,' meaning that it was originally designed to promote open access to the courts and to facilitate a resolution of disputes on the merits." *Id.* "The innovation of modern discovery ushered in by the rules further promoted access by enabling plaintiffs to initiate their claims without having to have full and complete information." *Id.*

[33] *See* FRIEDENTHAL ET AL., *supra* note 22, at 397–98.

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to establish or defend their claims.[34] As Professor Geoffrey Hazard explained, "Broad discovery is thus not a mere procedural rule. Rather it has become, at least for our era, a procedural institution perhaps of virtually constitutional foundation."[35]

Modern discovery rules are designed to enhance judicial efficiency and assure resolution of legal issues based on the merits of the case.[36] The Court created a variety of tools to assist in the fact finding process and to narrow the issues: depositions upon oral examination,[37] depositions upon written examination,[38] interrogatories to parties,[39] requests for production of documents and things or entry upon land for inspection and other purposes,[40] physical and mental examinations of persons,[41] and requests for admission.[42] Moreover, these discovery rules serve a number of important purposes for an effective civil justice system. A primary reason for liberal discovery is to avoid unfair surprise and to assure that all relevant facts are known prior to trial.[43] Furthermore, the discovery process aids in judicial efficiency because it allows the parties to weed out frivolous claims or settle meritorious claims.[44] Similarly, the discovery rules allow the parties to determine the actual facts in dispute and to narrow the issues.[45] The discovery rules further allow the parties to preserve evidence and secure testimony before trial to assure more accurate and contemporaneous testimony.[46] Finally, the federal discovery rules are widely accepted by state

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[34] *See* Geoffrey C. Hazard, Jr., *From Whom No Secrets Are Hid*, 76 TEX. L. REV. 1665, 1694 (1998).

[35] *Id.*

[36] FRIEDENTHAL ET AL., *supra* note 22, at 397–98.

[37] *See* FED. R. CIV. P. 30 (entitled, "Depositions by Oral Examination").

[38] *See* FED. R. CIV. P. 31 (entitled, "Depositions by Written Questions").

[39] *See* FED. R. CIV. P. 33 (entitled, "Interrogatories to Parties").

[40] *See* FED. R. CIV. P. 34 (entitled, "Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes").

[41] *See* FED. R. CIV. P. 35 (entitled, "Physical and Mental Examinations").

[42] *See* FED. R. CIV. P. 36 (entitled, "Requests for Admission").

[43] *See* John S. Beckerman, *Confronting Civil Discovery's Fatal Flaw*, 84 MINN. L. REV. 505, 513–14 (1999); Hickman v. Taylor, 329 U.S. 495, 500–01 (1947) (noting that with the establishment of Rules 26–37, the "civil trials in the federal courts no longer need be carried on in the dark. The way is now clear, consistent with recognized privileges, for the parties to obtain the fullest possible knowledge of the issues and facts before trial").

[44] *See Development in the Law—Discovery*, *supra* note 22, at 945–46; *see* Beckerman, *supra* note 43, at 535; Wolfson, *supra* note 22, at 37, n.144.

[45] *See Development in the Law—Discovery*, *supra* note 22, at 945–46; Beckerman, *supra* note 43, at 535; Wolfson, *supra* note 22, at 37, n.144.

[46] *See* FRIEDENTHAL ET AL., *supra* note 22, at 397–98.

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courts, thus allowing for uniformity and predictability across American judicial systems.[47]

Although the discovery process is beneficial to the American judicial system, it also comes with burdens and challenges.[48] The discovery process is plagued with criticism over cost, delays, abuse of the rules, and ineffective judicial management.[49] Costs associated with the discovery process distort the legal process and place too high a burden on a person responding to a discovery request.[50] Courts and scholars suggest a defendant will settle a lawsuit because it is more cost efficient to pay a plaintiff's demand rather than to pay for the discovery cost.[51] Plaintiffs are allowed to file a "nuisance lawsuit,"[52] where a plaintiff files a lawsuit in bad faith, not wishing for the courts to resolve the dispute; instead, the plaintiff believes the defendant will settle, rather than defend, because the cost of defending the lawsuit is high.[53] When parties engage in discovery abuse, the judicial system is not best served.[54] "Discovery abuse is a term employed to describe a multitude of

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[47] *See id*. at 397; Wolfson, *supra* note 22, at 33; *Development in the Law—Discovery*, *supra* note 22, at 950–51.

[48] *See* Beckerman, *supra* note 43, at 505 ("Sixty years ago, discovery was the most innovative and controversial feature of the litigation process conceived by the then-new Federal Rules of Civil Procedure. . . . It remains the most debated, and in some cases the most fractious and vexing, aspect of litigation today.").

[49] *See id.* at 543; Wolfson, *supra* note 22, at 41–43; Elizabeth G. Thornburg, *Just Say "No Fishing": The Lure of Metaphor*, 40 U. MICH. J.L. REFORM 1, 1 (2006); Lonny S. Hoffman, *Burn Up the Chaff with Unquenchable Fire*, 88 B.U. L. REV. 1217, 1231–34 (2008) (discussing the effect of the cost of discovery in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007)); David A. Green, *Friend or Foe*, 39 S.U. L. REV. 1, 28 (2011) ("[T]he Supreme Court concluded that the potential high cost of discovery outweighs the need to redress social harms, including racial discrimination."); Frank H. Easterbrook, *Discovery as Abuse*, 69 B.U. L. REV. 635, 647 (1989) ("The source of 'discovery abuse' does not lie in the rules regulating discovery."); Carl Tobias, *The 2000 Federal Civil Procedure Rules Revisions*, 38 SAN DIEGO L. REV. 875, 884 (2001) (noting that studies have demonstrated discovery "operates effectively in most lawsuits").

[50] *See* Beckerman, *supra* note 43, at 543–44.; Wolfson, *supra* note 22, at 42–43; *Twombly*, 550 U.S. 544.

[51] *See* John H. Beisner, *Discovering a Better Way: The Need for Effective Civil Litigation Reform*, 60 DUKE L. J. 547, 549, 551 (2010). *See* Beckerman, *supra* note 43, at 543–44 (discussing two economists' analysis of discovery cost, misuse, and abuse).

[52] *See* Lance P. McMillan, 31 AM. J. TRIAL ADVOC. 221, 223 (2007) (defining a nuisance lawsuit as the scenario in which "a plaintiff purposely files a complaint with an improper intent," such that "[b]ad faith is the lynchpin of any nuisance analysis").

[53] *Id*. at 223, 242–46 (discussing the effect of discovery on the plaintiff's intent).

[54] *See* Easterbrook, *supra* note 49, at 636 (discussing a Harris Poll that reflects federal judges' views regarding the problem with discovery abuse and the high percentage of judges who have ordered sanctions); Charles Yablon, *Stupid Lawyer Tricks: An Essay on Discovery Abuse*, 96 COLUM. L. REV. 1618, 1618–19 (1996) (describing an example of an extreme case

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sins. From burdensome sets of interrogatories or requests for production to evasive responses and frustrating delaying tactics."[55] In a process that is meant to be self-regulating, judges are not in the best position to regulate the problems with discovery.[56] Judicial intervention is not the best solution to discovery problems because of time constraints, limited judicial resources, intensive factual inquiries, and judges' aversion addressing attorney's inappropriate behavior.[57]

The Supreme Court of the United States' concern over discovery costs and ineffective judicial management has led to a substantial change in the pleading standard for civil cases.[58] In its decisions in *Twombly* and *Iqbal*, the Court concluded that the potential high cost of discovery should be a factor in determining the appropriate initial pleading standard.[59] The Court retired the "no set of facts" standard for 12(b)(6)[60] dismissals and adopted a new "plausibility" standard.[61] In *Twombly*, the Court cautioned that in determining whether to dismiss an anti-trust complaint in advance of

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of discovery abuse in a defamation lawsuit between Philip Morris Co. and American Broadcasting Company [ABC] where the attorney for ABC alleged that Philip Morris Co. disclosed documents on smelly paper that had a nauseous effect on one of the attorneys).

[55] Wolfson, *supra* note 22, at 41–42.

[56] *See* Beckerman, *supra* note 43, at 513; Easterbrook, *supra* note 49, at 638.

[57] *See* Beckerman, *supra* note 43, at 564–68.

[58] *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 559, 570 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009) (stating that the Court's "decision in *Twombly* expounded the pleading standard for 'all civil actions'"); Green, *supra* note 49, at 25, 28; Hoffman, *supra* note 49, at 1231–32.

[59] Green, *supra* note 49, at 28; Hoffman, *supra* note 49, at 1232.

[60] *See* FED. R. CIV. P. 12(b)(6) (allowing motions for "failure to state a claim upon which relief can be granted").

[61] Green, *supra* note 49, at 23–24. In *Iqbal*, the Court summarized the new standard, noting the following:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is *plausible on its face*." A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. *Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"*

Id. at 27–28 (quoting *Iqbal*, 556 U.S. at 678) (emphasis added).

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discovery, the trial court should consider the expense of litigation.[62] The Court's decision also reflected a lack of confidence in the trial court's ability to address discovery abuse.[63] The Court further noted,

> It is no answer to say that a claim just shy of a plausible entitlement to relief can, if groundless, be weeded out early in the discovery process through "careful case management" given the common lament that the success of judicial supervision in checking discovery abuse has been on the modest side.[64]

Furthermore, in *Iqbal*, the Court stated,

> Our rejection of the careful-case-management approach is especially important in suits where the Government-official defendants are entitled to assert the defense of qualified immunity. The basic trust of the qualified immunity doctrine is to free officials from the concerns of litigation, including "avoidance of disruptive discovery."[65]

The Court's concerns over discovery abuse prompted "a cost–benefit analysis that could lead to certain cases being dismissed early in the process without access to much needed information."[66]

Even though the discovery process was not initially part of the American litigation process, today it is central. From the Judicial Act of 1789 to the creation of the Federal of Rules of Civil Procedure in 1934, to the present-day rules, the role of discovery continues to grow and has substantially affected the litigation process.[67] As the Court continues to revisit the federal rules, changes in discovery are at the heart of the discussion. Moreover, as society shifts to the technological era, the rules of discovery will change and continue to affect the litigation process and which party wins or loses a case.

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[62] Green, *supra* note 49, at 28; *see also Twombly*, 550 U.S. at 558 ("[I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive." (citation omitted)).

[63] *See Twombly*, 550 U.S. at 559.

[64] *Id*. (citation omitted).

[65] *Iqbal*, 556 U.S. 685 (2009) (citation omitted).

[66] Green, *supra* note 49, at 28–29; *see also* Hoffman, *supra* note 49, at 1231. *Cf.* Richard A. Epstein, Bell Atlantic v. Twombly*: How Motions To Dismiss Become (Disguised) Summary Judgments*, 25 WASH. U. J.L. & POL'Y 61, 66–67 (2007) (noting, in support of the *Twombly* decision, that "[i]n general, as the costs of discovery mount, the case for terminating litigation earlier in the cycle gets ever stronger, and should be realized").

[67] *See* Mary Kay Kane, *Pretrial Procedural Reform and Jack Friedenthal*, 78 GEO. WASH. L. REV. 30, 31–32 (2009).

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III. SUPREME COURT RELIES ON LIBERAL RULES OF DISCOVERY TO RATIONALIZE THE PLAINTIFF'S HEAVY BURDEN

The Supreme Court of the United States in both disparate treatment[68] and disparate impact[69] cases placed a heavy burden on plaintiffs to establish that defendants have engaged in a discriminatory practice. The reason for this burden placement is primarily based on the Court's determination that the discovery process provides plaintiffs with sufficient resources to prove their claims.[70] In disparate treatment cases, which are based on circumstantial evidence, the plaintiff has the initial burden of establishing a prima facie case of illegal discrimination.[71] "The burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection."[72] Finally, the plaintiff should be given the opportunity to establish that the employer's "stated reason for the employment decision was in fact a pretext."[73] The Court, in *Texas Department of Community Affairs v. Burdine*, made it clear that after the plaintiff has proven a prima facie case of discriminatory treatment, the burden does not shift to the employer to persuade the court by the preponderance of the evidence that a legitimate, nondiscriminatory reason for the challenged employment action existed.[74] The Court determined only that the burden of production shifts to the defendant, and the burden of

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[68] In a disparate treatment case, the plaintiff/employee must establish that the defendant/employer treats the plaintiff/employee less favorably because of his or her protected status such as race, color, or national origin. *See* 42 U.S.C. § 2000e-2(a)(1) (2012); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

[69] In a disparate impact case, the plaintiff/employee must establish that the defendant/employer utilizes an employment practice that is facially neutral in its treatment of different groups, but it, in fact, falls more harshly on one group—which has a protected status—than another group, and the practice cannot be justified by business necessity. *See* 42 U.S.C. § 2000e-2(a)(2); Griggs v. Duke Power Co., 401 U.S. 424, 429–31 (1971).

[70] *See* Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252–53 (1981); Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656, 660 (1989) (superseded by statute on other grounds).

[71] *See McDonnell Douglas Corp.*, 411 U.S. at 802. The plaintiff must show:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id.

[72] *Id*.

[73] *Id*. at 804.

[74] *See Burdine*, 450 U.S. at 254.

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persuasion remains at all times with the plaintiff.[75] Although the defendant, who made the employment decision, would be in the best position to provide information about its employment decision, the Court chose not to place the burden of persuasion on the defendant.[76]

The Court's decision to place the burden of persuasion on the plaintiff was motivated, in large part, by the Court's belief that the liberal rules of discovery would assist the plaintiff in meeting this burden.[77] First, the Court reasoned that the plaintiff will not be unduly hindered by limiting the defendant's burden to one of production because the plaintiff is given a full and fair opportunity to show defendant's proffered reason was a pretext for discrimination.[78] Second, the Court reasoned that although the defendant does not bear the formal burden of persuasion, the defendant retains an incentive to persuade the trier of fact that the employment decision was lawful.[79] Finally, the Court reasoned that the liberal discovery rules in a Title VII case in federal court are supplemented by the plaintiff's access to Equal Employment Opportunity Commission (EEOC) investigatory files.[80] For these reasons, the Court determined that a plaintiff will not "find it

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[75] *See id*.

[76] *See id*. at 258.

[77] *See id.*; Ann K. Hadrava, *The Amendment to Federal Rule of Civil Procedure 26(b)(1) Scope of Discovery*, 26 OKLA. CITY U. L. REV. 1111, 1132 (2001) ("The very structure of employment discrimination law seems to have been founded partly on the availability of broad discovery." (quoting Richard L. Marcus, *Discovery Containment Redux*, 39 B.C. L. REV. 747, 751 (1998)).

[78] *See Burdine*, 450 U.S. at 258.

[79] *See id*.

[80] *See id*. The Court was incorrect in determining that plaintiffs' cases are supplemented by the plaintiffs' access to the EEOC investigatory files; the EEOC is an "ineffective" agency and rarely produces thorough investigatory files. *See* Pauline T. Kim, *Addressing Systemic Discrimination: Public Enforcement and the Role of the EEOC*, 95 B.U. L. REV. 1133, 1143 (2015) ("The challenges posed by limited resources are compounded by the EEOC's particular statutory mandates, which further constrain its flexibility in targeting systemic discrimination."); Katherine A. Macfarlane, *The Improper Dismissal of Title VII Claims on "Jurisdictional" Exhaustion Grounds*, 21 GEO. MASON U. C.R. L.J. 213, 222–23 (2011) (contending that the "EEOC is so ineffective that the deference federal courts give its procedure is nonsensical"); Marcia L. McCormick, *The Truth Is Out There*, 30 BERKELEY J. EMP. & LAB. L. 193, 218 (2009) (describing the EEOC as ineffective and further noting that "[t]he EEOC lacks the resources to fulfill its mission and, even if it were fully funded, EEOC processes would not fully transform the workplace"); Vaseem S. Hadi, *Ending The 180 Day Waiting Game*, 27 U. DAYTON L. REV. 53, 86–87, n.272 (2001) ("The EEOC . . . is burdened by an ever-growing backlog, which has crippled its ability to investigate charges. . . . The EEOC has 'long been considered one of the most troubled and ineffective [agencies] in the Federal Government.'").

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particularly difficult to prove that a proffered explanation lacking a factual basis is a pretext."[81]

In disparate impact cases, the Court again relies on the liberal civil discovery rules to explain the burden placed upon the plaintiff.[82] In a disparate impact case, the plaintiff must establish a prima facie case of discrimination by proving that a policy that appears neutral on its face selects applicants for hire or promotion in a racial—or otherwise protected—status, in a pattern significantly different from the other pool of applicants.[83] Furthermore, the Court noted, "Our disparate-impact cases have always focused on the impact of *particular* hiring practices on employment opportunities for minorities."[84] The Court added, "As a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack. Such a showing is an integral part of the plaintiff's prima facie case in a disparate-impact suit under Title VII."[85] Moreover, the Court conceded, "Some will complain that this specific causation requirement is unduly burdensome on Title VII plaintiffs. *But liberal civil discovery rules give plaintiffs broad access to employers' records in an effort to document their claims*."[86] The Court determined the plaintiff has the heavy burden to "specifically" show the challenged practice has a significantly disparate impact on employment opportunities for those in the protected status and those not in the protected status.[87] The Court feared that "[t]o hold otherwise would result in employers being potentially liable for 'the myriad of

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[81] *Burdine*, 450 U.S. at 258.

[82] *See* Hadrava, *supra* note 77, at 1133–34.

[83] *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971). In the Civil Rights Act of 1991, Congress codified the burden of proof in disparate impact cases, providing:

> An unlawful employment practice based on disparate impact is established . . . if a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the bases of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.

42 U.S.C. § 2000e-2(k)(1)(A) (2012).

[84] Wards Cove Packing Co. v. Atonio, 490 U.S. 642, 656 (1989).

[85] *Id*. at 657.

[86] *Id*. (emphasis added).

[87] *See id*.

(*continued*)

innocent causes that may lead to statistical imbalance in the composition of their work forces.'"[88]

Plaintiffs' success in employment discrimination cases is largely contingent on the plaintiffs' reliance on the "liberal rules of discovery."[89] Today, plaintiffs have a more difficult time proving discrimination because employers' actions are more subtle and there is seldom direct evidence of discrimination.[90] The employee who is a victim of discrimination will rarely have eyewitnesses to the discriminatory acts.[91] The Court has recognized the lack of available evidence for the plaintiff and the need for court intervention to assure plaintiffs can access the relevant data.[92] In *University of Pennsylvania v. EEOC*, it reaffirmed its views on the significant role of liberal discovery in employment discrimination cases and intervened to assure available data for the plaintiff.[93] In that case, the complainant—a Chinese–American woman—alleged discrimination based on race, sex, and

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[88] *Id*. (quoting Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 992 (1988)).

[89] *See* Ross v. Buckeye Cellulose Corp., 980 F.2d 648, 660–61 n.19 (11th Cir. 1993); Sweat v. Miller Brewing Co., 708 F.2d 655, 658 (11th Cir. 1983) (applying liberal discovery rules in employment discrimination litigation and allowing "[s]tatistical information concerning an employer's general policy and practice concerning minority employment may be relevant to a showing of pretext, even in a case alleging an individual instance of discrimination rather than a 'pattern and practice' of discrimination"); Thornton v. Mercantile Stores Co., Inc., 180 F.R.D. 437, 439 (M.D. Ala. 1998) ("[C]ourts often apply more liberal discovery rules in [employment discrimination] cases than in typical civil cases."); Finch v. Hercules, Inc., 149 F.R.D. 60, 62 (D. Del. 1993) ("[T]he necessity for liberal discovery to clarify the complex issues encountered in litigation seeking to redress employment discrimination has been widely recognized."); Roger v. Elec. Data Sys., 155 F.R.D. 537, 539 (E.D. N.C. 1994) ("[I]mposition of unnecessary discovery limitations is to be avoided" in discrimination cases.); Serina v. Albertson's, Inc., 128 F.R.D. 290, 292 (M.D. Fla. 1989); Haykel v. G.F.I. Furniture Leasing Co., 76 F.R.D. 386, 391 (N.D. Ga. 1976).

[90] *See* Susan K. Grebeldinger, *How Can a Plaintiff Prove Intentional Employment Discrimination If She Cannot Explore the Relevant Circumstances*, 74 DENV. U. L. REV. 159, 179 (1996) ("The courts routinely state that discovery in employment discrimination litigation is special. An individual plaintiff suing 'a huge industrial employer' creates a 'modern day David and Goliath confrontation.' She needs ample discovery, because 'the nature of the proofs required to demonstrate unlawful discrimination may often be indirect or circumstantial.'") (quoting Pettway v. American Cast Iron Pipe Corp., 411 F.2d 998, 1005 (5th Cir. 1969); Marshall v. Westinghouse Electric Corp., 576 F.2d 588, 592 (5th Cir. 1978); Green, *supra* note 8, at 429 (discussing the subtleties in employment discrimination).

[91] *See* U.S. Postal Serv. Bd. of Governors v. Aikens, 460 U.S. 711, 716 (1983) ("There will seldom be 'eyewitness' testimony as to the employer's mental processes."); Jackson v. Univ. of Pittsburgh, 826 F.2d 230, 236 (3d Cir. 1987) ("Discrimination victims often come to the legal process without witnesses and with little direct evidence indicating the precise nature of the wrongs they have suffered.").

[92] *See, e.g.*, Univ. of Pa. v. EEOC, 493 U.S. 182, 186–93 (1989).

[93] *See id*.

(*continued*)

national origin in violation of Title VII in her denial for tenure.[94] The University Personnel Committee attempted to justify its decision "on the ground that [it] is not interested in China-related research."[95] The complainant asserted that the Committee's explanation for the alleged charge was a pretext for discrimination and was "simply their way of saying they do not want a Chinese–American, Oriental, woman in their school."[96] In response to the Commission's subpoena for documents relating to the tenure decision, the University claimed that the Court should recognize a "qualified common-law privilege against disclosure of confidential peer review materials," and "a First Amendment right of 'academic freedom' against wholesale disclosure of the contested documents."[97] The Court, in a unanimous decision, rejected the University's arguments and required it to disclose the confidential documents to the EEOC.[98] Its decision in this case gave paramount importance to liberal discovery in support of an employment discrimination claim.

Though the discovery rules have substantially affected all civil cases,[99] they ultimately have had a greater effect in employment discrimination cases because of the Court's reliance on liberal discovery in deciding the burden of the parties in employment discrimination cases.[100] The Court's analysis of discovery in employment discrimination cases has been based upon a utopic view of discovery and fails to recognize the problems in the present-day litigation.

IV. THE REVOLUTION OF TECHNOLOGY AND THE ADVENT OF E-DISCOVERY

Now in the cyber era, the manner in which individuals and companies store information has substantially changed.[101] Today, electronic information is the fabric of society. A supervisor no longer says to her assistant, "Bring me the file." Instead, the request is, "Email me the file."

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[94] *See id*. at 185.
[95] *Id.*
[96] *Id*. at 185.
[97] *Id*. at 188.
[98] *See id*. at 201.
[99] *See* Moss, *supra* note 22, at 892.
[100] *See Univ. of Pa*., 493 U.S. at 199, 201.
[101] *See* GEORGE L. PAUL & BRUCE H. NEARON, THE DISCOVERY REVOLUTION: E-DISCOVERY AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE 1 (2d ed. 2006); RALPH C. LOSEY, INTRODUCTIONS TO E-DISCOVERY: NEW CASES, IDEAS, AND TECHNIQUES 15–16 (2009); AM. BAR ASS'N, MANAGING E-DISCOVERY AND ESI: FROM PRE-LITIGATION THROUGH TRIAL 1 (Michael D. Berman et al., eds., 2012); Moss, *supra* note 22, at 1893.

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This substantial change has not only affected everyday life, but also has revolutionized commercial litigation and commerce.[102] By the 1990s, American society had entered a new era where computers were supreme and metal file cabinets were outdated.[103] A business once that measured its storage space for documents by its number of file cabinets now measures its space in "kilobytes" and "gigabytes."[104] The capacity for storage today is substantially greater than it was thirty years ago.[105] A person can store over one million documents on a computer or external drive, but an average file cabinet only holds about ten thousand sheets of paper.[106] Technology has also changed the modes of communication. Instead of sending letters via postal mail, people now send the same information by email and text message.[107] American businesses send over 100 billion emails per day, and that number continues to grow.[108] For example, in 2006, Exxon generated about 5.2 million emails each day, and "its employees have 65,000 desktop computers and 30,000 laptop computers. The storage capacity of the desktop and laptop computers . . . is 40 gigabytes each. Forty gigabytes equates to 20 million typewritten pages."[109] This substantial change in the manner information is stored requires companies to do business differently and requires attorneys to handle litigation differently.

Information technology (IT)[110] is constantly changing, which makes it difficult for anyone to comprehend operational systems and to determine the best means to extract information.[111] Companies regularly change the means in which they store information, so collecting data stored a few years ago is

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[102] *See* PAUL & NEARON, *supra* note 101, at 1.

[103] *See id.* at 1–2; MERRIAM-WEBSTER DICTIONARY, http://www.merriam-webster.com/dictionary/cyber (noting the first known use of cyber was in 1991).

[104] *See* PAUL & NEARON, *supra* note 101, at 4–5, nn.4–5 (defining "gigabyte" as "[a] unit of information equal to one billion (1,073,741,824) bytes or 1,024 megabytes" and "kilobyte" as "[a] unit of information equal to one thousand (1,024) bytes").

[105] *See id*. at 4.

[106] *Id*. at 5.

[107] *See* Purple Commc'ns, Inc., 361 N.L.R.B. No. 126, 201 L.R.R.M. (BNA) 1929, 6–7 (Dec. 11, 2014) (citing Sara Radicati, *Email Statistics Report, 2014-2018*, THE RADICATI GROUP, INC., 2 (Apr. 2014), http://www.radicati.com/wp/wp-content/uploads/2014/01/Email-Statistics-Report-2014-2018-Executive-Summary.pdf).

[108] *Purple Commc'ns, Inc.*, 361 N.L.R.B. No. 126 at 7.

[109] PAUL & NEARON, *supra* note 101, at 4.

[110] Information technology is defined as "the technology involving the development, maintenance, and use of computer systems, software, and networks for the processing and distribution of data." *Information Technology*, Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/information%20technology.

[111] *See* PAUL & NEARON, *supra* note 101, at 6 (discussing the complexity of storing information and the constantly changing systems).

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not necessarily readily retrievable today.[112] Individuals with backgrounds in IT and informatics[113] are crucial players in understanding information systems.[114] Today, many entities utilize alternative delivery models, such as cloud computing "for providing and accessing software applications."[115] "Cloud computing is a model for enabling ubiquitous, convenient, on-demand network access to a shared pool of configurable computing resources (e.g., networks, servers, storage, applications, and services) that can be rapidly provisioned and released with minimal management effort or service provider interaction."[116] Cloud computing eliminates fixed and overhead costs for hardware, software, and human capital because end users are only billed for actual consumption.[117] Therefore, the number of entities considering utilizing cloud services will increase.

Because of changes in the way information is communicated and stored, the discovery process—along with litigation as a whole—evolved to the technological growth. E-discovery, now a mainstay in civil litigation, is "defined as the request, collection, review, production and management of electronic information."[118] When access to data stored in cloud computing environments may have been addressed in a licensing agreement, an e-discovery request can implicate an entity's access to its data.[119] Entities are compelled not only to address the need to recover data, but also to ensure their data is protected and easily recoverable from the cloud.[120] Furthermore, confidentiality, data security, and data privacy prompt entities to consider the types of data and the jurisdictions in which the data is stored.[121] Therefore, entities utilizing storage and application services "should set forth in detail how the data will be organized and stored, how it can be searched and, if necessary, extracted" by drafting well-crafted licensing

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[112] *See id.*

[113] Informatics is "the collection, classification, storage, retrieval, and dissemination of recorded knowledge, treated both as a pure and an applied science." *Informatics*, Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/information+science.

[114] *See* PAUL & NEARON, *supra* note 101, at 7.

[115] H. WARD CLASSEN, A PRACTICAL GUIDE TO SOFTWARE LICENSING FOR LICENSEES AND LICENSORS 265 (5th ed. 2013).

[116] Peter Mell & Timothy Grance, *The NIST Definition of Cloud Computing*, NAT'L INST. OF STANDARDS AND TECH. 2 (Sept. 2011), http://csrc.nist.gov/publications/nistpubs/800-145/SP800-145.pdf.

[117] *See* CLASSEN, *supra* note 115, at 266.

[118] Robert Milburn, *eDiscovery: Are You at Risk?*, 124 BANKING L.J. 810, 810 (2007).

[119] *See* CLASSEN, *supra* note 115, at 280–81.

[120] *See id.*

[121] *See id.* at 275–78.

(*continued*)

provisions that address timelines and formats for producing data when prompted by e-discovery requests.[122]

The change in the means to store information required the rule makers to substantially revise the Federal Rules of Civil Procedure, specifically the discovery rules.[123] The Civil Rules Advisory Committee began to analyze the issues related to electronically stored information (ESI) in the fall of 1999, but it was not until 2006 that the Federal Rules of Civil Procedure were amended to include clear guidance on ESI.[124] Prior to the 2006 amendments, the Federal Rules did not accurately reflect or parallel advancements in technology.[125] However, in 2006, the Federal Rules of Civil Procedure were amended to reflect the revolution in technology and "provide additional guidance for the discovery of electronically stored information."[126] The Federal Rules Advisory Committee explained, "[D]iscovery of electronically stored information stands on equal footing with discovery of paper documents."[127] The Committee further noted, "The change clarifies that Rule 34 applies to information that is fixed in a tangible form and to information that is stored in a medium from which it can be retrieved and examined."[128] ESI is an evolving concern with no precise definition.[129] The 2006 Federal Rules Advisory Committee noted, "Electronically stored information may exist in dynamic databases and other forms far different from fixed expression on paper."[130] Furthermore, the Committee concluded, "The wide variety of computer systems currently in use, and the rapidity of technological change, counsel against a limiting or precise definition of electronically stored information."[131] The Federal Rules of Civil Procedure were not transformed to respond to the enormous changes in technology.

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[122] *See id.* at 281.

[123] *See* PAUL & NEARON, *supra* note 101, at 9.

[124] *See id.* at 9–10.

[125] *See* Jonathan L. Moore, *Time for an Upgrade*, 50 JURIMETRICS J. 147, 153 (2010).

[126] *Id*.

[127] FED. R. CIV. P. 34 advisory committee's note to 2006 amendment.

[128] *Id*.

[129] Moore, *supra* note 120, at 149. Some commentators consider electronically stored information as "everything other than the traditional documents or microfilm." *Id.* (quoting MARIAN K. RIEDY ET AL., LITIGATING WITH ELECTRONICALLY STORED INFORMATION 5 (2007)). Others consider it narrowly as "any information created, stored, or best utilized with computer technology of any type." *Id.* (quoting CONF. OF CHIEF JUSTICES, GUIDELINES FOR STATE TRIAL COURTS REGARDING DISCOVERY OF ELECTRONICALLY-STORED INFORMATION 1 (2006), http://ncsc.contentdm.oclc.org/cdm/ref/collection/civil/id/56).

[130] FED. R. CIV. P. 34 advisory committee's note to 2006 amendment.

[131] *Id*.

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The 2006 amendments to the Federal Rules of Civil Procedure affected a number of different rules, including a significant change to Rule 34, which now encompasses "producing documents" and "electronically stored information."[132] Parties involved in litigation are now responsible for early attention to e-discovery in their discovery plans pursuant to Rule 26(f).[133] As explained by the Advisory Committee, "Rule 26(f) is amended to direct the parties to discuss discovery of electronically stored information if such discovery is contemplated in the action."[134] As part of the discovery plan, the parties must discuss "any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced."[135] Prior to the amendments, the parties could "evade e-discovery requests by proactively deleting entire subsets of potentially harmful data before . . . notice that the documents are likely to be requested in discovery."[136] The Advisory Committee hoped an early discussion on e-discovery would alleviate disputes, lower the cost, and allow for appropriate preservation of electronic data.[137] Furthermore, the 2006 amendment reflected that, pursuant to Rule 16, "scheduling order[s] also may include . . . provisions for disclosure or discovery of electronically stored information."[138] The Advisory Committee stated, "The amendment to Rule 16(b) is designed to alert the court to the possible need to address the handling of discovery of electronically stored information early in the litigation if such discovery is expected to occur."[139] Finally, the Advisory Committee amended Rules 37 (Failure to Make Disclosures or to Cooperate in Discovery; Sanctions) and 45 (Subpoena). Rule 37 added that, "absent exceptional circumstances, sanctions cannot be imposed for loss of electronically stored information resulting from the routine, good faith operation of an electronic information system."[140] Also, Rule 45 was amended to specifically reference ESI, which now conforms with the

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[132] FED. R. CIV. P. 34; Moore, *supra* note 125, at 154; PAUL & NEARON, *supra* note 101, at 13.

[133] *See* FED. R. CIV. P. 26(f)(3)(C); PAUL & NEARON, *supra* note 101, 18.

[134] FED. R. CIV. P. 26 advisory committee's note to 2006 amendment.

[135] FED. R. CIV. P. 26(f)(3)(C).

[136] Daniel B. Garrie, Matthew J. Armstrong & Bill Burdett, *Hiding the Inaccessible Truth*, 25 REV. LITIG. 115, 128 (2006).

[137] *See* FED. R. CIV. P. 16 advisory committee's note to 2006 amendment.

[138] FED. R. CIV. P. 16(b)(5) (amended 2015).

[139] FED. R. CIV. P. 16 advisory committee's note to 2006 amendment.

[140] FED. R. CIV. P. 37(f) advisory committee's note to 2006 amendment. The "exceptional circumstances" standard for imposing sanctions for loss of ESI in Rule 37(e) has been deleted and replaced with a new standard. DUKE CONFERENCE AMENDMENTS, *supra* note 7, at 7.

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provisions for subpoenas to other changes in the discovery rules.[141] All of these amendments help lay the foundation for the new and ever-changing world of e-discovery.

On April 29, 2015, the Supreme Court of the United States approved sweeping changes to the Federal Rules of Civil Procedure that will affect e-discovery.[142] The changes were driven, in large part, by the enormous cost associated with discovery, and more specifically, with e-discovery.[143] The Court amended Rule 26 to limit the scope of discovery to information relevant to the claims and defenses in the litigation and eliminated the provisions allowing for the court to "order discovery of any matter relevant to the subject matter involved in the action . . . if the discovery appears reasonably calculated to lead to the discovery of admissible evidence."[144]

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[141] *See* FED. R. CIV. P. 45(a)(1)(C) (amended 2013).

[142] *See* DUKE CONFERENCE AMENDMENTS, *supra* note 7, at 7 ("The amendments were transmitted to Congress in accordance with the Rules Enabling Act and will take effect on December 1, 2015, absent congressional action to the contrary."); United States Courts, *How the Rulemaking Process Works*, http://www.uscourts.gov/rules-policies/about-rulemaking-process/how-rulemaking-process-works (last visited Aug. 7, 2016).

> [T]he Rules Enabling Act of 1934, 28 U.S.C. § 2071-2077 . . . authorized the Supreme Court to promulgate rules of procedure, which have the force and effect of law. Over time, the work and oversight of the rulemaking process was delegated by the Court to committees of the Judicial Conference, the principal policy-making body of the U.S. Courts. In 1988, amendments to the Rules Enabling Act formalized this committee process. Today, the Judicial Conference's Committee on Rules of Practice and Procedure, ("Standing Committee") and its five advisory rules committees "carry on a continuous study of the operation and effect" of the federal rules as directed by the Rules Enabling Act. . . . If an advisory committee pursues a proposal, it may seek permission from the Standing Committee to publish a draft of the contemplated amendment. Based on comments from the bench, bar, and general public, the advisory committee may then choose to discard, revise, or transmit the amendment as contemplated to the Standing Committee. The Standing Committee independently reviews the findings of the advisory committees and, if satisfied, recommends changes to the Judicial Conference, which in turn recommends changes to the Supreme Court. The Court considers the proposals and, if it concurs, officially promulgates the revised rules by order before May 1, to take effect no earlier than December 1 of the same year unless Congress enacts legislation to reject, modify, or defer the pending rules.

Id.

[143] *See* DUKE CONFERENCE AMENDMENTS, *supra* note 7, at 22.

[144] FED. R. CIV. P. 26(b)(1) (amended 2015).
The 2015 amendment states:

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Furthermore, the new rule incorporates a proportionality requirement directly into the definition of discoverable material.[145] Although the proportionality requirement is not new,[146] "[t]his otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery."[147] The Committee was responding to concerns of the courts failing to act consistently with the original intent of the rule.[148] The new emphasis on a balancing test was designed to limit extensive discovery.[149] The Committee also amended Rule 26 to include an explicit reference to shifting discovery expenses through protective orders[150] and a provision allowing for earlier service of request for production.[151]

> (b) Discovery Scope and Limits.
>
> (1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

FED. R. CIV. P. 26(b)(1). The 2015 amendment replaced the 2006 language:

> (1) *In General*. Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

FED. R. CIV. P. 26(b)(1) (amended 2015).

[145] FED. R. CIV. P. 26(b)(1).

[146] *See* FED. R. CIV. P. 26 advisory committee's note to 2006 amendment.

[147] FED. R. CIV. P. 26 advisory committee's note to 2006 amendment.

[148] *See* FED. R. CIV. P. 26 advisory committee's note to 2006 amendment.

[149] *See* FED. R. CIV. P. 26(b)(1).

[150] *See* FED. R. CIV. P. 26(c)(1)(B) (stating "specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery").

[151] *See* FED. R. CIV. P. 26(d)(2).

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The 2015 amendments to Rule 37(e) also clarify when a party has breached its duty to preserve electronically stored information and the consequences of the breach.[152] The Committee deemed it necessary to amend Rule 37(e) because "the explosion of ESI in recent years has presented new and unprecedented challenges in civil litigation."[153] The Committee noted that litigation challenges affected "unsophisticated as well as sophisticated litigants."[154] The Committee recognized a split in the circuits regarding when a party has breached its duty to preserve electronically stored information and the appropriate remedies upon a showing of a breach of that duty.[155] The proposed rule does not affect when a duty to preserve has been triggered, the scope of the duty, or the duration of a preservation obligation, but instead chose to leave existing case law interpretation in place to address those issues.[156] Under the new rule, a party only breaches its duty to preserve when "electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery."[157] The Committee stressed, "[T]he rules call for reasonable steps, not perfection," and it further noted that the trial court should consider the party's resources and sophistication when determining reasonableness.[158] In addition, under proposed Rule 37(e), for the court to impose remedial measures, there must be "prejudice" to the requesting party.[159] Furthermore, when a failure to

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[152] *See* DUKE CONFERENCE AMENDMENTS, *supra* note 7, at 7–8. *See also* COMM. ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONF. OF THE UNITED STATES, PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE, app. B-15, (Sept. 2014), http://www.uscourts.gov/file/18218/download [hereinafter COMM. ON RULES].

[153] COMM. ON RULES, *supra* note 152, at app. B-15.

[154] *Id*.

[155] *See id*. at app. B-14.

[156] *See id*. at app. B-15.

[157] FED. R. CIV. P. 37(e) (amended 2015) (emphasis added). The "reasonable steps" standard adopted by the rule mirrors the rule in *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 613 (S.D. Tex. 2010). The rule also rejects the strict liability approach of cases such as *Zubulake IV*, 220 F.R.D. 212, 220 (S.D. N.Y. 2003).

[158] COMM. ON RULES, *supra* note 152, at app. B-16.

[159] *See id*.; FED. R. CIV. P. 37(e) (proposed Dec. 1, 2015).

> Proposed Rule 37(e) Failure to Preserve Electronically Stored Information.
>
> If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to

(*continued*)

preserve ESI causes prejudice, trial courts are given discretion to select remedial measures that are "no greater than necessary to cure the prejudice."[160] The proposed rule rejects the holdings in which adverse inference instructions were justified by mere negligent conduct,[161] but instead requires a preliminary finding that the party acted "with the intent to deprive another party of the information's use in the litigation" before allowing such remedies as an adverse inference, dismissal, or default judgment.[162] The Committee endeavored to provide a more balanced approach to breaches of the duty to preserve and to assure the "remedy should fit the wrong."[163]

Proportionality and cost shifting play a crucial role in determining the burden expenses associated with e-discovery. Although the general presumption is that the responding party will bear the cost of compliance with e-discovery requests, the rules require more emphasis on proportionality.[164] *Zubulake v. UBS Warburg LLC*, which comprises five separate opinions,[165] is one of the most influential cases to affect e-discovery

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> take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> (A) presume that the lost information was unfavorable to the party;
>
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> (C) dismiss the action or enter a default judgment.

Id.

[160] COMM. ON RULES, *supra* note 152, at app. B-16.

[161] *See, e.g.*, Residential Funding Corp. v. DeGeorge Fin. Corp., 306 F.3d 99, 101 (2d Cir. 2002).

[162] COMM. ON RULES, *supra* note 152, at app. B-17.

[163] *Id*. at app. B-18.

[164] *See* DUKE CONFERENCE AMENDMENTS, *supra* note 7, at 63–64.

[165] *See* Zubulake I, 217 F.R.D. 309, 311 (S.D.N.Y. 2003) (establishing the legal standard for determining the cost allocation for producing e-mails contained on backup tapes); Zubulake II, 230 F.R.D. 290, 292 (S.D.N.Y. 2003) (addressing Zubulake's reporting obligations); Zubulake III, 216 F.R.D. 280, 281 (S.D.N.Y. 2003) (allocating the backup tape restoration costs between Zubulake and UBS with detailed explanation of the appropriate criteria and weighting); Zubulake IV, 220 F.R.D. 212, 222 (S.D.N.Y. 2003) (ordering sanctions against UBS for violating its duty to preserve evidence and establishing the scope of the duty to preserve evidence); Zubulake V, 229 F.R.D. 422, 432 (S.D.N.Y. 2004) (*continued*)

and cost-shifting.[166] Laura Zubulake sued UBS Warburg LLC for gender discrimination and illegal retaliation.[167] One of the initial issues was a discovery dispute that arose when Zubulake served UBS with her first document request for "[a]ll documents concerning any communication by or between UBS employees concerning Plaintiff" which "includ[es], without limitation, electronic or computerized data compilations."[168] UBS objected in part to complying with the entire request, because it deemed the cost to be prohibitive, at an estimated $3 million.[169] In determining whether to shift the cost of discovery, the district court identified seven factors to take into consideration:

1. The extent to which the request is specifically tailored to discover relevant information;
2. The availability of such information from other sources;
3. The total cost of production, compared to the amount in controversy;
4. The total cost of production, compared to the resources available to each party;
5. The relative ability of each party to control costs and its incentive to do so;
6. The importance of the issues at stake in the litigation; and
7. The relative benefits to the parties of obtaining the information.[170]

The district court ultimately held that "[f]or data that is kept in an accessible format, the usual rules of discovery apply: the responding party should pay the costs of producing responsive data."[171] However, it is only when dealing with electronic data that is "relatively inaccessible, such as backup tapes,"

(requiring outside counsel to "make certain that all sources of potentially relevant information are identified and placed 'on hold'").

[166] *See* LOSEY, *supra* note 101, at 441 (describing *Zubulake* as "The Most Famous and Important e-Discovery Case of All"); PAUL, *supra* note 101, at 135 (noting that the case "had a significant influence on the Advisory Committee's proposed language" to the rules).

[167] *See Zubulake I*, 217 F.R.D. at 312.

[168] *Id*. at 312–13 (citations omitted).

[169] *Id*. at 313.

[170] *Id*. at 322.

[171] *Id*. at 324.

(*continued*)

that a court should consider a cost shifting analysis.[172] The rules determining proportionality and cost shifting, driven by evolving case law, were influenced in large part by Judge Shira Sheindlin, who served as a member of the Advisory Committee and was the presiding judge in *Zubulake*.[173]

As the revolution of technology has evolved, so have the rules of e-discovery. The Advisory Committee for the Federal Rules of Civil Procedure must keep up with the changes in information technology, which prompts regular review of the discovery rules. These changes necessitate that the Court review and revisit the effect of these changes on all civil cases, and specifically employment discrimination cases.

V. THE EFFECT OF E-DISCOVERY ON EMPLOYMENT DISCRIMINATION CASES

In employment discrimination cases, pretrial discovery disputes involving issues of e-discovery have led to a significant number of court decisions.[174] The issues include, among many others, cost shifting, spoliation, and lack of cooperation among the parties.[175] The initial issue that arises in a discovery dispute is frequently the cost associated with compliance with a discovery request.[176] The presumption is that "the responding party must bear the expense of complying with discovery requests."[177] However, under Rule 26(c), a district court may issue an order protecting the responding party from "undue burden or expense" by "conditioning discovery on the requesting party's payment of the costs of

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[172] *Id*.

[173] *See* PAUL, *supra* note 101, at 135.

[174] *See, e.g.*, K&L Gates, *Court Sets Protocol for Forensic Examination of Employment Discrimination Plaintiff's Home Computers*, ELECTRONIC DISCOVERY LAW BLOG (Apr. 9, 2008), http://www.ediscoverylaw.com/2008/04/court-sets-protocol-for-forensic-examination-of-employment-discrimination-plaintiffs-home-computers.

[175] *See, e.g.*, K&L Gates, *Party Not Entitled to Shift Costs of Restoring Emails that Were Converted to Inaccessible Format After Duty to Preserve Was Triggered*, ELECTRONIC DISCOVERY LAW BLOG (Sept. 15, 2006), http://www.ediscoverylaw.com/2006/09/party-not-entitled-to-shift-costs-of-restoring-emails-that-were-converted-to-inaccessible-format-after-duty-to-preserve-was-triggered.

[176] *See, e.g.*, K&L Gates, *Court Imposes Sanctions on Plaintiff and Counsel, Orders Plaintiff to Provide Access to Database and for Attorney and His Law Firm to Pay Defendant's Costs, Fees, and Expenses*, ELECTRONIC DISCOVERY LAW BLOG (Mar. 16, 2009), http://www.ediscoverylaw.com/2009/03/court-imposes-sanctions-on-plaintiff-and-counsel-orders-plaintiff-to-provide-access-to-database-and-for-attorney-and-his-law-firm-to-pay-defendants-costs-fees-and-expenses.

[177] Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 358 (1978).

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discovery."[178] The responding party must demonstrate good cause and the responding party has the burden of proof on a motion for cost-shifting.[179] The issue of undue burden and expense typically arises when a party makes a discovery request requiring the responding party to restore and search backup tapes[180] or other complex electronic format to comply with the discovery request.[181] Furthermore, the court must determine the appropriate action when a party committed spoliation when it failed to preserve evidence. Spoliation is "the intentional destruction, mutilation, alteration, or concealment of evidence, usu[ally] a document. If proved, a party may use spoliation to establish the evidence was unfavorable to the party

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[178] *Id*.

[179] *See* Zubulake III, 216 F.R.D. 280, 283 (S.D.N.Y. 2003).

[180] *See* BERMAN, *supra* note 101, at 89–90. "While backup tapes were developed as a cheap and reliable way to store large amounts of data and system-configuration information for a variety of purposes," its effect has been significant in the e-discovery process. *Id.* "Traditionally, the cost, complexity, and operational impact of backup tape e-discovery have been such that courts have been reluctant to order a party to restore data from backup tapes without a showing of good cause." *Id.* Moreover, "the only way to access data [from a backup tape] was to restore it, by copying the data from tape to an operational computer." *Id.* "This was time-consuming, because of the volume of data, compression, and the transfer rates, and costly, because the restored data still had to be preserved, searched, and reviewed." *Id.* at 89–90.

[181] *See, e.g.*, Quinby v. WestLB AG, 245 F.R.D. 94, 111 (S.D.N.Y. 2006) (A female former associate director and vice president brought a lawsuit alleging gender discrimination and retaliatory firing. The defendant moved to shift to the plaintiff cost of producing certain documents. Specifically, the defendant sought to shift to the plaintiff the costs associated with restoring backup tapes and searching the emails of six of its former employees. The court granted the defendant's motion with respect to shifting 30% of the costs of restoring and searching the emails.); Chen-Oster v. Goldman, Sachs & Co., 285 F.R.D. 294, 295, 301 (S.D.N.Y 2012) (Former employees brought a putative class action against their employer, alleging gender discrimination. In response to a discovery request for computerized compensation, promotion, and performance evaluation data, Goldman Sachs argued that the data sources are not reasonably accessible, and that searching them would involve undue burden and expense. As a result, the defendants sought to shift the cost of production to the plaintiff. The court determined that the cost or burden must be associated with some technological feature that inhibits accessibility.); Haka v. Lincoln County, 246 F.R.D. 577, 579 (W.D. Wisc. 2007) (A former county employee brought an action alleging that the county violated state and federal law when it eliminated positions in retaliation for his having filed a false claims complaint alleging improper child support billing by the county. Although the issues at stake in this lawsuit were important, the potential damages were low, so that the cost of engaging in the ESI search plaintiff requested was disproportionate to the available recovery. On the other hand, defendants' ESI, particularly their e-mail, is a *potentially* fecund source of relevant information that is not easily obtained from other sources. The court required the parties to divide the costs of performing the terms searches of the emails 50/50, with the defendant paying 100% of the costs of privilege and relevance review.).

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responsible."[182] When determining the appropriate sanction for spoliation, the courts use three key elements: "the duty to preserve—when it attached and its scope; the culpability of the spoliating party; and the relevance of the lost evidence, or, put differently, the degree of prejudice to the nonspoliating party arising from the loss of that evidence."[183] The courts strongly focus on the relevance of the evidence and the controlling party's culpability in failing to preserve.[184] Finally, the issues of lack of cooperation among the parties and inaccurate representations are prevalent in discovery disputes.[185]

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[182] *Spoliation*, BLACK'S LAW DICTIONARY (10th ed. 2014). *See also* BERMAN, *supra* note 101, at 234.

[183] BERMAN, *supra* note 101, at 236–37 (citing Zubulake IV, 220 F.R.D. 212, 220 (S.D.N.Y. 2003)).

[184] *See, e.g.*, Grey v. Kirkland & Ellis, LLP, Nos. 07C975, 07C978 & 07C979, 2010 WL 3526478, at *7 (N.D. Ill. Sept. 2, 2010) (Two former employees and one unsuccessful job applicant of Chicago-based law firm Kirkland & Ellis LLP (Kirkland), asserted various employment discrimination claims against the firm. Where plaintiffs offered nothing more than speculation regarding defendants' alleged intentional or grossly negligent spoliation of metadata and where defendant asserted that before destroying the server at issue, the information thereon was migrated and no metadata was knowingly changed, the court declined "to infer from the absence of metadata that such evidence would have been favorable to Plaintiff's claims."); Johnson v. Metro. Gov't. of Nashville & Davidson Cty., 502 F. App'x 523, 532–33 (6th Cir. 2012) (Caucasian male police officers brought an action against the police department and its former chief, asserting reverse discrimination claims. Reviewing the district court's denial of spoliation sanctions for abuse of discretion, the Sixth Circuit found that the information at issue should have been preserved and was intentionally destroyed, but upheld the denial of sanctions based on plaintiffs' inability to establish relevance, a necessary element of the test for determining whether sanctions are appropriate.); Lane v. Vasquez, 961 F. Supp. 2d 55, 61–62, 77–78, 80–81 (D.D.C. 2013) (A job applicant brought an action against the director of the U.S. Peace Corps alleging that he was denied employment on the basis of his sex and that he was and retaliated against in violation of Title VII. The court denied plaintiff's motion for default judgment for alleged spoliation of "documents pertaining to his non-selections" (in hiring) where plaintiff failed to present "clear and convincing evidence" that the "abusive behavior" occurred and failed to show why a lesser sanction would not sufficiently punish or deter defendant's behavior. The court also addressed plaintiff's motion for an adverse inference as to several specific instances of spoliation and provided individual analysis for each piece of evidence, ultimately denying the adverse inference as to all evidence for reasons including the failure to establish that any documents were in fact destroyed, and the court's determination that an adverse inference would not rebut Defendant's "legitimate, nondiscriminatory reasons" for the alleged adverse employment actions.).

[185] *See, e.g.*, Jackson v. Deen, No. CV412-139, 2012 WL 7198434, *1–2 (S.D. Ga. Dec. 3, 2012) (In an employment discrimination case involving defendant Paula Deen, the court required the lawyers to personally confer, if only by telephone, to determine if they could in *good faith* resolve the discovery dispute before the court would rule on the matter.); Reeves v. Case W. Univ., No. 1:07-CV-1860, 2009 WL 3242049, *16 (N.D. Ohio Sept. 30, 2009) (Former employee brought a wrongful termination case alleging discrimination because of

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The issues of lack of cooperation and inaccurate representation tie closely to issues of cost shifting and sanctions for lack of compliance, which frequently result in the court sending the issues back to the parties before ruling in whole or in part on the issue.[186] Trial court judges prefer not to get involved in discovery disputes and expect the parties to resolve the issues without court intervention.[187]

VI. THE SUPREME COURT OF THE UNITED STATES MUST REVISIT PLAINTIFFS' HEAVY BURDEN IN EMPLOYMENT DISCRIMINATION CASES

Once the plaintiff in an employment discrimination case establishes a prima facie case of illegal discrimination, the Court should require the defendant to persuade the fact finder that its proffered reason is the real reason for its action. The Court has erroneously relied upon the concept of liberal discovery to determine the burden of persuasion in employment discrimination cases. Its decision in *Burdine*[188] failed to consider the cost, lack of cooperation, and ineffective judicial supervision of discovery disputes. Moreover, the Court must consider the issue of discovery in the present day e-discovery era that has revolutionized and further complicated the litigation process. Although the reliance on liberal discovery has always been misplaced, it is further unsuitable in the present-day technological age. Only by changing the allocation of burden between the plaintiff/employee and the defendant/employer can the Court further the objective to eliminate unlawful employment discrimination. Because the employer has superior knowledge and the relevant documentation regarding its employment decision, it is in the best position to resolve the issue of intentional

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her mental disability. Where it remained "entirely unclear" that defendant performed a "full and thorough search" for responsive ESI, the court imposed sanctions on the defendant, preventing refiling of the motion for summary judgment for "failing to even search for certain evidence," and ordered a "comprehensive examination of all electronic storage . . . where information reasonably expected to be related to [the] litigation might be stored."); *Haka*, 246 F.R.D. at 578–79 (requiring plaintiff to "narrow his search terms to the narrowest set with which he is comfortable" to settle the discovery dispute, and only allowing additional searches by joint agreement or court order).

[186] *See supra* note 185 and accompanying text.

[187] *See* BERMAN, *supra* note 101, at 678 (discussing the need for "a comprehensive framework to address and resolve a wide range of ESI issues and to facilitate the just, speedy, and inexpensive conduct of discovery involving ESI in civil cases, and to promote, whenever possible, the resolution of disputes regarding the discovery of ESI without court intervention" (citation omitted)).

[188] *See* Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 259–60 (1981).

(*continued*)

discrimination.[189] Such a change would substantially eliminate some of the pretrial discovery legal battles and lessen the cost of pretrial discovery.[190]

Professor Belton correctly urged that a defendant in an employment discrimination case has the burden of persuasion regarding its legitimate, nondiscriminatory reason, and more than the burden of production.[191] He noted that "[u]nder this construction of the prima facie case, it is only reasonable and fair to impose upon a defendant the obligation—that is, the burden of persuasion—to demonstrate his conduct was motivated by lawful reasons."[192] Moreover, his proposal is consistent with the objective of the national policy[193] to eliminate unlawful employment discrimination.[194] He further observed that his proposal would:

> [R]equire[] those subject to regulation to examine and evaluate their policies and practices in the interest of avoiding both intended and unintended discriminatory consequences that might be embedded in their institutional and organizational practices. Each time that a decisionmaker makes a determination about a member of a protected class, he must recognize the potential legal consequences that might follow if a lawsuit is brought against him.[195]

Under Professor Belton's sound proposal, the defendant would have to prove by a preponderance of the evidence that its employment decision was legitimate and not for an invidiously discriminatory reason.[196] This proposal would not only be consistent with the national objective to eliminate unlawful employment discrimination, but also the proposal is sound because the employer is in the best position to explain its employment discrimination, and it would lessen battles in pretrial discovery disputes.

The Court's view on liberal discovery in employment discrimination cases is belied by its decisions in *Twombly* and *Iqbal*, in which the Court

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[189] *See* Belton, *supra* note 13, at 1286.

[190] *See id.* at 1286–87.

[191] *See id.* at 1271–72.

[192] *Id.* at 1271.

[193] *See* 29 C.F.R. § 1608.1 (2002) ("Congress, by passage of title VII, established a national policy against discrimination in employment on grounds of race, color, religion, sex, and national origin.").

[194] *See* Belton, *supra* note 13, at 1286.

[195] *Id.*

[196] *See id.*

(*continued*)

demonstrated its own lack of confidence in the discovery process.[197] Moreover, during the process to revise the Federal Rules of Civil Procedure, the participants noted the problem in "cases in which plaintiffs lack access to information necessary to plead sufficiently because that information is solely in the hands of the defendants and not available through public resources or informal investigation."[198] Although the participants provided "substantial encouragement" for an amendment to allow for limited discovery in such cases,[199] this alone would not address the problem in employment discrimination cases. The plaintiffs would benefit from limited discovery to meet their initial burden of pleading, which, in an employment discrimination case, would be to establish a prima facie case of discrimination.[200] However, the defendant still should have the burden of persuasion that its proffered reason is the real reason for its decision. Although giving the plaintiff limited discovery will help, the participant's suggestion does not address the complications and cost of the discovery process.[201] By requiring the defendant/employer to persuade that its reason for making the employment decision is the real reason, the litigation process would fetter illegal discrimination.

Moreover, if the Court places the burden of persuasion on the employer to prove its employment decision was not invidious discrimination, the employer would have an incentive to maintain an appropriate and cost effective data collection system that is more readily accessible. Because it is the employer that sets up, creates, and implements the technological systems, it is the employer who should take steps with the idea of future litigation in mind. During the creation and implementation phase, employers could implement cost-effective measures to ensure data is easily collectible and transferable in the event of litigation. Furthermore, shifting the burden of persuasion to the employer does not unduly burden the employer because the employer, unlike the employee, is in a better position to establish cost effective measures for data collection. Justice Souter, in his dissent in *St. Mary's Honor Center v. Hicks*,[202] astutely concluded:

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[197] *See* Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 558–560 (2007); Ashcroft v. Iqbal, 556 U.S. 662, 684–85 (2009).

[198] DUKE CONFERENCE AMENDMENTS, *supra* note 7, at 21.

[199] *See id*. "'Information asymmetry' has become the descriptive phrase for cases in which only formal discovery is able to provide plaintiffs with information necessary to plead adequately." *Id.*

[200] *See supra* Part III.

[201] *See supra* Part IV.

[202] 509 U.S. 502 (1993).

(*continued*)

> Because I see no reason why Title VII interpretation should be driven by concern for employers who are too ashamed to be honest in court, at the expense of victims of discrimination who do not happen to have direct evidence of discriminatory intent, I respectfully dissent.[203]

Like Justice Souter in *Hicks*, the Court must go through a cost analysis, and it should conclude that placing the cost and responsibility on the employer is not too great when the plaintiff lacks direct evidence of discriminatory intent. To conclude otherwise, the Court would fail to effectively address subtle, but nevertheless invidious, discrimination.

VII. CONCLUSION

The Supreme Court of the United States must make decisions that are consistent with the ever-changing times. Although the nature in which discriminatory acts have changed, so has technology. The Court cannot continue to rely upon the fallacy of liberal discovery in determining that the plaintiff must maintain the burden of persuasion throughout the litigation process. The Court must accept that employers are going to be more clandestine in making invidiously discriminatory decisions. In response, the Court should put in place a procedure that allows invidious discrimination to be completely eliminated. Moreover, the Court must accept that employers are in the best position to control cost associated with electronic data and to assure there is the necessary data to determine if illegal discrimination occurred. Unfortunately, racial discrimination continues to play a prominent role in employers' decisions. The Court must be the gatekeeper to assure those decisions are made free of bigotry and are exclusively merit based. Accordingly, the Court must place the burden of persuasion on the defendant/employer to demonstrate its legitimate, nondiscriminatory reason is, in fact, the real reason for the employment decision.

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[203] *Id.* at 543 (1993) (Souter, J., dissenting) (disagreeing with the majority, which requires the plaintiff employee to persuade the fact finder that the employer defendant acted with discriminatory intent, even when the employer defendant's legitimate, nondiscriminatory reason lacked credence).