

**CLAIMS AGAINST PUBLIC ENTITIES  
AND OFFICIALS  
UNDER 42 U.S.C. § 1983**

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# CLAIMS AGAINST PUBLIC ENTITIES AND OFFICIALS UNDER 42 U.S.C. § 1983

## I. THE PROTECTIONS OF 42 U.S.C. § 1983

Claims<sup>1</sup> for violation of the federal constitution (and certain statutory violations) are brought under 42 U.S.C. § 1983, which is derived from § I of the Civil Rights Act of 1871, and provides that:

Every person who, under color or any statute, ordinance, regulation, custom, or usage, of any state or territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at suit, suit in equity, or other proper proceeding for redress. For the purpose of this section, any act of congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## II. § 1983 DEFENDANTS

### A. The State as a § 1983 Defendant.

By its terms, the Eleventh Amendment prohibits the federal courts from granting both monetary relief (“in law”) and prospective relief (“equity”) against the states. However, because if construed literally the Eleventh Amendment would prohibit federal courts from granting injunctive relief requiring the states to conform to the requirements of the constitution, the U.S. Supreme Court has rejected such a strict interpretation.

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<sup>1</sup> Remedies under § 1983 are broad. All legal and equitable relief is available, including back pay, front pay, compensatory damages, punitive damages, and attorney fees and costs. Punitive damages, however, are only available against individual defendants in their individual capacities and not against governmental organizations, which are immune to punitive damages. (City of Newport v. Fact Concerts, 452 U.S. 247 (1981).)

In Ex Parte Young, 209 U.S. 123 (1908), the Court held that the Eleventh Amendment does not deprive the Federal Courts of the power to require State officials to comply with the Federal Constitution. Under Young, State officials may be sued in both their individual and official capacities. Pursuant to an official capacity claim, which is the same as a claim against the State, the plaintiff may only obtain “prospective relief.” Prospective relief has been interpreted to include injunctive relief, and in the employment context, back pay, reinstatement, and sometimes front pay and attorney fees. (See, e.g., Russell v. Dunston, 896 F.2d 664 (2<sup>nd</sup> Cir. 1990) (order requiring State officials to reinstate plaintiff to medical leave status is prospective in nature); Nix v. Norman, 879 F.2d 429 (8<sup>th</sup> Cir. 1989) (injunction in form of order requiring defendant to clear plaintiff’s employment record of any false allegations of improper behavior is prospective relief not barred by the Eleventh Amendment); Barnes v. Bosley, 828 F.2d 1253 (8<sup>th</sup> Cir. 1987) (Eleventh Amendment does not bar prospective award of reinstatement and payment of salary from date of Court’s judgment; fact that district court stayed judgment pending appeal does not change results); Patterson v. Johnson, 787 F.2d 1245 (8<sup>th</sup> Cir.) (award of salary and other benefits from date to district court judgment until plaintiff is either reinstated or is awarded damages in lieu of reinstatement is prospective relief not barred by the Eleventh Amendment), cert. denied, 479 U.S. 828 (1986).)

## **B. Individual Defendants in Their Individual Capacities.**

### **1. Direct Liability.**

Section 1983 expressly authorizes the imposition of liability upon a person who “subjects, or causes to be subjected, any citizen . . . or other person . . . to the deprivation of any rights” protected by federal law. To be held liable, the individual’s conduct must be the proximate cause of the plaintiff’s injury. (Monell v. Department of Social Services, 436 U.S. 658, 694 (1978) (conduct must be “the moving force of the constitutional violation”); City of Canton v. Harris, 109 S.Ct. 1197, 1203 (1989) (must be a “direct causal link between a municipal policy or custom, and the alleged constitutional deprivation”; liability may be imposed only when identified training deficiency is “closely related to the ultimate injury”; plaintiff must show “that the deficiency in training actually caused” the injury).)

### **2. Supervisory Liability.**

Both governmental entities and individuals may be held responsible under § 1983 for the inadequate supervision of constitutional violations. That is so, even where the supervisor or policy maker with final decision making authority did not specifically engage in the unconstitutional conduct. However, mere negligence with respect to constitutional violations will not give rise to supervisor liability for either municipalities or individuals.

Supervisory officials may be held personally liable for “deliberate indifference” to the existence of unconstitutional conditions or conduct. (See, e.g., Canton, 109 S.Ct at 1197 (deliberate indifference to training of police officers); Meade v. Grubbs, 841 F.2d

1512, 1528 (10<sup>th</sup> Cir. 1988) (sheriff individually liable “for improperly hiring, training, supervising, and disciplining his deputies”); Anthony v. Baker, 767 F.2d 657 (10<sup>th</sup> Cir. 1985) (imposing individual liability for supervisor who demonstrated tacit authorization of unconstitutional conduct and failed to take sufficient remedial action).)

In the employment context, “deliberate indifference” is defined as knowledge and acquiescence to unconstitutional conduct by subordinate employees. The deliberate indifference standard may be satisfied “when the municipality has actual or constructive notice that its action or failure is substantially certain to result in a constitutional violation, and it consciously and deliberately chooses to disregard the risk of harm.” (Olsen v. Layton Hills Mall, 312 F.3d 1304, 1318 (10<sup>th</sup> Cir. 2002); see Woodward v. City of Worland, 977 F.2d 1392, 1400 (10<sup>th</sup> Cir. 1992), cert. denied, 113 S.Ct. 3038 (1993) (recognizing viability of supervisory liability where supervisor knows of illegal sexual harassment and acquiesces to it), citing Andrews v. City of Philadelphia, 895 F.2d 1469, 1478 (3<sup>rd</sup> Cir. 1990) (denying qualified immunity defense to supervisors who acquiesced to acts of sexual harassment); Lankford v. City of Hobart, 73 F.3d 283, 287 (10<sup>th</sup> Cir. 1996) (following Woodward and Andrews in evaluating supervisors liability for acts of sexual harassment by non-supervisory employees).)

Similarly, governmental entities may be held responsible for deliberate indifference to constitutional violations where it is the governmental entity’s policy making officials that have exhibited that deliberate indifference. As the Harris Court noted:

To establish the existence of a governmental custom [of] failure to receive, investigate or act on complaints of violations of constitutional rights, a plaintiff must prove: (1) the existence of a continuing, wide spread, persistent pattern of unconstitutional misconduct by the governmental entity's employees; (2) deliberate indifference to or tacit authorization of such conduct by governmental entity's policy-making officials after notice to the officials of the misconduct; and (3) that plaintiff was injured by acts pursuant to the governmental entity's custom, i.e., that the custom was the moving force behind the constitutional violation.

(831 F.2d at 503.)

However, a pattern of misconduct is not always required. "Although a single incident generally will not give rise to liability, deliberate indifference may be found absent a pattern of unconstitutional behavior if a violation of federal rights is a 'highly predictable' or 'plainly obvious' consequence of a municipality's action." (Olsen, 312 F.3d at 1318)(internal citations omitted).)

### **3. The Qualified Immunity Defense.**

Governmental employees who are sued in their individual capacities may be entitled to qualified immunity. Pursuant to the dictates of the U.S. Supreme Court's decision in Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982), [g]overnment officials performing discretionary functions [are generally shielded] . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." The key inquiry is the "objective reasonableness" of the official's conduct in light of the legal rules that were "clearly established" at the time the action was taken. (See Melton, 879 F.2d at 727; Wulf v. City of Wichita, 883 F.2d 842, 864 (10<sup>th</sup> Cir. 1989); Considine v. Adams County, 910 F.2d 695, 702 (10<sup>th</sup> Cir. 1990).) Qualified immunity for a government

official is not appropriate where “in the light of pre-existing law, the unlawfulness . . . [is] apparent.” (See Anderson v. Creighton, 483 U.S. 635 (1987).)

To defeat qualified immunity, the particular action in question need not have previously been held unlawful. (Anderson, 483 U.S. at 643.) Nor must there even be a strict factual correspondence between the cases establishing the law and the case at hand. (Garcia By Garcia v. Miera, 817 F.2d 650, 657 (10<sup>th</sup> Cir. 1987), cert. denied, 485 U.S. 959 (1988).) Rather, the Tenth Circuit requires only “some but not precise factual correspondence.” (Id., quoting People of Three Mile Island v. Nuclear Regulatory Commissioners, 747 F.2d 139, 144 (3<sup>rd</sup> Cir. 1984). See also Johnson v. Martin, 195 F.3d 1208, 1217-20 (10<sup>th</sup> Cir. 1999) (“We have never said that there must be a case presenting the exact fact situation at hand in order to give parties notice of what constitutes actionable conduct. Instead we merely require the parties to make a reasonable application of existing law to their own circumstances”).) “It is incumbent upon governmental officials ‘to relate established law to analogous factual situations.’” (Garcia, 817 F.2d at 657.)

#### **4. Qualified Immunity and Discovery.**

Defendants may attempt to postpone discovery by raising the qualified immunity defense and seeking a stay of discovery based upon that defense. However, if the complaint alleges a violation of clearly established law, Defendants will be allowed discovery concerning, at least, the qualified immunity defense. (See Maxey by Maxey v. Fulton, 890 F.2d (10<sup>th</sup> Cir. 1989); Pueblo Neighborhood Health Centers, Inc. v. Losavio, 847 F.2d 642, 646 (10<sup>th</sup> Cir. 1988) (“Once the ‘qualified immunity’ defense has

been raised, the court must allow the plaintiff a limited opportunity allowed in Fed.R.Civ.P. Rules 12(b)(6) and 56 to come forward with facts or allegations sufficient to show that the defendant's alleged conduct violated the law and that the law was clearly established when the violation occurred").) Moreover, if the plaintiff has alleged claims for which the qualified immunity defense is inapplicable, such as claims against the governmental entity itself or overlapping statutory claims, discovery should be allowed with respect to those claims, even though they overlap factually. This is so, because in Maxey, the Court held that "qualified immunity does not shield governmental officials from all discovery, but only from discovery which is either avoidable or overly broad."<sup>2</sup> (See Maxey, 890 F.2d at 282, emphasis added).)

#### **5. Interlocutory Appeals.**

Courts of Appeal normally have jurisdiction only over final decisions of the District Courts. (Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949); Timpanogos Tribe v. Conway, et al., 286 F.3d 1195, 1199 (10<sup>th</sup> Cir. 2002) (citing to 29 U.S.C. § 1291).) While interlocutory review of certain "collateral orders" may be permitted, such review is limited to extraordinary circumstances. The Tenth Circuit has noted that it has "jurisdiction over an extremely narrow class of claims raised interlocutorily. The collateral order doctrine sets a high bar for any interlocutory appeal . . ." (Timpanogos, 286 F.3d at 1200.)

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<sup>2</sup> Of course, the qualified immunity defense is not available to the entity defendants, but only to the individually named defendants. (Owen v. City of Independence, 445 U.S. 622 (1980) (qualified immunity of City officials is not a defense to the City).)

Defendants are entitled to an interlocutory appeal from a trial court's denial of a motion for summary judgment based upon the assertion of qualified immunity or its failure to rule prior to trial. The filing of a notice of appeal confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal. (See, e.g., Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982); Marrese v. American Academy of Orthopedic Surgeons, 470 U.S. 373 (1985); Mitchell v. Forsyth, 473 U.S. 511 (1985) (interlocutory appeal permitted from denial of qualified immunity defense); Steward v. Donges, 915 F.2d 572, 574-79 (10<sup>th</sup> Cir. 1990) (same); Workman v. Jordan, 958 F.2d 332, 336 (10<sup>th</sup> Cir. 1992) (permitting interlocutory appeal based on Court's failure to rule on qualified immunity defense itself prior to trial); Lowe v. Town of Fairland, Oklahoma, 143 F.3d 1378 (10<sup>th</sup> Cir. 1998) (interlocutory appeal from Court's failure to rule on qualified immunity defense prior to trial).)

However, even where the qualified immunity defense is implicated, interlocutory appeals have been permitted only under limited circumstances.<sup>3</sup> For example, in Johnson, the U.S. Supreme Court held that a district court's denial of summary judgment based on qualified immunity was not immediately appealable where its order addressed only a question of the sufficiency of the evidence. (Id. at 313.) In Graham v.

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<sup>3</sup> Thus, interlocutory appeals from a collateral order are only permitted where the order: "[1] conclusively determine[s] the disputed question, [2] resolve[s] an important issue completely separate from the merits of the action, and [3] [is] effectively unreviewable on appeal from a final judgment." (Johnson v. Jones, 515 U.S. 304, 310-11 (1995), citing to Cohen, 337 U.S. at 541; Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993), quoting Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978).) Additionally, in determining whether to permit an interlocutory appeal, prejudice caused by undue delay, as well as the unwise use of appellate resources, must be considered. (Johnson, 515 U.S. at 316-17.)

Gray, 827 F.2d 679, 681-82 (10<sup>th</sup> Cir. 1987), the Tenth Circuit refused to permit interlocutory review of an order denying a request to stay discovery based on the qualified immunity defense, because it was not an appealable final order even under the collateral order doctrine. (Id. at 682; see also Lugo v. Alvarado, 819 F.2d 5, 7-8 (1<sup>st</sup> Cir. 1987) (holding that interlocutory review is not available from order refusing to stay discovery based on qualified immunity)<sup>4</sup>.)

Moreover, the Tenth Circuit has noted that “[b]ecause the district court is divested of jurisdiction to proceed to trial by the filing of a notice of interlocutory appeal raising a double jeopardy or qualified immunity issue, there is the risk that such interlocutory appeals will be subject to abuse.” (See Steward v. Donges, 915 F.2d 572, 576 (10<sup>th</sup> Cir. 1990).) In that vein, the Court further warned in U.S. v. Hines, 689 F.2d 934, 936-37 (10<sup>th</sup> Cir. 1982) that:

The divestiture of jurisdiction rule, applicable even when a defendant files a notice of appeal, should not leave the trial court powerless to prevent intentional dilatory tactics by enabling a defendant unilaterally to obtain a continuance at any time prior to trial by merely filing a motion, however frivolous, and appealing the trial court’s denial thereof.

Pursuant to Hines and Steward, the potential misuse of interlocutory review can be prevented if the district court “(1) after a hearing and (2) for substantial reasons given, (3) found the claim to be frivolous.” (See Steward, 915 F.2d at 576; Hines, 689 F.2d at 937.) “Upon such a procedure and an explicit finding that the claim raised on appeal was frivolous, the ‘district court should not be divested of jurisdiction.’” (Id.)

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<sup>4</sup> While the Lugo Court refused to rule out the possibility that an interlocutory appeal may be permissible from a discovery order based on the qualified immunity defense, its example of such a circumstance was “a § 1983 case for damages only in which the Judge inordinately delays decision on qualified immunity but allows extensive discovery.” (Id. at 7-8, fn 3.)

After certification that an interlocutory appeal is frivolous, the case may proceed to trial while the appeal is pending. (See Langley v. Adams County, 987 F.2d 1473, 1477 (10<sup>th</sup> Cir. 1993) (after certification, both the district court and the court of appeals have jurisdiction to proceed).)

### **C. Municipalities**

A governmental entity may be held liable pursuant to § 1983 for the conduct of officials “whose acts may fairly be said to represent official policy.” (See Monell v. Dept. of Social Services, 436 U.S. 658, 694 (1978).) An official policy is (1) a . . . decision that is officially adopted and promulgated by the municipalities’ law-making officers or by an official to whom the law-makers have delegated policy-making authority; or (2) a persistent wide-spread practice of County officials or employees, which although not authorized by officially adopted and promulgated policy, is so common and well settled as to constitute a custom that fairly represents municipal policy. (See Monell, 436 U.S. at 691; Webster v. City of Houston, 735 F.2d 838, 841 (5<sup>th</sup> Cir. 1984); Bennett v. City of Slydate, 735 F.2d 861, 862 (5<sup>th</sup> Cir. 1984) (en banc), cert. denied, 472 U.S. 1016 (1985).)

The key inquiry in determining whether a particular employment decision was made pursuant to municipal policy is whether the offending official had “final decision making authority” over the particular subject matter. The answer to that question is to be found in state or municipal law. (See St. Lewis v. Praprotnik, 108 S.Ct. 915 (1988); Pembaur v. Cincinnati, 475 U.S. 469 (1986).)

Importantly, illegal acts by supervisors or managers who have been delegated final decision making authority may subject an entity to liability. For example, in Melton v. Oklahoma City, 879 F.2d 706 (10<sup>th</sup> Cir. 1989), rev'd on other grounds at 928 F.2d 920 (10<sup>th</sup> Cir. 1991) (en banc), the Court held that the City was responsible for the Chief of Police's firing of a police officer where the City Charter gave the City Manager final policy-making authority over City employment decisions and where the City Manager approved the firing. The City Manager's ratification of the violation brought the City's actions within the realm of municipal liability. (Id. at 725.)

Custom or Practice are typically more difficult to establish. To establish that conduct was made pursuant to municipal custom, the plaintiff must establish prior examples of the unconstitutional conduct. Such proof requires proof that the illegal conduct was repeated. (See, e.g., Bordanaro v. McLeod, 871 F.2d 1151, 1156 (1<sup>st</sup> Cir.) (for a custom or practice to be attributable to a municipality, "it must be so well settled and wide spread that the policy making officials . . . can be said to have either actual or constructive knowledge of it yet did nothing to end the practice"), cert. denied, 110 S.Ct. 75 (1989); Harris v. City of Pagedale, 821 F.2d 499, 503 (8<sup>th</sup> Cir. 1987) (to establish custom, plaintiffs must prove the existence of a continuing, wide spread, persistent pattern of unconstitutional misconduct by the governmental entities' employees and tacit authorization of such conduct by the governmental entity's policy making officials).) Additionally, plaintiffs must establish that the unconstitutional custom was the "moving force" behind the constitutional violation. (See, e.g., City of Canton v. Harris, 109 S.Ct. 1197, 1203-06 (1989) (§ 1983 municipal liability may be imposed when the enforcement

of a custom was the “moving force,” “direct causal link,” “closely related,” and “actually caused” the violation of federally protected rights); ; Dubbs v. Head Start, Inc., 336 F.3d 1194 (10<sup>th</sup> Cir. 2003)(municipal policy or practice must be the "direct cause" or "moving force" behind the constitutional violation).)

### **III. CLAIMS AGAINST THE FEDERAL GOVERNMENT**

As a general rule, the doctrine of sovereign immunity prohibits all suits against the United States unless it has given consent. (See, e.g., Cohens v. Virginia, 19 U.S. 264 (1821); Library of Congress v. Shaw, 478 U.S. 310 (1986); Block v. North Dakota, 461 U.S. 273 (1983).)

However, sovereign immunity ordinarily will not apply in actions for monetary damages brought against Federal officers and employees in their individual or personal capacity. (See, e.g., Deutsch v. Federal Bureau of Prisons, 737 F.Supp. 261 (S.D.N.Y. 1990), aff'd 2<sup>nd</sup> Cir. N.Y. 1991). While 42 U.S.C. § 1983 does not authorize suit against the Federal government or its officers and employees in their individual capacity, the right to bring such a suit and seek monetary damages was recognized as part of the Federal common law in Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971).

A plaintiff may establish an actionable Bivens claim when: (1) the plaintiff asserted a constitutionally-protected right; (2) the plaintiff stated a cause of action that asserted that right; and (3) relief in the form of damages constituted an appropriate remedy. (Davis v. Passman, 442 U.S. 228 (1979).)

A Bivens action is precluded when: (1) Congress has either statutorily prohibited the relief sought or provided an alternative and equally effective remedy as a substitute for recovery directly under the Constitution; or (2) in the absence of such affirmative action by Congress, there are nonetheless “special factors counseling hesitation.” (Schweiker v. Chilickey, 487 U.S. 412 (1988).)

#### IV. CLAIMS FOR PROSPECTIVE RELIEF

##### A. Factual and legal basis for claim.

Statutory or common law basis (federal or state):

*e.g.*, Title VII, Title IX, ADA, Rehabilitation Act, ADEA, APA, RFRA, RLUIPA

Constitutional basis:

Federal/state

Limitations and restrictions:

Statute of limitations

Restrictions on jurisdiction

Administrative exhaustion requirements (*e.g.*, grievance process)

Limitations on remedies (*e.g.*, Prison Litigation Reform Act)

##### B. What relief do we want.



###### Retrospective Relief

Damages

Equitable restitution

[Edelman v. Jordan, 415 U.S. 651 (1974)]



###### Prospective Relief

Declaratory

Injunctive

Mandamus

##### C. Jurisdiction – choosing the court.

State court? Federal court?

Exclusive, concurrent, supplemental jurisdiction

Certification of questions of law (C.A.R. 21.1; "Pullman abstention")

##### D. Prospective claims and Sovereign Immunity issues.

Suing states and state agencies for prospective relief under 42 U.S.C. §1983:

Ex Parte Young, 209 U.S. 123 (1908) – as state has sovereign immunity, creates the fiction of suing state officers (as state has "no power to impart to him any immunity from responsibility to the supreme authority of the United States") in their official capacities.

Will v. Michigan Dept. of State Police, 491 U.S. 58 (1989) – a state is not a "person" under 42 U.S.C. §1983, and thus cannot be sued for prospective (or retrospective) relief. But – "Of course a state official in his or her *official capacity*, when sued for injunctive relief, would be a person under §1983 because 'official-capacity actions for prospective relief are not treated as actions against the State.' [citation omitted] This distinction of 'commonplace in sovereign immunity doctrine,' . . . [citation omitted]." 491 U.S. at 71, ftn. 10 (emphasis added).

Suing municipalities for prospective relief under 42 U.S.C. §1983:

No sovereign immunity. Directly under 42 U.S.C. §1983 – "in an action at law, suit in equity, or other proper proceeding for redress . . . ."

Suing federal agencies for prospective relief:

"There is no such animal as a Bivens suit against a public official tortfeasor in his or her official capacity." Simmat v. U.S. Bureau of Prisons, 413 F.3d 1225, 1231 (10<sup>th</sup> Cir. 2005).

but...

". . . as a result of congressional action in 1875 (creating general federal question jurisdiction), 1962 (extending mandamus jurisdiction to all federal district courts), and 1976 (waiving sovereign immunity in cases for nonmonetary relief against federal officials and agencies), federal district courts now have jurisdiction over claims by federal prisoners against federal prison officials seeking vindication of their constitutional rights under either 28 U.S.C. §1331 or 28 U.S.C. §1361, and may obtain relief in the nature of either injunction or mandamus. In many cases these forms of relief may be interchangeable." 413 F.3d at 1236. The waiver of sovereign immunity under 5 U.S.C. §702 "is not limited to suits under the Administrative Procedure Act." 413 F.3d at 1233.

**E. Choosing the "official capacity" defendants.**

States and state agencies:

Name the public official responsible for "carrying out" or enforcing the law or policy being challenged and/or for which an injunction is sought, or the

public official with the power to affirmatively remedy the violation – in his or her "official capacity."

– "John Hickenlooper, in his official capacity as Governor of the State of Colorado"

– "Tom Clements, in his official capacity as Executive Director of the Colorado Department of Corrections"

– "Kevin Milyard, in his official capacity as Warden of the Sterling Correctional Facility"

– "Mitchell R. Morrissey, in his official capacity as District Attorney for the Second Judicial District, State of Colorado"

In a 42 U.S.C. §1983 action, *do not* name "State of Colorado" or "Colorado Department of Corrections"

Municipalities or other non-state-agency governmental actors:

Name the municipality or governmental entity.

– "City and County of Denver"

– "School District No. 1"

– "Board of County Commissioners for Pitkin County, Colorado"

– "Regional Transportation District"

Federal agencies:

May name the agency:

– "Federal Bureau of Prisons"

May name "official capacity" representatives of the agency:

– "Eric H. Holder, Jr., in his official capacity as Attorney General of the United States"

– "Harley G. Lappin, Director, Federal Bureau of Prisons"

May name "United States of America" - per 5 U.S.C. §702 (not often done)

General practice is to follow 42 U.S.C. §1983 format since judges and lawyers are used to it

**F. Other considerations.**

Standing

Ripeness

Mootness

Exhaustion of administrative remedies

Fee awards

42 U.S.C. §1988

Prison Litigation Reform Act limitation (PLRA) (42 U.S.C. §1997e)

Equal Access of Justice Act (EAJA)

Limitations on prospective relief (and consent decrees) in actions involving prison conditions – PLRA (18 U.S.C. §3626)

– limitations on preliminary injunctive relief

– restrictions on availability of prisoner release orders

(*but see*, Brown v. Plata, U.S. Supreme Court, 5/23/2011)

– provisions for termination of prospective relief orders

## V. PLEADING § 1983 CLAIMS AFTER TWOMBLY/IQBAL

### A. Twombly and Iqbal.

Fed.R.Civ.P. 8(a)(2) provides that a Complaint must contain a “short and plain statement of the claim showing that the pleader is entitled to relief.” For 50 years, Rules 8(a)(2) and 12(b)(6) were interpreted pursuant to the U.S. Supreme Court’s decision in Conley v. Gibson, 355 U.S. 41, 78 (1957), which held that a Complaint could not be dismissed “unless it appears beyond doubt that the plaintiff can prove no set of facts in support of this claim that would entitle him to relief.”

Pursuant to the U.S. Supreme Court’s recent decisions in Bell Atlantic Corp., et al. v. Twombly, et al., 127 S.Ct. 1955 (2007), and Ashcroft, et al. v. Iqbal, et al., 129 S.Ct. 1937 (2009), however, the Conley standard has been abandoned and radically changed.

In Twombly, a case arising under the Sherman Anti-Trust Act, the Supreme Court held that Conley was no longer good law. (127 S.Ct. at 1967.) The Court then held that under Rules 8(a)(2) and 12(b)(6), it was insufficient to simply plead the

conclusory elements of a claim. (Id. at 1965.) The Court then adopted a “plausibility” standard for stating a claim under Rule 12(b)(6). (Id. at 1965.) Under that standard, a Complaint must set forth facts “plausibly suggesting” that the plaintiff is entitled to relief. (Id.) In that regard, the Court distinguished between factual allegations, which are relevant to the 12(b)(6) analysis, and mere conclusions that are not. (Id. at 1965.)

Iqbal arose under 42 U.S.C. § 1983. In that case, the Court rejected the Plaintiff’s contention that the Twombly decision was limited to the Sherman Anti-Trust Act and specifically held that Twombly’s new plausibility standard applied to cases brought under 42 U.S.C. § 1983 (and, indeed, all Complaints brought in federal court).

## **B. Critical Citations for Pleading Claims under 42 U.S.C. § 1983.**

### **1. U.S. Supreme Court Authority.**

- Bell Atlantic Corp., et al. v. Twombly, et al., 550 U.S. 544 (2007)
- Erickson v. Pardus, 551 U.S. 89 (2007)
- Ashcroft, et al. v. Iqbal, et al., 129 S.Ct. 1937 (2009)

### **2. Tenth Circuit Decisions.**

- Van Zandt v. Oklahoma Department of Human Services, et al., 276 Fed.Appx. 843 (10<sup>th</sup> Cir. 2008) (application of Twombly/Iqbal to qualified immunity defense)
- Bryson v. Gonzales, 534 F.3d 1282 (10<sup>th</sup> Cir. 2008)
- Robbins, et al. v. Oklahoma, et al., 519 F.3d 1242 (10<sup>th</sup> Cir. 2008)
- Ridge at Red Hawk, L.L.C. v. Schneider, et al., 493 F.3d 1174 (10<sup>th</sup> Cir. 2007) (not § 1983 case)
- Alvarado, et al. v. KOVTV, L.L.C., 493 F.3d 1210 (10<sup>th</sup> Cir. 2007) (not § 1983 case)

### **3. Tenth Circuit Trial Courts Denying 12b6 Motion after Iqbal (in whole or in part).**

- Kuyper v. Board of County Commissioners of Weld County, Colorado, 2010 WL 12877534 (D. Colo. 2010) (motion involving Twombly/Iqbal in qualified immunity defense)
- Asten v. City of Boulder, 2009 WL 2766723 (D. Colo. Aug. 26, 2009)

- Bergerud v. Fortunato, 2009 WL 3158154 (D. Colo. Sept. 29, 2009)
- Short v. Trujillo, 2009 WL 2438524 (D. Colo. Aug. 20, 2009)
- Bell v. Turner Recreation Commission, 2009 WL 2914057 (D. Kan. Sept. 8, 2009)

**4. Trial Courts Within the Tenth Circuit Granting 12b6 Motions after Iqbal.**

- Sanaah v. Howell, 2009 WL 3273459 (D. Colo. Sept. 14, 2009)
- Carani v. Meisner, 2009 WL 2762719 (D. Colo. Aug. 26, 2009)
- Creamer v. Ellis County Sheriff Department, 2009 WL 1870872 (D. Kan. June 29, 2009)

**C. Application of Iqbal and Twombly to Defense Pleadings.**

Most Courts have applied Twombly and Iqbal to pleadings in which defendants assert claims against the plaintiffs in the form of counter-claims, cross-claims, or third party complaints. (See, e.g., Nesselrotte v. Allegheny Energy, Inc., 2007 WL 3147038 at \*2, \*6 (W.D. Pa.) (applying Twombly to counter-claims of contract violation and breach of fiduciary duty); Sun Microsystems, Inc. v. Versotta Enterprises, Inc., 630 F.Supp.2d 395, 404 (D. Del. 2009) (applying Twombly and Iqbal to counter-claim); Carpenter's Health and Welfare Fund of Philadelphia v. Kia Enterprises, Inc., 2009 WL 2152276 at \*3 (E.D. Pa.) (applying Iqbal to counter-claim).)

The lower courts are split, however, with respect to whether the pleading requirements of Twombly and Iqbal apply to affirmative defenses. On the one hand, some lower courts have refused to adopt a double standard whereby plaintiffs are held to a heightened pleading standard and defendants are not. (See, e.g., United States v. Quadri, 2007 WL 4303213, \*4 (E.D. Mich.) (refusing to exempt defendants from requirements of Twombly in pleading affirmative defenses); Shinew v. Wszola, 2009 WL 1076279, \*2-4 (E.D. Mich.) (Id.); Holtzman v. B/E Aerospace, Inc., 2008 WL 2225668,

\*2 (S.D. Fla.) (Id.); In Re Mission Bay Ski and Bike, Inc., 2009 WL 2913438, \*6 (Bkrtcy. N.D. Ill.) (Id.); Tracy v. NVR, Inc., 2009 WL 3153150, \*7 and n 13 (W.D.N.Y.) (Id.); Greenheck Fan Corp. v. Loren Cook Co., 2008 WL 4443805, \*1 (W.D. Wis.) (Id.); Stoffels Ex Rel SBC Telephone Concession Plan v. SBC Communications, Inc., 2008 WL 4391396, \*1-2 (W.D. Tex.) (Id..) However, a number of other lower court decisions have held that, even post-Iqbal, defendants can plead affirmative defense in conclusory, fact-free language. (See Holdbrook v. Saia Motor Freight Line, L.L.C., 2010 WL 865380 (D. Colo. 2010) (J. Babcock refusing to apply Twombly/Iqbal to affirmative defenses); First Nat. Ins. Co. of America v. Camps Services, Ltd., 2009 WL 22861, \*2 (E.D. Mich.) (Twombly is inapplicable to pleading of affirmative defenses); Romantine v. CH2M Hill Engineers, Inc., 2009 WL 3417469 (W.D. Pa.) (Id..)

## **VI. APPENDIX**

Amended Complaint, Nathan Acks, et al. v. City and County of Denver, et al., Denver District Court, Civil Action No. 09-cv-02197-RPM