
For Whom The Bell Tolls

The Continued Vitality of the Heightened Pleading Requirement for Qualified Immunity Cases in the Eleventh Circuit

BY: Jason B. Tompkins

When the United States Supreme Court begins to dismember a legal principle, the courts of some circuits immediately hear it as the death knell for the principle as a whole. In other circuits, the courts carve away only the smallest legally offensive portions, leaving the remainder intact. With Supreme Court opinions resonating differently throughout the circuits, lawyers may attempt to direct other circuits' changing tides toward their own. The window of opportunity to change a circuit's long-standing principles, however, is small. Once a particular court of appeals has addressed the effect of a Supreme Court opinion, further arguments that rely on other circuits' interpretations are generally futile.

Fifteen years ago, the majority of circuits imposed heightened pleading requirements in all § 1983 cases. Since then, in a series of opinions, the Supreme Court has limited application of the heightened pleading standard unless expressly required by Fed. R. Civ. P. 9 or federal statute. Eleven courts of appeals have abandoned heightened pleading requirements in all § 1983 cases. The Eleventh Circuit Court of Appeals, on the other hand, has expressly reaffirmed that at least one type of § 1983 case still requires heightened pleading: those cases in which the defendant is entitled to assert qualified immunity. Nonetheless, many lawyers continue to argue in this circuit's federal district courts that these cases do not require heightened pleading, sometimes wasting as much as one-third of their briefs on an argument that many district judges will not entertain. Accepting that a heightened pleading requirement exists

should encourage better drafted complaints and allow parties to focus on the merits of the case rather than arguing about the proper pleading standard, which is well engrained in Eleventh Circuit jurisprudence.

The defense of qualified immunity may be raised by an official being sued in his individual capacity for damages. The defense is available to government officials performing discretionary functions "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Qualified immunity is immunity from suit, not just immunity from judgment. Although the defendant has historically borne the burden of proving he was performing a discretionary function, the plaintiff's allegations must nonetheless state a claim of violation of a clearly established law; otherwise, a defendant pleading qualified immunity is entitled to dismissal prior to discovery. Yet, because qualified immunity is clearly an affirmative defense, a plaintiff will many times be given the opportunity to present a more definite statement to satisfy his burden.

Before 1993, courts generally imposed heightened pleading requirements in all civil rights cases, especially those involving qualified immunity. In *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, however, the Supreme Court began to pare back application of judicially-created heightened pleading standards. In that case, the Court rejected a heightened pleading standard for claims involving municipal liability but refused to consider "whether our qualified

immunity jurisprudence would require a heightened pleading in cases involving individual government officials.” After *Leatherman*, the courts of most circuits continued to require some form of heightened pleading in cases against individuals. The Eleventh Circuit Court of Appeals, for example, noted: “Although the Supreme Court has held that courts may not impose a heightened pleading requirement in § 1983 cases involving municipalities, . . . the Court specifically declined to extend its holding to cases involving individual government officials . . . and we likewise decline to do so here.”

In 2002, the Supreme Court further crippled application of a heightened pleading standard when the rules of civil procedure and relevant federal statutes do not prescribe it. In *Swierkiewicz v. Sorema*, the Court reviewed a district court’s dismissal of Swierkiewicz’s employment discrimination complaint for “not adequately alleg[ing] circumstances that support an inference of discrimination.” The Supreme Court determined that the heightened pleading requirement imposed by the district court conflicted with Fed. R. Civ. P. 8(a)(2), which requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” Rule 8, the Court observed, “applies to all civil actions, with limited exceptions,” such as Fed. R. Civ. 9(b).

Several courts of appeals saw *Swierkiewicz* as an indication from the Supreme Court that the rationale of *Leatherman* applied to all § 1983 claims, including those against individuals. The Eleventh Circuit Court of Appeals did not; in fact, it has not cited *Swierkiewicz*, an employment discrimination case, in any decision involving qualified immunity. Rather, the Court of Appeals has continued to apply a heightened pleading standard, but acknowledged that it is limited to only those § 1983 suits against individuals to whom qualified immunity is available.

Last term, the Supreme Court again assaulted judicially-imposed heightened

pleading requirements. In *Jones v. Bock*, the Court held that a plaintiff is not required to plead administrative exhaustion with specificity in § 1983 claims covered by the Prisoner Litigation Reform Act (PLRA) because failure to exhaust is an affirmative defense. Several circuits had imposed such a pleading requirement to facilitate early judicial screening of cases. The Supreme Court concluded: “We once again reiterate, however – as we did unanimously in *Leatherman*, *Swierkiewicz*, and *Hill* – that adopting different and more onerous pleading rules to deal with particular categories of cases should be done through established rulemaking procedures, and not on a case-by-case basis by the courts.” A few months later, in *Erickson v. Pardus*, the Court, *per curiam*, held that the Tenth Circuit Court of Appeals erred in holding that a plaintiff’s allegations of harm in a § 1983 case were too “conclusory” to survive a motion to dismiss. The Court admonished such a “departure from the liberal pleading standards set forth by Rule 8(a)(2).”

Although the Eleventh Circuit Court of Appeals has not discussed the implication of these two most recent decisions on its heightened pleading standard in cases involving qualified immunity, the Court of Appeals is unlikely to change its current requirement. The *Jones* decision arose under the PLRA, and involved a requirement for the plaintiff to specifically plead facts to overcome an affirmative defense of failure to exhaust. Although qualified immunity is likewise an affirmative defense, as indicated above, the plaintiff has the burden to prove defendants are not entitled to the defense. *Erickson* is more on point, yet the Supreme Court did not expressly hold that a heightened pleading requirement is prohibited in all cases involving qualified immunity. Rather, it held that, in the circumstances presented by that case, the plaintiff had sufficiently alleged harm resulting from the defendant’s actions.

Two months after *Erickson*, the Elev-

enth Circuit Court of Appeals applied the heightened pleading standard without reference to *Erickson*, but at this time, the Court of Appeals has not explicitly addressed the implication of *Erickson*. Consequently, district courts continue to impose the heightened pleading standard in cases of qualified immunity, even while citing *Erickson*. Few district judges in the circuit are likely to hold otherwise without a clearer indication from the Supreme Court or the Eleventh Circuit Court of Appeals. Given the Eleventh Circuit's desire to truly resolve the issue of qualified immunity "at the earliest possible stage in litigation," the Court of Appeals will likely distin-

guish *Erickson* or limit its application to its facts.

Rightly or wrongly, in the Eleventh Circuit, the death knell has not sounded for the heightened pleading requirement in § 1983 cases against defendants entitled to assert the qualified immunity defense. Absent a clear pronouncement from the Supreme Court or a major shift in Eleventh Circuit jurisprudence, that is unlikely to change. Attorneys should acknowledge this reality and, whenever possible, plead their cases with specificity to avoid needless motions practice, or, worse, dismissal.

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Allison O'Neal Skinner

Registered on the Alabama State Court Mediator Roster

205.327.5550 askinner@rumberger.com