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Heightened Pleading Standards in Civil Rights Cases Against Municipalities

by Michele L. Hammers

THE UNITED STATES SUpreme Court recently held that federal courts can no longer apply heightened pleading standards in civil rights cases brought against municipal defendants under 42 U.S.C. Section 1983 in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit.*[1] This decision resolved a split in opinions among the federal circuit courts regarding the appropriate pleading standard to be used in civil rights cases. The Supreme Court did this by rejecting the heightened pleading standard as conflicting with the "liberal system of 'notice pleading' set up by the Federal Rules."[2]

THE CIRCUIT SPLIT

The Supreme Court granted certiorari in the *Leatherman* case to settle differences between the circuits on how to handle Section 1983 cases brought against municipalities. For example, the Ninth Circuit did not subject these cases to any special pleading requirement. Rather, the Ninth Circuit had stated explicitly that a Section 1983 claim against a municipality was "sufficient to withstand a motion to dismiss even if the claim is based on nothing more than a bare allegation that the individual officers' conduct conformed to official policy, custom or practice."[3] In contrast, prior to the recent Supreme Court ruling, the Fifth Circuit required that a Section 1983 complaint "allege with particularity all material facts establishing a plaintiff's right to recovery."[4] The Fifth Circuit not only required Section 1983 plaintiffs to plead the facts of their cases with particularity, but also required plaintiffs to anticipate the possible defense of immunity and to plead "detailed facts supporting the contention that [a] plea of immunity cannot be sustained."[5]

Leatherman brought the Fifth Circuit's heightened pleading requirement before the Supreme Court. The plaintiffs in *Leatherman* alleged several civil rights violations by officers under the supervision of the Tarrant County Narcotics Coordination and Intelligence Unit; Tarrant County, as a municipal defendant, sought to take advantage of the Fifth Circuit's heightened pleading standard and to have the Leatherman's suit disposed of at the summary judgment stage. It was the county's contention that the plaintiffs had not alleged the facts of their case with sufficient particularity. The Supreme Court seized upon the *Leatherman* case as an opportunity to settle the differences between the circuits as to pleading standards. *Leatherman* disapproved the Fifth Circuit's heightened pleading standard, at least to the extent that the heightened standard had been applied to municipal defendants.

THE ORIGINS OF *PEREZ*

The Fifth Circuit's heightened pleading requirement originated in *Elliott v. Perez.*[6] This requirement was intended as a protective measure for government officials, in line with the Fifth Circuit's interpretation of the policies behind the Supreme Court's decision in *Harlow v. Fitzgerald.*[7] *Harlow* eliminated the subjective portion of the former two-prong test for determining whether an official was entitled to immunity based on a good faith defense.[8]

The subjective element of a

good faith defense was treated historically as a question of fact, requiring extensive discovery and expense at trial. By eliminating this subjective test, the *Harlow* court created a strictly objective test of good faith, which could be determined as a matter of law allowing "the resolution of many insubstantial claims on summary judgment."[9] The *Harlow* decision gave limited protection from litigation, as well as immunity from liability, to individual defendants in civil rights cases. By making the question of a liability defense determinable at the summary judgment stage of trial, *Harlow* gave officials an early opportunity to escape from the litigation, sparing them the expense and burden of extensive discovery.[10] *Harlow* explained the existence of a qualified immunity defense as a compromise between the competing interests of redressing injuries and protecting innocent officials from frivolous lawsuits.[11] *Harlow* also emphasized that the qualified immunity defense was intended to permit "insubstantial lawsuits [to] be quickly terminated."[12] Because the subjective element of the good faith test required a factual determination, this part of the test was eliminated by *Harlow* as being inconsistent with *Butz'* "admonition" that insubstantial claims should not proceed to trial.

As justification for this emphasis on the early detection of insubstantial claims, both *Harlow* and *Butz* rely on what the Court refered to as the "substantial costs [that] attend the litigation of the subjective good faith of officials."[13] These costs included non-economic elements, such as distraction of the official from ongoing obligations at work and the disruption of wide-ranging discovery, which would include numerous professional colleagues.[14]

The Court further held in *Harlow* that "bare allegations of malice should not suffice to subject government officials either to the costs of trial or to the burdens of broad reaching discovery."[15] Accordingly, the Court held that the subjective element of the test for a good faith defense would no longer be applied.[16]

The *Elliott* court found a heightened pleading standard to be a natural extension of the policies behind *Harlow*. The heightened pleading standard pushed the limited protection afforded defendants by *Harlow* at the summary judgment stage back to the pleadings stage of trial. Under *Elliott's* heightened requirement, the plaintiff had to anticipate the requirements for surviving a motion for summary judgment at the pleading stage of trial. Thus, *Elliott* had the effect of providing a greater opportunity for civil rights defendants under Section 1983 to escape the litigation at the earliest possible stage. In this, *Elliott* closely followed the premise stated in *Williams v. Collins*[17] that, in cases involving an immunity defense, a "protected official should be sheltered from trial and pretrial preparation as well as liability."[18]

Elliott was later extended, without explanation, to protect municipalities as well as individuals by the Fifth Circuit's decision in *Palmer v. San Antonio*.[19] It was this extension of *Elliott* that the Supreme Court struck down when it addressed the heightened pleading requirement set forth in *Leatherman*.

In *Leatherman*, the Supreme Court did not directly address the soundness of the Fifth Circuit's original application of *Harlow* and *Williams* to pleading requirements for individual defendants. *Leatherman* only addressed the heightened pleading requirement as it applied to municipal defendants under Section 1983. *Elliott* itself remains unadressed by the Supreme Court; thus, the Fifth Circuit's heightened pleading standard has not yet been completely abrogated.

THE SUPREME COURT DECISION

The Fifth Circuit explained its extension of *Elliott* to municipal defendants by referring to "the heavy cost of responding to even a baseless legal action."[20] Tarrant County, as respondent before the Supreme Court, defended the heightened pleading standard with a slightly different approach to the Fifth Circuit's cost argument.

Tarrant County argued that the policy allowing defendants the earliest possible opportunity to escape the burdens of trial, put forth in *Elliott* and simply extended in *Palmer*, is further supported by Supreme Court

decisions providing municipalities with immunity from certain types of liability.[21]

Tarrant County relied on the Supreme Court's decision in *Monell v. New York City Dept. of Social Services*[22] for the following premise: since municipalities are free from respondeat superior liability for their employees' actions, they should also be immune from suit in cases based on liability for employee actions.[23] This position rests in part on the Fifth Circuit's cost arguments. The reasoning was that "a more relaxed pleading requirement would subject municipalities to expensive and time consuming discovery in every Section 1983 case, eviscerating their immunity from suit and disrupting municipal functions."[24] The Supreme Court found this reasoning to be fundamentally flawed, however, because it assumed that municipalities have access to the same immunity defenses that individual government officials do, which is not true.[25]

In *Owen v. City of Independence*,[26] the Supreme Court held that municipalities were not entitled to the kind of qualified immunity that individual officials enjoyed via the good faith defense.[27] Furthermore, *Monell* itself, apart from eliminating respondeat superior liability for municipal defendants, overruled a prior court decision and held that local governments were not immune from suit under Section 1983 cases.[28] Tarrant County's reliance on *Monell* was therefore based on a mistaken view that attempted to "[equate] freedom from liability with immunity from suit."[29]

The Supreme Court pointed out that its *Leatherman* holding did not address whether individual defendants, who have access to the good faith defense, are entitled to the protection of a heightened pleading standard as put forth in *Elliott*.[30]

Since the Court disposed of the *Leatherman* case without directly addressing the cost-based policy arguments made in *Elliott* and its progeny, it is unclear how a challenge to *Elliott* would be decided.

THE IMPACT OF NOTICE PLEADING

The Supreme Court also addressed Tarrant County's attempts to justify the heightened pleading standard under the Federal Rules of Civil Procedure. This procedural argument, while applied in *Leatherman* only to municipal defendants, seems equally applicable to individual defendants and may provide insight into how the court would handle a later challenge to *Elliott*.

The procedural justification for a heightened pleading standard relies on attempts to balance the pro-plaintiff effect of notice pleading with the "fundamental substantive objectives" behind the idea of official immunity.[31] The argument in *Elliott* was that the trial court, when applying Federal Rule of Civil Procedure 8, must "adapt its procedures to assure full effectuation of" the substantive right at stake in cases involving an immunity defense.[32]

This argument in favor of balancing conflicting policies is largely supported by reference to Rule 11's requirement that an attorney certify that "to the best of his knowledge, information, and belief formed after reasonable inquiry, each document is well grounded in fact and is warranted by existing law . . . ."[33] The *Elliott* court saw this language as requiring plaintiff's counsel, in a case that might involve a question of immunity, to certify that he has a "good faith belief" that the defendant could not successfully raise the immunity defense, and that he be able to state what facts support this belief.[34]

Tarrant County argued that the "degree of factual specificity required of a complaint by the Federal Rules of Civil Procedure varies according to the complexity of the underlying substantive law." Respondents therefore urged that since Section 1983 claims against municipalities required that plaintiffs show more than just a "single instance of misconduct," they fell within the more complicated set of cases which required heightened pleading standards.[36] Since plaintiffs had a burden under Rule 11 to make reasonable inquiry into the merits of their claim, respondents urged that this heightened pleading standard was not inconsistent with what was already required of them.[37]

Without specifically addressing the merits of respondent's attempts to tie the heightened pleading standard to existing Rule 11 obligations, the Supreme Court noted that the

only exceptions to Rule 8's liberal pleading requirements are enumerated in Rule 9(b). And no mention is made in Rule 9(b) of Section 1983 complaints against municipalities. Invoking the expression *"expressio unius est exclusio alterius"*[38] the Court held that the Fifth Circuit's heightened pleading standard is "impossible to square" with the general requirements of our notice pleading system.[39]

WHAT REMAINS AFTER *LEATHERMAN*?

It is clear that after *Leatherman* civil rights plaintiffs bringing suit against municipal defendants can no longer be subjected to heightened pleading requirements. While plaintiffs may still be required to defeat a good faith defense in order to survive a motion for summary judgment, they will not have to anticipate such a defense at the pleadings stage. Nor will they have to plead the facts underlying their cause of action with any more particularity than the usual plaintiff under Fed. R. Civ. P. 8.

Despite this, *Elliott* remains untouched by *Leatherman* with regard to individual defendants. Until the question of heightened pleading with regard to individual officials and the policies behind the broad "good faith" protection that they enjoy are addressed, it appears that, at least in the Fifth Circuit, plaintiffs will continue to face a heightened pleading standard in cases falling within *Elliott's* scope. ❖

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ENDNOTES

[1] *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 113 S. Ct. 1160 (1993).

[2] *Id.* at 1161.

[3] *Karim-Pananhi v. Los Angeles Police Dept.*, 839 F.2d 621, 624 (9th Cir. 1988) *citing Shah v. County of Los Angeles*, 797 F.2d 745, 747 (9th Cir. 1986).

[4] *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 954 F.2d 1054, 1055 (5th Cir. 1992), *rev'd* 113 S. Ct. 1160 (1993).

[5] *Id. citing Elliott v. Perez*, 751 F.2d 1472, 1482 (5th Cir. 1985).

[6] *Elliott*, 751 F.2d at 1482.

[7] *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S. Ct. 2727 (1982).

[8] *See Elliott*, 751 F.2d at 1477, *citing Harlow*, 457 U.S. at 816, 102 S. Ct. at 2737-38.

[9] *Elliott*, 751 F.2d at 1478, *citing Harlow*, 457 U.S. at 818, 102 S. Ct. at 2739.

[10] *Id.*

[11] *See Harlow*, 457 U.S. at 814, 102 S. Ct. at 2736.

[12] *Id.* at 815-16, 102 S. Ct. at 2738, *quoting Butz v. Economou*, 438 U.S. 478, 507-8, 98 S. Ct. 2894, 2911-12 (1978).

[13] *Harlow*, 457 U.S. at 816, 102 S. Ct. at 2737.

[14] *Id.* at 817, 102 S. Ct. at 2737.

[15] *Id.* at 818, 102 S. Ct. at 2738.

[16] *See id.* at 818-19, 102 S. Ct. at 2738-39.

[17] *Williams v. Collins*, 728 F.2d 721 (5th Cir. 1984).

[18] *Id.* at 726.

[19] *See Palmer v. San Antonio*, 810 F.2d 514, 516-17 (5th Cir. 1987).

[20] *Leatherman*, 954 F.2d at 1057, *citing Rodriguez v. Avita*, 871 F.2d 552, 554 (5th Cir. 1989), *cert. denied*, 493 U.S. 854, 110 S. Ct. 156 (1989).

[21] *See Leatherman*, 113 S. Ct. at 1162-63.

[22] *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018 (1978)

[23] *See Leatherman*, 113 S. Ct. at 1162, *citing Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S. Ct. 2018.

[24] *Leatherman*, 113 S. Ct. at 1162.

[25] *Id.*

[26] *Owen v. City of Independence*, 445 U.S. 622, 100 S. Ct. 1398 (1980).

[27] *Id.* at 650, 100 S. Ct. at 1415.

[28] *Leatherman*, 113 S. Ct. at 1162, *citing Monell*, 436 U.S. at 691, 98 S. Ct. at 2036.

[29] *Id.*

[30] *See id.*

[31] *Elliott*, 751 F.2d at 1479.

[32] *Id.*

[33] Fed. R. Civ. P. 11.

[34] *See Elliott*, 751 F.2d at 1481.

[35] *Leatherman*, 113 S. Ct. at 1162.

[36] *Id.*

[37] *See id.*

[38] Latin, "the expression of one thing is the exclusion of another."

[39] *Id.* at 1163, *citing Conley v. Gibson*, 355 U.S. 41, 47, 78 S. Ct. 99, 103 (1957) ("the Federal Rules ... do not require a claimant to set out in detail the facts upon which he bases his claim.")