When Plaintiffs Sue for Excessive Force

How to Get Out of Court Quickly

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During the past several years police misconduct claims have exploded. That is not to say that the force used by officers in effecting an arrest has become overbearing. The use of reasonable force in police fieldwork has remained relatively constant. Rather, the law has changed. The prerequisites for filing an excessive force claim have become easier. A claimant is no longer required to be significantly injured in order to sue. Courts also are becoming less sympathetic to the qualified immunity defense, asserted by individual officers in virtually every case. The disclosure requirements set forth in the new federal rules of procedure have significantly decreased the cost of litigating police misconduct. Do not think that these legal changes have been made in a vacuum. They have not. The carnivorous appetite of the plaintiffs' bar has been refocused by the media's attention on the exceptional case of egregious police conduct. The result? Cities, their police departments, and the officers they employ, are viewed as "deep pockets" who are sued with regularity on marginal or merciless claims. The modest goal of this article is to focus on defenses according to the party sued that often allow a quick exit from the courthouse.[1]

Officer Liability – *Who did it?*

The plaintiff's petition, on a very basic level, defines the suit and gives the defendant notice of the facts and legal theories of the case. It is the plaintiff's obligation to name the proper party defendant. Whether from simple ignorance or outright stupidity, many civil rights plaintiffs have trouble grasping this principle.

Unidentified Officers - ***We did it but you don't know it.***

Commonly there are multiple police officers involved in an arrest. Often civil rights complainants name many of these police officers as John Doe defendants. John Doe defendants are generally not cognizable in federal courts.[2] Neither the federal statutes nor the federal rules of civil procedure contain any provision for the use of fictitious parties.[3] To the contrary, Federal Rule of Civil Procedure 10(a) requires that the complaint include the names of all parties. Pleadings in which the defendants are not identified by name will not suffice.[4] A person is not a party to a lawsuit until named as a party.[5] References to fictitious parties are therefore considered mere surplusage, the subject of dismissal for failure to state a claim.[6]

Getting the name right also implicates jurisdiction over the person. In *Taylor v. Federal Home Loan Bank Board,*[7] a civil rights action, the court was faced with the plaintiff's request to add 50 "Doe" defendants. Declining the plaintiff's invitation, the court quoted the seminal Ninth Circuit opinion of *Sigurdson v. Del Guercio*:[8]

"These John Doe complaints are dangerous at any time. It is inviting disaster to allow them to be filed and to allow fictitious persons to remain defendants if the complaint is still of record. Appropriate action has been taken by the trial court on its own motion in some such cases. Although the fact that the Rules of Civil Procedure, [and] 28 U.S.C.A., contain no express prohibition upon the subject, there is no authority of which we are aware for the joining of fictitious defendants in an action under a federal statute. These defendants should be eliminated by motion of [defendant]…."[9]

On this precedent the court dismissed the Doe defendants for lack of personal jurisdiction. Doe defendants in the other civil rights actions are similarly entitled to dismissal under Rule 12(b)(2).

Misidentified Officers – ***We didn't do it and you can't prove it.***

Just as officers who participated in an arrest are named erroneously as unidentified defendants, officers who did not participate in an arrest are named fallaciously as misidentified defendants. Having never struck, punched or kicked the plaintiff, or even observed anyone doing so, officers are named only in the caption or included with broad, sweeping allegations that the "defendants" used excessive force. Neither identification is sufficient.

It is entrenched in federal jurisprudence that an official will not be liable in an action brought under §1983 unless he directly and personally participates in conduct under color of state law that deprives the plaintiff of rights, privileges, and immunities secured him by the United States Constitution.[10] Personal participation is an essential element in a civil rights claim.[11] Where a complaint alleges no specific act or conduct on the part of an officer toward the plaintiff, or conspicuously names the officer only in the caption, a cry of "I didn't do it" properly dismisses the officer even under the liberal construction given *pro se* complaints. [12]

Nominally Identified Officers - *We did it but we're not liable.*

Sometimes the plaintiff will correctly identify an officer who participated in the arrest, but will bring suit against the officer in his official capacity.[13] Suing an officer in his official capacity is legally indistinct from suing a municipality.[14] When a municipality and its officer, officially, are both named defendants, the claims are redundant. [15] Dismissal of the officer is appropriate.[16]

Properly Identified Officers - *We did it but we're not plainly incompetent.*

Officers, sued in their personal capacities, who participated in the arrest and are named in the complaint should invoke the defense of qualified immunity. Qualified immunity is a substantive right belonging to police officers. [17] Its principal purpose is to shield officials not only from liability but also from defending against a lawsuit. [18] "[Q]ualified immunity is in part an entitlement not to be forced to litigate the consequences of official conduct. …"[19] Police officers are immune if they could have reasonably believed their actions to be lawful in light of clearly established law and the information the officers possessed. [20] Even if law enforcement officials erred in concluding that probable cause existed, they are entitled to summary immunity if their decision was reasonable, albeit mistaken. [21] Qualified immunity has therefore been recognized to protect all but the plainly incompetent or those who knowingly violate the law. [22]

Questions regarding qualified immunity are resolved on the face of the pleadings and with limited resort to discovery. [23] Qualified immunity poses a question of law to be decided by the court [24] at the earliest possible stage of litigation. [25] Consequently, summary judgment, together with a motion to stay discovery, should be pursued jointly within weeks of service of process.

The most critical element of the qualified immunity doctrine is its immediate appealability from an adverse determination in the trial court.

Qualified immunity is more than just a defense to liability. It is, in fact, an immunity from suit. The Supreme Court explained in *Mitchell v. Forsyth* [26] that qualified immunity is an entitlement not to stand trial or suffer other litigation burdens until the legal question of the defendant's conduct is first determined by an appellate court to have violated clearly established law. If a claim to which immunity applies is erroneously permitted to go to trial, the defense is forever lost.[27]

Heightened Pleading - *We did it but you can't clearly say it.*

An officer asserting the qualified immunity defense has a corresponding substantive right to avoid the potentially arduous process of discovery when a complaint does not plead facts which, if true, would defeat a claim of qualified immunity.[28] A complaint of excessive force is required in many circuits to be pled under a heightened pleading standard. [29] Heightened pleading "requires significantly more specific allegations that required by "notice pleading" under Federal Rule of Civil Procedure 8. It is a judicially crafted extension of the doctrine of qualified immunity.

Because questions regarding qualified immunity are resolved on the face of the pleadings with limited resort to discovery, a plaintiff, at the pleading stage, is required to engage the affirmative defense of qualified immunity. [30] To state a §1983 claim, plainly and concisely, against a police official, the plaintiff must chart a factual path, free of conclusion, that defeats qualified immunity.[31] Greater pleading detail is required in order to accommodate the substantive right of officials to be free both from individual liability and the discovery process. [32] Allowing broadly worded complaints leads to traditional pre-trial depositions, interrogatories and document production, all of which eviscerate the protections of qualified immunity. [33] Therefore, a plaintiff's complaint must state with factual detail and particularity the basis for the excessive force claim, including why the defendant cannot successfully maintain the defense of immunity.[34] If conclusory allegations comprise the complaint, a Rule 12 motion to dismiss should first be asserted, and if unsuccessful, summary judgment based on qualified immunity should secondarily be pursued.

Police Department Liability - *You sued the wrong thing so you lose.*

Plaintiffs, demonstrating a further lack of normal intelligence, or, at least a naivete of the law, frequently sue police departments. A police department in most cases is an improper party defendant. [35] To sue a city department, the department must enjoy a separate legal existence. [36] A police department

generally has no corporate identity separate from its municipality. Each governmental department is not a "person" distinct from the government at large for purposes of §1983.[37] A police department is a sub-unit of the city government and, as such, is merely a vehicle through which the city fulfills its policing functions. [38] Unless the municipality has taken explicit steps to grant the servient agency with jural authority, the city department cannot be engaged in litigation. [39] Suit can no more proceed against a police department than it could against an accounting department of a corporation. [40] Early dismissal under Rule 12(b)(6) is appropriate. [41]

Municipal Liability - *You sued the right thing but you lose anyway*.

Should the plaintiff wish to sue an entity for his supposed distress, a municipality is the property party defendant. To establish municipal liability under §1983 a complainant must demonstrate a policy or custom that caused constitutional injury. [42] A municipality, of course, can act only through its human agents, but it is not vicariously liable. [43] The doctrine of *respondeat superior* does not apply to §1983 claims. [44] A city can be liable for its non-policy making employees' acts only if its employees were carrying out city policies when they acted. [45] Isolated acts of an individual officer, without additional proof connecting those acts to the municipality, are not deemed a custom or policy of a municipality. [46] To impose liability under these circumstances would be to impose it simply because the municipality hired one "bad apple". Conversely, a stipulation that the action of a police officer is in compliance with the city's customs and policies triggers municipal liability if a verdict is rendered against the individual officer. [47]

The task of establishing municipal liability in a §1983 context is formidable. [48] To establish a *prima facie* case, a plaintiff must identify a specific policy, connect the specific policy to the city itself, and show that the particular injury was inflicted because of the execution of that policy. [49] Thus, not only must there be some degree of fault on the part of the municipality in establishing or tolerating the custom or policy, but there also must exist a causal link between the custom or policy and the deprivation. [50] A municipal policy is not unconstitutional if it might *permit* unconstitutional conduct in some circumstances; it is unconstitutional only if it *requires* its officers to act unconstitutionally.[51]

Moreover, the custom or policy must demonstrate deliberate indifference to the plaintiff's constitutional rights and be a conscious choice by the municipality's final decision-making officials. [52] Mere negligence is not sufficient to state a claim.[53] Rather, the test is one of deliberate indifference to the claimant's rights. [54] This standard has

been defined as "just not giving a damn.[55] It is indeed rare when a plaintiff can meet this burden and establish that a municipality has a policy, ordinance, regulation, or custom adopting or requiring the use of excessive force.

Many plaintiffs counsel practice what might charitably be described as the "Bubba Smith" approach to civil rights litigation: the plaintiff grabs as many defendants as possible and then, with the court's helping hand, throws them out one by one until he finds one with a plausible violation. While this approach may be effective on the gridiron, it has no place in the courtroom. Not only is it without merit, it runs afoul of Rule 11.[56] An attorney's signature on a pleading constitutes a certificate that the signer has read the document and, to his best knowledge, it is well-grounded in fact and warranted by existing law. [57] Improperly naming police officers, police departments, and municipalities as parties to a lawsuit violates this principle and allows the imposition of sanctions. [58]

Section 1983 claims against municipalities therefore provide fit grist for the summary judgment mill.

Conclusion

Notes

[1] Jaundiced by a perspective of the Fifth Circuit, this article cites general principles of law supported by Supreme Court decisions when applicable. Consult the law of your jurisdiction for specific precedent.

[2] *Agresta v. City of Philadelphia*, 694 F. Supp. 117,119n.a (E.D. Pa. 1988); *Riley v. Brazeau*, 612 F. Supp. 674, 679 (D. Or. 1985); *Hernandez v. Aeronaves de Mexico*, 583 F. Supp. 331, 332 (N.D. Cal. 1984); *M. J. Brock & Sons, Inc. v. City of Davis*, 401 f. Supp. 354, 357 (N.D. Cal. 1975); *Macchiavelli v. Shearson, Hamill & Co., Inc.,* 384 F. Supp. 21, 23 (E.D. Cal. 1974); *Wiltsie v. California Dept. of Corrections,* 406 F.2d 515, 518 (9th Cir. 1968). *Compare Schiff v. Kennedy,* 691 F.2d 196, 197 (4th Cir. 1982); *Maclin v. Paulson,* 627 F.2d 83, 87 (7th Cir. 1980) (fictitious names may be used until plaintiff has a reasonable opportunity to learn their identify through discovery).

[3] *McDonald v. General Mills, Inc.,* 387 F. Supp. 24, 33 (E.D. Cal. 1974).

[4] *Linebarger v. Williams,* 77 F.R.D. 682, 685 (E.D. Okla. 1977).

[5] *Klingler v. Yamaha Motor Corp.,* 738 F. Supp. 898, 910 (E.D. Pa. 1990).

[6] *Id.*

[7] 661 F. Supp. 1341 (N.D. Tex. 1986).

[8] 241 F.2d 480, 482 (9th Cir. 1956)

[9] *Taylor,* 661 F. Supp. At 1350

[10] *Herrera v. Scully,* 815 F. Supp. 713, 722 (S.D. N.Y. 1993); *Int'l Soc'y for Krishna Consciousness, Inc. v. Lake City Agric. Soc'.,* 521 F. Supp. 8, 12 (N.D. Ind. 1980); *Hopkins v. Hall,* 372 F. Supp. 182, 183 (E.D. Okla. 1974).

[11] *Bennett v. Passic,* 545 F. 2d 1260, 1262-63 (10th Cir. 1976); *Linebarger,* 77 F.R.D. at 684.

[12] *Jones v. Johnson,* 16 F.3d 727, 728 (7th Cir. 1994); *Hopkins,* 372 F. Supp. At 183; *Brazozowski v. Randall,* 281 F. Supp. 306, 312 (E.D. Pa. 1968). See also *Hardin v. Peck,* 686 F. Supp. 1254 (N.D. III. 1988) (Rule 11 sanctions imposed against plaintiff's counsel for not alleging specific conduct against three officers in the complaint).

[13] If the plaintiff names an officer but does not identify the capacity in which he is sued, it is presumed that the officer is sued officially. *Yeksigian v. Nappi,* 900 F.2d 101, 104 (7th Cir. 1990). If the plaintiff names an officer in the style of the case as being sued both officially and personally, but in the body of the complaint does not indicate in which capacity the officer is liable, sanctions may be imposed against the plaintiff's counsel. See *DeSisto College Inc. v. Line,* 888 F.2d 755, 763 (11th Cir. 1989).

[14] *Kentucky v. Graham,* 473 U.S. 159, 167 (1985).

[15] *Doe v. Raines Ind. School District,* 865 F. Supp. 375, 378 (E.D. Tex. 1994); *Amati v. City of*

Woodstock, Ill., 829 F. Supp. 998, 1011 (N.D. Ill. 1993).

[16] *Amati*, 829 F. Supp. At 1011; *Ellis v. City of Fairburn, Ga.,* 852 F. Supp. 1581 (N.D. Ga. 1994).

[17] *Schultea v. Wood,* 47 F.3d 1427, 1430 (5th Cir. 1995).

[18] *Span v. Rainey,* 987 F.2d 1110, 1111 (5th Cir. 1993).

[19] *Michell v. Forsyth,* 472 US. 51, 527 (1985).

[25] *Lampkin*, 7F. 3d at 435.

[26] 472 U.S. at 526

[27] *Id.*

[28] *Jacquez v. Procunier,* 801 F.2d 789 (5th Cir. 1986).

[29] Although the Supreme Court disavowed the use of heightened pleading scrutiny as applied to municipalities, it has not had occasion to consider whether qualified immunity jurisprudence requires heightened pleading as applied to individual government officials. *Leatherman v. Tarrant Cunty Narcotics Intelligence and Coordination Unit,* 113 S. Ct. 1160, 1162 (1993). A heightened pleading standard has, however, been uniformly adopted in qualified immunity analysis among the courts of appeals. *See Hunter v. District of Columbia,* 943 F.2d 69, 76 (D.C. Cir. 1991); *Oladeinde v. City of Birmingham,* 963 F.2d 1481, 1485 (11th Cir. 1992), *cert. denied* 113 S. Ct. 1586 (1993); *Sawyer v. County of Creek,* 903 F.2d 663, 667 (10th Cir. 1990); *Branch v. Tunnel,* 937 F.2d 1382, 1386-87 (9th Cir. 1991); *Brown v. Frey,* 889 F.2d 159, 170 (8th Cir. 1989), *cert. denied,* 483 U.S. 1088 (1990); *Chapman v. City of Detroit,* 808 F.2d 459, 465 (6th Cir. 1986); *Dunbar Corp. v. Lindsey,* 905 F.2d 754, 763 (4th Cir. 1990).

[30] *Schultea,* 47 F.3d at 1430.

[31] *Id.*

[32] *Id.*

[33] *Jackson v. City of Beaumont Police Dep't.* 958 F.2d 626, 620 (5th Cir. 1992).

[34] Note, the Fifth Circuit recently changed its procedure. These allegations are now required to be pled in a Rule 7 reply. *Schultea,* 47 F. 3D at 1432-34.

[35] *Johnson v. City of Erie, Pa.,* 834 F. Supp. 873, 879 (W.D. Pa. 1993).

[36] *Darby v. Pasadena Police Dep't.,* 939 F.2d 311, 313 (5th Cir. 1991).

[37] *Johnson,* 834 F. Supp. At 879.

[38] *Id.* At 878; *Post v. City of Fort Lauderdale,* 750 F. Supp. 1131, 1132-33 (S.D. Fla 1990).

[39] *Darby,* 939 F.2d at 313.

[20] *Hunter v. Bryan,* 502 U.S. 511, 527 (1985).

[21] *Lampkin,* 7 F. 3d at 435.

[22] *Malley v. Briggs,* 475 U.S. 335, 341 (1986).

[23] *James v. Sadler*, 909 F.2d 834, 838 (5th Cir. 1990).

[24] See *Hall v. Ochs,* 817 F.2d 920, 924 (11th Cir. 1990); *Gorra v. Hanson,* 880 F.2d 95, 97 (8th Cir. 1989); *Warlick v. Cross,* 969 F.2d 303, 305 (7th Cir. 1992); *Holt v. Artis,* 843 F.2d 242, 246 (6th Cir. 1988).

[40] *Id.*

[41] *Maxwell v. Henry,* 815 F. Supp. 213, 215 (S.D. Tex. 1993).

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

[43] *City of Canton, Ohio v. Harris,* 489 U.S. 388. 389-92 (1989); *Rhyne v. Henderson County,* 973 F.2d 386, 392 (5th Cir. 1992).

[44] In fact, a civil rights plaintiff violates Rule 11 if he pleads respondeat superior as a basis for municipal liability. *Worthington v. Wilson,*790 F. Supp. 829, 837 (E.D. Ill. 1992).

[45] *City of Canton, Ohil,* 489 U.S. at 389-92.

[46] See *Ctiy of Oklahoma City v. Tuttle,* 471 U.S. 808, 821 (1984).

[47] *Kersh v. Derozier,* 851 F.2d 1509, 1513 (5th Cir. 1988).

[48] *Hare v. City of Corinth,* 814 F. Supp. 1312, 1323 (N.D. Miss. 1993).

[49] *Bennett v. City of Slidell,* 728 F.2d 762, 767 (5th Cir. 1984).

[50] *Funiller v. City of Cooper City,* 777 F.2d 1436, 1442 (11th Cir. 1985).

[51] *Kerr v. City of West Palm Beach,* 875 F.2d 1546, 1544 (11th Cir. 1989); *Handle v. City of Little Rock,* 772 F. Supp. 434, 438 (E.D. Ark. 1991).

[52] *City of Canton, Ohio* 489 U.S. at 389-92.

[53] *Id.*

[54] *Id.*

[55] *Bordanaro v. McLeod, 871 F.2d 1151, 1164 (1st Cir. 1989).*

[56] Harden v. Peck, 686 F.Supp. 1254, 1263 (N.D. Ill. 1988).

[57] FED. R. CIV. P. 11.

[58] *See Worthington,* 790 F. Supp. At 837; *Gibson v. Alexandria,* 855 F. Supp. 133, 137 (E.D. Va. 1994); *Haverstick Enterprises v. Fin. Fed. Credit Inc.,* 803 F. Supp. 1251, 1260-61 (E.D. Mich. 1992).