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ISSUES AFTER IQBAL

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ISSUES AFTER IQBAL IN PRISONERS'
RIGHTS LITIGATION

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BRIEF BIOGRAPHY

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I. INTRODUCTION

This section will address those areas of law that are most likely to be affected after the Supreme Court's decision in Ashcroft v. Iqbal, 129 S.Ct. 1937 (2009): (1) pleading; (2) supervisory liability; and (3) Monell liability. The bottom-line takeaways are: (1) plead as many facts as you, in good faith, can allege (unless the result is a prolix complaint that obscures the most relevant facts); (2) do not plead any facts that could defeat your claim for relief by providing an alternative legal explanation for the defendants' conduct; and (3) if you sue supervisors or municipalities, take particular account of the effect of Iqbal on the standard for municipal and supervisory liability in your circuit (although in most circuits, so far, the effect has been minimal).

II. OVERVIEW OF IQBAL

Ashcroft v. Iqbal¹ completed, by many accounts, a radical change in civil procedure that started two years earlier with Bell Atlantic v. Twombly.² In Twombly, the Supreme Court adopted a "plausibility" pleading standard in reviewing the sufficiency of an antitrust complaint, overruling in part Conley v. Gibson,³ the 1957 case that ratified the notice pleading regime adopted by the Federal Rules of Civil Procedure.⁴ Iqbal extended Twombly to all civil actions and applied an even more rigorous standard to a civil rights action filed against high level federal officials.⁵ The end result is a pleading standard that heightens attention to "conclusory" factual pleading,⁶ treats state of mind allegations in a manner at odds with prior precedent,⁷ and encourages lower courts to apply their "judicial experience

1. 556 U.S. ___, 129 S.Ct. 1937 (2009).

2. 550 U.S. 544 (2007).

3. 355 U. S. 41 (1957).

4. 550 U.S. at 561-63 (reviewing criticisms of Conley and concluding that expansive language of the case "has been questioned, criticized, and explained away long enough").

5. 129 S. Ct. at 1950 (explaining that in determining whether a complaint is "plausible," judges may rely on their "judicial experience and common sense").

6. 129 S. Ct. at 1949-50.

7. Id. at 1954 (interpreting Fed. R. Civ. P. 9(b) to require more than "general" allegations for state of mind even where neither fraud nor mistake is alleged). The Iqbal Court's interpretation of Rule 9(b) is arguably at odds with the Advisory Committee notes to Rule 9. See Fed. R. Civ. P. 9, Advisory Committee Notes to 1937 Adoption (citing ENGLISH RULES UNDER THE JUDICATURE ACT (The Annual Practice, 1937) O. 19, r. 22.) The English rules cited by Rule 9 state that when a plaintiff makes allegations as to any "condition of the mind of any person, it shall

and common sense” to decide whether a plaintiff’s⁸ legal claims and allegations are sufficient to proceed to discovery.⁹

It may be too early to judge the effect of Iqbal and Twombly, even as many lower courts maintain that it has changed outcomes in particular cases.¹⁰ At the broad empirical level, there is some ongoing debate about

be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.” Jeff Sobern, Reconsidering Federal Civil Rule 9(B): Do We Need Particularized Pleading Requirements in Fraud Cases? 104 F.R.D. 143, 146 n.19 (1985). Moreover, as some courts have recognized, the Iqbal Court’s treatment of Rule 9(b) is in some tension with its prior decision in Swierkiewicz v. Sorema, 534 U.S. 506 (2002). See, e.g., Fowler v. UPMC Shadyside, 578 F.3d 203, 210-11 (3d Cir. 2009); Brown v. Castleton State College, 663 F.Supp.2d 392, 403 n.8 (D. Vt. 2009); cf. Kasten v. Ford Motor Co., 09 Civ. 11754, 2009 WL 3628012, at *7 (E.D. Mich. Oct. 30, 2009) (stating that tension between Swierkiewicz and Iqbal has yet to be resolved).

8. Pleading standards obviously apply to all parties. Defendants sometimes bring counter-, cross-, or third-party claims, and as such may face the burden of overcoming heightened pleading standards. But in this paper I will use “plaintiff” to refer generally to anyone who brings a claim that is subject to a particular pleading standard.
9. Iqbal, 129 S. Ct. at 1950.
10. To be fair, the Supreme Court itself stated that it did not consider Twombly or Iqbal to break significant new ground, see Iqbal, 129 S. Ct. at 1949-50, Twombly, 550 U.S. at 563 n.8, and some lower courts seem to be taking the Court at its word. See, e.g., Valenti v. Massapequa Union Free School Dist., No. 09-977, 2010 WL 475203 (E.D.N.Y. Feb. 5, 2010); Rouse v. Berry, No. 06-2088, 2010 WL 325569 (D.D.C. Jan. 29, 2010); Desrouleaux v. Quest Diagnostics, Inc., No. 09-61672, 2009 WL 5214964 (S.D. Fla. Dec. 29, 2009); Gillman v. Inner City Broadcasting Corp., No. 08-8909, 2009 WL 3003244 (S.D.N.Y. Sept. 18, 2009). The dissenters in Iqbal took a sharply different view, see Iqbal, 129 S. Ct. at 1959-61 (Souter, J., dissenting), and many lower courts have explicitly acknowledged the significant difference between adjudicating pleading motions before and after these decisions. See Young v. City of Visalia, No. 09-115, 2009 WL 2567847, at *6 (E.D. Cal. Aug. 18, 2009) (interpreting Iqbal to overturn Ninth Circuit pleading precedent for constitutional claims against municipalities); Doe v. Butte Valley Unified School Dist., 09-245, 2009 WL 2424608, at *8 (E.D. Cal. Aug. 6, 2009) (questioning whether, after Iqbal, the Fed. R. Civ. P. form complaints are still sufficient); Ocasio-Hernandez v. Fortuno-Burset, 639 F. Supp. 2d 217, 226 n.4 (D. Puerto Rico 2009) (acknowledging Iqbal’s harsh results); Ibrahim v. Department of Homeland Sec., No. 06-545, 2009 WL 2246194, at *10 (N.D. Cal. July 27, 2009) (criticizing demanding nature of Iqbal standard); Williams v. City of Cleveland, No. 09-1310, 2009 WL 2151778, at *4 (N.D. Ohio July 16, 2009) (describing Iqbal as imposing a heightened pleading standard); Kyle v. Holinka, No. 09-90, 2009 WL 1867671, at *1 (W.D. Wis. June 29, 2009) (describing Iqbal as “implicitly overturn[ing] decades of circuit precedent in which the court of appeals had allowed discrimination claims to be pleaded in a conclusory fashion.”).

whether dismissal rates have increased, decreased, or stayed the same after Twombly and Iqbal, although the most recent data from the Federal Judicial Center suggests that dismissal rates have increased significantly for civil rights cases.¹¹ Doctrinally, however, it is hard to underestimate the potential impact of the two decisions together, especially as it applies to prisoner civil rights cases in which the defendant’s state of mind is often at issue. In this presentation, my goal is to review the most important of these doctrinal changes, summarize how lower courts have addressed them so far, and offer some thoughts as to how they may be resolved.

I will begin with some history, even as I assume that much of it is known to my audience. The changes ushered in by the 1938 adoption of the Federal Rules of Civil Procedure, especially with respect to pleading, were particularly striking. Rule 8, with its mandate that all a pleading requires is a “short and plain statement of the claim showing that the pleader is entitled to relief” was a sharp departure from prior practice.¹² This change was crystallized by the Supreme Court’s decision in Conley v. Gibson,¹³ in which the Court articulated an interpretation of Rule 8 that focused on the notice given to the defendant of the nature of the plaintiff’s lawsuit rather than on the relationship of particular pleaded facts to the legal claims at issue. The Conley Court treated pleading as a way of “facilitat[ing] a proper decision on the merits” by giving a defendant “fair notice of what the plaintiff’s claim is and the grounds upon which it rests.”¹⁴ The Supreme Court’s broad statement that a

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11. See Patricia W. Hatamyar, The Tao of Pleading: Do Twombly and Iqbal Matter Empirically? 59 AM. U. L. REV. 553, 556 (2010) (estimating that motions to dismiss were four times more likely to be granted after Iqbal as they were during the Conley era, after controlling for relevant variables); Kendall W. Hannon, Note, Much Ado About Twombly? A Study on the Impact of Bell Atlantic Corp. v. Twombly on 12(b)(6) Motions, 83 NOTRE DAME L. REV. 1811, 1837 (2008) (reporting a civil rights dismissal rate of 41.7% under the pre-Twombly standard and 52.9% under Twombly, using only reported cases between 2006 and 2007); Joseph A. Seiner, The Trouble with Twombly: A Proposed Pleading Standard for Employment Discrimination Cases, 2009 U. ILL. L. REV. 1013, 1014 (showing effect of Twombly standard on published opinions regarding employment discrimination cases); Federal Judicial Center, Motions to Dismiss (2010), <http://www.uscourts.gov/rules/Motions%20to%20Dismiss.pdf>.
 12. The goal of the Federal Rules was to create both simplicity and uniformity in pleading, and prevent premature dismissals. See id. at 439 (“Rule 8(a)(2) was drafted carefully to avoid use of the charged phrases ‘fact,’ ‘conclusion,’ and ‘cause of action.’”).
 13. 355 U.S. 41 (1957).
 14. Id. at 47-48.

complaint should survive dismissal “unless it appears beyond doubt that the plaintiff can prove no set of facts . . . that would entitle him to relief,”¹⁵ was the most expansive reading of Rule 8 that had yet (or since) been offered. Once so articulated, the notice pleading standard dominated the resolution of pre-discovery motions, at least rhetorically.¹⁶

Until Twombly and Iqbal, the Supreme Court had maintained a relatively consistent commitment to Conley’s notice pleading rule, twice unanimously rejecting heightened pleading standards in civil rights and employment discrimination cases.¹⁷ Admonishing lower courts to adhere to Conley’s liberal pleading standard, the Court specifically recognized that the purported justification for heightened pleading standards was to screen out unmeritorious suits.¹⁸ The Court acknowledged that there might be “practical merits” to heightened pleading, but reminded the lower courts that such changes may be obtained only “by the process of amending the Federal Rules” (or by Congressional action), not by judicial fiat.¹⁹

In Twombly, however, the Court adopted a “plausibility” standard in an antitrust case, expressing its specific concern in the antitrust context that liberal pleading rules, combined with expansive discovery, would pressure defendants to settle weak or meritless cases.²⁰ Twombly also overruled at least that part of Conley which cautioned district courts not to dismiss a case for insufficient pleading unless they can conclude that

15. Conley, 355 U.S. at 45-46.

16. Christopher Fairman has argued that notice pleading has rarely been the rule, at least in practice, pointing to examples from antitrust, RICO, environmental, civil rights, intellectual property, and defamation cases, among others, in which lower courts have constructed a variety of heightened pleading standards. See Fairman, *supra* note 21 at 998-1011 (summarizing different categories of heightened pleading).

17. See Swierkiewicz v. Sorema, 534 U.S. 506, 512-13 (2001) (explaining that discovery and summary judgment, not heightened pleading requirements, are the proper means for disposal of unmeritorious suits); Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 168 (1993) (stating that heightened pleading standard for Section 1983 claims against municipalities is “impossible to square . . . with the liberal system of ‘notice pleading’ set up by the Federal Rules”); see also Crawford-El v. Britton, 523 U.S. 574, 595 (1998) (“[O]ur cases demonstrate that questions regarding pleading, discovery, and summary judgment are most frequently and most effectively resolved either by the rulemaking process or the legislative process.”).

18. Swierkiewicz, 534 U.S. at 514-15; Leatherman, 507 U.S. at 168.

19. Swierkiewicz, 534 U.S. at 514-15 (quotation marks omitted).

20. 550 U.S. at 559-60.

the plaintiff cannot “prove any set of facts” consistent with the defendant’s liability.²¹

The Court’s decision in Iqbal made clear that “plausibility” pleading applied in all civil cases, not just antitrust.²² Iqbal stemmed from the treatment of Javid Iqbal, a criminal detainee who was held in the most restrictive conditions of confinement known in the federal detention system (ADMAX SHU) while awaiting trial on charges related to his use of a contrived social security number. Mr. Iqbal was arrested shortly after September 11, 2001, and he alleged that he was treated as a terrorist suspect (despite the lack of any evidence that he was involved in terrorism) solely because of his race (South Asian), religion (Muslim), and national origin (Pakistani). He was held in restrictive conditions, where he was strip-searched every day, shackled whenever he left his cell, housed in solitary confinement, and subjected to discrete instances of misconduct by correction officials working in the MDC. He was told that he was being considered “high security” and called a “terrorist,” but like the other Arab and South Asian men who were held on the ADMAX SHU at that time, he was never given an explanation as to what grounds were relied upon to classify him as such.

Mr. Iqbal was eventually released from the ADMAX SHU, after which he pleaded guilty and served a brief prison sentence. He was then removed to his home country of Pakistan. He brought suit in 2004, alleging causes of action under Bivens and its progeny, civil rights statutes, and the Federal Tort Claims Act. A handful of high level defendants moved to dismiss his claims, arguing that they were entitled to qualified immunity because the law after September 11 was so unclear that they could not have reasonably anticipated being held accountable for violations of the constitution. The district and appellate courts rejected these arguments,²³ and the defendants petitioned for certiorari, emphasizing the sufficiency of the complaint’s allegations of discrimination rather than the issue of qualified immunity.

On May 18, 2009, the Supreme Court issued its opinion in Iqbal.²⁴ By a 5-4 vote, the Court held that Mr. Iqbal had failed to allege a plausible claim for relief under the Equal Protection Clause.²⁵ Justice

21. Id. at 561-63.

22. Iqbal, 129 S. Ct. at 1949-50.

23. See Iqbal v. Hastly, 490 F.3d 143 (2d Cir. 2007).

24. 556 U.S. ___, 129 S.Ct. 1937 (2009).

25. The Court did not explicitly address plaintiff’s claims under 42 U.S.C. § 1985(3), but the reasoning of the Court’s Equal Protection holding makes clear that the Section 1985(3) claims were not viable.

Kennedy authored the majority opinion, joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito. Justice Souter, the author of Twombly, authored the principal dissent, joined by Justices Stevens, Ginsburg, and Breyer.²⁶

After addressing subject matter jurisdiction arguments that had been raised by Mr. Iqbal,²⁷ the Court turned to the merits of the dispute. Proceeding to the issue of whether Mr. Iqbal had alleged a Bivens cause of action under either the Equal Protection Clause or the free expression clause of the First Amendment, the Court first spent some time addressing the scope of supervisory liability. The parties had not briefed the issue, because they had agreed that (1) Bivens liability could not be based on a respondeat superior theory and (2) supervisory Bivens liability could be based on a “knowledge and acquiescence” theory. Without requesting briefing or argument on the issue, however, the Court held that the “knowledge and acquiescence” theory was insufficient, at least in the context of equal protection claims, where the Court stated that a discriminatory intent was necessary.²⁸

From there, the Court turned to the pleadings. The Iqbal majority reviewed the Twombly decision in depth, making clear that Twombly applied beyond the antitrust context in which it was announced.²⁹ And from Twombly the Court discerned a two step process for evaluating a complaint under Rule 12. First, a reviewing court must examine each allegation in a complaint and exclude from consideration those allegations that are stated in a “conclusory” fashion. Although the Court did not explain precisely what is meant by conclusory, it did offer some guidance: allegations that are mere “legal conclusions” or that are “[t]hreadbare recitals of the elements of a cause of action” will not suffice at the pleading stage.³⁰ Once a court adjudicating a motion to dismiss has excluded all conclusory allegations from the calculus, it may conduct the second step, which is to assess the “plausibility” of the connection between the facts alleged and the relief claimed.³¹ Thus, the

26. Justice Breyer authored a brief dissent in which he emphasized the role that cogent case management by lower courts could play in ameliorating the concerns that liberal pleading rules would interfere with Government functions by imposing burdensome discovery. 129 S. Ct. at 1961-62 (Breyer, J., dissenting).

27. Although the Court’ reasoning regarding subject matter jurisdiction is important, it is beyond the scope of this presentation to address it.

28. Id. at 1948-49.

29. Id. at 1949-50.

30. Id. at 1949.

31. Id. at 1950.

Court held, there is a gap between what a plaintiff has “alleged” and what a plaintiff has “shown,” and plausibility analysis fills that gap, informed by the judge’s “judicial experience and common sense.”³²

As applied to Mr. Iqbal’s complaint, the Court first excluded those allegations which it deemed conclusory. The most critical of these was paragraph 96 of the complaint which alleged that the defendants “knew of, condoned, and willfully and maliciously agreed to subject [him]” to harsh conditions of confinement “as a matter of policy, solely on account of [his] religion, race, and/or national origin and for no legitimate penological interest.”³³ The Court also identified two other paragraphs of the complaint as conclusory, one which identified Ashcroft as the “principal architect” of the discriminatory policy and the other which alleged that Mueller was “instrumental” in the policy’s adoption.³⁴ According to the Court, these allegations were to be ignored not because they were “unrealistic or nonsensical,” but because they merely recited a critical element of an equal protection violation, which is that a defendant must take action “because of, not merely in spite of,” its disparate impact.³⁵

Once these allegations were taken off of the table, the Court considered the plausibility of plaintiff’s claim for relief against Messrs. Ashcroft and Mueller based on the factual allegations that remained. According to the Court, these were the following: (1) that “the [FBI], under the direction of Defendant Mueller, arrested and detained thousands of Arab Muslim men ... as part of its investigation of the events of September 11,”; and (2) that “[t]he policy of holding post-September-11th detainees in highly restrictive conditions of confinement until they were ‘cleared’ by the FBI was approved by Defendants Ashcroft and Mueller in discussions in the weeks after September 11, 2001.”³⁶ The Court accepted that these allegations “are consistent with petitioners’ purposefully designating detainees ‘of high interest’ because of their race, religion, or national origin” but that because there were other “more likely explanations, [the allegations] do not plausibly establish this purpose.”³⁷

32. Id.

33. Id. at 1951.

34. Id.

35. Id. (citing Personnel Administrator of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (internal quotation marks omitted)).

36. Id. at 1951 (quoting Paragraphs 47 and 69, respectively, of the complaint)

37. Id.

The alternative lawful explanation for the wholesale detention of Arab, South Asian and Muslim men could also be explained by the application of ordinary and unobjectionable law enforcement techniques, as the Court explained in the following paragraph:

The September 11 attacks were perpetrated by 19 Arab Muslim hijackers who counted themselves members in good standing of al Qaeda, an Islamic fundamentalist group. Al Qaeda was headed by another Arab Muslim-Osama bin Laden-and composed in large part of his Arab Muslim disciples. It should come as no surprise that a legitimate policy directing law enforcement to arrest and detain individuals because of their suspected link to the attacks would produce a disparate, incidental impact on Arab Muslims, even though the purpose of the policy was to target neither Arabs nor Muslims. On the facts respondent alleges the arrests Mueller oversaw were likely lawful and justified by his nondiscriminatory intent to detain aliens who were illegally present in the United States and who had potential connections to those who committed terrorist acts. As between that “obvious alternative explanation” for the arrests, Twombly, *supra*, at 567, 127 S.Ct. 1955, and the purposeful, invidious discrimination respondent asks us to infer, discrimination is not a plausible conclusion.³⁸

There are some aspects of Iqbal that left many questions: Given the Court’s treatment of Paragraph 96, what facts are conclusory? Does Swierkiewicz v. Sorema, a case involving the pleading standard for employment discrimination claims, survive Iqbal? Is there a quantum of plausibility – that is, does the plaintiff’s claim for relief have to be only a smidgen more plausible than alternative theories? Is it sufficient if the different theories are in equipoise? Or is there a high standard for the defendant to show that the alternative theories are significantly more plausible than the plaintiff’s theories? Does the Court’s rejection of the “knowledge and acquiescence” theory of supervisory liability apply to all constitutional claims, or only equal protection-type claims? For an appreciation and understanding of these matters, we must turn to lower courts, at least until the Supreme Court takes pleading up yet again.

III. APPLICATIONS OF IQBAL’S PLEADING HOLDINGS IN LOWER COURTS

A. Lower Court Treatments of “Conclusory” Allegations

The first key question prompted by Iqbal requires courts to distinguish between “factual” and “conclusory” allegations.³⁹ As noted

38. Id. at 1951-52.

39. The Third Circuit described the process for evaluating a complaint after Iqbal as follows:

above, Iqbal offers courts some guidance in this inquiry: we are told that an allegation that merely mirrors the elements of a cause of action is conclusory and not to be credited. But the guidance is less than crystal clear. Thus, it is impossible to draw any universalizable conclusions about the way in which lower courts have treated arguments about the conclusory nature of particular pleadings. There are many general matters about which the debate is ongoing. Lower courts have disagreed as to whether allegations which fail to distinguish among defendants are by definition conclusory or not.⁴⁰ There has been some disagreement about whether the Form Complaints incorporated by the Federal Rules are now inadequate under Iqbal.⁴¹ But there also are some areas for which a majority rule may be emerging. For instance, courts have seemed somewhat willing to forgive thin pleadings when the extent of informational asymmetry

First, the factual and legal elements of a claim should be separated. The District Court must accept all of the complaint's well-pleaded facts as true, but may disregard any legal conclusions. Second, a District Court must then determine whether the facts alleged in the complaint are sufficient to show that the plaintiff has a 'plausible claim for relief.'

- Fowler v. UPMC Shadyside, 2009 WL 2501662 (3rd Cir. 2009).
40. Compare Penalbert-Rosa v. Fortuno-Burset, 2010 WL 759139, *2 (D. Puerto Rico 2010) (Allegation conclusory because they do not distinguish among different defendants.); Arar v. Ashcroft, — F.3d —, 2009 WL 3522887 (CA2 2009) (same); Warren v. Luzerne County, 2010 WL 521130, *6 (M.D.Pa. 2010) (same); In re Travel Agent Commission Antitrust Litigation, 583 F.3d 896 (CA6 2009) (same); Short v. Sanzberro, 2009 WL 5110676 (ED Cal. Dec. 18, 2009) (failure to distinguish among defendants fatal to section 1983 claim); with Brenes-Laroche v. Toledo Davila, 2010 WL 431389, *5-6 (D. Puerto Rico 2010) (allegations that did not distinguish among different defendants, at least for certain claims, found sufficient); Narodetsky v. Cardone Industries, Inc., 2010 WL 678288 (E.D.Pa. 2010) (same); Consumer Protection Corp. v. Neo-Tech News, 2009 WL 2132694 (D. Ariz. July 16, 2009) (references to defendants generally sufficient).
41. Compare Mark IV Industries Corp. v. Transcore, L.P., 2009 WL 4403187 (DDEL 2009) (In patent action, the court denied the motion to dismiss because the complaint's allegations conform with Form 18 of the FRCP); with Anthony v. Harmon, 2009 WL 4282027 (ED Cal. Nov. 25, 2009) (stating that Form complaints "have been cast into doubt"); Doe v. Butte Valley Unified School Dist., 2009 WL 2424608, *8 (E.D. Cal. Aug. 6, 2009) (calling into question whether, after Iqbal, the FRCP Form Complaints are still sufficient). Cf. The Cincinnati Ins. Co. v. Tienda La Mexicana, Inc., 2009 WL 4363450 (WDVA 2009) (allegation that insured "negligently" caused fire was sufficient to state a claim for breach of insurance contract).

between the parties is high.⁴² And Iqbal has been applied without much discussion to affirmative defenses.⁴³

For the most part, however, the lower courts are going in many different directions in interpreting what kinds of allegations are “conclusory” under Twombly and Iqbal. Sometimes the difficulty is addressing allegations that are a mix of law and fact, such as allegations as to disability,⁴⁴ dangerousness,⁴⁵ and bribery,⁴⁶ to take only a few examples. Relatedly, some courts treat allegations as to

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42. Connolly v. Smugglers’ Notch Mgmt. Co., 2009 WL 3734123 (D. Vt. Nov. 5, 2009) (Not necessary for FLSA plaintiff to allege specific time periods when she worked overtime, given informational asymmetry); Morgan v. Hubert, 2009 WL 1884605 (CA5 2009) (discovery ordered where “key facts are unknown” and solely within defendant’s possession); Young v. City of Visalia, — F.Supp.2d —, 2009 WL 2567847 (E.D. Cal. Aug. 18, 2009) (Not requiring that plaintiff make separate allegations as to each defendant where plaintiff was not in room where defendants executed search); EEOC v. Scrub, Inc., 2009 WL 3458530 (N.D. Ill. Oct. 26, 2009) (litigants “entitled to discovery before being put to their proof”); Tompkins v. Lasalle Bank Corp., 2009 WL 4349532 (N.D. Ill. Nov. 24, 2009) (in discrimination case hinging on whether parent company could be deemed plaintiff’s employer or whether parent company might be liable, 12(b)(6) motion was denied where discovery was necessary to determine liability.); Pasqualetti v. Kia Motors America, Inc., 2009 WL 3245439 (N.D. Ohio Sept. 30, 2009) (Where evidence supporting allegations of fraud are in defendants’ possession, it is enough for plaintiff to have “articulated a plausible fraudulent intent and scheme.”).
 43. Tracy v. NVR, Inc., 2009 WL 3153150 (WDNY Sept. 30, 2009); Tran v. Thai, 2010 WL 723633, 1 -2 (S.D. Tex. 2010); Hayne v. Green Ford Sales, Inc., 2009 WL 5171779, *2-4 (D. Kan. 2009).
 44. Lawson v. Ellison Surface Technologies, Inc., 2010 WL 935361, *1-2 (E.D. Ky. 2010) (Allegation that plaintiff is disabled, without alleging facts that show he satisfies this condition, is conclusory). But see Doe v. Astrue, 2009 WL 2566720 (N.D. Cal. Aug. 18, 2009) (allegation that plaintiff was “otherwise qualified” for benefits was not conclusory).
 45. Stevens v. Spegal, 2010 WL 106603, *2 (E.D. Mo. 2010) (allegations that snow blade constituted a “dangerous condition” and that it presented a “reasonably foreseeable risk of harm” were conclusory); see also Altman v. HO Sports Co., Inc., 2009 WL 4163512 (ED Cal. Nov. 23, 2009) (allegations that product did not meet consumer expectations; that product defects were substantial causes of plaintiff’s injuries; and that there was an inadequate warning of a “known risk of injury” were conclusory without explanation of why the product did not meet expectations, how it caused injury, and what warnings were insufficient).
 46. Dauphinis v. Cunningham, 2009 WL 4545293 (D. Conn. Nov 30, 2009) (Plaintiff’s allegation that he believed defendant had bribed state officials was conclusory). But see Halpin v. David, 2009 WL 2960936, *2-3 (N.D. Fla. 2009) (“That a defendant took a bribe is a factual allegation that must be accepted as true.”).

whether a private individual is acting under color of law as factual,⁴⁷ and others treat it as conclusory.⁴⁸ Even allegations relating to the status of plaintiffs, tinged with both legal and factual elements, have been subjected to varying treatment by lower courts.⁴⁹

For the purposes of prisoner's rights claims, allegations of a defendant's state of mind are perhaps most significant, and unsurprisingly these kinds of allegations have been heavily litigated post-Iqbal. There is thus a broad dispute over whether "general" allegations of state of mind are sufficient on their own.⁵⁰ Courts differ

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47. Carpenter v. Kloptoski, 2010 WL 891825, 5 (M.D.Pa. 2010) (extensive factual allegations sufficient to support claim of private actor acting under color of law); Huxtable v. Geithner, 2009 WL 5199333 (S.D. Cal. Dec. 23, 2009) (allegation that private lender defendants are effectively acting as government agents for federal loan program was sufficient to allege action under color of law).
 48. See Claudio v. Sawyer, 2009 WL 4929260 (SDNY Dec 23, 2009) (Allegation that off-duty officer was acting under color of law was conclusory in the absence of factual showing that officer was acting in capacity as police officer); McCain v. Episcopal Hosp., 2009 WL 3471274, *1-2 (CA3 2009) (allegation that private hospitals acted under color of state law was conclusory); Francis v. Giacomelli, — F.3d —, 2009 WL 4348830 (4th Cir. 2009) (Fourth Amendment claim implausible because it "did not allege that the defendants were engaged in a law-enforcement effort"; instead, the facts showed that the defendants' actions were those of a government employer retrieving its property from terminated employees and escorting them off the premises); Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252 (11th Cir. 2009) (allegation that paramilitaries were acting under color of law is conclusory).
 49. U.S. ex rel. Duxbury v. Ortho Biotech Products, L.P., 579 F.3d 13, 28 (CA1 2009) (allegation that relator in qui tam action was "original source" was conclusory when based on allegation that relator had "direct and independent knowledge of information on which the allegations are based, and have provided such information to the United States before filing suit, as required by 31 U.S.C. § 3730(e)(4)."); Haskins v. VIP Wireless Consulting, 2009 WL 4639070 (W.D.Pa. 2009) (in FLSA action, allegation that plaintiff was not a salaried employee was not conclusory).
 50. Compare Brenes-Laroche v. Toledo Davila, 2010 WL 431389, *5-6 (D. Puerto Rico 2010) (general allegations of defendants' state of mind found sufficient); Young v. Speziale, 2009 WL 3806296 (D.N.J. 2009) (general allegations may be sufficient in deliberate indifference context.); Henderson v. Fries, 2009 WL 3246673 (N.D. Ind. Oct. 5, 2009) (sufficient for plaintiff to state that plaintiff had a serious medical need in jail and that jail officials denied him medical attention); Capps v. US Bank Nat'l Ass'n, 2009 WL 5149135 (D. Or. Dec. 28, 2009) (general allegations assumed to include specific facts necessary to support them); Consumer Protection Corp. v. Neo-Tech News, 2009 WL 2132694 (D. Ariz. July 16, 2009) (same); with First Medical Health Plan, Inc. v. CaremarkPCS Caribbean, Inc., 2010 WL 391305, *5-6 (D. Puerto Rico 2010) (general allegation of state of mind insufficient); Cuevas v. City of New York, 2009 WL 4773033 (SDNY Dec 07, 2009) (general allegations of Monell liability insufficient);

over whether allegations of discriminatory or retaliatory intent are factual or conclusory.⁵¹ They differ over whether an allegation that a

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- complaint was “heavy on descriptive language” but “light on facts”); Fabian v. Dunn, 2009 WL 2567866, *4-5 (W.D. Tex. 2009) (allegation that defendants acted with deliberate indifference is conclusory).
51. For cases treating discriminatory allegations alone as conclusory, see Penalbert-Rosa v. Fortuno-Burset, 2010 WL 759139, *2 (D. Puerto Rico 2010); Delgado-O’Neil v. City of Minneapolis, 2010 WL 330322, *10-11 (D. Minn. 2010) (allegation that defendant took several adverse employment actions “in retaliation” for plaintiff’s protected conduct were conclusory); Holmes v. Poskanzer, 2009 WL 2171326 (CA2 2009) (Allegation that defendants were “not impartial” was conclusory and, without facts to support actual bias or conflict of interest, could not state due process claim); Nali v. Ekman, 2009 WL 4641737 (CA6 2009) (allegation that defendants were racially biased and had animosity toward plaintiff was conclusory); Short v. Sanzberro, 2009 WL 5110676 (ED Cal. Dec. 18, 2009) (allegation of retaliation conclusory absent specific facts to support retaliatory motive for defendants). For cases treating such allegations as factual, see Fowler v. UPMC Shadyside, 578 F.3d 203 (CA3 2009); P.W. v. Delaware Valley School Dist., 2009 WL 5215397, *3-4 (M.D. Pa. 2009) (Allegation of disability discrimination sufficient where plaintiff alleges that he is a “handicapped person who has a mental impairment which substantially limits his life activities” and who was “denied” a “meaningful educational benefit.”); Riley v. Vilsack, — F. Supp. 2d —, 2009 WL 3416255 (W.D. Wis. Oct. 21, 2009) (plaintiff’s allegations of age discrimination survive because they are “more than conclusions,” in that plaintiff alleges that “defendants targeted for outsourcing the job responsibilities of older workers while making comments about their preference for younger workers”); Paris v. Faith Props. Inc., 2009 WL 4799736 (N.D. Ind. Dec. 8, 2009) (plaintiff adequately pleaded retaliation under Title VII where she provided details about her complaints about acts of sexual harassment of discrimination and alleged that her employment was terminated as a result); Retaliation claim sufficient where plaintiff alleged that adverse employment action taken after plaintiff complained of discrimination. Harman v. Unisys Corp., 2009 WL 4506463 (CA4 2009); Committee for Immigrant Rights v. County of Sonoma, 644 F.Supp.2d 1177 (N.D. Cal. 2009) (sufficient for plaintiffs to allege that defendant engaged in a racially biased policy of stopping those perceived to be Latino); Mack v. Wilcox County Com’n, 2009 WL 4884310, *5 (S.D. Ala. 2009) (allegation that black employees paid less than white employees and subjected to other disparate treatment on account of race stated discrimination claim); Miller v. Eagle Tug Boat Companies, 2009 WL 4751079, *4-5 (S.D. Ala. 2009) (allegation that white applicants treated differently than plaintiff were sufficient to state plausible Title VII claim); Rouse v. Berry, 2010 U.S. Dist. LEXIS 7474 (D.D.C. Jan. 29, 2010) (stating that all employment discrimination plaintiff has to allege is that he was subjected to adverse action “because of” a protected class status); Floyd-Keith v. Homecomings Financial, LLC 2010 WL 231575, *2 (M.D. Ala. 2010) (allegation that the defendants treated her differently from similarly situated white people during the lending process and denied her a loan based on her race was plausible).

defendant “knew” or was “aware” of a particular fact is conclusory⁵² or factual.⁵³

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52. See, e.g., Choate v. Merrill, 2009 WL 3487768, *6 (D. Me. 2009) (in Eighth Amendment case, allegation of supervisors knowledge of and indifference to lack of adequate life-saving equipment and training was conclusory); Milne v. Navigant Consulting, 2009 WL 4437412 (SDNY Nov 30, 2009) (retaliation claim implausible where no facts supported allegation that defendant was aware that plaintiff intended to file Title VII claim); Jones v. Hashagen, 2010 WL 128316, *4 (M.D.Pa. 2010) (plaintiff’s allegation that the superintendent “failure to take action to curb Inmate Mitchell’s pattern of assaults, known or should have been known to [him], [and] constituted deliberate indifference” is conclusory); Garvins v. Hofbauer, 2009 WL 1874074 (W.D. Mich. June 26, 2009) (allegation that defendants were “aware” of plaintiff’s medical condition insufficient to state claim for deliberate indifference); Kasten v. Ford Motor Co., 2009 WL 3628012 (E.D. Mich. Oct. 30, 2009) (allegation of defendant’s awareness insufficient without some statement of source of awareness); Long v. Holtry, 2009 WL 4269424 (MDPA 2009) (Allegation that defendants developed policy to shut down plaintiffs’ foster home and that defendants failed to adequately train and supervise employees regarding seizures and notice process was conclusory in Monell case); ; Smith v. District of Columbia, 2009 WL 4849054, *2-3 (D.D.C. 2009) (allegation that District “knew of” specific systemic problems with medical care in prisons was conclusory).
53. See, e.g., Decker v. Borough of Hughestown, 2009 WL 4406142 (MDPA 2009) (allegation that Defendants “knew or should have known of Plaintiff’s right to express himself in such a manner” was sufficient to support failure to train claim in First Amendment Monell case); Gioffre v. County of Bucks, 2009 WL 3617742 (EDPA 2009) (in §1983 (Eighth Amendment) case, finding following allegations sufficient: plaintiff needed medical examination upon admission; exam was not provided because of policies and practices of prison; defendants had tolerated practice of denying care to preserve resources; and defendants were on notice); Mallinckrodt Inc. v. E-Z-Em Inc., 2009 WL 4496021 (DDEL 2009) (in patent case, the plaintiff satisfied the pleading standard for an infringement claim by alleging that defendant “became aware” of patent “shortly after” its issuance and that defendants “actively induced” infringing acts); Lewis v. Jordan, 2009 WL 3718883, *5 (MDNC 2009) (Fourth Amendment claim sufficient where complaint alleged that “Defendant Robinson . . . arrested Plaintiff without probable cause and that Defendants knew there was no probable cause.”); Evans v. Tavares, 2009 WL 3187282 (N.D. Ill. Sept. 30, 2009) (allegation that defendants knew plaintiff had committed no crime but arrested him anyway was sufficient); Schoppel v. Schrader, 2009 WL 1886090 (N.D. Ind. June 30, 2009) (allegation that county council was on notice that jail was inadequately funded and understaffed, and that another inmate had died because of inadequate medical care, sufficient to state Section 1983 claim based on inadequate funding); Smith v. Sangamon County Sheriff’s Dep’t, 2009 WL 2601253 (C.D. Ill. Aug. 20, 2009) (allegation of sheriff’s knowledge that he had housed plaintiff with a violent inmate was not conclusory); Allegation that plaintiff was arrested without probable cause was not conclusory. Velazquez v. Office of Ill. Sec’y of State, 2009 WL 3670938 (N.D. Ill. Nov. 2, 2009); AMX Int’l, Inc. v. Battelle Energy Alliance, LLC, 2009 WL

Unsurprisingly, there has been the hint of required fact pleading in certain areas of litigation. Some courts have suggested that discrimination plaintiffs must make some factual allegation about similarly situated individuals who were treated more favorably in order to state a claim for disparate treatment.⁵⁴ But a significant number of courts have rejected heightened fact pleading in the discrimination context.⁵⁵ Courts have seemed to approach fact pleading in some other civil rights cases as well. Where a Section 1983 complainant alleged that a Mayor participated in and executed raids in which household pets were confiscated and killed, the First

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- 5064561 (D. Idaho Dec. 16, 2009) (general allegation of knowledge is sufficient, but not general allegation of intent to interfere with contracts); Decker v. Borough of Hughestown, 2009 WL 4406142 (MDPA 2009) (Allegation that Mayor “created policy of using disorderly conduct citations as viewpoint based restrictions” and that Mayor was deliberately indifferent and failed to train officers on proper procedures was sufficient to state Monell claim); Excelsior Ins. Co. v. Incredibly Edible Delites, 2009 WL 5092613, *2-3 (E.D.Pa. 2009) (allegation that, “[i]n knowing and willful breach of the insurance policy, Excelsior has refused to reimburse or defend that Counterclaim Plaintiffs for their covered claims under the Policy,” is alone a sufficient allegation of a breach of a duty to fulfill a contractual obligation); Vaden v. Campbell, 2009 WL 1919474, *3 (N.D. Fla. 2009) (allegation of sheriff’s knowledge of deputy’s propensity for sexual assault were not conclusory).
54. Lopez v. Bay Shore Union Free Sch. Dist., — F.Supp.2d —, 2009 WL 3720038 (EDNY Nov. 9, 2009) (statutory discrimination claim conclusory in the absence of any allegations of different treatment of similarly situated individuals); Jenkins v. Murray, 2009 WL 3963638 (CA3 2009) (same for equal protection claim); McTernan v. City of York, Penn., 577 F.3d 521, 532 (CA3 2009) (same for First Amendment religion claim); see also Francis v. Giacomelli, — F.3d —, 2009 WL 4348830 (4th Cir. 2009) (discrimination claim implausible where one of plaintiffs was white and complained of exact same treatment as black plaintiffs); Moss v. U.S. Secret Service, 572 F.3d 962 (CA9 2009) (dismissing First Amendment claim where allegations did not support inference of disparate treatment of similarly situated groups); Hughes v. America’s Collectibles Network, Inc., 2010 WL 890982, 4 (E.D. Tenn. 2010) (in age-discrimination claim, plaintiff’s allegation that she was in “protected class” and that replacement employee was not is insufficient – plaintiff did not allege what her age is and did not allege anything to support a “pattern” of discrimination); Kasten v. Ford Motor Co., 2009 WL 3628012 (E.D. Mich. Oct. 30, 2009) (finding age discrimination complaint implausible because plaintiff did not provide age of replacement employee). But see Kubicek v. Westchester County, 2009 WL 3720155 (SDNY Oct. 8, 2009) (employment discrimination complaint found sufficient despite failure to identify person who was hired to position to which plaintiff applied, other than that person was African-American “and/or” younger than plaintiff, and despite failure to identify who made discriminatory hiring decisions).
55. Appendix B describes some of the most useful of these cases.

Circuit treated that allegation as conclusory and not credited.⁵⁶ And in a school disciplinary case, the Second Circuit held that an allegation that defendants were “not impartial” was conclusory without more detail.⁵⁷ There are numerous other cases in which lower courts have treated Iqbal as establishing a fact-detailed pleading system, in arguable contrast to the notice pleading system which prevailed pre-Twombly.⁵⁸

There are plenty of counter-examples, some from the prison context. In a case from the Southern District of Indiana, a court found that an allegation that the defendant was “deliberately indifferent” to serious medical needs was conclusory, but the same court found factual the allegation that the defendant had “knowledge of the substandard medical care provided to inmates” but “remained indifferent to the medical needs of inmates at the facility.”⁵⁹ In the Eastern District of Pennsylvania,⁶⁰ a district court focused on the notice provided by the complaint and upheld a supervisory liability claim that alleged that defendants had “established, tolerated or ratified a practice, custom or policy of failing to provide necessary medical care to inmates” because of the costs imposed by such medical care.⁶¹ The court did so even though the complaint “lacks much detail,” did not “identify the precise policy or practice instituted by Defendants,” and were only “barely” more than “a

56. Maldonado v. Fontanes, 568 F.3d 263, 268 (1st Cir. 2009).

57. Holmes v. Poskanzer, 2009 WL 2171326, *1 (2d Cir. 2009).

58. Coleman v. Tulsa Cty. Bd. Of Cty. Comm’rs, 2009 WL 2513520, *3 (N.D. Okla. Aug. 11, 2009) (stating that claim might have survived under Conley standard; plaintiff alleged that she was sole female employee in her department and that she was subjected to offensive and insulting remarks based upon her gender); Dorsey v. Georgia Dept. of State Road and Tollway Auth., 2009 WL 247756, *7 (N.D. Ga. Aug. 10, 2009) (allegations of “numerous” racially disparaging remarks insufficient to state hostile work environment claim without greater detail establishing that remarks were severe enough to alter the conditions of employment); Carrea v. California, 2009 WL 1770130, *9 (C.D. Cal. June 18, 2009) (equal protection claim dismissed because although plaintiff alleged that no white prisoner was ever treated the same as the plaintiff, there were no factual allegations regarding housing, medical care, conditions of segregation or other treatment of white prisoners); Lopez v. Beard, 2009 WL 1705674, *3 (3d Cir. June 18, 2009) (unpublished op.) (per curiam) (claim based on HIV status discrimination dismissed for lack of detail).

59. Estate of Allen ex rel. Wrightsmann v. CCA of Tennessee, LLC, 2009 WL 2091002, *2-3 (S.D. Ind. 2009)

60. Gioffre v. County Of Bucks, No. 08-4232, 2009 WL 3617742, at *5 (E.D. Pa. Nov. 2, 2009).

61. Id.

blanket, general assertion of entitlement to relief.”⁶² Appendix A, found at the end of this written material, provides additional examples of significant post-Iqbal pleading cases, mostly from the prison context.

Although it is virtually impossible to draw complete lessons from each of these cases, because they are fact-intensive, it is apparent that courts are more willing to consider factual allegations that appear to be based on the plaintiff’s personal knowledge rather than assumptions.⁶³ Thus, if a prisoner alleges that a guard knew of “X” fact (because the prisoner told the guard), courts are more likely to find that allegation factual than an allegation that a supervisor knew of “x” fact (because the prisoner wrote a letter to the supervisor). This is not to say that pleading on information and belief is no longer permissible; indeed, few courts have addressed this issue and most who have have confirmed that information and belief pleading remains alive and well. It is only a sign that judges are, explicitly or not, relying on their “judicial experience and common sense” to assess the basis for a prisoner’s allegation of the state of mind of a defendant.⁶⁴

Relatedly, however, judges continue to appear to be willing to draw inferences that are obvious from the asserted facts. In excessive force cases, if a prisoner alleges that he was beaten and had acted in no way to trigger the assault, most judges will draw an inference that the officer possessed the necessary state of mind from these facts. Similarly, if a plaintiff alleges that she informed a medical provider of her serious medical problem and the provider ignored her, most courts will find this sufficient to state a deliberate indifference claim. Again, all of this information is within the personal knowledge of the plaintiff.

However, there are risks to alleging too much that is within a plaintiff’s personal knowledge. For instance, a plaintiff might provide

62. Id.

63. See, e.g., Bush v. Horn, 2010 WL 1712024, *4-5 (S.D.N.Y. Mar 02, 2010) (casting doubt on allegations against commissioner because court could not imagine how prisoner could have personal knowledge of state of mind of such a high level defendant, but permitting claim to go forward against lower level defendant).

64. E.g., Sanchez v. Pereira-Castillo, 590 F.3d 31, 41-44 (CA1 2009) (finding prisoner’s Fourth Amendment claim sufficient against some defendants but not others, in large part because certain defendants were directly involved in unreasonable search and allegations against supervisory defendants were conclusory).

so many details of an encounter that lead to excessive force that a court will consider the allegations of sadistic and malicious use of force to be implausible.⁶⁵ Complaints that detail each of a plaintiff's visits to the medical clinic might establish, from a court's perspective, that the defendants were not at all deliberately indifferent to the prisoner's serious medical needs.

It also seems fair to observe that Iqbal has been received with less favor in some circuits. The Seventh Circuit, for instance, has suggested that it be limited to its facts or at least to cases involving costly discovery or qualified immunity (the latter limitation would still leave Iqbal applying in full force in prisoner damages' actions individual defendants). Some district courts have suggested that it be given narrower application where there is a large amount of informational asymmetry and most of the relevant factual detail is within the defendant's possession.

B. Lower Court Treatment of Plausibility

When a court considers the plausibility of a plaintiff's claim for relief vis a vis other alternative plausible explanations, a key issue is implied in the analysis: the comparative level of plausibility of the plaintiff's theory versus the alternative explanatory theories. If the plaintiff's theory must be more plausible than the alternative lawful explanations, then it has substantially different consequences than if the alternative lawful explanations have to be significantly more plausible than the plaintiff's theory. The Supreme Court did not resolve this question, other than to suggest, as it did in Twombly, that the alternative explanation must be "obvious" in order for the plaintiff's claim to be implausible.⁶⁶

Courts have taken varying approaches to plausibility analysis. Some have insisted that any alternative explanation from the defendant must be much more obvious than the plaintiff's theory of relief to render a claim "implausible."⁶⁷ Some have simply insisted

65. E.g., Hamer v. Jones, 2010 WL 44350, *3 (CA10 Feb. 9, 2010) (dismissing complaint where plaintiff admitted that "his complaints triggered the use of force," and did not allege that the officers did more than necessary to bring him to the floor).

66. 129 S. Ct. at 1951.

67. Arkansas PERS v. GT Solar Int'l, Inc., 2009 WL 3255225 (D.N.H. Oct. 7, 2009) (defendants' alternative explanation does not render plaintiff's complaint implausible because defendant's explanation is not "obvious"); Chao v. Ballista, 630 F.Supp.2d 170 (D. Mass. 2009) (defendant's explanation has to be "so

that the defendant's explanation be more plausible than the plaintiff's.⁶⁸ Thus, a court has found that rather than believe that a warden transferred a prisoner because of deliberate indifference to contagious diseases, it was "more likely" that the warden relied on the advice of competent professionals and was not deliberately indifferent.⁶⁹ Similarly, a court hearing a retaliation claim filed by a prisoner found it "more likely" that the prisoner was transferred to segregation for his own safety and not because of retaliation for his complaints.⁷⁰ Finally, some courts have failed to address the quantum of plausibility at all, while suggesting that it is a high hurdle for plaintiffs to overcome.⁷¹

Along with determining the quantum of plausibility, lower courts have had to take up the Supreme Court's invitation to use their "judicial experience and common sense" to mediate the plausibility analysis. In the Southern District of New York, for example, a court dismissed a Section 1983 claim against the City of New York which had alleged that a Fourth Amendment violation was the result of an unwritten City policy, finding it more plausible to believe that the

overwhelming, that the claims no longer appear plausible"); Destro v. Hackensack Water Co., 2009 WL 3681903 (DNJ 2009) (plaintiff's claim plausible where there "could" be a violation of duty of fair representation); Gonzalez v. Kay, 577 F.3d 600 (CA5 2009) (Plaintiff can state a claim where "reasonable minds can differ" about whether particular conduct violates the FDCPA);

68. In re Travel Agent Commission Antitrust Litigation, 583 F.3d 896 (CA6 2009) (where defendants' explanation is "just as likely" as plaintiffs' explanation, plaintiffs' claim is implausible); Phillips v. Bell, 2010 WL 517629, *6-8 (CA10 2010) (finding complaint implausible because "more plausible" reasons exist for alleged conduct); Blanchard v. Yates, 2009 WL 2460761, *3 (E.D. Cal. July 27, 2009).
69. Blanchard, 2009 WL at *3.
70. Lacy v. Tyson, 2009 WL 2777026, *4 (E.D. Cal. Aug. 27, 2009).
71. Nemet Chevrolet, Ltd. v. ConsumerAffairs.com, 2009 WL 5126224 (CA4 Dec. 29, 2009) (dissent characterizes the majority as applying an incorrect "rule that the existence of any other plausible explanation that points away from liability bars the claim."); Errivares v. Transportation Sec. Admin., 2010 WL 610774, *2 (D.Md. 2010) (allegation of conversion is not plausible where facts show only that defendant's employee "could have acted wrongfully"); but see Braden v. Wal-Mart Stores, Inc., — F.3d —, 2009 WL 4062105 (8th Cir. 2009) ("Just as a plaintiff cannot proceed if his allegations are merely consistent with a defendant's liability, so a defendant is not entitled to dismissal if the facts are merely consistent with lawful conduct."); Al-Kidd v. Ashcroft, 580 F.3d 949 (CA9 2009) (claims are plausible so long as they are not unreasonable); U.S. ex rel. Lusby v. Rolls-Royce Corp., 570 F.3d 849, 854-855 (7th Cir. 2009) (clarifying that pleading not exclude all alternative possibilities to be plausible).

officer who carried out the search “was a rogue officer who disobeyed City policy.”⁷² In a suit against a Tennessee County under a “class of one” theory of equal protection, the Court found an “obvious alternative explanation” for the differential treatment of plaintiffs was that the defendants “made a mistake in applying the law,” not that they singled out plaintiffs for pernicious reasons.⁷³ Arguably, courts could also rely on their experience and common sense to amplify a plaintiff’s pleadings by taking notice of some particularly well-recognized problem.⁷⁴ A District of Massachusetts judge did precisely this in a prison case involving supervisory liability for sexual assault, reasoning that there was widespread knowledge of the problem of sexual assault in prison.⁷⁵ And one Eastern District of New York judge surveyed his colleagues to determine that there was “anecdotal evidence of repeated, widespread falsification by arresting police officers of the New York City Police Department” that was widespread enough to suggest the existence of a custom or policy of lying by police officers in criminal matters.⁷⁶ Similarly, the Northern District of Illinois found a supervisory liability claim plausible where the plaintiff alleged that the prison was infested with vermin and unfit for human habitation.⁷⁷ The court reasoned that “an inference of involvement was justified to sustain claims asserted against certain senior officials, such as the county sheriff or the prison warden, when the claims alleged” systemic rather than “localized” conditions.⁷⁸ Plausibility is obviously an easier inquiry when the allegations establish a defendant’s presence or direct involvement in misconduct.⁷⁹

72. 5 Borough Pawn, LLC v. City of New York, ___ F. Supp. 2d ___, 2009 WL 1834584, *24 (S.D.N.Y. June 22, 2009)

73. Arnold v. Metropolitan Gov’t of Nashville and Davidson County, 2009 WL 2430822, *5 (M.D. Tenn. Aug. 6, 2009); see also Chassen v. Fidelity Nat. Financial, Inc., 2009 WL 4508581 (DNJ 2009) (allegation that defendants were part of RICO enterprise was conclusory, in part based on the court’s “common experience.”).

74. Chao v. Ballista, ___ F. Supp. 2d ___, 2009 WL 1910954, *5 (D. Mass. July 1, 2009).

75. Id.

76. Colon v. City of New York, Nos. 09-CV-8, 09-CV-9, 2009 WL 4263362, at *1, *2 (E.D.N.Y. Nov. 25, 2009)

77. Lieberman v. Budz, 2010 WL 369614 (N.D. Ill. 2010).

78. Id.

79. Tavares v. City of New York, 2010 WL 234974 (S.D.N.Y. Jan 19, 2010) (Plaintiff alleges a plausible bystander liability use of force claim by asserting that captain and officer watched assault for at least three minutes; use of force stopped when

C. Suggestions for Addressing Issues of Conclusoriness and Plausibility

As I suggested at the outset, in many ways it is too early to take the pulse of courts as to the significance of Iqbal. But the lower court decisions that have applied it so far suggest some troubling trends. First, there is a high level of confusion and discord in the lower courts. Applications of “conclusory” range far and wide, and even within the same courthouse there are varying interpretations. Nonetheless, there are important ways in which a holding that a particular allegation is conclusory may have limited impact on a litigant’s ability to obtain relief. After all, as long as a plaintiff has leave to amend, it may be possible to replead in such a way as to avoid making conclusory allegations, especially where parties are represented by counsel; even the Iqbal Court acknowledged that factual allegations are to be taken as true and that all inferences are to be drawn in favor of a plaintiff.

Dealing with plausibility raises more difficult issues. If a court decides that a plaintiff’s theory of relief is implausible in comparison to other alternative explanations, it is not obvious that the court’s conclusion would change upon repleading. It therefore strikes me that it is worthwhile for litigants and courts to think carefully about the correct standard for plausibility. This may be accomplished by focusing on the relationship between the plausibility required by Rule 8 and the ultra-heightened pleading standard mandated by the Private Securities Litigation Reform Act. The same Term that the Supreme Court decided Twombly, it also announced Tellabs Inc. v. Makor Issues & Rights,⁸⁰ a case interpreting the pleading standard for the PSLRA. Specifically, the Court in Tellabs defined “plausibility” for the purposes of the PSLRA as equipoise: that is, if the plaintiff’s theory of relief was “at least as compelling” as the alternative explanations, the complaint would survive a motion to dismiss under the PSLRA. If we accept the common wisdom that the PSLRA sets up a super-heightened pleading standard (higher than the particularity

commander ordered officer to stop); Marion v. Nickels, 2010 WL 446464 (W.D.Wis. 2010) (despite questions regarding likelihood of plaintiff’s claim, prison retaliation case could go forward after plaintiff alleged that defendant directed an officer to falsely alter a conduct report in retaliation for filing a lawsuit; that another defendant retaliated against him by finding him guilty of the conduct charged in the report; and that a third defendant continued the retaliation by refusing to overturn the decision even though she knew it was false).

80. 551 U.S. 308 (2007),

required for fraud allegations under Rule 9(b)), then it follows that plausibility for the purpose of Rule 8 is met even if the plaintiff's theory is less plausible than alternative explanation. Indeed, it would be incoherent to interpret plausibility any other way: requiring that a plaintiff's theory be more plausible than alternatives would lead to the conclusion that Rule 8's pleading standard is more demanding than the PSLRA.

It is also worthwhile to consider the Seventh Amendment and due process implications of dismissing a case on plausibility grounds. The Seventh Amendment requires that, in all cases that would have been tried before a jury at common law, the jury's role to be determine facts be preserved. The right to jury trial applies in employment discrimination actions, even for relief that has been characterized as equitable.⁸¹ Thus, although the Court has discounted the Seventh Amendment implications of heightened pleading regimes created by Congress or the Federal Rules,⁸² the Iqbal rule is the product of neither.⁸³ Obviously, to the extent that a court is making, at the motion to dismiss stage, a factual determination that is constitutionally committed to the jury, there are significant Seventh Amendment concerns.⁸⁴ These were never addressed in the Iqbal decision because the Government was not arguing for a pleading standard along the lines of that adopted by the Court in Iqbal. Whether application of an Iqbal-type standard always results in serious Seventh Amendment issues is not necessary to address here, but there are certain cases where courts may cross the Seventh Amendment line.

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81. Hetzl v. Prince William County, 523 U.S. 208 (1998); Lytle v. Household Mfg., Inc., 494 U.S. 545 (1990); Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558 (1990).
 82. See Tellabs, 551 U.S. at 327 ("No decision of this Court questions that authority in general, or suggests, in particular, that the Seventh Amendment inhibits Congress from establishing whatever pleading requirements it finds appropriate for federal statutory claims.").
 83. Indeed, to some extent the Court's hesitance to impose heightened pleading as a matter of judicial fiat, see Swierkiewicz, 534 U.S. at 515, Leatherman, 507 U.S., at 168, may reflect Seventh Amendment concerns.
 84. For a more developed argument on these lines, see Kenneth S. Klein, Ashcroft v. Iqbal Crashes Rule 8 Pleading Standards on to Unconstitutional Shores, 88 NEB. L. REV. 261 (2009); Kenneth S. Klein, Is Ashcroft v. Iqbal The Death (Finally) Of The "Historical Test" For Interpreting The Seventh Amendment? 88 NEB. L. REV. 467 (2010).

Finally, there are due process concerns whenever a court bases a decision on factors that have not been disclosed to the parties. Nearly every court of appeals has concluded that sua sponte dismissals for failure to state a claim are inappropriate without providing an opportunity to amend, unless there is no possibility that an amendment could cure the defect.⁸⁵ Thus, one could argue that just as a court would not issue a sua sponte dismissal without giving a plaintiff the opportunity to cure, so should a court be wary of dismissing a case based on undisclosed “judicial experience” or “common sense,” without giving the pleader an opportunity to rebut whatever inferences may be drawn from those intuitions.

IV. SUPERVISORY LIABILITY

As Iqbal made clear, although there is no respondeat superior liability under § 1983 or Bivens, in certain circumstances supervisors themselves can be held liable for constitutional wrongs. In this section, I will first summarize the pre-Iqbal case law and then discuss how, if at all, Iqbal has changed the landscape.

A. Pre-Iqbal Case Law

In the Second Circuit, prior to Iqbal supervisors could be “personally involved” in the constitutional torts of their supervisees if: (1) the supervisory official, after learning of the violation, failed to remedy the wrong; (2) the supervisory official created a policy or custom under which unconstitutional practices occurred or allowed such policy or custom to continue; or (3) the supervisory official was grossly negligent in managing subordinates who caused the unlawful condition or event; or (4) if the supervisor directly participated in the

85. See Martinez-Rivera v. Sanchez Ramos, 498 F.3d 3, 7 (1st Cir. 2007); Perez v. Ortiz, 849 F.2d 793 (2d Cir. 1988); Roman v. Jeffes, 904 F.2d 192, 196 & n. 8 (3d Cir.1990); Hill v. Braxton, 277 F.3d 701, 708 (4th Cir. 2002) (applying rule in habeas context); Bazrowx v. Scott, 136 F.3d 1053, 1054 (5th Cir. 1998); Wagenknecht v. United States, 533 F.3d 412, 417 (6th Cir. 2008); Southern Illinois Riverboat Casino Cruises, Inc. v. Triangle Insulation and Sheet Metal Co., 302 F.3d 667, 678 (7th Cir. 2002); Williams v. Department of Corrections, 208 F.3d 681 (8th Cir. 2000); Franklin v. Murphy, 745 F.2d 1221, 1226 (9th Cir.1984); Perkins v. Kan. Dep’t of Corr., 165 F.3d 803, 806 (10th Cir. 1999); Clark v. Maldonado, 288 Fed.Appx. 645, 647, 2008 WL 2957122, *2 (11th Cir. 2008) (limited to pro se complaints); Razzoli v. Federal Bureau of Prisons, 230 F.3d 371, 377 (D.C. Cir. 2000). These cases often arise in the context of pro se complaints, but not every circuit has so limited the rule.

wrong.⁸⁶ Other circuits expressed the standard slightly differently, requiring an “affirmative link” between the actions or omission of the supervisor and the unconstitutional conduct, such that “the supervisor’s conduct led inexorably to the constitutional violation.”⁸⁷ The Third Circuit, for example, offered a different variation, to similar effect: “The plaintiff must (1) identify the specific supervisory practice or procedure that the supervisor failed to employ, and show that (2) the existing custom and practice without the identified, absent custom or procedure created an unreasonable risk of the ultimate injury, (3) the supervisor was aware that this unreasonable risk existed, (4) the supervisor was indifferent to the risk; and (5) the underling’s violation resulted from the supervisor’s failure to employ that supervisory practice or procedure.”⁸⁸

The general standard for supervisory omission cases –failure to train or supervise at all – is deliberate indifference.⁸⁹ Meeting this standard can be particularly difficult in the supervisory liability context.⁹⁰ The following are some of the pre-Iqbal standards articulated from some select circuits:

- i. Second Circuit: Supervisory liability may be imposed where an official demonstrates “gross negligence” or “deliberate indifference” to the constitutional rights of inmates by failing to act on information indicating that unconstitutional practices are taking place.⁹¹ Courts in the Second Circuit impose supervisory liability

86. Blyden v. Mancusi, 186 F.3d 252 (2d Cir. 1999); Spencer v. Doe, 139 F.3d 107, 112 (2d Cir. 1998), citing Williams v. Smith, 319 F.2d 319, 323-24 (2d Cir. 1986).

87. Maldonado v. Fontanes, 568 F.3d 263, 274-275 (1st Cir. 2009) (internal quotation marks omitted).

88. Brown v. Muhlenberg Tp., 269 F.3d 205 (3d Cir. 2001). The Tenth Circuit agrees with the Third that there must be personal direction or “actual knowledge and acquiescence.” Woodward v. City of Worland, 977 F.2d 1392, 1400 (10th Cir. 1992) (citing Andrews v. City of Philadelphia, 895 F.2d 1469 (3rd Cir.1990)).

89. E.g., City of Canton v. Harris, 489 U.S. 378, 385 (1989).

90. Estate of Davis ex rel. McCully v. City of North Richland Hills, 406 F.3d 375, 380 -386 (5th Cir. 2005) (“To satisfy the deliberate indifference prong, a plaintiff usually must demonstrate a pattern of violations and that the inadequacy of the training is obvious and obviously likely to result in a constitutional violation.” (internal quotation marks omitted))

91. Wright v. Smith, 21 F.3d 496, 501 (2d Cir. 1994); accord, Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995).

when an official has actual **or** constructive notice of unconstitutional practices.⁹²

- ii. Sixth Circuit: “There must be a showing that the supervisor encouraged the specific incident of misconduct or in some other way directly participated in it. At a minimum, a § 1983 plaintiff must show that a supervisory official at least implicitly authorized, approved or knowingly acquiesced in the unconstitutional conduct of the offending subordinate.”⁹³
- iii. Eighth Circuit: Supervisors are liable for directly participating in a constitutional violation, for deliberate indifference in training and supervising the subordinate who causes the violation, or for “tacit authorization of the offensive acts.”⁹⁴
- iv. Ninth Circuit: A supervisor may be liable under § 1983 only if there exists either “(1) his or her personal involvement in the constitutional deprivation, or (2) a sufficient causal connection between the supervisor’s wrongful conduct and the constitutional violation.”⁹⁵ The causal connection can be established by “setting in motion a series of acts by others which the actor knows or reasonably should know would cause others to inflict the constitutional injury.”⁹⁶ Supervisory liability is appropriate “even without overt personal participation in the offensive act if supervisory officials implement a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force of the constitutional violation.”⁹⁷
- v. Eleventh Circuit: Describing the standard as “extremely rigorous,” the Eleventh Circuit permits supervisory liability “either when the supervisor personally participates in the alleged constitutional violation or when there is a causal connection between

92. See Meriwether v. Coughlin, 879 F.2d 1037, 1048 (2d Cir. 1989).

93. Turner v. City of Taylor, 412 F.3d 629, 642 -644 (6th Cir. 2005) (“Although Plaintiff alleges that an officer with “sergeant stripes” on his shirt witnessed, and allegedly condoned, one of the beatings, Plaintiff has not submitted any competent evidence that identifies this individual as one of the supervisory Defendants.”).

94. Brockinton v. City of Sherwood, Ark., 503 F.3d 667, 673 (8th Cir.2007) (holding that supervisor’s duty to train was met by relying on a law enforcement training academy and remedial training courses – no need to have a specific departmental policy or training procedure).

95. Jeffers v. Gomez, 267 F.3d 895 (9th Cir. 2001) (internal quotation marks omitted).

96. Johnson v. Duffy, 588 F.2d 740, 743-44 (9th Cir.1978).

97. Redman v. County of San Diego, 942 F.2d 1435, 1447-1448 (9th Cir. 1991).

actions of the supervising official and the alleged constitutional deprivation.”⁹⁸ In practice, this means that a plaintiff must show (1) that there is a history of constitutional violations which put the supervisor on notice of the need to make corrections, which corrections the supervisor failed to enact, (2) that the supervisor directed subordinates to act unlawfully, (3) that the supervisor knew that subordinates would act unlawfully and failed to stop them; or (4) that a supervisor created a custom or policy that exhibited and resulted in deliberate indifference to constitutional rights.⁹⁹

- vi. DC Circuit: Absent direct participation or encouragement of unlawful conduct, a supervisor can only be liable if he knows of misconduct and “facilitate[s] it, approve[s] it, condone[s] it, or turn[s] a blind eye for fear of what they might see.”¹⁰⁰

Examples of imposition of supervisory liability, pre-Iqbal: Failure to act on a “report or appeal” may support liability.¹⁰¹ Failing to act on other, non-official sources of information may also support liability.¹⁰² Even a prisoner’s letters to prison officials could be

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98. Brown v. Crawford, 906 F.2d 667, 671 (11th Cir. 1990); see also Gonzalez v. Reno, 325 F.3d 1228 (11th Cir. 2003).
 99. Danley v. Allen, 540 F.3d 1298, 1314 -1315 (11th Cir. 2008) (finding allegations sufficient where plaintiff alleged that there were prior use of force reports, complaints from prisoners and others, and personal observations by supervisors to put them on notice that pepper spray was used excessively as punishment).
 100. International Action Center v. United States, 365 F.3d 20, 27-28 (D.C. Cir. 2004) (citing Jones v. City of Chicago, 856 F.2d 985, 992 (7th Cir. 1988)).
 101. Wright v. Smith, 21 F.3d 496, 502 (2d Cir. 1994), quoting Williams v. Smith, 781 F.2d 319, 323-24 (2d Cir. 1986); Amaker v. Hakes, 919 F.Supp. 127, 132 (W.D.N.Y. 1996) (holding that information coming to the Commissioner through the prison grievance process may support liability); Roucchio v. Coughlin, 923 F.Supp. 360, 379 (S.D.N.Y. 1996) (holding that service of Article 78 petition on Commissioner can support liability); Gabai v. Jacoby, 800 F.Supp. 1149, 1156 (S.D.N.Y. 1992) (holding that a supervisor who reviewed a deficient disciplinary proceeding can be held liable); Langley v. Coughlin, 709 F.Supp. 482, 486 (S.D.N.Y.) (holding Commissioner could be held liable based on the complaint in the case and a Correctional Association report), appeal dismissed, 888 F.2d 252 (2d Cir. 1989).
 102. Colon v. Coughlin, 58 F.3d 865, 873 (2d Cir. 1995); Wright v. Smith, 21 F.3d 496, 501 (2d Cir. 1994) (both citing “failing to act on information indicating that unconstitutional practices are taking place” as a basis for liability separate from non-response to a “report or appeal”); Hall v. Artuz, 954 F.Supp. 90, 95 (S.D.N.Y. 1997) (holding letter from Legal Aid Society could put prison superintendent and regional health services administrator on sufficient notice)

sufficient to give notice of constitutional violations for purposes of determining liability of supervisors.¹⁰³ Failure to maintain an adequate medical care system—e.g. by ensuring adequate staffing—may trigger supervisory liability.¹⁰⁴ Failure to respond to subordinates' misconduct may also support a supervisor's liability.¹⁰⁵ Failure to promulgate policies to guide subordinates' conduct may also support liability.¹⁰⁶ In addition, the failure to inform and train staff concerning policies may support liability.¹⁰⁷

With all of these barriers to imposing supervisory liability, it is worth asking why one would pursue such claims. They can multiply legal and factual theories; complicate discovery, proof, and motion practice; and delay the resolution of seemingly simple disputes. On the other hand, they will usually ensure a solvent defendant, in the event one is concerned about line officers not being indemnified. Moreover, they may also increase access to relevant discovery and may increase the scope of relevant trial evidence. Some juries also may be more willing to find high level defendants liable, especially where there is evidence that unlawful conduct was the result of systematic policy decisions. In addition, having supervisors as defendants reduces the potential that a "following orders" defense will have legs. In short, it is a case-by-case determination, but in most cases it will be more beneficial than costly to have supervisory defendants in the case.

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103. See Richardson v. Goord, 347 F.3d 431, 435 (2d Cir. 2003); Pacheco v. Commisse, 897 F.Supp. 671, 678 (N.D.N.Y. 1995); Mandala v. Coughlin, 920 F.Supp. 342, 351 (E.D.N.Y. 1996).
 104. Greason v. Kemp, 891 F.2d 829, 839-40 (11th Cir. 1990).
 105. Vann v. City of New York, 72 F.3d 1040 (2d Cir. 1995); Ricciuti v. New York City Transit Authority, 941 F.2d 119, 123 (2d Cir. 1991).
 106. Horne v. Coughlin, 795 F.Supp. 72, 74-75 (N.D.N.Y. 1991) (holding that Commissioner could be held liable for lack of a policy requiring appointment of counsel substitute for a mentally retarded prisoner facing disciplinary charges); Bryant v. McGinnis, 463 F.Supp. 373, 387 (W.D.N.Y. 1978) (holding Commissioner could be held liable for failure to promulgate regulations protecting Muslims' religious rights).
 107. Gilbert v. Selsky, 867 F.Supp. 159, 166 (S.D.N.Y. 1994) (holding that Director of Special Housing and Inmate Discipline could be held liable based on lack of formal training manual and requirement of training sessions for hearing officers); Allman v. Coughlin, 577 F.Supp. 1440, 1448 (S.D.N.Y. 1984) (holding systematic failures in training of emergency team could support liability of Commissioner).

B. Relevance of Iqbal to Supervisory Liability Standard

The Supreme Court's decision in Iqbal has the potential to substantially rework the contours of supervisory liability. Again, as in Iqbal's effect on pleading standards, it is unclear how broad its effect will be in the supervisory liability context. The relevant language from Iqbal is as follows:

In a § 1983 suit or a Bivens action—where masters do not answer for the torts of their servants—the term “supervisory liability” is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct. In the context of determining whether there is a violation of clearly established right to overcome qualified immunity, purpose rather than knowledge is required to impose Bivens liability on the subordinate for unconstitutional discrimination; the same holds true for an official charged with violations arising from his or her superintendent responsibilities.¹⁰⁸

The principal dissent in Iqbal interpreted this language to do away entirely with supervisory liability, but the majority did not address this characterization. At the very least, the majority accepted that supervisors can be held liable for violations of their “superintendent responsibilities.” At the same time, however, the Court appeared to reject the standard, accepted in most circuits, that a supervisor's knowledge of and acquiescence in unconstitutional conduct is sufficient to establish Bivens or Section 1983 liability.¹⁰⁹ The Court's holding is less than clear, however, and many lower courts have interpreted the decision to only reject the knowledge and acquiescence standard for intent-based constitutional claims, not for claims like the Fourth Amendment and Eighth Amendment deliberate indifference standards in which no intentional state of mind is required.¹¹⁰ Many courts, particularly in the Third Circuit, have

108. 129 S. Ct. at 1949.

109. Id.

110. See Argueta v. U.S. Immigration and Customs Enforcement, 2010 WL 398839, *6 (D.N.J. 2010) (finding Iqbal's supervisory liability holding inapplicable to Fourth Amendment claim because the defendant's state of mind is irrelevant); Banks v. Montgomery, No. 3:09-cv-23-TS, 2009 WL 1657465 (N.D. Ind., June 11, 2009) (Eighth Amendment); Chao v. Ballista, 630 F.Supp.2d 170, 177-79 & n.2 (D. Mass. 2009) (“Notably, the state of mind required to make out a supervisory claim under the Eighth Amendment—i.e., deliberate indifference—requires less than the discriminatory purpose or intent that Iqbal was required to allege in his suit against Ashcroft and Mueller.”); Jackson v. Goord, 2009 WL 3047226, *16 n.7 (SDNY Sep 21, 2009) (citing to pre-Iqbal supervisory liability standard and stating that Iqbal's effect on supervisory liability concerns claims of intentional discrimination, not claims of deliberate indifference); Williams v.

seemingly ignored Iqbal when adjudicating supervisory liability claims.¹¹¹ District courts within the Second Circuit, by contrast, are in a state of confusion.¹¹² This issue has yet to be addressed in depth by any circuit court, so it will behoove any litigant in the prison context to rely as heavily as possible on those cases that carve out a distinction between Iqbal's equal protection context and the (sometimes) reduced emphasis on intent in Eighth Amendment claims.

V. MUNICIPAL LIABILITY UNDER SECTION 1983

Municipalities can be sued under Section 1983.¹¹³ They will be liable for the unconstitutional acts of their officers if “the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by

Fort Wayne Police Dept, No. 1:08-cv-152 RM, 2009 WL 1616749 (June 9, 2009 N.D. Ind.) (Fourth and Fourteenth Amendment unlawful arrest and excessive force claims); Preyer v. McNesby, No. 3:08cv247, 2009 WL 1605537 (N.D. Fla. Jun 05, 2009) (Fourteenth Amendment excessive force claim); Young v. Speziale, 2009 WL 3806296 (DNJ 2009) (in deliberate indifference case, distinguishing Iqbal); Williams v. Hull, No. 08-135Erie, 2009 WL 1586832 (W.D. Pa. Jun 04, 2009) (Eighth Amendment); Swagler v. Harford County, No. RDB-08-2289, 2009 WL 1575326 (D. Md. June 02, 2009) (Fourth Amendment unreasonable search and seizure).

111. Ayres v. Ellis, 2009 WL 3681892 (DNJ 2009) (In Eighth Amendment case, continuing to apply actual knowledge and acquiescence standard for supervisory liability); Damore v. Untig, 2009 WL 4666876 (DNJ 2009 2009) (dismissing supervisory liability claims but applying a knowledge and acquiescence standard); Gioffre v. County of Bucks, 2009 WL 3617742 (EDPA 2009) (applying Third Circuit's traditional test for supervisory liability, without even referring to Iqbal)
112. Cagle v. Gravlin, 2010 WL 2088267, *7 (N.D.N.Y. Apr 29, 2010) (recognizing that Iqbal casts doubt on Second Circuit's standard, but assuming that it still applies); Tafari v. McCarthy, 2010 WL 2044710, *9 (N.D.N.Y. Mar 31, 2010) (same); Robinson v. Federal Bureau of Prisons, 2010 WL 1752587, *5 (E.D.N.Y. Mar 24, 2010) (applying Second Circuit's standard without referring to Iqbal); Hardy v. Diaz, 2010 WL 1633379, *7 (N.D.N.Y. Mar 30, 2010) (applying Second Circuit's pre-Iqbal law); Rahman v. Fischer, 2010 WL 1063835, *4-5 (S.D.N.Y. Mar 22, 2010) (collecting cases) Morris v. Rabsatt, 2010 WL 1444880, *2 (N.D.N.Y. Feb 02, 2010) (dismissing, but applying pre-Iqbal standard); Spear v. Hugles, 2009 WL 2176725, *2 (S.D.N.Y. July 20, 2009) (assuming that only two of the five Second Circuit supervisory liability standards survive Iqbal).
113. Monell v. Department of Soc. Servs., 436 U.S. 658, 700-01 (1978).

that body's officers."¹¹⁴ Just as in supervisory liability, there is no respondeat superior liability for municipalities under Section 1983. Municipalities are only liable for the unconstitutional conduct that is the result of municipal custom or policies.

To form the basis for liability, a municipal policy need not be formalized or in writing. Even if the municipal policy has never been formally adopted by lawmakers, if it is an established custom it can form the basis for liability.¹¹⁵ Such an informal policy normally must be so "persistent or widespread" as to constitute "a custom or usage with the force of law" or "so manifest as to imply the constructive acquiescence of senior policy-making officials."¹¹⁶ Municipalities also may be liable for inadequate training or supervision, generally along the same lines that supervisors are liable – demonstrated deliberate indifference to the need for training or supervision.¹¹⁷ Deliberate indifference will be found where the nature of the employees' duties or a previous pattern of violations makes it obvious that, without further training, the employees are highly likely to violate citizens' federally protected rights.¹¹⁸ Id. The failure to train or supervise must have actually caused an underlying constitutional violation.

In limited circumstances a municipality will be held liable for its employees' constitutional wrongs on the basis that the city failed to adequately screen the employees before hiring them. For a municipality to be liable under this theory, a plaintiff must show that "adequate scrutiny of an applicant's background would [have led] a reasonable policymaker to conclude that the plainly obvious consequence of the decision to hire . . . would be the deprivation of a third party's federally protected right," and that adequate screening would have shown that "this officer was highly likely to inflict the particular injury suffered by the plaintiff."¹¹⁹ Id. at 412.

Unlike in the context of supervisory liability, it is not obvious that Iqbal should have any effect on Monell-type claims. Most courts to consider the question have so held. The Northern District of Illinois has

114. Id. at 690.

115. Patterson v. County of Oneida, N.Y., 375 F.3d 206, 226 (2d Cir. 2004); Jeffes v. Barnes, 208 F.3d 49, 61 (2d Cir. 2000); Sorlucco v. New York City Police Department, 971 F.2d 864, 870 (2d Cir.1992).

116. Sorlucco v. New York City Police Department, 971 F.2d 864, 870-71 (2d Cir.1992).

117. City of Canton v. Harris, 489 U.S. 378, 388 (1989).

118. Id.

119. Bd. of County Comm'rs v. Brown, 520 U.S. 397, 411-12 (1997).

applied the pre-Iqbal standard for both pleading and liability in Monell claims.¹²⁰ The District of Nevada, by contrast, has held that Iqbal supersedes Leatherman.¹²¹ No Court of Appeals has yet to address the question. The following cases are examples of Monell complaints that have survived dismissal post-Iqbal:

- a. Coric v. County of Fresno, No. 1:08cv1225 JTM (BLM), 2010 WL 364322, at *3, *4 (E.D. Cal. Jan. 25, 2010) (Allegation that, despite sheriff's warning of overcrowding, "the County continued to inadequately fund the jail, even after Plaintiff was beaten in the absence of sufficient supervision," was sufficient to state Monell claim.)
- b. Allen v. Montgomery County, 2009 WL 4042761 (EDPA 2009) (finding that the plaintiff sufficiently alleged municipal liability by alleging that 100-150 medical request forms were not included in his records, creating an inference that there was a policy of ignoring medical requests).
- c. Bullock v. Beard, 2010 WL 1507228 (MDPA 2010) (in case arising out of prison suicide, complaint adequately alleged policy and custom such that claim could proceed against corporation providing prison health care services).
- d. Reynolds v. Dallas County, 2009 WL 2591192 (N.D.Tex.,2009) (finding claim sufficient where "Plaintiff has alleged that there was a policy of not staffing the appropriate numbers of trained personnel at the jail, and also stated that he did not see a nurse or a doctor during his incarceration in spite of repeated requests for medical attention. In addition, Plaintiff has alleged that he had a serious medical condition that required surgery, but that delay in receiving appropriate medical care exacerbated his medical condition.")
- e. Mracna v. Correctional Medical Services, 2009 WL 3060423 (W.D. Mich. Sept. 22, 2009) (In denying the motion to dismiss with respect to one claim, the court noted that in alleging a pattern of

120. Riley v. County of Cook, 682 F.Supp.2d 856, 861, 862 (N.D. Ill. 2010) (applying Leatherman and stating that "an official capacity claim can survive even with conclusory allegations that a policy or practice existed, so long as facts are pled that put the defendants on proper notice of the alleged wrongdoing.").

121. Ward v. Nevada, No. 3:09-CV-00007-RCJ-VPC, 2010 WL 1633461, at *5 (D. Nev. Feb. 26, 2010)

denials of treatment in the complaint, the plaintiff “set forth sufficient facts from which [the court] could reasonably infer that policy, practice or custom of [the defendant] caused Plaintiff’s injuries.”)

- f. Fox v. Ghosh, 2010 WL 345899 (N.D.Ill. 2010) (Monell claim survives where plaintiff alleged the existence of a policy under which inmates with serious medical conditions were routinely denied access to medication and medical care)
- g. Smith v. Sangamon County Sherriff’s Dep’t, 2009 WL 2601253 (C.D. Ill. Aug. 20, 2009) (Failure to train claim could proceed based on allegations that officials repeatedly denied proper medical care and bedding and that several incidents should have prompted sheriff’s department to provide better training).
- h. Barrett v. Maricopa County Sheriff’s Office, 2010 WL 46786 (D. Ariz. 2010) (finding that explicit policy need not be alleged if it can be inferred)

In closing, Iqbal will certainly play a role in resolving pleading issues in prisoners’ rights cases. It will likely play less of a role in supervisory liability claims, depending on the circuit. And it seems unlikely, for now, that Monell claims will be significantly affected by Iqbal.

APPENDIX A – SELECTED POST-IQBAL PLEADING CASES (BY CIRCUIT OF ORIGIN)

a. First Circuit Cases

Sanchez v. Pereira-Castillo, 590 F.3d 31, 41-44 (CA1 2009) (finding prisoner’s Fourth Amendment claim sufficient against some defendants but not others, in large part because certain defendants were directly involved in unreasonable search and allegations against supervisory defendants were conclusory).

Chao v. Ballista, 630 F.Supp.2d 170, 177-79 & n.2 (D. Mass. 2009): “Allegations become ‘conclusory’ where they recite only the elements of the claim and, at the same time, the court’s commonsense credits a far more likely inference from the available facts.”

Picard v. Hillsborough County Dep’t of Corrections Medical Dep’t, 2009 WL 4063191 (D.N.H. Nov. 20, 2009)

Denying motion to dismiss plaintiff’s §1983 claims for inadequate medical care. Plaintiff alleged that he complained several times to three named nurses (identified by their first names) about his significant weight loss, but that they did nothing in response and gave him a hard time about his complaints.

Whitten v. Blaisdell, 2010 WL 376903, *5 (D.N.H. 2010) (deliberate indifference allegations sufficient against supervisors where plaintiff alleged that he filed grievance related to medical care and supervisory officials did nothing).

b. Second Circuit Cases

Arar v. Ashcroft, — F.3d —, 2009 WL 3522887 (CA2 2009)

Cites Iqbal and Twombly in holding that plaintiff did not plead sufficiently specific involvement of individual supervisory defendants in alleged unconstitutional conditions of confinement and denial of access to courts and consular assistance, prior to plaintiff’s rendition to Syria. Emphasizes that the plaintiff’s allegations referred to “defendants” generally, that they used the passive voice, and that the plaintiff did not allege the “meeting of the minds” that a “plausible” conspiracy claim requires.

Cole v. Fischer, 2010 WL 2130974, *1-2 (CA2 2010) (finding allegations of excessive force sufficient where officers used racially and religiously derogatory language towards plaintiff)

Alexander v. Galeno, 2009 WL 3754254 (SDNY Nov. 5, 2009)

Cites Iqbal and then holds following allegations sufficient to plead deliberate indifference: plaintiff alleges that defendants refused to come to his prison to administer injections as treatment, in effort to force him to have surgery instead; that a doctor stated that plaintiff's only choices were surgery or no treatment at all; and that defendants denied him treatment so that they could use him for a physician's experimental practice.

Allah v. Kemp, 2010 WL 1036802 (N.D.N.Y. Feb 25, 2010)

Prisoner claim for lack of mental health care can go forward. Plaintiff alleged that defendants failed to provide him with mental health care, notwithstanding notations in the record that he had attempted suicide three days earlier, and that his mental health needs remained unmet as he attempted suicide two more times. "Whatever conclusions might be warranted after the record is developed, accepting the material facts alleged in the Complaint as true, and drawing all inferences in Plaintiff's favor, the Complaint states a plausible claim that Plaintiff's mental health needs were unmet and were, objectively, sufficiently serious."

Braxton v. Nichols, 2010 WL 1010001 (S.D.N.Y. Mar 18, 2010)

Prisoner claim based on tobacco smoke exposure can go forward; plaintiff alleged that he was exposed to unreasonable levels of smoke and has suffered ill health results. "While these documents do not establish that Plaintiff has suffered a serious injury or faces a risk of future harm, they suggest with sufficient plausibility that Plaintiff may be able to demonstrate through discovery that a serious present injury or a future risk of serious injury exists." Plaintiff offered three letters to superintendent and grievance, demonstrating that he complained; these are sufficient to show that supervisory officials were on notice and may have been involved.

Diaz v. Fischer, 2010 WL 1133074 (N.D.N.Y. Mar 23, 2010)

Prisoner retaliation case. Some claims found too conclusory, but claim is sufficiently pled as to another defendant. "Plaintiff alleges that Defendant Quinn issued a falsified misbehavior violation once he discovered Plaintiff was the ILC Secretary. Compl. ¶ 42. According to

Plaintiff's Complaint, Quinn's issued Plaintiff a false misbehavior report because of the content of Plaintiff's earlier filed grievances against Sergeant Cox FN2 and because of Plaintiff's membership in the ILC." Plaintiff provides several facts in support of his claim, including that "Plaintiff's contact with Defendant Quinn sprang from the latter's investigation of grievances pertaining to the IGRC's handling of grievances filed by Plaintiff; during their interview Quinn allegedly berated Plaintiff specifically about the latter's filing grievances; Quinn issued Plaintiff a misbehavior report following a pat-down leading to the discovery of an ILC card in Plaintiff's wallet; upon finding this card Quinn allegedly said, 'Now I'm definitely having you moved out of E-Block;' and the penalty of being sent to the Special Housing Unit ('SHU') that Plaintiff received as a result of the violation issued by Quinn was allegedly extraordinarily harsh but also required in order to remove Plaintiff from his ILC position."

Freeman v. Santos, 2010 WL 982893 (N.D.N.Y. Mar 15, 2010)

Pro se § 1983 prisoner claim, probably a beat-up, can go forward against supervisor. Plaintiff "contends that Santos personally orchestrated the assault by conversing with John Doe defendants and ordering them to teach [Plaintiff] a lesson." Additional facts supported this allegation. "The fact that Plaintiff did not actually hear what Defendant Santos was saying to the John Doe Defendants does not make his claim implausible. As Magistrate Judge Homer correctly noted, when Plaintiff's allegation that he saw Defendant Santos talking to the John Doe Defendants is coupled with his other allegations that Defendants John Doe # 1 and John Doe # 2 referred to him as the "tough guy" after speaking with Defendant Santos and that Defendant John Doe # 4 indicated that the assault occurred because Defendant Santos ordered the John Doe Defendants to teach Plaintiff a lesson, there is sufficient factual allegations in the complaint to state a plausible claim that Defendant Santos was personally involved in the alleged violation of Plaintiff's constitutional rights."

Harvey v. LaValley, 2009 WL 5219027 (N.D.N.Y. Dec 31, 2009)

Prisoner's § 1983 claim, apparently for excessive force and deliberate indifference to serious medical needs. Iqbal boilerplate is followed by recitation of the Colon v. Coughlin supervisory liability standard, with no suggestion that the latter has been undermined: "The failure to allege facts plausibly suggesting that a defendant was personally involved will generally subject a complaint to dismissal. However, this case falls

within an exception to the general rule. When a prisoner does not know the identities of any of the individuals who allegedly violated his constitutional rights, it is appropriate to maintain ‘supervisory personnel as defendants ... until the plaintiff has been afforded an opportunity through at least brief discovery to identify the subordinate officials who have personal liability.’”

Sash v. U.S., 2009 WL 4824669 (SDNY Dec 15, 2009)

Although plaintiff loses, court suggests that 2d Circuit’s supervisory liability standard in Colon v. Coughlin may survive Iqbal, at least outside the intentional discrimination context: “While Colon permitted supervisory liability in situations where the supervisor knew of and acquiesced in a constitutional violation committed by a subordinate, these post-Iqbal district court decisions reason that Iqbal’s ‘active conduct’ standard imposes liability only where that supervisor directly participated in the alleged violation or had a hand in creating a policy or custom under which the unconstitutional practices occurred. These decisions may overstate Iqbal’s impact on supervisory liability. Iqbal involved alleged intentional discrimination. . . . Where the constitutional claim does not require a showing of discriminatory intent, but instead relies on the unreasonable conduct or deliberate indifference standards of the Fourth and Eighth Amendments, the personal involvement analysis set forth in Colon v. Coughlin may still apply.” (Citing Chao v. Ballista).

Scaccia v. County of Onondaga, New York, 2009 WL 4985683 (NDNY Dec 15, 2009)

Court harmonizes Iqbal and Erickson v. Pardus by saying that Erickson says “detailed facts” aren’t needed, but some facts are. (*3). Court declines to dismiss plaintiff’s claim supported by concrete descriptions of his serious medical problem and of the obstruction by one defendant of treatment for his problem. It does dismiss plaintiff’s Monell claim because plaintiff does not cite facts showing that other persons besides himself were subject to the practices that he alleges are county policies. (*7-8). At *11: the fact that an individual supervised persons who were directly involved in the alleged violation is not sufficient to hold them liable.

Watson v. Wright, 2010 WL 55932 (N.D.N.Y. Jan 05, 2010)

Prison medical care case. Plaintiff pled that defendant doctor had a non-medical, discriminatory reason for interfering with his medical treatment

(i.e., they had had an argument, and the doctor stopped his interferon), and that is sufficient to state a claim.

c. Third Circuit Cases

Merritt v. Fogel, 2009 WL 3383257, *3-4 (C.A.3 (Pa.) Oct. 22, 2009)

“The Magistrate Judge thought Merritt’s claim deficient as a matter of law because his own allegations show that defendants have repeatedly monitored and tested him and have determined that he does not qualify for [Hepatitis C] treatment. In reaching that conclusion, the Magistrate Judge relied primarily on responses by certain defendants and others to Merritt’s grievances that he attached to his initial complaint. As the Magistrate Judge noted, those responses indicate that Merritt has been tested and that certain defendants and others have concluded that he is not a candidate for combined drug treatment for various reasons. . . . If that were all that Merritt alleged, then the Magistrate Judge would be right. Merritt, however, makes many other specific factual allegations that the Magistrate Judge did not discuss and that, taken as true as they must be at this stage, raise an inference of deliberate indifference. For example, Merritt alleges that one of defendants’ own specialists recommended him for treatment as long ago as 1996 but that defendants fraudulently concealed that information from him until he finally filed suit. He also alleges that he is within the protocol for treatment, though various defendants have falsely told him otherwise. Thus, as Merritt argues, he claims to seek, not merely the treatment of his own choice, but treatment that has been recommended by a specialist and that is called for by the Department of Corrections protocol. Moreover, his allegations permit the inference that defendants may have nonmedical reasons for refusing to provide this treatment. For example, he alleges that defendant Falor told him both that medical staff merely ‘shrug their shoulders, indicating nothing’ when the subject of HCV treatment arises at staff meetings and that Merritt would not receive treatment though his liver numbers were ‘all out of wack’ and that he should instead ‘pray.’ He also alleges that he overheard a physician’s assistant admit to having shredded his sick call requests. Finally, he alleges that has been denied treatment for at least five different reasons over the years, most of which he alleges were fabricated.”

Cummings v. Butler, 2009 WL 3763993 (WDPa 2009)

In this Section 1983 (First Amendment prisoners') claim, the court found it sufficient for plaintiff to allege that as a result of not having access to legal papers, another action was time-barred. (p. *2).

Damore v. Untig, 2009 WL 4666876 (DNJ 2009 2009)

At the screening stage of this Section 1983 (prisoners' rights) case, court finds that Eighth Amendment and due process claims sufficiently stated by allegation that COs beat and kicked prisoner while he was restrained, requiring x-rays and medical treatment. (pp. *5-6). The court dismissed the plaintiff's supervisory liability claims because it was clearly a respondeat superior theory, but court also seems to apply a knowledge and acquiescence standard. (p. *7).

Gioffre v. County of Bucks, 2009 WL 3617742 (EDPA 2009)

In §1983 (Eighth Amendment) case, finding following allegations sufficient: plaintiff needed medical examination upon admission; exam was not provided because of policies and practices of prison; defendants had tolerated practice of denying care to preserve resources; and defendants were on notice. Seems to apply the Third Circuit's traditional test for supervisory liability, without even referring to Iqbal.

Rivera v. Wahba, 2009 WL 4609831 (DNJ 2009)

Plaintiff's Section 1983 (due process) claim for failure to provide medical care plausible where complaint alleged that doctor failed to treat him and nurses failed to give medical attention for complaints of hernia pain for 12 hours; allegations suggest refusal was not based on medical justification. (p. *6).

Young v. Speziale, 2009 WL 3806296 (DNJ 2009)

In a Section 1983 (prisoners' rights) case, the court distinguishes Iqbal as involving an intent-based claim and holding that "general allegations may be sufficient in deliberate indifference context. (p. *7). The court also distinguishes Iqbal's approach to supervisory liability claims by resting on the intent-based nature of Iqbal's claims, as opposed to deliberate indifference theory of relief. (p. *7)

Zheng v. Palakovich, 2010 WL 1508521 (MDPA 2010)

§1983 claims under 8th and 14th Amendments and corporate negligence claim, arising from prison suicide, could proceed against corporation running prison health services and the individual doctors who treated prisoner. Plaintiff adequately alleged for all defendants that detainee was

particularly vulnerable to suicide, that defendants knew of and disregarded that vulnerability, and that they acted with reckless indifference to it. For corporation, plaintiff alleged that detainees could only see psychiatrist once a month, as a cost-saving measure, that resulted in detainee being taken off his medication and deteriorating. However, claim against supervisory psychiatrist who did not play direct role in treating detainee was dismissed.

d. Fifth Circuit Cases

Hamer v. Jones, 2010 WL 444350 (5th Cir. 2010)

Some § 1983 claims were dismissed, but claim of cross-sex strip search in violation of Fourth Amendment right to bodily privacy could proceed. Complaint contained inconsistent allegations, but court “must resolve this lack of clarity in the record in favor of Hamer.” If female guard was actually involved in search and if it occurred under non-exigent conditions, as plaintiff alleged, claim may rise to level of constitutional violation.

Morgan v. Hubert, No. 08-30388, 2009 WL 1884605, at *5, *6 (5th Cir. July 1, 2009) (unpublished) (finding that, even after Iqbal, plaintiffs are not required to plead specific facts “peculiarly within the knowledge of defendants”; approving of limited discovery in failure to protect case to determine when defendant knew of risk of harm to plaintiff)

Arita v. Stagg, 2010 WL 370343, *5 (M.D. La. 2010)

“In the instant case, the plaintiff has alleged that, notwithstanding a severe beating of extended duration by multiple security officers, including the use of riot batons and the electronic capture shield, and notwithstanding that the plaintiff appeared in the prison infirmary immediately thereafter for medical attention, the defendant turned away and would not address the plaintiff’s injuries. This allegation adequately presents the claim that defendant Roundtree was aware of and disregarded a potentially serious medical condition faced by the plaintiff, and so, this allegation overcomes the defendant’s bare-bones assertion of qualified immunity, especially on a motion to dismiss which is decided without the benefit of competent evidence.”

Even though complaint provided “little factual detail” it was adequate to state claim of deliberate medical indifference.

e. Sixth Circuit Cases

Flanory v. Bonn, 604 F.3d 249, 256 (CA6 2010) (allegation of filing grievance sufficient to establish knowledge and indifference of prison officials).

Nali v. Ekman, 2009 WL 4641737 (CA6 2009)

In this Section 1983 (prisoners' rights) claim, the court found that the plaintiff's first amendment claim was plausible because he alleged that he was disciplined in retaliation for filing an internal grievance (p. *2). However, the plaintiff's equal protection claim was dismissed because the only allegation was that the prisoner was non-white while the Correction Officers who disciplined him were white (*3). The plaintiff's allegation that the defendants were racially biased and had animosity toward plaintiff was conclusory (*3).

Wright v. Leis, 335 Fed.Appx. 552 (6th Cir. 2009)

Court affirms district court's denial of a motion to dismiss a § 1983 excessive force claim. Plaintiff adequately pleaded violation by sheriff based on failure to train, even though sheriff had no physical contact with plaintiff.

Cage v. Caruso, 2009 WL 2252669 (W.D. Mich. July 28, 2009)

§ 1983 Eighth Amendment claim can go forward against providers of prison health services and warden. Plaintiff alleged that defendants were deliberately indifferent to his serious medical needs, providing inadequate testing, treatment and pain medication; as the result of the inadequate treatment and the resultant falls, he experienced excruciating pain and has sustained multiple reinjuries to his head and neck; he also experienced severe depression from the untreated health conditions and has become suicidal on more than one occasion.

Carne v. Johnson, 2009 WL 2777174 (W.D. Mich. Aug. 28, 2009)

Court dismisses some claims in a prisoner's § 1983 civil rights action but finds plaintiff's allegations that one defendant "refused to retrieve his medication which resulted in his hospitalization are sufficient to state a claim" against that defendant. The court also finds that plaintiff has made sufficient factual allegations to state a claim against his medical services provider and various individuals involved in plaintiff's medical care.

Catanzaro v. Michigan Department of Corrections, 2009 WL 4250027 (E.D. Mich. Nov. 19, 2009)

The court dismisses as implausible many of the claims brought by prisoners in a § 1983 case. However, the court denies the motion to dismiss an Eighth Amendment excessive force claim. While the court notes that the plaintiff must ordinarily show more than de minimis injury, but no injury need be shown if force is maliciously or sadistically applied. In this instance, defendant admitted he deliberately attempted to hit the plaintiff with a motorized vehicle. The court also upholds an Eighth Amendment deliberate indifference claim in which the plaintiff alleges he was labeled a snitch and forced to fight other inmates.

Ciavone v. McKee, 2009 WL 2959737 (W.D. Mich. Sept. 10, 2009)

Court grants motion to dismiss in part and denies it in part in a prisoner's § 1983 civil rights complaint. The court allows the plaintiff's Eighth Amendment claim of failure to treat psychological problems to go forward against three defendants because plaintiff alleged sufficient facts to make the claim "plausible on its face."

Edwards v. Welton, 2009 WL 2777166 (W.D. Mich. Aug. 28, 2009)

Court dismisses most claims in a prisoner's § 1983 civil rights action but allows Eighth Amendment claim to go forward, finding plaintiff's allegations that the defendant "jeopardized Plaintiff's personal safety by asking him to purchase a knife from another prisoner" sufficient to state a claim.

Fletcher v. Michigan Dept. of Corrections, No. 09-CV-13904, 2010 WL 2376167, at *6 (E.D. Mich. June 9, 2010) (Finding Monell allegations sufficient where plaintiff alleged that county had a policy "to inadequately train or supervise its officers, deputies, nurses and counselors, with respect to the constitutional rights of the inmates." Plaintiff also alleged "six more specific policies relating to the handling of mentally ill inmates, including failure to comply with maintenance orders, as well as inmate abuse and the improper handling of complaints of abuse."

Garvins v. Hofbauer, 2009 WL 1874074 (W.D. Mich. June 26, 2009)

In examining a prisoner's § 1983 civil rights action in which plaintiff claims that various defendants violated the Eighth Amendment through deliberate indifference to plaintiff's medical problems, the court dismisses as conclusory those claims in which plaintiff made no specific

factual allegations and only alleged that defendants were “aware” of his medical condition. The court allows claims against other defendants to go forward.

Harrison v. Pitman, 2009 WL 2033343 (W.D. Mich. July 8, 2009)

In a prisoner’s § 1983 civil rights action, the court finds that the plaintiff has stated sufficient allegations to support a First Amendment retaliation claim when plaintiff alleged that defendants retaliated against him after he filed grievances.

Jones v. Smolinski, 2009 WL 3352804 (W.D. Mich. Oct. 13, 2009)

Court dismisses most claims in a prisoner’s § 1983 case, but the court denies the motion to dismiss with respect to a First Amendment relation claim based on allegation that defendant placed plaintiff on unemployable status in retaliation for filing a grievance against her. Filing of a prison grievance is constitutionally protected conduct for which a prisoner cannot be subject to retaliation.

Lawson v. Haddon, 2009 WL 2242692 (W.D. Mich. July 16, 2009)

The court dismisses most claims in a § 1983 case brought by a prisoner against various prison officials and employees. However, the court finds that the plaintiff has alleged sufficient facts to state an Eighth Amendment medical claim against two defendants for deliberate indifference to the plaintiff’s medical and mental health needs. The court does not discuss what makes the medical allegations adequate, but it appears that plaintiff listed specific medical problems and interactions with medical personnel in his complaint.

Rothschild ex rel. Rothschild v. Ahmed, 2010 WL 749923 (S.D. Ohio Feb 22, 2010)

§ 1983 claim brought on behalf of an individual who died while in custody at the county jail. The court cites Iqbal in finding it to be plausible that the decedent’s “Eighth Amendment rights were violated due to deliberate indifference to his medical care, as the Complaint meets both the objective (sufficiently serious medical need demonstrated by Gregory Rothschild’s death) and subjective (Complaint alleges that Dr. Ahmed knew of the Crone’s disease, knew that Gregory Rothschild was deteriorating, and disregarded his condition) tests.”

f. Seventh Circuit Cases

Burks v. Raemisch, 555 F.3d 592, 593 (7th Cir. 2009)(holding that “[k]nowledge and intent, in particular, need not be covered in detail” and that “[a] prisoner’s statement that he repeatedly alerted medical personnel to a serious medical condition, that they did nothing in response, and that permanent injury ensued, is enough to state a claim on which relief may be granted—if it names the persons responsible for the problem.”)

Cooney v. Rossiter, 583 F.3d 967 (7th Cir. 2009)

In this Section 1983 case, the court (Posner, J.) found that “[t]he complaint in this case, though otherwise detailed, is bereft of any suggestion, beyond a bare conclusion, that the remaining defendants were leagued in a conspiracy with the dismissed defendants.” 583 F.3d at 971. The court also, however, seems to limit *Iqbal*/*Twombly* by suggesting that the cases were motivated by concerns about complexity in *Twombly* and immunity in *Iqbal*: “[T]he height of the pleading requirement is relative to circumstances. We have noted the circumstances (complexity and immunity) that raised the bar in the two Supreme Court cases. This case is not a complex litigation, and the two remaining defendants do not claim any immunity.” *Id.* The court nevertheless dismissed the case on the basis of pre-*Iqbal* heightened pleading standards for conspiracy allegations (noting a concern about “paranoid pro se litigation”).

Rodriguez v. Plymouth Ambulance Service, 577 F.3d 816 (7th Cir. 2009) (finding complaint sufficient, despite plaintiff’s lack of knowledge of certain facts, where plaintiff cannot fairly be held to know the names of each individual who was responsible for his injury, or of the facts establishing that certain private individuals should be considered state actors – “We do not think that the children’s game of pin the tail on the donkey is a proper model for constitutional tort law. If a prisoner makes allegations that if true indicate a significant likelihood that someone employed by the prison system has inflicted cruel and unusual punishment on him, and if the circumstances are such as to make it infeasible for the prisoner to identify that someone before filing his complaint, his suit should not be dismissed as frivolous.”)

Santiago v. Walls, — F.3d —, 2010 WL 1170654 (7th Cir. 2010)

§ 1983 claim that warden failed to protect inmate from assault by another inmate could proceed. Plaintiff alleged that inmate was known to be dangerous, that staff deliberately housed him with inmate in order to provoke a confrontation, that he put the warden on notice of inmate's history, and that warden disregarded that risk. "To the extent that the dissent is asserting that the complaint itself lacked sufficient specificity, it is asking for a return to the days before the Supreme Court eliminated that impermissible gloss on the Federal Rules in Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993)."

Diaz v. Hart, 2010 WL 849654 (N.D.Ill. 2010)

Prisoner's § 1983 claim for inadequate medical care could go forward against prison medical personnel. Against physician for his division of the jail, plaintiff alleged that physician did not refill prescription for pain medication or schedule surgery while knowing that surgery was needed. Claim was also sufficiently pled against supervisory medical officials, who allegedly established policy of denying procedures needed to treat serious medical conditions. Plaintiff also adequately alleged the existence of a widespread custom to put defendants on notice: he had an injury requiring surgery; was examined by doctors who said he needed surgery; and no surgery was performed. Allegations included dates, names of parties, accounts of doctors' visits, and the locations of those visits. Claim could not, however, go forward against sheriff or warden, who were not personally involved in medical care or medical policies.

Fox v. Ghosh, 2010 WL 345899 (N.D.Ill. 2010)

Prisoner's § 1983 claim for failure to provide medical care can go forward where plaintiff alleged that medical provider defendants did not give him his seizure medication even though they knew that could cause serious harm. Plaintiff also alleged the existence of a policy under which inmates with serious medical conditions were routinely denied access to medication and medical care.

Henderson v. Fries, 2009 WL 3246673 (N.D. Ind. Oct. 5, 2009)

In § 1983 case filed by pro se prisoner, finding that "[g]iving the Plaintiff the benefit of the inferences to which he is entitled at this stage, he had a legitimate, serious medical need while he was at the Allen County Jail, and his claim that jail officials denied him medical attention for that need is sufficient to state a claim upon which relief can be granted."

Kervin v. Brown, 2009 WL 3720648 (N.D. Ind. Nov. 2, 2009)

Denying motion to dismiss in §1983 case filed by pro se prisoner. The court noted that “based solely on Mr. Kervin’s pleadings, the defendant might not have understood what claim he was being asked to defend, [but] pursuant to 28 U.S.C. § 1915A, this court’s orders have defined the nature and scope of Mr. Kervin’s claims. Therefore the motion to dismiss will be denied.”

Marion v. Nickels, 2010 WL 446464 (W.D.Wis. 2010)

Prison retaliation case could go forward after plaintiff alleged that defendant directed an officer to falsely alter a conduct report in retaliation for filing a lawsuit; that another defendant retaliated against him by finding him guilty of the conduct charged in the report; and that a third defendant continued the retaliation by refusing to overturn the decision even though she knew it was false. “Although one might question the likelihood that plaintiff will be able to prove his allegations, that is not the test.”

Riley v. County of Cook, 682 F.Supp.2d 856, 861, 862 (N.D. Ill. 2010)

Applying Leatherman and stating that “an official capacity claim can survive even with conclusory allegations that a policy or practice existed, so long as facts are pled that put the defendants on proper notice of the alleged wrongdoing.”

“In this case, Defendants contend that Plaintiff’s official liability claims against all Defendants are deficient. As to Counts I and II against Andrews and Dart, Defendants urge that they contain unsupported conclusions that Defendants acted with deliberate indifference by failing to maintain appropriate suicide prevention policies. However, given the above standards, the Court disagrees. Plaintiff’s Complaint alleges that Andrews and Dart were responsible for the care and management of the prisoners at Cook County Jail, and had policymaking authority to implement appropriate procedures to do so. Plaintiff further alleges that Andrews and Dart acted with deliberate indifference by failing to institute suicide prevention practices at Cook County Jail, and elaborates six specific examples of inadequate procedures as well as the failure to adequately monitor the jail cells. Plaintiff claims that Hopkins’ suicide was the result of this direct indifference. Plaintiff has clearly gone beyond bare legal conclusions and provided Defendants with fair notice of the basis for her claim.”

Smith v. Sangamon County Sherriff's Dep't, 2009 WL 2601253 (C.D. Ill. Aug. 20, 2009)

Court permits prisoner's § 1983 claim to go forward based on allegation that sheriff knowingly housed plaintiff with a violent inmate, since that gave sheriff fair notice of claim. Failure to train claim could also go forward based on allegations that officials repeatedly denied proper medical care and bedding and that several incidents should have prompted sheriff's department to provide better training.

Lieberman v. Budz, 2010 WL 369614 (N.D. Ill. 2010) (claim that unit of prison was infested with vermin and unfit for human habitation was sufficient despite lack of allegation that defendants were personally aware of the conditions, because "an inference of involvement was justified to sustain claims asserted against certain senior officials, such as the county sheriff or the prison warden, when the claims alleged" systemic rather than "localized" conditions.)

g. Ninth Circuit Cases

Anderson v. Towne, 2010 WL 455387, *4 (E.D.Cal. 2010) (prisoner who used wheelchair for mobility stated Eighth Amendment claim by alleging existence of dangerous floor tiles at the entrance to the shower, and that he made defendants aware of dangerous conditions).

Avila v. Cate, 2009 WL 5029827 (ED Cal. Dec. 15, 2009)

Prisoner 1983 case. Plaintiff alleged express racial classification of inmates. Because express classifications are inherently suspect, that allegation was sufficient. Allegation that supervisors were put on notice of discrimination by his complaints was insufficient for supervisory liability under Iqbal.

Calloway v. Warden Corcoran State Prison, 2010 WL 378042 (E.D.Cal. 2010) (finding allegations of malicious and unnecessary search via enema procedure sufficient to state claim where strip searches and x-rays revealed no contraband)

Coric v. County of Fresno, No. 1:08cv1225 JTM (BLM), 2010 WL 364322, at *3, *4 (E.D. Cal. Jan. 25, 2010) (Allegation that, despite sheriff's warning of overcrowding, "the County continued to inadequately fund the jail, even after Plaintiff was beaten in the absence of sufficient supervision," was sufficient to state Monell claim.

Short v. Sanzberro, 2009 WL 5110676 (E.D. Cal. Dec. 18, 2009)
Prisoner 1983 claim. Although plaintiff stated facts sufficient to show an unlawful search, his claim failed under Iqbal because he failed to state which specific defendants participated in the search. Also, his claim that defendants retaliated against him for filing suit failed under Iqbal because he did not allege any specific facts to support his conclusory assertion that the defendants had a retaliatory motive.

Walton v. Butler, 2010 WL 430829 (E.D. Cal. 2010) (allegation that plaintiff informed defendants that he “was not getting along with his bunkmate . . . and that he needed to be moved as a result” was sufficient to state failure to protect claim.

Ward v. Nevada, No. 3:09-CV-00007-RCJ-VPC, 2010 WL 1633461, at *5 (D. Nev. Feb. 26, 2010) (Iqbal supersedes Leatherman).

Wright v. Shannon, 2010 WL 445203, *11 (E.D. Cal. 2010) (allegation of failure to protect insufficient where plaintiff “fails to describe the basis of the threat: how the threat originated, when the threat was made, or why the threat was made”)

Zuniga v. Jordan, 2009 WL 5198902 (E.D. Cal. Dec. 23, 2009)
Prisoner 1983 claim for excessive force. With respect to supervisory liability: Plaintiff adequately stated claim against sergeant/supervisor, who allegedly threatened the use of force and stood by while other officers rushed in to shoot plaintiff with pepper spray etc. Plaintiff also adequately alleged claim against sheriff by alleging that he ordered the use of force at issue.

h. Tenth Circuit Cases

Arocho v. Nafziger, 2010 WL 681679 (C.A.10 March 1, 2010)
Allegation that director of Bureau of Prisons knew about plaintiff’s Hepatitis C and refused to approve treatment was sufficient to state Eighth Amendment claim. Allegation that clinic director was deliberately indifferent to plaintiff’s Hepatitis C was “thin,” but sufficient, in part because the relative responsibility of the clinic director depended in large part on the responsibility of the BOP director: “Obviously, the facts known to and alleged by Mr. Arocho cannot settle that question. He knows only what he has experienced and what he has been told by defendants, i.e., that Hepatitis C is causing him pain and damaging his

liver, that Nafziger recommended he be treated with Interferon/Ribavirin, and that Lappin refused to approve the treatment. The nature and extent of the exchange between Nafziger and Lappin, which may exonerate one (or both) while implicating the other (or both), is known only by defendants. In such circumstances, to dismiss the claim against Nafziger without one more chance at amendment following the reinstatement of the claim against Lappin could lead to a real injustice: after the dismissal, Lappin could oppose the claim against him by submitting evidence on summary judgment indicating that all of the fault lay, rather, with Nafziger who, having been dismissed with prejudice from the case, could not be brought back in to answer for his now-demonstrated liability.”

Casanova v. Ulibarri, 2010 WL 437335, *4 (CA10 Feb. 9, 2010) (finding district court’s disposition of claim “irregular” because it “not only considered [defendant’s] answer but even treated as true the answer’s assertion that [defendant] did not start work at the correctional facility until October 2006.” – the plaintiff’s allegation was sufficient, despite the lack of specifics about dates, because it provided “enough specifics concerning [plaintiff] being placed in segregation (which presumably was not a daily occurrence) that [defendant] could likely identify the incident.”)

Saunders v. Wilner, 2010 WL 582373 (D.Colo.,2010)

Prisoner’s case under First Amendment and Religious Freedom Restoration Act. Claims for injunctive relief against officers in their official capacities can proceed. The issue before the court on these claims was whether plaintiff had alleged that a substantial burden was imposed on his religious exercise. Plaintiff had alleged that his religion required group meditation and that he was restricted to solo practice, which the court held sufficient allegations of substantial burden.

i. Eleventh Circuit Cases

Lawrence v. Moore, 2009 WL 4884299 (S.D. Ala. Dec. 9, 2009)

Prisoner alleged failure to provide medical care; court denied motion to dismiss because “additional information is needed in order to resolve this claim.”

Preyer v. McNesby, 2009 WL 1605537 (N.D. Fla. June 5, 2009)

In § 1983 case concerning death of prisoner resulting from inadequate medical care, court rejected defendants’ arguments that plaintiff had failed to allege that the prisoner suffered from an objectively serious

medical need: “indeed, in light of the allegations made in the amended complaint, the court finds the argument offensive. . . . Plaintiff’s allegations easily are sufficient to establish the objective component of a claim of deliberate indifference.” Furthermore, “the amended complaint contains allegations reflecting an obvious need for treatment to which the defendant either responded in a cursory manner—effectively no response at all—or by delaying [the prisoner’s] receipt of necessary treatment which his medical records indicated he required and which he repeatedly requested.” The court observed that “[w]hile further development of the record is expected, at this pleading stage of the litigation the court finds the facts alleged are sufficient to permit the court to draw the reasonable inference that plaintiff has shown his entitlement to relief on the use of excessive force claim.”

Smith v. Dekalb County Sheriff’s Office, 2010 WL 308984 (N.D. Ga. 2010) (finding allegation of deprivation of law library insufficient – “The filing of this complaint in this Court belies any assertion that Plaintiff is being denied meaningful access to the courts.”)

j. D.C. Circuit Cases

Smith v. District of Columbia, 674 F.Supp.2d 209, 212-14 & n.2 (D.D.C. 2009) (allegation that municipality knew of systemic problems with referrals for off-site medical treatment of inmates and specialists care was conclusory)

“Ms. Smith’s complaint, and indeed the entire record, is devoid of any facts or allegations that the District of Columbia knew or should have known about Gilbert Smith’s supposed mistreatment. Nowhere does she allege that, for example, Gilbert Smith forwarded complaints or grievances about his treatment to the District of Columbia. . . . Although she alleges that ‘[o]n almost a daily basis, the deceased made requests for medical care, treatment, and attention,’ the Court cannot reasonably infer that these requests were made to or forwarded to the District. The District neither operated, nor provided medical care at, the Correctional Treatment Facility.”

“To be sure, the D.C. Circuit previously held that a plaintiff need only plead that a municipality ‘knew or should have known’ about the ongoing constitutional violations to sustain a claim for Monell liability predicated on deliberate indifference. . . . But Warren preceded Iqbal, and

must now be interpreted in light of that subsequent Supreme Court decision.”

Smith v. Corrections Corp. of America, Inc., 674 F.Supp.2d 201, 206, 207 (D.D.C. 2009)

Finding allegations of knowledge against CCA plausible – plaintiff alleged that “[o]n almost a daily basis, the deceased made requests for medical care, treatment, and attention including, but not limited to, providing medication ..., providing prompt and adequate dressing changes ..., providing of sanitary cell conditions ..., [and] providing of prompt transfers to medical facilities.” Although these allegations were also found implausible against the District of Columbia, the court found them plausible against CCA because CCA “operated the Correctional Treatment Facility. . . . And Ms. Smith’s allegation that CCA ‘failed to take reasonable actions to ensure that systemic problems were addressed,’ coupled with the absence of any indication that Gilbert Smith’s medical care and treatment improved during his incarceration, plausibly suggests that CCA failed to act in the face of its employees’ allegedly unconstitutional behavior.”

NOTES

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