IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED STATES OF AMERICA,	:	Civil Case No. C2-99-1097
Plaintiff,	:	JUDGE HOLSCHUH
CITY OF COLUMBUS, OHIO, et al.,	:	MAGISTRATE JUDGE KING
Defendants.	:	

MOTION FOR JUDGMENT ON PLEADINGS BY
THE FRATERNAL ORDER OF POLICE, CAPITAL CITY LODGE NO. 9

Defendant Fraternal Order of Police, Capital City Lodge No. 9 ("FOP") hereby moves for a judgment on the pleadings in favor of Defendants pursuant to Rule 12(c) of the Federal Rules of Civil Procedure. The FOP's Memorandum of Law in Support of Motion for Judgment on Pleadings is attached to and made a part of this Motion.

Respectfully submitted,

VORYS, SATER, SEYMOUR AND PEASE LLP

By: _____ Trial Attorney
James E. Phillips (0014542)

52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-5610

Trial Attorney for Defendant
Fraternal Order of Police,
Capital City Lodge No. 9

MEMORANDUM OF LAW OF FRATERNAL ORDER OF POLICE, CAPITAL CITY LODGE NO. 9, IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS

I. Introduction--The Complaint Fails To Allege The Culpability Of Or Causation By The City Of Columbus

The Department of Justice ("DOJ") is suing the City of Columbus (the "City"), not individual police officers. The Complaint alleges that the City "tolerated" the alleged misconduct of police officers by "failing to" take certain actions adequately(¶9). The Complaint does not allege that the City knew of a pattern or practice of violations of constitutional rights, does not allege that the City participated in a pattern or practice of violations of constitutional rights and does not allege that the City was the moving force in a pattern or practice of violations of constitutional rights.

Even if the allegations against the police officers were true—and they are not—the allegations in the Complaint against the City do not state a claim upon which relief can be granted.[1] Legislative history and judicial decisions interpreting the related statute, 42 U.S.C. §1983,[2] show that two of the necessary elements of a cause of action against a municipality under 42 USC §14141 are:

(1) the **municipality**, not simply some of its employees, **must be deliberately indifferent to the violation of constitutional rights**; and

---

[1] Rather than repeating them here, the Fraternal Order of Police, Capital City Lodge No. 9 (the "FOP") incorporates by reference the arguments of the City in its Motion to Dismiss.

(2) the **municipality**, not simply some of its employees, **must be the moving force behind the violation of constitutional rights.**

The Complaint does not allege facts supporting either of these necessary elements of a cause of action.

II. A Complaint Must Allege Facts Supporting Each Material Element Necessary For A Claim For Relief[3]

The Sixth Circuit has rejected the idea that a complaint only needs to put the opposing party on notice of the nature of a claim.[4] Veney v. Hogan, 70 F. 3d 917, 921 (6th Cir. 1995). In Veney, the Sixth Circuit said "[t]here is an unfortunate tendency in some quarters to overstate the liberality of the reform in pleading practice wrought by the adoption of Federal Rule of Civil Procedure 8." Id. Observing that "[s]ome appear to argue that one need only place the opposing party 'on notice'," the Sixth Circuit concluded that "in reality the rule envisions a 'statement of circumstances, occurrences, and events in support of the claim presented'. . . " Id. at 921-922 (emphasis added), not simply conclusory allegations.

A "complaint must contain either direct or inferential allegations with respect to all material elements necessary to sustain a recovery under some

---

[2] The FOP agrees with the City that for purposes of interpreting "pattern or practice" in §14141, cases interpreting the meaning of "pattern or practice" under Title VII are applicable.

[3] The defendant FOP is filing this Motion for Judgment on the Pleadings pursuant to Federal Rule 12(c). Since no matters outside the pleadings are raised, this "motion for judgment on the pleadings is treated like a motion to dismiss under Rule 12(b)(6)." Syncsort, Inc. v. Sequential Software, Inc., 50 F.Supp. 2d 318, 324 (D.N.J. 1999). The cases cited in this section therefore are cases involving motions to dismiss.

viable legal theory." (emphasis added). See Weiner v. Klais & Co., Inc., 108 F. 3d 86, 88 (6th Cir. 1997); Lewis v. ACB Bus. Servs., 135 F.3d 389, 406 (6th Cir. 1998); and Jackson v. City of Columbus, 194 F.3d 737, 755 (6th Cir. 1999). Vague allegations of "fact" or conclusory legal allegations are not sufficient to survive a motion to dismiss. For instance, in Kesterson v. Moritsugu, 1998 U.S. App. LEXIS 12182, **11-12 (6th Cir. 1998)(Exhibit A), the Sixth Circuit affirmed the district court's dismissal of the complaint, since the complaint made "only vague and conclusory allegations" with regard to defendants. The Sixth Circuit added that plaintiff "must allege that [defendant] took specific actions that constituted deliberate indifference rather than simply failure to treat or negligence. He has not done so." Id. at *12 (emphasis added). In Lewis v. ACB Bus. Servs., 135 F.3d at 408, the Sixth Circuit held that the allegation defendant was a "creditor" was a "bare legal conclusion", not a material allegation of fact.

In addition, "unwarranted factual inferences" do not constitute material allegations. McBride v. Village of Michiana, 1994 U.S. App. LEXIS 19679, *8 (6th Cir. 1994)(Exhibit B). For instance, in Jackson v. City of Columbus, 194 F.3d at 757, the Sixth Circuit said "Jackson has only made bare allegations that the publication of the report was motivated in part as a response to his intended speech. . . ." The Sixth Circuit added that the "lapse of time makes it unlikely that the report was published in response to his intended speech "and held that the

---

[4] The FOP agrees with the City that the Complaint in fact does not even put the Defendants on notice of what the claims of the DOJ are.

complaint did not state a cause of action for violation of the First Amendment." Id. at **45-46.

The next two sections of this Memorandum show that (1) cases interpreting 42 U.S.C. §1983 are the standard for determining the material elements for municipal liability under §14141, and (2) two of the material elements of a cause of action against a municipality under 42 U.S.C. §14141 are culpability of and causation by the municipality, rather than its employees. Section V of this Memorandum then shows that the Complaint does not allege material facts which satisfy either of these two elements, causation or culpability.[5]

III. Section 1983 Cases Are The Standard For Determining Whether There Has Been A Violation Of Rights By The Municipality Within The Meaning Of 42 U.S.C. §14141

Although there is no separate legislative history for the bill that was enacted and codified at 42 U.S.C. §14141 (Exhibit C), or judicial decisions interpreting 42 U.S.C. §14141, the legislative history of the predecessor bill to §14141 is instructive. That predecessor, section 1202(a)(1) of the Omnibus Crime Control Act of 1991, provided "[i]t shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law

---

[5] In its Motion to Dismiss, the City points out that the Complaint fails to allege facts to support two other elements: (1) the existence of a pattern or practice of violation of rights; and (2) the rights violation which form the pattern or practice must be constitutional rights. The FOP agrees with the City that the Complaint does not set forth allegations of fact which satisfy these two elements.

enforcement officers that deprives persons of rights, privileges or immunities, secured or protected by the Constitution or laws of the United States" (Exhibit D).[6] In explaining section 1202(a) of the Omnibus Crime Control Act of 1991, House Report 102-242 noted that the DOJ did not then have the right to sue police departments for injunctive relief for violating the constitutional rights of citizens and indicated Congress was simply trying to remedy "a serious and outdated gap in the federal scheme for protecting constitutional rights" (Exhibit E at 367).

The Omnibus Crime Control Act of 1991 would have given the Department of Justice such authority to sue for injunctive relief, not change the responsibilities of police departments. The House Report said:

> The Act does not increase the responsibilities of the police departments or impose any new standards of conduct on police officers. **The standards of conduct under the Act are the same as those under the Constitution, presently enforced in damage actions under section 1983.**

(Exhibit E at 368) (emphasis added). Given the identity in wording on this point, it is evident that section 1202(a)'s successor , 42 U.S.C. §14141, was not meant to expand the substantive scope of 42 U.S.C. §1983, but was simply meant to give the DOJ authority to sue for injunctive relief. As a result, §1983 cases are the

---

[6] The only change from § 1202(a) of the Omnibus Crime Control Act of 1991 to 42 USC §14141 was the addition of "or by officials or employees of any governmental agency with the responsibility for the administration of juvenile justice or the incarceration of juveniles" after "law enforcement officers" in §1202(a).

standard for determining the elements of municipal liability under §14141 for violations of constitutional rights by employees of the municipality.

IV. In Order To Be Liable, A Municipality , Not Its Employees, Must Be Deliberately Indifferent To The Rights Of Its Citizens and The Moving Force Behind The Violation of Rights

Before a municipality can be legally responsible for a violation of constitutional rights by its employees, a municipal policy must have caused the injury. In Canton v. Harris, 489 U.S. 378 (1989), an individual alleged that during her arrest the police officers improperly failed to summon necessary medical assistance. The fact that an employee of the city, a police officer, caused the injury and that the training program may have been negligently administered, did not establish municipal liability. The Supreme Court said "[n]either will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training ..." Id. at 391. The Supreme Court held that "the inadequacy of police training may serve as a basis for §1983 liability [of a municipality] only where the failure to train amounts to deliberate indifference to the rights of persons with whom police come into contact." Id. at 388 (emphasis added). In addition, the Supreme Court held that "respondent must still prove that the deficiency in training actually caused the police officer's indifference to her medical needs." Id. at 391 (emphasis added).

In Collins v. City of Harker Heights, 503 U.S. 115, 122 (1992), the Supreme Court held that it is "necessary to analyze whether execution of a municipal policy inflicted the injury in these cases because, unlike ordinary tort litigation,

the doctrine of *respondeat superior* was inapplicable." The Supreme Court added that a **municipality "is only liable when it can be fairly said that the city itself is the wrongdoer.**" Id. (emphasis added).

The Supreme Court affirmed the **distinction between municipal culpability and employee culpability** in Board of Commissioners v. Brown, 520 U.S. 397, 406-407 (1997). The Supreme Court said the fact that a plaintiff had "suffered a deprivation of federal rights at the hands of a municipal employee will not alone permit an inference of municipal culpability and causation; the plaintiff will simply have shown that the *employee acted culpably*" (emphasis added). The Supreme Court held that a municipality could not be found liable "unless *deliberate* action attributable to the municipality itself is the **'moving force'** behind the plaintiff's deprivation of federal rights." Id. at 400 (emphasis added), quoting Monell v. New York City Dept. of Social Services, 436 U.S. 658, 694 (1978). The Supreme Court in Brown also said that a plaintiff must demonstrate the municipal action was taken with the **deliberate indifference** to its consequences. 520 U.S. at 407.

The Sixth Circuit has applied the requirements of culpability and causation for municipal liability. In Berry v. City of Detroit, 25 F.3d 1342 (6th Cir. 1994), *cert. denied*, 513 U.S. 1111 (1995), a jury had awarded Doris Berry $6,000,000 for the death of her son, who had been shot by a Detroit police officer. The Sixth Circuit reversed, concluding that "in order for plaintiff to prevail, there must be sufficient evidence for the jury to conclude that the city's failure in this regard [failure to

discipline] amounted to deliberate indifference to the rights of its citizens. . . ." Id. at 1355 (emphasis added). The Sixth Circuit held that plaintiff's evidence had been insufficient to prove deliberate indifference. The Sixth Circuit also stated that "particularly when we deal with sins of omissions, as opposed to sins of commission, we should be certain that causal linkage is present that makes the omission the proximate cause of the wrong". Id. at 1348 (emphasis added).

The Fifth Circuit has also agreed that a condition for holding a city liable under §1983 for the actions of its employees is "culpability and causation." Snyder v. Trepagnier, 142 F.3d 791, 795 (5th Cir. 1998), cert. granted, 525 U.S. 1098, cert. dismissed, 119 S.Ct. 1493 (1999). In Snyder, the Fifth Circuit summarized: "First, the municipal policy must have been adopted with 'deliberate indifference' to its known or obvious consequences. Second, the municipality must be the 'moving force' behind the constitutional violation." Id. (emphasis added). The Fifth Circuit added that in a previous case it had "noted that mere negligence fell short of the 'deliberate indifference' standard and the '[i]n order for municipal liability to attach, plaintiffs must offer evidence of not simply a decision, but a 'decision by the city itself to violate the Constitution.'" Id. at 796 (citations omitted).

V. The Complaint Neither Alleges That The City of Columbus Is Deliberately Indifferent To The Rights of Citizens Nor That The City Is The Moving Force Behind Violations of Rights

The Complaint only alleges "facts" about the City of Columbus in the last sentence of paragraph 1 and in paragraph 9, and both parts of the Complaint

make the same conclusory allegation. The Complaint does not allege a municipal policy, but only alleges that the City has "tolerated" police misconduct by "failing": "to implement a policy on use of force that appropriately guides"; "to train officers adequately"; "to supervise CDP officers adequately"; "to monitor CDP officers adequately"; "to establish a procedure whereby citizen complaints are adequately investigated"; "to investigate adequately incidents in which a police officer uses lethal or non-lethal force"; "to fairly and adequately adjudicate or review citizen complaints"; and "to discipline adequately CDP officers who engage in misconduct."

Deliberate indifference means a "'deliberate' or 'conscious' choice by a municipality—a 'policy'". See Canton v. Harris, 489 US at 389. There is no allegation in the Complaint that the City was deliberately indifferent to violations by police officers of the rights of citizens.

Paragraph 9 of the Complaint does allege that the police "tolerated" the misconduct. However, toleration does not suggest a deliberate and conscious choice, but a lack of resistance. For instance, in Barcume v. City of Flint, 819 F.Supp 631, 655 (E.D.Mich. 1993), a §1983 action, the District Court concluded the City of Flint could be held liable if it "knew of, tolerated, and participated in the harassment," quoting Bohen v. East Chicago, 799 F2d 1180, 1189 (7th Cir. 1986). Toleration does not suggest knowledge or participation, and cannot be interpreted to mean deliberate indifference as defined in Canton v. Harris, 489 U.S. at 389, a deliberate or conscious choice-a policy- by a municipality.

In addition, the allegation in paragraph 9 of the Complaint is that the City "**tolerated**" police misconduct and "**failed to**" take certain actions adequately. However, an allegation that a municipality could have taken action to avoid an injury is not sufficient for municipal liability: In Canton v. Harris, 489 US at 391, the Supreme Court said "[n]either will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury - causing conduct." As the Sixth Circuit said in Berry v. City of Detroit, 25 F.3d at 1348, "when we deal with sins of omission. . . we should be certain the causal linkage is present that makes the omission the proximate cause of the wrong." (emphasis added)

There is no allegation in the Complaint that the City was the moving force behind the alleged misconduct. Indeed, since the Complaint alleges the City "tolerated" police misconduct by "failing to" take certain actions adequately, the only reasonable conclusion is something else was the moving force. There can be no municipal liability under 42 U.S.C. §14141 based on an allegation of toleration and failure to act.

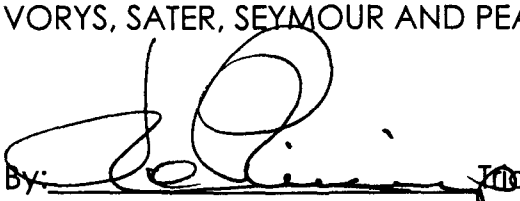
VI. Conclusion

The Complaint does not allege the City is deliberately indifferent to violations of the constitutional rights of citizens. The Complaint also does not allege the City is the moving force behind violations of rights. Since municipal culpability and causation are two material elements of a cause of action against a municipality under 42 USC § 14141, the Complaint fails to allege facts

upon which relief could be granted. This Court should therefore dismiss the Complaint.

Respectfully submitted,

VORYS, SATER, SEYMOUR AND PEASE LLP



By: _____ Trial Attorney
James E. Phillips (0014542)

52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-5610

Trial Attorney for Applicant
Fraternal Order of Police,
Capital City Lodge No. 9

OF COUNSEL:

John J. Kulewicz (0008376)
Douglas L. Rogers (0008125)
VORYS, SATER, SEYMOUR AND PEASE LLP
52 East Gay Street
P.O. Box 1008
Columbus, Ohio 43216-1008
(614) 464-6400

Attorneys for Applicant
Fraternal Order of Police,
Capital City Lodge No. 9

CERTIFICATE OF SERVICE

I served a copy of this Motion for Judgment on Pleadings and Memorandum of Law in Support upon Mark Masling, Steven H. Rosenbaum and Mark A. Posner, Special Litigation Section, Civil Rights Division, United States Department of Justice, P.O. Box 66400, Washington, D.C. 20035-6400; Sharon J. Zealey, United States Attorney, Two Nationwide Plaza, 280 North High Street, Columbus, Ohio 43215; Glenn B. Redick, Chief Litigation Attorney, Timothy J. Mangan, Senior Litigation Attorney, and Andrea Peeples, Assistant City Attorney, Office of the Columbus City Attorney, 90 West Broad Street, Columbus, Ohio 43215; by first-class U.S. mail on February 18, 2000.

Douglas L. Rogers (0008126)

*1998 U.S. App. LEXIS 12182, **

PAUL KESTERSON, Plaintiff-Appellant, v. DR. KENNETH MORITSUGU, et al., Defendants-Appellees.

No. 96-5898

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1998 U.S. App. LEXIS 12182

June 3, 1998, Filed

NOTICE: [*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

SUBSEQUENT HISTORY: Reported in Table Case Format at: 1998 U.S. App. LEXIS 22729.

PRIOR HISTORY: ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY. 96-00248. Forester. 6-21-96.

DISPOSITION: AFFIRMED.

CORE TERMS: heightened, notice, motion to dismiss, Federal Rules, pleading requirement, municipalities, specificity, withdraw, deliberate indifference, filing fee, pro se, deliberately, prisoner, medications, lawsuit, Federal Rules Of Civil Procedure, specialist, recommendation, injunctive relief, prescribed, discovery, motion to withdraw, survive, suffice, legislative process, rulemaking, wheelchair, sufficient to satisfy, construed liberally, qualified immunity

COUNSEL: PAUL C. KESTERSON, Plaintiff - Appellant, Pro se, Lexington, KY.

For KENNETH MORTISUGU, Dr., RAMIREZ, Dr., HARRELL, PAYNE, LOWELL DERTINGER, Dr., Defendants - Appellees: Joseph L. Famularo, U.S. Attorney, Shelley Darrell Chatfield, Office of the U.S. Attorney, Lexington, KY.

JUDGES: Before: BOGGS, NORRIS, and MOORE, Circuit Judges. KAREN NELSON MOORE, Circuit Judge, Dissenting.

OPINIONBY: BOGGS

OPINION: BOGGS, Circuit Judge. Paul Kesterson appeals the district court's dismissal, without prejudice, of his complaint asserting a claim of medical deliberate indifference under the Eighth Amendment. We affirm, because Kesterson's pleadings are insufficient to state a claim.

I

A

Kesterson claims to suffer from a degenerated spinal column, [*2] ruptured discs, cancerous bone disease, facet disease, arthritis, bursitis, spurs on the spine, impingement, asthma, gout, ulcers, stomach disease, migraines, sinus blockage, and nerve and anxiety disorders. He is currently an inmate at a federal medical center (FMC) in Lexington, Kentucky.

In May 1996, Kesterson filed a complaint seeking compensatory and punitive damages, and declaratory and injunctive relief. He claimed that FMC was understaffed and alleged that some of the doctors were not properly trained or certified. He said that he had been denied "specialist prescribed treatments" and "continued to be denied adequate medications to prevent pain and suffering," while given "useless and dangerous medications" that caused pain, suffering, and other side effects. He asserted that he had been denied adequate dental treatment, which left him unable to chew. He claimed that the defendants were engaged in a conspiracy to tamper with his medical records and falsify evaluations to "cover-up and manipulate" his treatment. Finally, Kesterson alleged that he was denied access to a wheelchair that he needed.

Kesterson named five defendants in their personal and official capacities, and [*3] added John/Jane Doe defendants to be named after discovery. The first four defendants -- Dr. Kenneth Moritsugu n1 (Acting Medical Director of the Bureau of Prisons); Associate Warden Harrell (director of FMC); Hospital Administrator Payne (medical administrator of FMC); and Dr. Richard Ramirez (clinical director at FMC) -- were named because they allegedly had full knowledge of conditions at FMC but "failed to enforce the appropriate laws, rules regulations, and policies." In addition, Kesterson alleged, Harrell failed to train the staff properly; Payne overrode various treatment orders for Kesterson; and Ramirez restricted Kesterson's treatment. The failures by Ramirez and Payne were allegedly deliberate.

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n1 Although Moritsugu's name is spelled "Mortisugu" throughout the record, that is incorrect. The spelling of Moritsugu's name is corrected in the rest of this opinion, including direct quotations, without note.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

The final named defendant, Dr. Lowell Dertinger, was Kesterson's primary-care physician at FMC. [*4] Kesterson alleged that Dertinger was "illegally practicing medicine under restrictions by . . . Ramirez"; that Dertinger failed to treat Kesterson properly; and that Dertinger failed to report the wrongs committed by other defendants (including, presumably, the Does).

Kesterson sued under five theories, two of which are relevant on appeal. In the first, he alleged a violation of his Eighth Amendment rights, by deliberate indifference to his medical condition. Second, Kesterson sought injunctive relief to guarantee proper medical treatment and prevent retaliation. Because the defendants were federal officials, Kesterson's federal constitutional claims were brought pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971).

B

The case was assigned to a magistrate judge for initial consideration, pursuant to 28 U.S.C. § 636(b). The magistrate judge granted Kesterson's motion for pauper status. Following the procedures of 28 U.S.C. § 1915(b) (recently amended pursuant to the Prison Litigation Reform Act (PLRA)), the magistrate judge required Kesterson to pay the full filing fee of $ 120, with an initial partial payment of [*5] $ 10.60 (20% of the six-month average of Kesterson's institutional account balance), and the remainder to be paid by taking money from Kesterson's account each time its balance exceeded $ 10.

In June 1996, the magistrate judge recommended dismissal of the case without prejudice, pursuant to 28 U.S.C. § 1915(e)(2)(B)(ii), which requires the court to dismiss a pauper petition when the court determines that it fails to state a claim on which relief can be granted. The reasons for dismissal were two-fold. First, Kesterson did not sufficiently allege personal involvement by the named defendants -- instead he offered only "bare and conclusory allegations," "did not allege that the[] defendants' conduct caused him to be deprived of any constitutional right," and did not show that any defendant deliberately chose or affirmatively adopted the allegedly problematic policies, customs, and practices.

Second, the pleadings were insufficiently specific, not providing a factual basis sufficient to apprise the defendants of the nature of the allegations against them. Because these flaws in the pleadings meant that Kesterson had no likelihood of success on the merits, the magistrate judge also [*6] recommended

dismissing the claim for preliminary injunctive relief.

Kesterson objected to the magistrate judge's report and recommendation. First, he objected to the filing fee determination. Then, with regard to the recommendation of dismissal, Kesterson challenged the magistrate judge's use of 28 U.S.C. § 1915(e)(2), which he said did not exist, apparently because he did not (or could not) consult the relevant pocket part. The rest of Kesterson's objections essentially reargued his complaint, and said that the complaint was adequate to meet the minimal pleading requirements. He also leveled a broad attack on the magistrate judge's treatment of his complaint, given his *pro se* status.

On June 21, the district court accepted the magistrate judge's recommendation and rejected Kesterson's objections, after a de novo review but without elaboration. Kesterson's case was thus dismissed, without prejudice. Kesterson filed this timely appeal.

C

In February 1997, Kesterson filed a motion with this court for injunctive relief. We have the power to grant such an injunction, pursuant to 28 U.S.C. § 1651, to prevent irreparable harm to a party during the pendency of an appeal. *See Melamed [*7] v. ITT Continental Baking Co.*, 592 F.2d 290, 296 (6th Cir. 1979); *Eastern Greyhound Lines v. Fusco*, 310 F.2d 632, 634 (6th Cir. 1962). Kesterson claimed, as he had below, that he was suffering from pain, to which the defendants were deliberately indifferent.

In August, Kesterson sent the clerk of this court a letter that reads as follows (typographical errors corrected):

> I would like to withdraw my appeal . . . and have it remanded back to the District Court, due to the decision of the Sixth Circuit, on Hampton vs. Hobbs, 106 F.3d 1281 (6th Cir. 1997). Which prisoner has to pay for filing fee. I would like it to be sent as soon as possible for to be able to get a stay of order, for my health is in jeopardy, of harms way.

Hampton was a decision by this court in February 1997 that upheld the filing fee requirements of the PLRA. As with Kesterson's motion for injunctive relief, we have not acted on this request.

II

On appeal, Kesterson complains that the PLRA makes it impossible for him to pursue his lawsuit. He also contends that the district court did not review the magistrate judge's recommendation de novo, as evidenced by its refusal to address any [*8] of his complaints. Finally, he argues that his complaint does in fact state a claim under which relief could be granted.

A

Kesterson's arguments regarding the unfairness of the PLRA -- which requires him to pay for this litigation -- were mooted by *Hampton*, as Kesterson noted in his August letter. Therefore, Kesterson's claims regarding both his fees and costs cannot prevail, and we affirm the district court's handling of Kesterson's pauper status.

As for the August letter itself, there is no basis for us both to allow Kesterson to withdraw his appeal, *and* to remand the case back to the district court. His request appears to us to be an attempt to evade his filing fee requirements. Since it is within our discretion to dismiss an appeal, *see* FED. R. APP. P. 4(b), we will not do so.

If Kesterson had simply asked us to dismiss his appeal, we would no doubt have accommodated him. However, he did not do so, for obvious reasons. A withdrawal of the appeal would mean that the result below stands, and Kesterson's complaint would be dismissed without prejudice. If Kesterson wanted to pursue his

claims further (and his letter indicates that he does), he would have to pay another [*9] filing fee. By contrast, if we dismiss the appeal *and* remand the case (an act for which our authority is unclear), Kesterson would have a live case in the district court without having to pay another filing fee. Indeed, Kesterson's letter seems to say as much -- that he wants the appeal dismissed because *Hampton* requires him to pay his fees. n2

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n2 Furthermore, while *Hampton* does moot part of his appeal on the merits, it leaves the other part (which we discuss below) intact.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Looking at this another way, if we ignore Kesterson's request for a remand and construe his letter (as the dissent does) as an unambiguous request to dismiss the appeal, he will be in exactly the same position as in his worst-case scenario (*i.e.*, we reach the merits and affirm the district court). The *only* potential purpose served by a dismissal is to save Kesterson a fee, and the only way this end is achieved is if we perform a remand of uncertain basis.

Therefore, as this is not a proper motion to withdraw an appeal, [*10] we will consider the appeal on its merits.

B

As a preliminary matter, contrary to Kesterson's suggestion on appeal, the district court is not required to address specifically each of the arguments raised by Kesterson in his objections to the magistrate judge's recommendation. It suffices for the district court to note that the review has been de novo. *Tuggle v. Seabold*, 806 F.2d 87, 92-93 (6th Cir. 1986). Furthermore, since our own review is de novo, *McGore*, 114 F.3d 601, 604, it is unlikely that the failure by the district court to perform a de novo review would constitute harmful error. Therefore, the only issue for this court to address is the sufficiency of Kesterson's complaint.

The district court held that Kesterson did not allege personal involvement by the defendants. That is, he did not allege that particular defendants performed the acts that resulted in a deprivation of Kesterson's constitutional rights. This is a requirement in *Bivens* actions such as this one. *See* *Rizzo v. Goode*, 423 U.S. 362, 375-76, 46 L. Ed. 2d 561, 96 S. Ct. 598 (1976); *Bivens*, 403 U.S. at 390 n.2; *Williams v. Mehra*, 135 F.3d 1105, 1114 (6th Cir. 1998). The court also held that [*11] Kesterson's allegations were not specific enough to constitute a definite constitutional violation.

We affirm on this basis with regard to all of the defendants, though we pause to consider the allegations against Dr. Dertinger in more detail. The complaint makes only vague and conclusory allegations with regard to "defendants," but it does allege specifically that Dertinger is "failing to treat plaintiff according to accepted professional medical judgment."

These allegations still do not suffice. Kesterson's complaint can be taken to allege poor, inadequate, or negligent treatment, but not the intentional lack of treatment necessary to support a deliberate indifference claim. *See* *Estelle*, 429 U.S. 97, 106, 50 L. Ed. 2d 251, 97 S. Ct. 285 ("Medical malpractice does not become a constitutional violation merely because the victim is a prisoner. In order to state a cognizable claim, a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs."). Therefore, Kesterson cannot prevail simply by alleging that his condition has worsened, that the "defendants" have "acted in deliberate indifference," and that Dertinger has failed to treat him properly. Instead, [*12] he must allege that Dertinger took specific actions that constituted deliberate indifference rather than simply failure to treat or negligence. He has not done so.

The dissent contends that we "apply a heightened pleading standard." Diss. Op. at 1. While we understand the dissent to disagree with the result we reach, the standard we use is not different from the law of this circuit or "heightened" in any way. The rules we have cited above are well-settled, and require that Kesterson allege that a specific defendant performed a specific act that suffices to state a claim. He has not

done so. The dissent has not cited any authority, binding or otherwise, to indicate that the particular facts of this case require a different result.

C

Because the district court correctly dismissed Kesterson's complaint without prejudice, leaving him free to seek relief in district court through the allegation of sufficient facts, we dismiss all of Kesterson's outstanding motions to this court as moot.

III

Based on the foregoing, we AFFIRM the district court's dismissal without prejudice of Kesterson's claim.

DISSENTBY: KAREN NELSON MOORE

DISSENT: KAREN NELSON MOORE, Circuit Judge, Dissenting. Because [*13] my colleagues in the majority improvidently exercise jurisdiction and improperly apply a heightened pleading standard in this case, I must respectfully dissent.

I. Withdrawal of Kesterson's Appeal

The majority holds that Kesterson's August letter provides "no basis for us both to allow Kesterson to withdraw his appeal, and to remand the case back to the district court . . . . As this is not a proper motion to withdraw an appeal, we will consider the appeal on the merits." *Slip op.* at 6 (citation omitted). On the contrary, while Kesterson's August letter lacks the indicia of a lawyer-drafted motion, nevertheless, it is a proper motion for withdrawal. His letter plainly requested this court to allow him to withdraw his appeal. *See* Letter from Kesterson to Leonard Green, Clerk of Court, of 8/29/97.

Rule 42(b) of the Federal Rules of Appellate Procedure provides: "An appeal may be dismissed on motion of the appellant upon such terms as may be agreed upon by the parties or fixed by the court." Rule 42(b) gives us broad discretion to grant an appellant's motion to withdraw, and absent unusual circumstances, we will normally grant the motion. *See, e.g.*, CHARLES [*14] ALAN WRIGHT, ARTHUR R. MILLER, AND EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3988 (2d ed. 1996) ("A motion by the appellant to dismiss under Rule 42(b) is generally granted, but may be denied in the interest of justice or fairness.") (internal quotation omitted). *See also* Ormsby Motors, Inc. v. General Motors Corp., 32 F.3d 240, 241 (7th Cir. 1994) ("Rule 42(b) authorizes the court of appeals to dismiss an appeal upon the request of the appellant, subject to appropriate conditions fixed by the court."); HCA Health Servs. of Virginia v. Metropolitan Life Ins. Co., 957 F.2d 120, 123 (4th Cir. 1992) ("An appellant's motion to voluntarily dismiss its own appeal is generally granted, although courts of appeal have the discretionary authority not to dismiss the case in appropriate circumstances.") In re Memorial Hosp. of Iowa County, Inc., 862 F.2d 1299, 1303 (7th Cir. 1988) ("An appellant may withdraw its appeal at any time.").

As the foregoing case law demonstrates, an appellant's motion to withdraw his appeal is normally granted unless circumstances dictate otherwise, such as when it would be unjust or unfair to do so. Circumstances in which courts have denied an [*15] appellant's motion to withdraw his appeal include the following: Township of Benton v. County of Berrien, 570 F.2d 114, 118-19 (6th Cir. 978) (denying motion to dismiss filed by one of two appellants because dismissal "would be a meaningless gesture," where both appellants pressed same arguments, and both would be affected by decision); Blount v. State Bank & Trust Co., 425 F.2d 266, 266 (4th Cir. 1970) (denying appellant's motion to dismiss, but granting appellee's because appellant violated briefing schedule and caused appellee to incur "trouble and expense" and to file motion to dismiss); Local 53, Int'l Ass'n of Heat and Frost Insulators v. Vogler, 407 F.2d 1047, 1055 (5th Cir. 1969) (denying motion and affirming on the merits because motion to dismiss was based on unsound argument that appeal from injunction was moot since appellant was voluntarily refraining from enjoined conduct).

In the present case, no circumstances present themselves which would compel this court to deny Kesterson's motion to dismiss. Even the majority recognizes that "[a] withdrawal of the appeal would mean that the result below stands, and Kesterson's complaint would be dismissed without [*16] prejudice." *Slip op.* at 6.

(5) $1,000,000 for fiscal year 2000.

(Pub.L. 103–322, Title XXI, § 210306, Sept. 13, 1994, 108 Stat. 2071.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1994 Acts. House Report Nos. 103–324 and 103–489, and House Conference Report No. 103–711, see 1994 U.S. Code Cong. and Adm. News, p. 1801.

LIBRARY REFERENCES

American Digest System

Appropriation of federal funds, see United States ⇐85.

Encyclopedias

Appropriation of federal funds, see C.J.S. United States § 123.

WESTLAW ELECTRONIC RESEARCH

United States cases: 393k[add key number].
See, also, WESTLAW guide following the Explanation pages of this volume.

PART B—POLICE PATTERN OR PRACTICE

§ 14141. Cause of action

(a) Unlawful conduct

It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers or by officials or employees of any governmental agency with responsibility for the administration of juvenile justice or the incarceration of juveniles that deprives persons of rights, privileges, or immunities secured or protected by the Constitution or laws of the United States.

(b) Civil action by Attorney General

Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.

(Pub.L. 103–322, Title XXI, § 210401, Sept. 13, 1994, 108 Stat. 2071.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports 1994 Acts. House Report Nos. 103–324 and 103–489, and House Conference Report No. 103–711, see 1994 U.S. Code Cong. and Adm. News, p. 1801.

The majority further acknowledges that Kesterson could refile his complaint at any time, even during the pendency of this appeal. *Id.* Accordingly, to the extent that Kesterson can refile his complaint, because it was dismissed without prejudice, there is no injustice or unfairness to the appellees in allowing Kesterson to withdraw his appeal. In the absence of any injustice or unfairness to the appellees, we should grant his motion to withdraw his appeal.

II. Merits of Kesterson's Appeal

Even if it were appropriate for us to reach the merits of this appeal, I would hold that Kesterson's complaint survives the defendants' motion to dismiss. We review de novo the district court's granting of a motion to dismiss. *Barrett v. Harrington*, 130 F.3d 246, 251 (6th Cir. 1997), *cert. denied*, __ U.S. __, 140 L. Ed. 2d 670, 118 S. Ct. 1517 (1998). The court must construe the complaint in a light most favorable to the plaintiff, accept all the factual allegations as true, and determine whether the plaintiff undoubtedly can prove no set of facts in support of his claims that would entitle him to relief. *See id.* In order [*17] to satisfy this standard, in the Eighth Amendment context involving medical mistreatment, "a prisoner must allege acts or omissions sufficiently harmful to evidence deliberate indifference to serious medical needs." *Estelle v. Gamble*, 429 U.S. 97, 106, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976). A prison official is deliberately indifferent when "the official knows of and disregards an excessive risk to inmate health or safety; the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference." *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 1979, 128 L. Ed. 2d 811 (1994).

The following paragraphs of Kesterson's complaint meet the preceding requirements:

> P 19 alleges that Kesterson "continues to be denied specialist prescribed treatments"; P 25 alleges that "defendants . . . deliberately override evaluating physician prescriptions of treatments and medications and physicians are regularly restricted by the FMC medical administration . . . ."; P 29 alleges that "defendants knowing that plaintiff cannot masicate [sic] food have and continue to deprive plaintiff [*18] of adequate dental treatment, which continues to cause plaintiff pain, suffering and emotional distress"; P 30 alleges that the defendants "have tampered with plaintiff's medical records to cover-up and manipulate specialist prescribed treatments and treatments attempted to be ordered by various FMC physicians"; P 33 charges that "defendants, knowing that plaintiff needs a wheelchair at times, deliberately refuse to provide plaintiff with a wheelchair . . . ."; P 38 charges that "defendant Dertinger has full knowledge that defendants are . . . restricting plaintiff's needed treatments . . . ."; P 40 charges that "contrary to plaintiff's medical history, defendants have and continue to refuse to provide plaintiff with adequate sleep and stress medications . . . ."; P 42 charges that "plaintiff, has and continues to be subject to long delays to adequate medical treatment, specialists to fully treat his condition and medications necessary to prolong life and to prevent pain and suffering . . . ."

J.A. at 11-16 (Compl.).

Although the complaint does not read with the sophistication and nuance that one would expect from an attorney-draftsman, a pro se litigant need not meet that [*19] level of technical proficiency in order to survive a motion to dismiss. It is well settled that courts construe pro se complaints liberally, ensuring that those complaints satisfy the "notice pleading" requirement of Rule 8(a)(2) of the Federal Rules of Civil Procedure, and no more. *See, e.g., Haines v. Kerner*, 404 U.S. 519, 520, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972) (holding that pro se complaints are construed liberally); *Jourdan v. Jabe*, 951 F.2d 108, 110 (6th Cir. 1991) ("Allegations of a complaint drafted by a pro se litigant are held to less stringent standards than formal pleadings drafted by lawyers in the sense that a pro se complaint will be liberally construed in determining whether it fails to state a claim upon which relief could be granted.") (citing *Estelle v. Gamble*, 429 U.S. 97, 106, 50 L. Ed. 2d 251, 97 S. Ct. 285 (1976)); *Vector Research, Inc. v. Howard & Howard Attorneys P.C.*, 76 F.3d 692, 697 (6th Cir. 1996) ("Under the liberal federal system of notice pleading, all that a plaintiff must do in a complaint is give a defendant fair notice of what the plaintiff's claim is and the

grounds upon which it rests.'") (quoting Conley v. Gibson, 355 U.S. [*20] 41, 47, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957)). Based on the foregoing standards, the allegations in Kesterson's complaint, construed liberally, provide the defendants with fair notice of his claims and the grounds upon which they rest sufficient to satisfy the notice pleading requirement.

Granted, with the exception of P 38 specifically naming Dertinger, several of the other paragraphs of Kesterson's complaint reference the "defendants" collectively. However, in PP 6-10, Kesterson describes who each defendant is and why he is suing that defendant. As a result, although he subsequently references the defendants collectively, construing his pro se complaint liberally as the case law requires, reading the substance of each allegation in connection with a reference to PP 6-10 provides each defendant with notice of his alleged wrongdoing sufficient to satisfy Rule 8(a)(2).

For example, P 19 alleges that Kesterson "continues to be denied specialist prescribed treatments . . . ." J.A. at 11-12. Kesterson has sued Defendant-Appellee Dr. Richard Ramirez, Clinical Director at the Lexington Medical Center, "for his reckless and deliberate restrictions upon evaluating physicians and specialists [*21] prescribed treatments." J.A. at 9 (P 9 of Kesterson's Compl.). Similarly, P 25 alleges that "defendants . . . deliberately override evaluating physician prescriptions of treatments and medications and physicians are regularly restricted by the FMC medical administration . . . ." J.A. at 13. Kesterson has sued Defendant-Appellee Payne, the Hospital Administrator at the Lexington Medical Center, "for overriding Doctors orders of treatments and medications." J.A. at 8 (P 8 of Kesterson's Compl.). Additionally, in PP 29 and 33, Kesterson alleges that the defendants have knowingly and deliberately withheld dental care and a wheelchair, and he has sued Dr. Ramirez "for his deliberate failure to provide plaintiff medical treatment. . . ." J.A. at 9 (P 9 of Kesterson's Compl.). These examples demonstrate that Kesterson's complaint, read in its entirety, provides each defendant with notice of his wrongdoing sufficient to satisfy the notice pleading requirements of Rule 8 (a)(2).

Despite Kesterson's satisfying the notice pleading requirements of Rule 8(a)(2), the majority holds that Kesterson did not plead with adequate specificity in order to survive the defendants' motion to dismiss. *Slip* [*22] *op.* at 7. In so doing, the majority effectively applies a heightened pleading requirement to Kesterson's complaint. n3 In Chapman v. City of Detroit, 808 F.2d 459, 465 (6th Cir. 1986), and Nuclear Transp. & Storage, Inc. v. United States, 890 F.2d 1348, 1354-55 (6th Cir. 1989), *cert. denied*, 494 U.S. 1079, 108 L. Ed. 2d 938, 110 S. Ct. 1807 (1990), this court held plaintiffs' complaints to a heightened pleading standard in actions under 42 U.S.C. § 1983 and *Bivens*. This heightened pleading standard required plaintiffs to plead with "greater specificity" allegations made against governmental officials who are entitled to assert the defense of qualified immunity. *Nuclear Transp. & Storage, Inc.* at 1355. This court explained the rationale for this requirement as follows:

> There is a sound reason for requiring that a civil rights action against a government official or employee state a claim in terms of facts rather than conclusions. When a government employee is sued, if no factual allegations are made, discovery and perhaps even trial may be required to demonstrate that the claim has no merit. Such activities require the government defendant and others such [*23] as government attorneys involved in defense of the claim to divert their attention from their usual activities and to become involved in the litigation to the neglect of their assigned duties.

Id. (quoting Chapman, 808 F.2d at 465).

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n3 The majority contends that "the rules [it has] cited above are well-settled, and require that Kesterson allege that a specific defendant performed a specific act that suffices to state a claim." *Slip op.* at 8. In support of that proposition, the majority cites Rizzo v. Goode, 423 U.S. 362, 375-76, 46 L. Ed. 2d 561, 96 S. Ct. 598 (1976); Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 390 n.2, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (1971); and Williams v. Mehra, 135 F.3d 1105, 1114 (6th Cir. 1998),

reh'g en banc granted. Slip op. at 7. None of these cases provides any support for the majority's view that to survive a motion to dismiss, a plaintiff must specify which defendants committed which acts. The majority's citations to *Rizzo* and *Bivens* appear to address the issue of named versus unnamed defendants in the complaint as opposed to requiring the plaintiff to name the specific acts committed by specific defendants. *Williams*, a case in which this court recently granted en banc review, addressed whether the particular defendant's conduct manifested deliberate indifference. Thus, these cases fail to support the majority's specificity requirement.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - [*24]

In Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163, 122 L. Ed. 2d 517, 113 S. Ct. 1160 (1993), the Supreme Court rejected heightened pleading requirements in lawsuits against municipalities. In so doing the Court explained that "We think it *impossible* to square the 'heightened pleading standard' . . . with the liberal system of 'notice pleading' set up by the Federal Rules. Rule 8(a)(2) requires that a complaint include only 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Id.* at 168 (emphasis added) (citation omitted). Further, to emphasize its point, the Court quoted its opinion in

> Conley v. Gibson, 355 U.S. 41, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957):
> The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'

Id. (quoting Conley, 355 U.S. at 47).

In rejecting the heightened pleading requirement, at least [*25] with respect to actions against municipalities, the Court noted that Rule 9(b) of the Federal Rules of Civil Procedure

> does impose a particularity requirement in two specific instances. It provides that 'in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.' Thus, the Federal Rules do address in Rule 9(b) the question of the need for greater particularity in pleading certain actions, but do not include among the enumerated actions any reference to complaints alleging municipal liability under § 1983. *Expressio unius est exclusio alterius.*

Leatherman, 507 U.S. at 168.

In noting that Rule 9(b) did not provide for heightened pleading requirements in § 1983 actions against municipalities, the Court rejected the idea of including such a requirement via judicial interpretation rather than through Congressional amendment of the Federal Rules. Specifically the Court reasoned that

> perhaps if Rule 8 and 9 were rewritten today, claims against municipalities under § 1983 might be subjected to the added specificity requirement of Rule 9(b). But that is a result which must be obtained by the process [*26] of amending the Federal Rules, and not by judicial interpretation. In the absence of such an amendment, federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later.

Id. at 168-69.

Although the Supreme Court limited its holding in *Leatherman* to lawsuits against municipalities, its

reasoning in *Leatherman* applies with equal force to lawsuits against government officials. n4 As with lawsuits against municipalities, it is equally "impossible" to square a heightened pleading requirement with Rule 8(a)(2)'s notice pleading standard in lawsuits against government officials. Similarly, just as Rule 9(b) does not provide any specificity requirement for actions against municipalities, neither does it provide any such requirement for *Bivens* actions against federal officials. Finally, to the extent that such a heightened pleading standard is desirable, it should be imposed via Congressional amendment to the Federal Rules rather than through judicial interpretation. n5

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n4 The *Leatherman* court reserved the question of "whether our qualified immunity jurisprudence would require a heightened pleading in cases involving individual government officials." *Leatherman*, 507 U.S. at 167. [*27]

n5 In a post-Leatherman case, *Vaughn v. United States Small Bus. Admin.*, 82 F.3d 684, 685 (6th Cir. 1996), this court seemed to leave open the question of whether heightened pleading applies to lawsuits against individual government officials after *Leatherman*: "We need not here decide whether that standard, condemned in actions against municipalities, applies to suits alleging the personal liability of public employees; this issue was left open in *Leatherman*."

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Building on its holding in *Leatherman*, in *Crawford-El v. Britton*, U.S. , 140 L. Ed. 2d 759, 1998 WL 213193 (1998), the Supreme Court again signaled its displeasure with lower courts imposing heightened standards upon civil rights plaintiffs. In *Crawford-El*, a litigious and outspoken prisoner in the District of Columbia correctional system was transferred to several out-of-state prisons to relieve overcrowding. Each move necessitated the transfer of his personal property to his new location. In connection with one such move, the prisoner did not receive his belongings for several months. As a result, the [*28] prisoner sued various District of Columbia correctional officials under 42 U.S.C. § 1983 alleging that they intentionally diverted his property in retaliation for exercising his First Amendment rights. The district court dismissed the complaint. In remanding, the D.C. Circuit, sitting en banc, held that in an unconstitutional-motive case, a plaintiff must establish motive by clear and convincing evidence. The Supreme Court reversed, holding that the court of appeals erred in fashioning a heightened burden of proof for unconstitutional-motive cases against public officials.

In support of its holding, as in *Leatherman*, the Supreme Court explained that federal courts cannot simply, *sua sponte*, impose heightened standards on civil rights plaintiffs. If such heightened standards are desirable, those standards must be imposed through the rulemaking or legislative process.

> Without such precedential grounding, for the courts of appeals or this Court to change the burden of proof for an entire category of claims would stray far from the traditional limits on judicial authority.
>
> Neither the text of § 1983 or any other federal statute, nor the Federal Rules of Civil Procedure, [*29] provides any support for imposing the clear and convincing burden of proof on plaintiffs either at the summary judgment stage or in the trial itself.
>
> ****
>
> To the extent that the court was concerned with this procedural issue [*i.e.*, the court's desire to reduce discovery in cases involving officials' motives] our 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.

Id. at *12.

The Court observed that it had rejected previously "invitations to revise established rules that are separate from the qualified immunity defense." *Id.* Specifically, the Court has "refused to change the Federal Rules governing pleading by requiring the plaintiff to anticipate the immunity defense, or requiring pleadings of heightened specificity in cases alleging municipal liability." *Id.* (citations omitted). Instead, absent a change instituted by the rulemaking or legislative process, the district court may require specificity in a plaintiff's allegations by ordering the plaintiff to file a reply to the defendant's answer under Rule 7(a) [*30] of the Federal Rules of Civil Procedure, or by granting the defendant's motion for a more definite statement under Rule 12(e) of the Federal Rules. *Id.* at 14.

As with the reasoning in *Leatherman*, the reasoning in *Crawford-El* applies with equal force to the present case. First, neither the *Bivens* decision or any federal statute, not the Federal Rules of Civil Procedure, provides any support for imposing a heightened pleading requirement. Moreover, if such a requirement is desirable it ought to be implemented through the rulemaking or legislative process rather than through judicial fiat. Finally, in the interim, any need for further specificity can be enforced via Rules 7(a) or 12(e).

Leatherman and *Crawford-El* signal the Supreme Court's displeasure with lower courts placing heightened burdens on civil rights plaintiffs in the absence of any support in the rules or statutes for so doing. As the *Leatherman* court reasoned, such a heightened pleading requirement is incompatible with the notice pleading requirement of Rule 8(a)(2). Kesterson's complaint, construed liberally as we must, contains sufficiently specific allegations to satisfy Rule 8(a)(2)'s notice [*31] pleading requirement. Because the majority improperly exercised jurisdiction in order to impose inappropriately a pleading standard higher than the one required by Rule 8(a)(2), I respectfully dissent.

1ST DOCUMENT of Level 1 printed in FULL format.

FULL TEXT OF BILLS

102ND CONGRESS; 1ST SESSION
IN THE SENATE OF THE UNITED STATES
AS PLACED ON THE SENATE CALENDAR

H. R. 3371

1991 H.R. 3371; 102 H.R. 3371

<=1> Retrieve Bill Tracking Report

SYNOPSIS:
AN ACT To control and prevent crime.

DATE OF INTRODUCTION: OCTOBER 31, 1991

DATE OF VERSION: NOVEMBER 20, 1991 -- VERSION: 6

SPONSOR(S):
Sponsor not included in this printed version.

TEXT:

NOVEMBER 19, 1991
Read the second time and placed on the calendar
Calendar No. 335

102D CONGRESS
1ST SESSION

H. R. 3371

IN THE SENATE OF THE UNITED STATES

OCTOBER 31 (legislative day, OCTOBER 29), 1991
Received

NOVEMBER 19 (legislative day, NOVEMBER 13), 1991
Read the first time

NOVEMBER 19, 1991
Read the second time and placed on the calendar

AN ACT
To control and prevent crime.

* Be it enacted by the Senate and House of Representatives of the United*

*States of America in Congress assembled, *

SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.

(a) SHORT TITLE.-This Act may be cited as the "Omnibus Crime Control Act of 1991".

(b) TABLE OF CONTENTS.-The following is the table of contents for this Act:

law.".

SEC. 1107. CERTIFICATES OF PROBABLE CAUSE.

The third paragraph of section 2253, title 28, United States Code, is amended to read as follows:

"An appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding where the detention complained of arises out of process issued by a State court, unless the justice or judge who rendered the order or a circuit justice or judge issues a certificate of probable cause. However, an applicant under sentence of death shall have a right of appeal without a certification of probable cause, except after denial of a second or successive application.".

SEC. 1108. FUNDING FOR DEATH PENALTY PROSECUTIONS.

Part E of title I of the Omnibus Crime Control and Safe Streets Act of 1968 *(42 U.S.C. 3711* et seq.) is amended by adding at the end the following new section:

"SEC. 515. Notwithstanding any other provision of this subpart, the Director shall provide grants to the States, from the funding allocated pursuant to section 511, for the purpose of supporting litigation pertaining to Federal habeas corpus petitions in capital cases. The total funding available for such grants within any fiscal year shall be equal to the funding provided to capital resource centers, pursuant to Federal appropriation, in the same fiscal year.".

TITLE XII-PROVISIONS RELATING TO POLICE OFFICERS

Subtitle A-Police Accountability

SEC. 1201. SHORT TITLE.

This subtitle may be cited as the "Police Accountability Act of 1991".

SEC. 1202. PATTERN OR PRACTICE CASES.

(a) CAUSE OF ACTION.-

(1) UNLAWFUL CONDUCT.-It shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law enforcement officers that deprives persons of rights, privileges, or immunities, secured or protected by the Constitution or laws of the United States.

(2) CIVIL ACTION BY ATTORNEY GENERAL.-Whenever the Attorney General has reasonable cause to believe that a violation of paragraph (1) has occurred, the Attorney General, for or in the name of the United States, may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice.

(3) CIVIL ACTION BY INJURED PERSON.-Any person injured by a violation of paragraph (1) may in a civil action obtain appropriate equitable and declaratory relief to eliminate the pattern or practice. In any civil action under this paragraph, the court may allow the prevailing plaintiff reasonable attorneys' fees and other litigation fees and costs (including expert's fees). A governmental body shall be liable for such fees and costs to the same extent as a private individual.

(b) DEFINITION.-As used in this section, the term "law enforcement officer" means an official empowered by law to conduct investigations of, to make arrests for, or to detain individuals suspected or convicted of, criminal offenses.

SEC. 1203. DATA ON USE OF EXCESSIVE FORCE.

(a) ATTORNEY GENERAL TO COLLECT.-The Attorney General shall, through the victimization surveys conducted by the Bureau of Justice Statistics,

30TH REPORT of Level 1 printed in FULL format.

Committee Reports

102nd Congress

House Report 102-242 Part 1A

102 H. Rpt. 242; Part 1A

OMNIBUS CRIME CONTROL ACT OF 1991

DATE: October 7, 1991. Ordered to be printed

SPONSOR: Mr. Brooks, from the Committee on the Judiciary, submitted the following

REPORT together with ADDITIONAL, DISSENTING, AND ADDITIONAL DISSENTING VIEWS
(To accompany H.R. 3371)
(Including cost estimate of the Congressional Budget Office)

TEXT:

The Committee on the Judiciary, to whom was referred the bill (H.R. 3371) to control and prevent crime, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE AND TABLE OF CONTENTS.

(a) Short Title. This Act may be cited as the "Omnibus Crime Control Act of 1991".

(b) Table of Contents. The following is the table of contents for this Act: TITLE I COMMUNITY POLICING; COP ON THE BEAT TITLE II DRUG TREATMENT IN FEDERAL PRISONS TITLE III SUBSTANCE ABUSE TREATMENT IN STATE PRISONS TITLE IV SAFE SCHOOLS TITLE V VICTIMS OF CRIME Subtitle A Crime Victims Fund Subtitle B Restitution Subtitle C HIV Testing TITLE VI CERTAINTY OF PUNISHMENT FOR YOUNG OFFENDERS TITLE VII DRUG TESTING OF ARRESTED INDIVIDUALS TITLE VIII DRUG EMERGENCY AREAS ACT OF 1991 TITLE IX COERCED CONFESSIONS TITLE X DNA IDENTIFICATION TITLE XI HABEAS CORPUS TITLE XII PROVISIONS RELATING TO POLICE OFFICERS Subtitle A Police Accountability Subtitle B Retired Public Safety Officer Death Benefit Subtitle C Study on Police Officers Rights Subtitle D Law Enforcement Scholarships Subtitle E Law Enforcement Family Support TITLE XIII FRAUD TITLE XIV PROTECTION OF YOUTH Subtitle A Crimes Against Children Subtitle

This section adopts the recommendation of the Powell Committee that prisoners under sentence of death should not be required to obtain a certificate of probable cause in order to appeal from the denial of relief at the district court level, except in successive petition cases. Since certificates are issued routinely in death penalty cases, the certification process now wastes valuable judicial resources.

conclusion

As ABA President John Curtin testified:

A system that would take life must first give justice. The paramount requirement of a civilized system of justice is that a sentence of death not be carried out until it has been subjected to full, fair, and deliberate scrutiny. Unique among all legal decisions, the decision to execute the defendant cannot be corrected after it has been carried out.
8 6363Curtin and Liebman statement at 52, Subcommittee Hearings, July 17, 1991.

In a manner consistent with justice, the Act will expedite death penalty proceedings and ensure that every petitioner will have one, and only one, fair opportunity to present his or her claims to a Federal court. The Act thus return the focus of capital litigation to the States courts, where it belongs.
TITLE XII PROVISIONS RELATING TO POLICE OFFICERS

Subtitle A Police Accountability

purpose

Subtitle A is the Police Accountability Act of 1991. It grants standing to the United States Attorney General and, in certain circumstances, to private parties to obtain civil injunctive relief against governmental authorities that engage in patterns or practices of unconstitutional or unlawful conduct by law enforcement officers. It also requires the Attorney General, through the surveys of the Bureau of Justice Statistics, to collect data about the incidence of police use of excessive force.

background

On March 3, 1991 motorist Rodney King was apprehended by members of the Los Angeles Police Department (LAPD) after a high speed chase. While twenty-one other officers stood by, three LAPD officers and a sergeant administered 56 baton blows, six kicks to the head and body, and two shocks from a Taser electric stun gun. The incident was captured on videotape by a citizen. President Bush rightly called the beating "sickening."

Unfortunately, the Rodney King incident is not an aberration. The Independent Commission on the Los Angeles Police Department, created to examine the incident and headed by former Deputy Attorney General and Deputy Secretary of State Warren Christopher, concluded in its July 1991 report that "there is a significant number of officers in the LAPD who repetitively use excessive force against the public." Moreover, as the Commission found, the conduct of these officers was well known to police department management, who condoned the behavior through a pattern of lax supervision and inadequate investigation of

complaints.

As Professor James Fyfe, a 16-year veteran of the New York City Police Department and one of the nations leading experts on police use of force, testified before the Subcommittee on Civil and Constitutional Rights, the King incident "was no aberration. . . . (T)here exists in LAPD a culture in which officers who choose to be brutal and abusive are left to do so without fear of interference."

It is apparent, moreover, that the problem is not limited to Los Angeles. Police chiefs from 10 major cities convened soon after the King incident and emphasized that "the problem of excessive force in American policing is real." The same point was stressed by Hubert Williams, President of the Police Foundation and former Chief of Police for Newark, New Jersey: "Police use of excessive force is a significant problem in this country, particularly in our inner cities" District of Columbia police officer Ronald Hampton, director of national affairs for the National Black Police Association, testified before the Subcommittee that his organization has complained for years that minority residents "were disrespected, disregarded, (and) physically and verbally abused" by police. The Flint, Michigan ombudsman, who reported that citizen complaints about police conduct to his office were up 10 percent in 1990, after a 25 percent increase in 1989, wrote to the Subcommittee that the experience of his office led him to believe that the Los Angeles beating "was not an isolated incident."

The Subcommittee on Civil and Constitutional Rights held two days of hearings on police brutality after the King incident and received written submissions regarding alleged police misconduct from across the country. Many of the complaints involved individual incidents. Many, however, also presented systemic issues particular policies or practices that were reflected in a pattern of misconduct. Among the matters brought to the Subcommittees attention:

The Civil Rights Division of the Massachusetts Attorney Generals office found that in 1989-90 Boston police officers routinely conducted unconstitutional, harassing stops and searches of minority individuals, including requiring youths to submit to strip searches in public.

In New York City, bystanders who complain about police actions are arrested and "run through the system," according to affidavits compiled by the New York Civil Liberties Union. The Police Department admitted that a 1977 order prohibiting such arrests was "mistakenly" revoked in 1980.

A lawsuit against the town of Reynoldsburg, Ohio discovered that a special unit within the police department called itself the S.N.A.T. squad, for "Special Nigger Arrest Team."

The Los Angeles Police Department directed officers to use an illegal king-fu device known as the nun-chuk to inflict pain on passive demonstrators in an effort to force them to comply with police orders.

Policing is difficult, dangerous work. Most police officers do not abuse the authority granted them. To the contrary, the majority of police officers in America are dedicated men and women who strive to uphold the ideals of the Constitution. Under growing stresses, they make an enormous contribution to

public safety and deserve the nations gratitude. Incidents of restraint in the face of provocation certainly outnumber incidents of brutality. Faced, however, with evidence that the problem of excessive force is a serious one, police departments, local authorities and the Federal Government have a responsibility to strengthen their responses.

Current Federal legal authority and Justice Department policy

Police brutality is a violation of the U.S. Constitution, and under sections 241 and 242 of title 18 it is a federal crime. However, the Federal response to police misconduct has been limited. The Assistant Attorney General in charge of the Civil Rights Division testified that the U.S. Justice Department follows a "back-stop" policy, deferring to local authorities. Statistics provided to the Subcommittee on Civil and Constitutional Rights by the Justice Department show that the Justice Department prosecutes on average 50 police officers a year. This represents a fraction of the 3,000 criminal civil rights cases, most of them involving law enforcement officers, that the Justice Department investigates yearly.

Moreover, the cases investigated by the Department represent only a fraction of the allegations of police misconduct reported to local authorities, most of which are never reported to Federal officials. The Justice Department provided to the Subcommittee statistics showing that the FBI had investigated 720 criminal civil rights matters in the Central District of California, which encompasses Los Angeles, between 1982 and March 1991. Of those 720 cases investigated in a nine year period, 72 involved the Los Angeles Police Department and 186 involved the Los Angeles County Sheriffs Office. Yet, the Los Angeles Police Misconduct Referral Service received 652 complaints against the LAPD in 1988 alone and 616 in 1990. Of the 720 Federal investigations, only four resulted in indictments against police officers. Yet, during just a 3 year period, 1987-1990, the LA County Sheriffs Office lost or settled 56 civil lawsuits involving the use of excessive force, paying out $8.5 million in damages, and the LAPD paid out $18.8 million in damages for police brutality cases.

Pattern or practice authority

The Justice Department currently lacks the authority to address systemic patterns or practices of police misconduct. The Justice Department can only prosecute individual police officers, whom juries are often reluctant to convict. If an officer was poorly trained, or was acting pursuant to an official policy, it is difficult to obtain a conviction, and Justice has no authority to sue the police department itself to correct the underlying policy.

In 1980, the Third Circuit Court of Appeals held in United States v. City of Philadelphia, 644 F. 2d 187 (3d Cir. 1980), that the United States does not have implied statutory or cnstitutional authority to sue a local government or its officials to enjoin violations of citizens constitutional rights by police officers.

This represents a serious and outdated gap in the federal scheme for protecting constitutional rights. The Attorney General has pattern or practice authority under eight civil rights statutes, including those governing voting, housing, employment, education, public accommodations and access to public facilities. The Justice Department can sue a city or county over its voter

registration practices or its educational policies. It can sue private and public employers, including police departments, over patterns of employment discrimination. The Justice Department can seek injunctive relief under the Civil Rights of Institutionalized Persons Act against a jail or prison that tolerates guards beating inmates. But it cannot sue to change the policy of a police department that tolerates officers beating citizens on the street.

While a private citizen injured by police misconduct can sue for money damages, he or she cannot sue for injunctive relief, absent a showing of likely future harm, under the Supreme Court decision in Los Angeles v. Lyons, 461 U.S. 95 (1983). The case involved a resident of Los Angeles who had been choked unconscious by a police officer following a routine traffic stop. Unlike other cities, Los Angeles did not limit the use of chokeholds to situations where the officers life was in danger. From 1975 to 1982, 15 people died as a result of LAPD chokeholds. The Supreme Court ruled that the plaintiff had no standing to seek an injunction restricting the use of chokeholds because he could not demonstrate that he himself was likely to be choked again. If choked again, the Court allowed, he could sue for damages again. But neither he nor anyone else could sue to bring the LAPDs policy on use of the chokehold in line with practices accepted in most other cities.

The Police Accountability Act would close this gap in the law, authorizing the Attorney General and private parties to sue for injunctive relief against abusive police practices. The Committee expects that the Department of Justice will be diligent in exercising its new authority. But the Committee believes that private standing is necessary, especially in situations where the Department of Justice does not act. To ensure that the issues being litigated are not hypothetical, and to provide a court with the benefit of a factual context, the Act requires that a private citizen seeking injunctive relief have been injured by the challenged practice.

The Act creates an enforceable right to be free of patterns of police brutality. In adopting the provision granting individuals the standing to sue, Congress is exercising its authority to create legal rights, the invasion of which creates standing even where the plaintiff would not have had standing in the absence of the statute. Warth v. Seldin, 422 U.S. 490 (1975).

The Act does not increase the responsibilities of police departments or impose any new standards of conduct on police officers. The standards of conduct under the Act are the same as those under the Constitution, presently enforced in damage actions under section 1983. The Act merely provides another tool for a court to use, after a police department is held responsible for a pattern or practice of misconduct that violates the Constitution or laws of the United States.

Because the Act imposes no new standard of conduct on law enforcement agencies, it should not increase the amount of litigation against police departments. Individuals aggrieved by the use of excessive force already can and do sue under 42 U.S.C. 1983 for monetary damages. With adoption of this section, such persons will be able to seek injunctive relief as well, if their injury is the product of a pattern or practice of misconduct.

This provision may in fact decrease the number of lawsuits against police departments. Currently, changes in a police departments policy are prompted by

successive criminal cases or damage actions; the cumulative weight of convictions or adverse monetary judgments may lead the police leadership to conclude that change is necessary. This is an inefficient way to enforce the Constitution and is not always effective. Some police departments have shown they are willing to absorb millions of dollars of damage payments per year without changing their policies. If there is a pattern of abuse, this section can bring it to an end with a single legal action.

Pattern or practice authority is needed because the Federal Governments criminal authority to prosecute police brutality is not adequate to address patterns or practices such as the lack of training or the routine use of deadly techniques like chokeholds, or the absence of a monitoring and disciplinary system. Two cases illustrate both the need for this authority and how it will work.

In Mason County, Washington, in the nine month period between June 1985 and March 1986, citizens in four separate incidents were beaten by police officers following traffic stops. A federal jury returned civil verdicts against all of the deputy sheriffs involved in the incidents and against the county, awarding a total of $853,000 in damages and costs. The Ninth Circuit affirmed, tracing the incidents to the lack of training provided by the sheriffs department, which it described as "woefully inadequate, if it can be said to have existed at all." Davis v. Mason County, 927 F.2d 1473, 1482 (9th Cir. 1991). Yet while the lack of training was established and was found to rise to the level of a constitutional violation, the courts were powerless to correct it. In formulating a remedy, the courts would have had to look no further than the Washington State statute on police training standards, which Mason County has ignored.

Another federal case, against the Goldsboro, North Carolina police department, resulted in a $220,000 payment to the father of a young black man who was strangled to death by city police officers. The officers involved in the incident had been involved in several prior incidents involving use of excessive force, yet there had been disciplinary action taken against them. One expert witness, the former chief of police for Boston and St. Louis County, testified that the City of Goldsboro had an "official policy of not investigating incidents (involving deadly force)." Again, the court had no authority to order remedies for the glaring deficiencies the case has highlighted. Swann v. Goldsboro, No. 90-59-CIV-5-D (E.D.N.C.).

The Police Accountability Act as originally introduced and reported out of the Subcommittee on Civil and Constitutional Rights contained a section on criminal liability against police officers. That section was stricken by an amendment during full Committee consideration.

Section-by-Section Analysis

Section 1201 is the short title: Police Accountability Act of 1991.

Section 1202 creates a cause of action and standing for pattern or practice cases.

Subsection 1202(a)(1) provides that it shall be unlawful for any governmental authority, or any agent thereof, or any person acting on behalf of a governmental authority, to engage in a pattern or practice of conduct by law

*1994 U.S. App. LEXIS 19679, *; 23 Media L. Rep. 1600*

NOREEN MCBRIDE, Plaintiff-Appellant v. VILLAGE OF MICHIANA; ELIZABETH O'DONNELL, individually and as Clerk of the Village of Michiana, former Assistant Clerk of the Village of Michiana, former President of the Village of Michiana, former member of the Village of Michiana and as former President Pro Tem of the Village Council of the Village of Michiana; KATHLEEN ROBERTS, individually and as former President of the Village of Michiana and as a member and former President Pro-Tem of the Village Council of the Village of Michiana; KENNETH BOOKS, individually and as a Police Officer of the Village of Michiana; MARIANNE GOSSWILLER, individually and as former Chairperson of the Zoning, Planning and Environmental Commission of the Village of Michiana; MARY ANN JOHNSON, individually and as a former member of the Village Council of the Village of Michiana and as a former member of the Zoning, Planning and Environmental Commission of the Village of Michiana; GERTRUDE PETERSON, individually and as former Clerk of the Village of Michiana; RICHARD GOSSWILLER, individually, and as former President of the Village of Michiana and as a former member of the Village Council of the Village of Michiana; and HARVEY KEMP, individually and as a former member of the Zoning, Planning and Environmental Commission of the Village of Michiana and as former acting Temporary Building inspector of the Village of Michiana, Defendants-Appellees.

No. 93-1641

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

1994 U.S. App. LEXIS 19679; 23 Media L. Rep. 1600

July 28, 1994, Filed

NOTICE: [*1] NOT RECOMMENDED FOR FULL-TEXT PUBLICATION. SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED, A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THIS DECISION IS REPRODUCED.

SUBSEQUENT HISTORY: Reported in Table Case Format at: 30 F.3d 133, 1994 U.S. App. LEXIS 27212.

PRIOR HISTORY: ON APPEAL from the United States District Court for the Western District of Michigan. District No. 92-00155. Quist, District Judge.

CORE TERMS: village, retaliation, deprivation, first amendment, color of state law, constitutional rights, actionable, state law, reporter, interview, municipal, constitutionally protected, dispositive, cognizable, newspaper, deprived, retaliatory, complain, Fourteenth Amendment, constitutional violation, motion to dismiss, liberty interest, cause of action, motion to amend, state action, free speech, subjected, favorable, deprive, lawsuit

JUDGES: BEFORE: MILBURN and NELSON, Circuit Judges; and COOK, Chief District Judge. *

* The Honorable Julian Abele Cook, Jr., Chief United States District Judge for the Eastern District of Michigan, sitting by designation.

OPINIONBY: PER CURIAM

OPINION: PER CURIAM. The Plaintiff-Appellant, Noreen McBride, appeals the decision of the district court which dismissed her Complaint pursuant to Fed. R. Civ. P. 12(b)(6). For the following reasons, we reverse and remand to the district court for further proceedings that are consistent with this opinion.

I

Noreen McBride is a reporter for several news reporting agencies, including the New Buffalo Times, the South Bend Tribune, and the radio station WEFM. For a number of years, she reported news events relating [*2] to the Village of Michiana in Berrien County, Michigan. However, some of her articles were perceived by the individual Defendants, all of whom were Michiana officials, to have been extremely inaccurate and politically embarrassing to them. n1 It is this perception by the Defendants, and their subsequent actions, that form the basis of the conflict between the parties.

- - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n1 Examples of McBride's articles, which were found by the Defendants to have been grossly unfair, pertained to (1) a system that ostensibly encourages non-residents to vote in Village elections, (2) claimed violations of the Open Meetings Act by the Village Council and other Village agencies, and (3) alleged improprieties in the handling of public funds.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

McBride first asserts that some of the Defendants n2 repeatedly called her employers in an effort to discourage them from using her as a reporter to cover the news activities in Michiana. She contends that on one occasion, Roberts, Johnson, and Gosswiller n3 threatened to boycott the New Buffalo Times [*3] and attack its circulation base. These officials eventually placed an advertisement in the Harbor Country News which encouraged its readers to cancel their subscriptions to the New Buffalo Times.

- - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - -

n2 McBride identified these Defendants as Kathleen Roberts, then the President Pro Tem of the Village Council, Marianne Gosswiller and Mary Ann Johnson, former Village officials, and Louis A. Desenberg, the Village Attorney.

n3 All references to Gosswiller are to Marianne Gosswiller unless otherwise indicated.

- - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

On a separate occasion, another Defendant, Kenneth Books, a Michiana police officer, acting as an official representative of the Village, contacted the publisher of the New Buffalo Times in an effort to dissuade him from assigning McBride as a reporter to the meetings of the Village Council because the Police Department could not guarantee her physical safety. The phone call was reportedly made at the behest and in the presence of at least two members of the Village Council or the Village Zoning, Planning [*4] and Environmental Commission.

McBride contends that between 1990 and 1992, Defendants Gosswiller, Elizabeth O'Donnell, an officer of the Village Council, Gertrude Peterson, the Village Clerk, and several other unnamed Michiana employees violated the Freedom of Information Act of Michigan by (1) refusing to make some public documents available to her, (2) assessing inflated costs for the reproduction of public information, (3) charging her with unreasonable prices for the sole purpose of viewing a public document, (4) deliberately delaying the delivery of public documents without just cause, and (5) insisting that she submit a written request prior to viewing or obtaining a municipal document, even though oral requests are sufficient under state law.

In June 1990, Defendant Henry Kemp, the Village Building Inspector and a member of the Zoning, Planing, and Environmental Commission, required all of the members of the press who were present at a meeting of the Village's Zoning, Planning and Environmental Commission, including McBride, to stand and identify themselves. Two months later, he threw a chair toward McBride and other members of the press at a public meeting. Later that year, [*5] O'Donnell (1) instructed a municipal employee not to talk to McBride and (2) encouraged a newly appointed election inspector to terminate an interview with her.

McBride maintains that O'Donnell, Roberts, Gosswiller and Richard Gosswiller, also a Village official, verbally abused her in public and during public meetings. She also alleges that Peterson ordered her to leave the press table during a public meeting of the Michiana Council. In an apparent demonstration of her support for

the Village Clerk's directive, Carol Nagy, one of the members of the Council, informed the general public that the meeting would not begin until McBride left the premises. As a point of emphasis, Books threatened to arrest or physically remove McBride if she did not leave the meeting room on her own volition. Prior to the next meeting, the press table was removed from the Council meeting room. Finally and in an unrelated matter, she contends that Richard Gosswiller, while serving as the Village President, deliberately destroyed a variety of municipal documents expressly for the purpose of keeping her from obtaining access to them.

Relying upon the First and Fourteenth n4 Amendments and 42 U.S.C. § 1983, [*6] McBride initiated a lawsuit in which she sought injunctive relief against, and monetary relief from, the Defendants whom she contends had conspired to (1) interfere with her right to free speech, (2) hinder freedom of the press, and (3) retaliate against her for unfavorable reporting of municipal affairs. n5 On April 5, 1993, the district court granted the Defendants' motion to dismiss, finding that McBride had failed to set forth any cognizable claim under the United States Constitution. n6

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n4 In the Complaint, McBride alleged that her constitutional rights under the Fifth Amendment had been infringed upon by the Defendants. However, in her appeal, she states that her Complaint "sufficiently sets forth claims under the First and Fourteenth Amendments." (See Brief at 3.)

n5 McBride also alleged state claims, over which she requested the court exercise its supplemental jurisdiction.

n6 The district court judge concluded that (1) McBride's allegations of defamation and interference with employment relationships did not support her claim of deprivation of constitutional rights, (2) the denial of the privilege of sitting at a special press table did not constitute a violation of her constitutional rights, (3) there is no constitutional right to conduct an interview with a public employee, and (4) there was no abridgement of her rights under the United States Constitution because the Michigana officials had not denied her access to any of its Village meetings.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - - - [*7]

On appeal, McBride argues that the Village officials have undermined the freedom of the press, in that their retaliatory actions against her have threatened the collection, as well as the dissemination, of the public news. She complains, inter alia, that the district court erroneously failed to evaluate the Defendants' activities as a whole, which would clearly demonstrate their collective desire to impede the future exercise of her First Amendment freedoms.

II

The dismissal of an action pursuant to Fed. R. Civ. P. 12(b)(6) is a question of law that is subject to de novo review. G.M. Engineers & Assoc., Inc. v. West Bloomfield Township, 922 F.2d 328, 330 (6th Cir. 1990) (quoting Dugan v. Brooks, 818 F.2d 513, 516 (6th Cir. 1987)). Moreover, dismissals of complaints in which claims under civil rights statutes have been asserted will be "scrutinized with special care." Brooks v. Seiter, 779 F.2d 1177, 1180 (6th Cir. 1985). It is well settled that in evaluating the merit of a dispositive motion, the trial court must assume all material allegations within the Complaint to be true and examine [*8] its contents in a light that is most favorable to the plaintiff. Ana Leon T. v. Federal Reserve Bank, 823 F.2d 928, 930 (6th Cir.), cert. denied, 484 U.S. 945, 98 L. Ed. 2d 360, 108 S. Ct. 333 (1987). However, neither legal conclusions nor unwarranted factual inferences constitute material allegations, and, hence, we are not obliged to accept them as true. Morgan v. Church's Fried Chicken, 829 F.2d 10, 12 (6th Cir. 1987). Dismissal is proper "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73, 81 L. Ed. 2d 59, 104 S. Ct. 2229 (1984); see Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957). "Although this standard for Rule 12(b)(6) dismissals is quite liberal, more than bare assertions of legal conclusions is ordinarily required." Scheid v. Fanny Farmer Candy Shops, Inc., 859 F.2d 434, 436 (6th Cir. 1988). [*9] If the plaintiff is to overcome a dispositive motion, the complaint must contain direct or inferential allegations.

Section 1983 of Title 42 creates a private cause of action under which local governments can be subjected to liability when constitutional deprivations occur. Monell v. Dep't. of Social Servs., 436 U.S. 658, 690, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (1978). This statute "provides a remedy for deprivations of rights secured by the Constitutions and laws of the United States" when the tortious activity takes place under color of state law. Lugar v. Edmondson Oil Co., 457 U.S. 922, 924, 73 L. Ed. 2d 482, 102 S. Ct. 2744 (1982). "The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." Wyatt v. Cole, 118 L. Ed. 2d 504, U.S. , 112 S. Ct. 1827, 1830 (1992). In order to state a claim under § 1983, a plaintiff must allege that (1) she was deprived of a [*10] right secured by the Constitution or laws of the United States, and (2) the deprivation was caused by a person who was acting under the color of state law. Parratt v. Taylor, 451 U.S. 527, 535, 68 L. Ed. 2d 420, 101 S. Ct. 1908 (1981), overruled in part on other grounds, Daniels v. Williams, 474 U.S. 327, 330-31, 88 L. Ed. 2d 662, 106 S. Ct. 662 (1986); Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 155-56, 56 L. Ed. 2d 185, 98 S. Ct. 1729 (1978); see also Leatherman v. Tarrant County Narcotics Unit, 122 L. Ed. 2d 517, U.S. , 113 S. Ct. 1160, 1163 (1993).

In support of her contention that she was deprived of a right under the United States Constitution, McBride relies upon the Fourteenth Amendment, which forbids all state actors from acting to "deprive any person of life, liberty or property without due process of law. . . ." U.S. Const. amend. XIV, § 1. To maintain these due process claims, McBride must assert facts which, if proven, would establish [*11] that the Defendants deprived her of a constitutionally protected property or liberty interest. Board of Regents v. Roth, 408 U.S. 564, 569-71, 33 L. Ed. 2d 548, 92 S. Ct. 2701 (1972).

In this case, McBride maintains that she was subjected to retaliatory measures by the Defendants who sought to prevent her from exercising her First Amendment rights to free speech and the freedom of the press. Hence, we must initially determine if the injury, about which McBride complains, amounts to a constitutional deprivation that is cognizable under § 1983. See generally Martinez v. California, 444 U.S. 277, 62 L. Ed. 2d 481, 100 S. Ct. 553 (1980); Crowder v. Lash, 687 F.2d 996, 1002 (7th Cir. 1982) (damages recoverable under § 1983 if plaintiff establishes defendants' actions were conducted under color of state law, resulted in deprivation of plaintiff's constitutional rights, and proximately caused constitutional violation).

A

The district court, in finding that McBride's claims of defamation, interference with employment relationships, revocation [*12] of privileges, and interference with interviews were not cognizable as constitutional claims, implies that the deprivation of a property or liberty interest must accompany her injuries. However, the district court does not address the fact that there may be several configurations in a § 1983 claim, such as an injury to a party's reputation that leads to the deprivation of a liberty or property interest. Paul v. Davis, 424 U.S. 693, 47 L. Ed. 2d 405, 96 S. Ct. 1155 (1976). Another example is the retaliatory conduct against a constitutionally protected activity that leads to an injury. See, e.g., Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 50 L. Ed. 2d 471, 97 S. Ct. 568 (1977). The injury need not be a constitutional violation. For example, in Rakovich v. Wade, 850 F.2d 1180 (7th Cir. 1988), cert. denied, 488 U.S. 968, 102 L. Ed. 2d 534, 109 S. Ct. 497 (1988), the Seventh Circuit Court of Appeals approved the conclusion of the district court that an [*13] investigation, which had been conducted in retaliation for the publication of protected comments under the First Amendment, could be actionable under § 1983. Id. at 1189.

Where, as here, the motive of the governmental actor is pertinent to the inquiry, the claimant, if engaged in a constitutionally protected activity during the relevant time period, need only show that the act of retaliation consisted of the deprivation of a non-trivial commodity. n7 See e.g., Rutan v. Republican Party, 497 U.S. 62, 72, 111 L. Ed. 2d 52, 110 S. Ct. 2729 (1990) ("we find the assertion here that the employee petitioners had no legal entitlement to promotion, transfer, or recall beside the point); North Mississippi Communications Inc. v. Jones, 874 F.2d 1064 (5th Cir. 1989), cert. denied, 121 L. Ed. 2d 129, U.S. , 113 S. Ct. 184 (1992) (Mount Healthy applies to claim by newspaper that county board withheld advertising in retaliation for critical editorials and stories); Georgia Ass'n of Educators v. Gwinnett County School Dist., 856 F.2d 142 (11th Cir. 1988) [*14] (denial of union dues checkoff privileges in retaliation for First Amendment activity is actionable); Howland v. Kilquist, 833 F.2d 639, 644 (7th Cir. 1987) ("act in retaliation

for the exercise of a constitutionally protected right is actionable under § 1983 even if the act, when taken for different reasons, would have been proper") (quoting Buise v. Hudkins, 584 F.2d 223, 229 (7th Cir. 1978), cert. denied, 440 U.S. 916, 59 L. Ed. 2d 466, 99 S. Ct. 1234 (1979)); Rakovich, 850 F.2d at 1189 (7th Cir.) ("an investigation conducted in retaliation for comments protected by the first amendment could be actionable under section 1983"); Gibson v. United States, 781 F.2d 1334, 1338 (9th Cir. 1986), cert. denied, 479 U.S. 1054, 93 L. Ed. 2d 979, 107 S. Ct. 928 (1987) (proper § 1983 claim stated where plaintiffs alleged "discrete acts of police surveillance and intimidation directed solely at silencing them"). n8

- - - - - - - - - - - - - - - - - -Footnotes- - - - - - - - - - - - - - - - - -

n7 This is directly contrary to the Defendants' assertion that "whatever the actions are that they allege were taken in retaliation have to have some independent constitutional significance. . . ." (Joint Appendix at 72.) [*15]

n8 Although these cases involve the deprivation of a property right, they are analogous to claims of retaliation.

- - - - - - - - - - - - - - - - - -End Footnotes- - - - - - - - - - - - - - - - -

Moreover, any governmental action that falls short of direct prohibition but results in a chilling effect upon an individual's right of free speech may violate the First Amendment. Laird v. Tatum, 408 U.S. 1, 11, 33 L. Ed. 2d 154, 92 S. Ct. 2318 (1972), reh'g denied, 409 U.S. 901, 34 L. Ed. 2d 165, 93 S. Ct. 94 (1972). Any state action that is designed to chill political expression is at the core of the First Amendment. Pickering v. Board of Education, 391 U.S. 563, 573, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968). The Seventh Circuit Court of Appeals has determined that the effect of the acting party's conduct upon another individual's freedom of speech need not be great in order to be actionable because there is no justification for harassing people who seek to exercise their fundamental constitutional rights. [*16] Bart v. Telford, 677 F.2d 622, 625 (7th Cir. 1982). Thus, in determining whether the conduct of the Village officials had any adverse effect upon McBride's constitutional rights, the test is whether their challenged activities are likely to chill the exercise of constitutionally protected speech. Laird, 408 U.S. at 13-14.

McBride has charged the Defendants with having made a threat to her safety, harassed her on the street, engaged in a campaign to force her employers to use other reporters, and verbally abused her during town meetings, all in retaliation for her publication of negative articles about them. Furthermore, she contends that future harm will occur as a result of the Defendants' outward hostility toward those persons who seek to assert their guarantees under the First Amendment. Under the above-mentioned standard, the harassment which has been attributed to the Defendants by McBride is sufficient to state a cause of action for retaliation, despite the contrary determination by the district court.

B

We now turn to the question of whether the Defendants were acting under the color [*17] of state law at the time of their alleged acts of misconduct. It has been held by the Supreme Court that the involvement of a state official satisfies the state action element which is essential to a violation claim under the Fourteenth Amendment, whether or not the actions were lawful or officially authorized. Flagg Bros., 436 U.S. at 157 n.5 (1978) (quoting Adickes v. S.H. Kress & Co., 398 U.S. 144, 152, 26 L. Ed. 2d 142, 90 S. Ct. 1598 (1970)). Generally, a public employee acts under the color of state law while serving in her official capacity or exercising her responsibilities pursuant to state law. West v. Atkins, 487 U.S. 42, 101 L. Ed. 2d 40, 108 S. Ct. 2250 (1988). The dispositive issue is whether the officials were acting as private individuals or if they were exercising their authority under state or local government. For example, the Supreme Court determined that an official's "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the [*18] authority of state law, is action taken 'under color of' state law." Monroe v. Pape, 365 U.S. 167, 184, 5 L. Ed. 2d 492, 81 S. Ct. 473 (1961), overruled on other grounds, Monell, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018 (quoting United States v. Classic, 313 U.S. 299, 326, 85 L. Ed. 1368, 61 S. Ct. 1031 (1941)). See also West, 487 U.S. at 50 ("it is firmly established that a defendant in a § 1983 suit acts under color of state law when he abuses the position given him by the state").

In the present case, McBride contends that the Defendants were acting under color of state law at all times. She contends that the Village officials acted in their official capacities when they made calls to the newspapers and radio station. On the basis of the record, the parties were clearly functioning in their positions as Village officials during the meetings of the Michiana Council and its other municipal bodies. Even when the official terminated McBride's [*19] interviews of Village employees, this was the instruction from an individual who had acted as a representative of the municipal government. Accordingly, when all of the allegations are viewed in a light that is most favorable to McBride, it is our conclusion that the Defendants were acting in their capacities as Village officials. Given the sympathetic construction that is necessary when evaluating a motion under Fed. R. Civ. P. 12(b)(6), we find that McBride has asserted sufficient allegations to support a viable claim under § 1983.

C

During the hearing on the Motion to Dismiss before the district court, McBride asked for authority to amend the Complaint in the event that her claim was found to be legally deficient:

> If that's a mistake on our part, that we [request to be] given some leave to amend with regard to that; although, we don't think its necessary.

(Joint Appendix 90.) Federal Rule of Civil Procedure 15(a) states that leave to file an amended pleading "shall be freely given when justice so requires." The decision as to when justice requires an amendment is left to the discretion of the trial court judge, and is reviewed under an abuse of discretion standard. Miller v. Metropolitan Life Ins. Co., 925 F.2d 979, 982 (6th Cir. 1991); [*20] see also Robinson v. Michigan Consolidated Gas Co., 918 F.2d 579, 591 (6th Cir. 1990) (decision as to whether proposed claim is without merit, thereby making motion to amend futile, is "a decision that the district court alone is in a position to make"). Granting a motion to dismiss while a motion for leave to amend the complaint is pending is an abuse of discretion. See e.g., Thompson v. Superior Fireplace Company, 931 F.2d 372, 374 (6th Cir. 1991). Inasmuch as we have already determined that McBride's lawsuit was improperly dismissed by the district court, those remaining issues which relate to whether (1) her cursory comment relating to a proposed amendment of the Complaint constituted an adequate motion to amend, or (2) the district court should have granted the motion for leave to amend the Complaint prior to dismissing the action, need not be addressed for reasons of mootness.

III

For the reasons that have been set forth above, the order of the district court is REVERSED and this action is REMANDED for further proceedings that are consistent with this opinion.

CONCURBY: DAVID A. NELSON

CONCUR: DAVID A. NELSON, Circuit Judge, concurring. [*21] I fully agree that this case -- petty though it may seem -- ought not to have been dismissed under Rule 12(b)(6), Fed. R. Civ. P. I write separately, however, to note my understanding that many of the shenanigans attributed to the defendants hardly constitute violations of the United States Constitution.

Municipal employees have rights of free speech, for one thing, just as newspaper reporters do. Those rights may not always be exercised wisely, but courts are not arbiters of good taste or sensible politics, and Article III of the Constitution is not a charter for a conciliation service. Public officials are under no constitutional obligation to speak to the press at all, moreover, whether diplomatically or undiplomatically, and I hope that our opinion in this case will not be read as suggesting otherwise.

If Michiana police officers have made veiled threats with regard to the plaintiff's physical safety, on the other hand, and have done so on behalf of the village, or if Michiana has sought to exclude the plaintiff from public

meetings, the plaintiff clearly has something to complain about. The truth of factual allegations such as these cannot be decided on a demurrer to the complaint, [*22] and I therefore concur in the court's judgment.