

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-4032
Summary Calendar

ELIGHA WALKER,

Plaintiff-Appellant,

versus

MIKE GRAHAM, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the
Eastern District of Texas
(9:92-CV-46)

(July 28, 1994)

Before GARWOOD, SMITH and DeMOSS, Circuit Judges.*

GARWOOD, Circuit Judge:

Plaintiff-appellant Eligha Walker (Walker) appeals the district court's dismissal with prejudice of his 42 U.S.C. § 1983 lawsuit against defendants-appellees Nacogdoches County (the County) and Mike Graham (Graham). We reverse and remand.

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

Facts and Proceedings Below

On April 3, 1992, Walker, a black, filed a civil rights lawsuit, pursuant to 42 U.S.C. § 1981 and § 1983 against the County and County district attorney, Graham. In his complaint, Walker stated that he had operated a bail bond business in Nacogdoches for many years. Walker asserted that he and a white male were the only bail bondsmen in the County. Walker alleged that the County's past practice respecting forfeiture of bonds by an accused criminal defendant was to revoke the bonds of those who failed to appear and issue a *capias* for the person's arrest. The County, however, would not require the bail bondsman to pay for bonds forfeited by clients.

Walker stated that after Graham's election as County district attorney,¹ a new policy regarding forfeiture of bonds was instituted. Under this policy, not only were accused criminal defendants' bonds forfeited and a *capias* issued on failure to appear, but also the bail bondsman was required to pay those forfeited bonds. Walker alleged that the new policy was applied *only* to him.² He alleged that the white bail bondsman was never required to pay for bonds forfeited by his clients. Walker contended that, in violation of 42 U.S.C. § 1981 and § 1983, he was intentionally singled out by the new policy, solely due to his

¹ Walker alleged Graham had been County district attorney for approximately one and one half years prior to the filing of the complaint.

² Walker does not dispute the legality of the new policy under state law; he only alleges the policy was applied discriminatorily.

race.

In response to Walker's complaint, the defendants filed a Federal Rule of Civil Procedure 12(b)(6) motion to dismiss. In granting the motion, the district court held that Walker failed to satisfy the heightened pleading standard established by this Circuit for all section 1983 lawsuits. The district court ordered the lawsuit dismissed with prejudice unless Walker amended his pleadings within twenty days. Walker failed to file amended pleadings and the lawsuit was dismissed. Walker now appeals.

Discussion

I. Heightened Pleading Requirement

Walker's lawsuit was dismissed by the district court based on the "heightened pleading" standard adopted by this Court in *Elliott v. Perez*, 751 F.2d 1472, 1482 (5th Cir. 1985). Under *Elliott*, a plaintiff suing a government official for damages in his individual capacity is required to state with factual detail and particularity the basis of the claim, including why the qualified immunity defense could not be maintained. *Id.* The *Elliott* Court reasoned that more specific pleadings were required for such lawsuits against government officials who were able to plead immunity because such defendants are not only immune from liability but also immune from defending a lawsuit. *Id.* at 1478. This Circuit later expanded the heightened pleading standard to all section 1983 lawsuits. *See, e.g., Palmer v. City of San Antonio*, 810 F.2d 514, 516-17 (5th Cir. 1987).

Recently the heightened pleading standard was overruled in part by the Supreme Court's decision in *Leatherman v. Tarrant*

County Narcotics Intelligence & Coordination Unit, 113 S.Ct 1160, 1163 (1993). The *Leatherman* Court ruled that the heightened pleading standard was not applicable to section 1983 lawsuits against municipalities, since municipalities are not entitled to qualified immunity. *Id.*

In view of *Leatherman*, Walker's lawsuit against the County may not be dismissed based on the heightened pleading standard. Instead, under *Leatherman* Walker's complaint has to satisfy only the "short and plain statement" requirements of Federal Rule of Civil Procedure 8(a)(2). *Id.* at 1163. Walker's complaint alleging that the County applied its bond forfeiture policy in a discriminatory manner "based solely upon considerations of race" so as to forfeit Walker's bonds but not those of his white competitor in similar instances satisfies Rule 8(a)(2)'s liberal "notice pleading" system. Therefore, the district court's order dismissing Walker's lawsuit against the County is reversed.

II. Qualified Immunity

The district court also held that Walker's lawsuit against Graham, in his individual capacity, should be dismissed due to the heightened pleading standard of *Elliott*.³ The propriety of continuing to impose a heightened pleading standard for section

³ Before *Leatherman*, *Elliott's* heightened pleading requirements were applied to actions against a government official acting in either his official or individual capacities. However, as a lawsuit against a county official in his official capacity is the equivalent of an action against the county, see, e.g., *Will v. Michigan Dep't of State Police*, 109 S.Ct. 2304, 2311 (1989), *Leatherman* in essence prohibits a heightened pleading standard for complaints against a government official acting in his official capacity. 113 S.Ct. at 1163.

1983 actions brought against government defendants in their individual capacities was an issue left open by *Leatherman*. We also decline to address this issue since we find that Walker's complaint satisfies the heightened pleading standard.

The heightened pleading standard was established to protect government defendants from the "oft-time overwhelming preliminaries of modern litigation" until after resolution of the question of whether an immunity defense applies. *Elliott*, 751 F.2d at 1478. The purpose of the standard is to require a plaintiff's complaint to allege specific facts that not only support a right to recovery, but also establish why the defense of immunity cannot be sustained.

Qualified immunity shields government officials from liability unless their conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 102 S.Ct 2727, 2738 (1982). In examining a defendant's claim of qualified immunity, the first inquiry is whether the plaintiff has alleged a violation of a clearly established constitutional right. Next, the court must "decide whether the public official's action could reasonably have been thought consistent with the constitutional right." *Enlow v. Tishomingo County*, 962 F.2d 501, 508 (5th Cir. 1992).

As noted, Walker alleged that he, a black, and a white were the only bail bondsmen in the County and that his, but not the white's, bonds were forfeited under similar circumstances, pursuant to the new policy adopted by Graham, and that in this respect "Graham, has deliberately and intentionally engaged in discriminatory conduct toward Plaintiff based solely upon

considerations of race." This is a plain allegation of intentional racial discrimination (not disparate impact) by a state district attorney, something which any reasonable district attorney would know was forbidden by the United States Constitution. Thus, the district court's order should be reversed since Graham's complaint satisfies the heightened pleading requirement by sufficiently alleging why Graham is not entitled to immunity.⁴

For the reasons stated, we hold that Walker has adequately stated a claim under section 1983 against the County and district attorney Graham in his official and individual capacities. Accordingly, the district court's order is reversed and the cause is remanded.

REVERSED and REMANDED

⁴ When reviewing a plaintiff's claim that has been dismissed under Rule 12(b)(6), the well pleaded facts are accepted as true and viewed in the light most favorable to the plaintiff. *Partridge v. Two Unknown Police Officers*, 791 F.2d 1181, 1185-86 (5th Cir. 1986) (citations omitted).