06-3745-cv (L)

06-3785-cv (CON); 06-3789-cv (CON); 06-3800-cv (CON); 06-4187 (CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IBRAHIM TURKMEN, ASIF-UR-REHMAN SAFFI, SYED AMJAD ALI JAFFRI, YASSER EBRAHIM, HANY IBRAHIM, SHAKIR BALOCH, AKHIL SACHDEVA AND ASHRAF IBRAHIM,

Plaintiffs-Appellees,

IBRAHIM TURKMEN, ASIF-UR-REHMAN SAFFI, YASSER EBRAHIM, HANY IBRAHIM, SHAKIR BALOCH, AKHIL SACHDEVA AND ASHRAF IBRAHIM,

*Cross-Appellant*s,

V.

JOHN ASHCROFT, ROBERT MUELLER, JAMES ZIGLAR, DENNIS HASTY, AND JAMES SHERMAN,

Defendants-Cross-Appellees,

MICHAEL ZENK, SALVATORE LOPRESTI, STEVEN BARRERE, WILLIAM BECK, LINDSEY BLEDSOE, JOSEPH CUCITI, HOWARD GUSSAK, MARCIAL MUNDO, DANIEL ORTIZ, ELIZABETH TORRES, PHILLIP BARNES, SYDNEY CHASE, MICHAEL DEFRANCISCO, RICHARD DIAZ, KEVIN LOPEZ, MARIO MACHADO, MICHAEL MCCABE, RAYMOND MICKENS, JOHN OSTEEN, BRIAN RODRIGUEZ, SCOTT ROSEBERY, CHRISTOPHER WITSCHEL, RAYMOND COTTON, JAMES CUFFEE, CLEMMET SHACKS, JOHN DOES 1-20,

*Defendants-Appellant*s-*Cross-Appellees*,,

STUART PRAY

Defendant-Cross Claimant,

UNITED STATES OF AMERICA

Defendant-Cross Defendant-Cross Appellee.

On Appeal from the United States District Court
for the Eastern District of New York

SUPPLEMENTAL BRIEF OF APPELLANTS DENNIS HASTY AND JAMES SHERMAN

Debra L. Roth (Bar No. 06-185837)
SHAW, BRANSFORD, VEILLEUX & ROTH, P.C.
1100 Connecticut Avenue, N.W., Suite 900
Washington, DC 20036-4101
(202) 463-8400

Attorney for Appellant James Sherman

Michael L. Martinez
David E. Bell
Matthew F. Scarlato
CROWELL & MORING LLP
1001 Pennsylvania Avenue, N.W.
Washington, DC 20004-2595
(202) 624-2500

Attorneys for Appellant Dennis Hasty

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

INTRODUCTION AND SUMMARY OF ARGUMENT

The Supreme Court's ruling in *Ashcroft v. Iqbal*, 129 S. Ct 1937 (2009), has important and dispositive implications for the claims against Warden Dennis Hasty and Associate Warden James Sherman (the "Wardens"). Essentially a companion case to these appeals, *Iqbal* affirms what the Wardens have argued all along – that Plaintiffs' Complaint fails sufficiently to connect the Wardens to the violations alleged.

The issue in *Iqbal*, just as here, was whether the complaint sufficiently alleged a *Bivens* claim against supervisory officials. *See id.* at 144.[1] Finding the complaint insufficient, the Supreme Court held that there can be no supervisory liability under *Bivens* absent factual allegations demonstrating the supervisory official's direct involvement in the allegedly unconstitutional acts. Similarly, here, many of Plaintiffs' claims against the Wardens fail from the outset because they are predicated solely on the acts of subordinate employees.

The Supreme Court also confirmed that the tenets announced in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554 (2007) apply generally. Against that standard, which requires sufficient factual allegations to render the claims plausible and not

---

[1] Of note, Hasty was also sued in *Iqbal* and filed his own petition for a writ of certiorari concerning similar issues. After the *Iqbal* ruling, the Supreme Court granted Hasty's petition and remanded the case to this Court for further proceedings consistent with its decision. *See* Order of May 26, 2009, Supreme Court Case No. 07-827. Sherman is not a party in *Iqbal*.

just metaphysically possible, it determined that Iqbal's claim failed to permit the inference that the defendants engaged in any misconduct. The same conclusion holds true here. In fact, many of Plaintiffs' claims against the Wardens closely resemble those in *Iqbal* and suffer the same flaw that requires dismissal. Further, *Iqbal's* affirmation of the need for facts, not legal conclusions, at the pleading stage also confirms the flaw in Plaintiffs' remaining claims. Indeed, the Complaint lacks *any* facts from which this Court could plausibly infer misconduct by the Wardens.

ARGUMENT

I. *Iqbal's* Rejection Of "Supervisory Liability" Under *Bivens* Requires Dismissal Of Many Of Plaintiffs' Claims.

In *Iqbal*, the Supreme Court held that supervisory officials sued in the *Bivens* context cannot be held liable for the acts of their subordinates. The Court explained that, because vicarious liability is inapplicable in *Bivens* cases, "a plaintiff must plead that each Government-official defendant, through the official's *own individual actions*, has violated the Constitution." *Id.* at 1948 (emphasis added). That is, "each Government official, his or her title notwithstanding, is only liable for his or her own misconduct," and "knowledge [of] and acquiescence in" unconstitutional conduct is insufficient to impose supervisory liability in the *Bivens* context. *Id.* at 1949. This means that plaintiffs can no longer circumvent the ban on vicarious liability under *Bivens* merely by recasting the theory as one of

supervisory liability and coupling it with allegations of knowledge of, or even acquiescence in, the allegedly Constitution-offending acts.[2] *Id.*; *see also id.* at 1957 ("Lest there be any mistake, in these words the majority is not narrowing the scope of supervisory liability; *it is eliminating Bivens supervisory liability entirely*.") (Souter, J., dissenting) (emphasis added).

Rather, to state a claim against a supervisory official, a plaintiff must allege that the supervisor's direct personal acts violated the plaintiff's constitutional rights. Such allegations are entirely missing here with respect to the Wardens. As the Wardens explained in their Opening Brief ("Br.") and Response and Reply Brief ("Reply"), Claim 7 (interference with religious practices), Claim 8 (confiscation of personal property), Claim 23 (unreasonably and punitive strip searches), and, to some extent, Claim 5 (discriminatory physical and verbal abuse in violation of the Equal Protection Clause)[3] against them are based exclusively on allegations regarding acts committed by the Wardens' subordinates. *See* Br. at 29-49; Reply at 20-29. Indeed, Plaintiffs do not even attempt to allege that the Wardens themselves engaged in any of the challenged conduct. Thus, because

---

[2] The Supreme Court's ruling in this regard effectively overrules the Second Circuit's "personal involvement" standard. *See*, *e.g.*, *Williams v. Smith*, 781 F.2d 319, 323 (2d Cir. 1986) (stating the elements of the personal liability standard).

[3] Claim 5 also rests on allegations of "harsh treatment" resulting from the policy to assign Plaintiffs to restrictive conditions of confinement. As described below, this claim cannot be sustained for a different reason.

none of these claims rest on the Wardens' "own individual actions," *Iqbal* dictates that they must be dismissed. *See* 129 S. Ct. at 1949.

II. Plaintiffs' Allegations Here Closely Resemble Those In *Iqbal*, And Similarly Fail To State A Claim Against The Wardens.

Even if this Court were to decide that some form of supervisory liability survived *Iqbal*, the Supreme Court's explication of the minimum pleading standard confirms that nothing in the Complaint here (and the exhibits incorporated thereto) permits Plaintiffs' claims against the Wardens to withstand their motion to dismiss. In affirming *Twombly's* "plausibility" pleading standard, *Iqbal* explained that "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." 129 S. Ct. at 1949 (citing *Twombly*, 550 U.S. at 556).

The Supreme Court observed in *Iqbal* that "[t]wo working principles underlie" the *Twombly* standard. *Id.* First, the call for "factual content" requires a plaintiff to plead *facts*, not "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements . . . ." *Id.* Such allegations are "not entitled to the assumption of truth" and are discarded. *Id.* at 1950. Second, if well-pled factual allegations remain, they must render the claim *plausible*, which occurs when the facts alleged "permit the court to infer more than the mere *possibility* of misconduct . . . ." *Id.* (emphasis added).

Here, Plaintiffs' Complaint is predicated on the same conclusory allegations and defects in "plausibility" that existed in *Iqbal.* In fact, the policy at issue in *Iqbal* – holding detainees labeled as "of high interest" in the government's post-9/11 investigation at the Metropolitan Detention Center's ("MDC") Administrative Maximum Special Housing Unit ("ADMAX SHU") until cleared of any terrorist connection – is the same policy challenged in Plaintiffs' Due Process claim for being assigned to the ADMAX SHU (Claim 20), and, in part, Plaintiffs' Equal Protection claim (Claim 5), and suffers from the same flaw. *Compare Iqbal*, 129 S. Ct. at 1952 (finding that the "constitutional claims against petitioners rest solely on their ostensible 'policy of holding post-September 11th detainees' in the ADMAX SHU once they were categorized as 'of high interest'") *with* Compl. ¶¶ 80, 309; JA 115, 183 (Equal Protection Clause violation based on harsh treatment because of, *inter alia*, their assignment to the ADMAX SHU, and alleging that this assignment and prolonged detention were due to the "of high interest" designation); *id.* ¶ 391; JA 195 ("of high interest" determination led to Due Process violation).

In *Iqbal*, the Supreme Court held that "all [the complaint] plausibly suggests is that the Nation's top law enforcement officers, in the aftermath of a devastating terrorist attack, sought to keep suspected terrorists in the most secure conditions available until the suspects could be cleared of terrorist activity." 129 S. Ct. at

1952. The Court explained that Iqbal's allegation that the policy was created for discriminatory reasons was "not a plausible conclusion" because there was a *more likely* "obvious alternative explanation" – *i.e.,* that the defendants created policies for legitimate reasons that may have had an incidental disparate impact on Arab Muslims. *Id.* at 1951. As for the "of high interest" designation – which was at the heart of Iqbal's claim – the Supreme Court observed that the complaint established that "various other defendants" created this designation, and because "purpose rather than knowledge" must be alleged to demonstrate unlawful discrimination, any misconduct resulting from that determination could not be attributed to the petitioners. *Id.* at 1952

Plaintiffs' Claims 5 and 20 are similarly based on the "of high interest" determination, and should suffer a similar fate. As in *Iqbal*, the Complaint here, and the reports of the Office of the Inspector General ("OIG") (which are fully incorporated therein), note that the FBI made the "of high interest" designations, and the Bureau of Prisons headquarters told MDC officials to hold "of high interest" detainees "until the FBI had cleared a particular detainee . . . ." *See, e.g.,* Compl. ¶ 80; JA 116. Thus, Plaintiffs' own pleading demonstrates that they are not challenging the Wardens' actions, but those of the Wardens' superiors.

Moreover, with respect to these claims, the Wardens' liability is even less plausible than the defendants in *Iqbal* because the Wardens had no involvement in

creating the policy to detain suspected terrorists in the ADMAX SHU, but merely implemented policies set by their superiors as part of their law enforcement duties. *See* Br. at 19-27; Reply at 5-12. This precludes any inference that the Wardens had the "purpose" to violate Plaintiffs' rights. Rather, as in *Iqbal*, the Complaint here provides an "obvious alternative explanation" for the Wardens' conduct: they placed Plaintiffs in the ADMAX SHU because of their superiors' directives that were based on legitimate purposes. *See id.* Thus, these allegations are, at best, like those in *Iqbal* that the Supreme Court deemed "well-pled" but insufficient to "nudge" the claims from the realm of "possibility" to "plausibility." 129 S. Ct. at 1950-51.

The same conclusion holds true for Plaintiffs' claims based on the "communications blackout" policy (Claims 21 and 22). As the Complaint alleges, the MDC implemented this policy "pursuant to a joint policy of the FBI, INS, and Bureau of Prisons . . . ." Compl. ¶ 83; JA 117. But the Complaint fails to allege that the Wardens, or anyone at the MDC, did anything but implement this policy, which was based on the "of high interest" designation created by their superiors. These allegations, therefore, also "do not permit the court to infer more than the mere possibility of misconduct" and must be dismissed.[4] *Iqbal*, 129 S. Ct. at 1950.

---

[4] The Wardens' prior briefs in this appeal focused on the "objective reasonableness" prong of the qualified immunity test to demonstrate the deficiency

(continued…)

Plaintiffs' attempt to allege misconduct by the Wardens is feeble at best. As previously explained, the only references in the Complaint to such misconduct are conclusory "group" allegations that the Wardens (and others) created and implemented the policies at issue here. *See* Br. at 19-29; Reply Br. at 5-9. For instance, Plaintiffs' section labeled "Personal Participation of the Defendants" attempts to sweep the Wardens along with other named MDC officials and "John Doe" defendants by labeling them "MDC Policy and Implementation Defendants" and alleging:

> The MDC Policy and Implementation Defendants created the unconstitutional and unlawful policies and customs relating to the manner in which the post-9/11 detainees were detained at the MDC that are at issue in this suit. Moreover, they allowed the continuation of these policies and customs, exhibited gross negligence and/or deliberate indifference in the supervision of subordinates who committed unconstitutional acts, and/or participated directly in the implementation of such policies or customs . . . .

Compl. ¶ 136; JA at 136.

But these allegations are an almost verbatim recitation of this Circuit's now-overruled personal involvement legal standard. *See* footnote 2, *supra*. Further, even if *Iqbal* had not changed the personal involvement standard, these allegations could not be credited because they are "bare assertions [that] . . . amount to nothing

---

(…continued)

in Claims 20, 21, 22, and, in part, Claim 5, *see* Br. at 16-29, but *Twombly/Iqbal's* plausibility analysis leads to the same result – the Complaint fails adequately to allege that the Wardens engaged in any unlawful conduct.

more than a formulaic recitation of the elements" of a claim. *Iqbal*, 129 S. Ct. at 1951. As *Iqbal* explained, "the tenet that a court must accept as true all of the allegations contained in a complaint is *inapplicable to legal conclusions*." *Id.* at 1949 (emphasis added).

Indeed, these are precisely the type of conclusory allegations that *Iqbal* rejected. Allegations that the Wardens "created the unconstitutional and unlawful policies and customs" and "adopted, promulgated, and implemented policies and customs" closely parallel allegations in *Iqbal* that one defendant was the "principle architect," another was "instrumental in adopting and executing it," and that both "'knew of, condoned, and willfully and maliciously agreed to subject [plaintiff]' to harsh conditions of confinement 'as a matter of policy . . . .'" *Id.* at 1951. This Court should therefore dismiss Claims 20, 21, 22, and, in part, Claim 5 because Plaintiffs fail to allege any facts plausibly linking the Wardens to the alleged unlawful actions.[5]

What remains – again, only *had* some form of supervisory liability survived – are Claims 7, 8, 23 and, in part, Claim 5, which are based solely on acts allegedly committed by the Wardens' subordinates. *See* Section I, *supra*; Br. at

[5] Further, Plaintiffs' allegations that the Wardens created the policies at issue for these claims must also be disregarded because they are directly contradicted by "documents upon which pleadings rely" – *i.e.*, the OIG Reports – which state that other officials created these policies. *In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 405-06 (S.D.N.Y. 2001).

29-49. For these claims, the Complaint alleges in great detail the names and acts committed by the Wardens' subordinates, but it fails to link such conduct to the Wardens with anything other than the conclusory allegations described above about the Wardens creating "policies and practices" that resulted in abuse. *See* Br. at 37-49. These legal conclusions are not entitled to the presumption of truth, and there are no well-pled facts that remain – only "'naked assertions' devoid of 'further factual enhancement.'" *Iqbal* at 1949 (citation omitted). Because the complaint lacks adequate "factual enhancement" for these claims, they too fail to satisfy the plausibility standard set forth in *Twombly* and *Iqbal* and must be dismissed. [6]

CONCLUSION

Iqbal underscores the Wardens' previously-asserted arguments that Plaintiffs' Complaint fails to demonstrate any misconduct by them. As in *Iqbal*, the Complaint "has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief'" as required to move to discovery. 129 S. Ct. at 1950. (quoting Fed. R.

---

[6] Moreover, these vague and conclusory allegations were insufficient in this Circuit even *before Twombly*. *See Patterson v. Travis*, No. 02-CV-6444, 2004 WL 2851803, at *4 (E.D.N.Y. Dec. 9, 2004) (citation omitted) (holding that a complaint must "allege personal involvement of defendants in a manner that goes beyond restating the legal standard for liability in conclusory terms"); *see also* Br. at 32-34 (collecting cases).

Civ. P. 8(a)(2)). Accordingly, this Court should reverse the district court's decision below denying the Wardens' qualified immunity as to Claims 5, 7, 8, 20, 21, 22 and 23. In addition, this Court should affirm the district court's grant of qualified immunity as to Claims 1, 2, and 5.

Respectfully submitted,

/s/

Michael L. Martinez
David E. Bell
Matthew F. Scarlato
Crowell & Moring LLP
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2595
(202) 624-2500
Attorneys for Appellant Dennis Hasty

/s/

Debra L. Roth (Bar No. 06-185837)
Shaw, Bransford, Veilleux & Roth, P.C.
1100 Connecticut Avenue, N.W., Suite 900
Washington, DC 20036-4101
(202) 463-8400
Attorney for Appellant James Sherman

Dated: June 30, 2009

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

I hereby certify, pursuant to Fed. R. App. P. 32(a)(7)(C), that the forgoing brief contains 2,470 words (excluding the parts of the brief exempted by Fed. R. App. P.32(a)(7)(B)(iii)), which is within the 2,500-word limit set by this Court's June 17, 2009 order. In addition, this brief was prepared using proportionally spaced, 14-point typeface in accordance with Fed. R. App. P. 32(a)(5)-(6).

Dated: June 30, 2009

/s/
David E. Bell

ANTI-VIRUS CERTIFICATION FORM

See Second Circuit Interim Local Rule 25.1(a)(6)

CASE NAME: Turkmen, *et al.* v. Ashcroft, *et al.*

DOCKET NUMBER: 06-3745-cv (L)

I, David E. Bell, certify that I have scanned for viruses the PDF version of the Defendants/Cross-Appellees' Consent Motion for Leave to File Supplemental Briefs, which was submitted in this case as an email attachment to agencycases@ca2.uscourts.gov, and no viruses were detected. To conduct the virus-scan, I used **Symantec Anti-Virus version 10.1.8.8000.**

Dated: June 30, 2009

/s/
David E. Bell

CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2009, two copies of the foregoing Supplemental Brief of Appellants Dennis Hasty and James Sherman was served via first-class and electronic mail upon each of the following counsel:

Michael Winger
C. William Phillips
Covington & Burlington LLP
620 Eighth Avenue
New York, NY 10018
mwinger@cov.com
cphillips@cov.com
Counsel for Plaintiffs

Rachel Meeropol
Bill Quigley
Center for Constitutional Rights
666 Broadway, 7th Floor
New York, New York 10012
rachelm@ccr-ny.org
Bquigley@ccr-ny.org
Counsel for Plaintiffs

Dennis Barghaan
Richard Sponseller
Office of the US Attorney
2100 Jamieson Avenue
Alexandria, VA 22314
Richard.Sponseller@usdoj.gov
Dennis.Barghaan@usdoj.gov
Counsel for John Ashcroft

Craig Lawrence
Office of the US Attorney
555 4th Street, NW
10th Floor
Room 10-435
Washington, DC 20001
craig.lawrence@usdoj.gov
Counsel for Robert Mueller

Robert M. Loeb
Appellate Staff Civil Division,
Department of Justice
950 Pennsylvania Ave., N.W., Room 7268
Washington, D.C. 20530
Robert.Loeb@usdoj.gov
Counsel for John Ashcroft, Robert Mueller and the United States

Stephen E. Handler
U.S. Department of Justice
Ben Franklin Station
P.O. Box 888
Washington DC 20004
Stephen.Handler@usdoj.gov
Counsel for the United States

William A. McDaniel, Jr.
Law Offices of William A. McDaniel, Jr.
McDaniel, Bennett & Griffin
118 West Mulberry Street
Baltimore, MD 21201-3606
wam@wamcd.com
Counsel for James Ziglar

I further certify that on June 30, 2009, I sent 10 copies of the forgoing brief to the Clerk of the United States Court of Appeals for the Second Circuit, and e-mailed an electronic version of the brief to: agencycases@ca2.uscourts.gov

/s/
David E. Bell