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

REPLY IN SUPPORT OF THE 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

Page

TABLE OF AUTHORITIES

INTRODUCTION

Plaintiffs' Supplemental Brief ("Plfs. Supp. Br.") vastly underplays the import of *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), to the instant appeals. First, Plaintiffs erroneously argue that *Iqbal's* analysis of so-called "supervisory liability" is limited to discrimination claims. Rather, the Supreme Court declared that in *all Bivens* cases, a supervisory government official can be held liable only for his or her own misconduct. This holding effectively abrogates the prior "supervisory liability" standard in this Circuit to the extent it permitted liability based on passive acts of supervision. Second, even Plaintiffs acknowledge that *Iqbal* requires pleading discriminatory purpose for discrimination claims, yet they fail to meet this burden for the discrimination claims against Warden Dennis Hasty and Assistant Warden James Sherman (collectively, "the Wardens"). Third, even if the Second Circuit's supervisory liability standard remains intact, Plaintiffs have failed to demonstrate that their allegations state a plausible claim against the Wardens under *Iqbal's* pleading requirements.

I. *Iqbal's* Rejection Of Supervisory Liability Is Not Limited To Discrimination Claims.

Plaintiffs attempt to dodge *Iqbal* by claiming that the Supreme Court's rejection of supervisory liability was limited to discrimination claims. *See* Plfs. Supp. Br. at 3-4. They are mistaken. The Supreme Court rejected notions of "supervisory liability" for *all Bivens* claims, explaining as a general proposition

that the concept of supervisory liability was a "misnomer" because "each Government official, his or her title notwithstanding, is only liable for his or her *own misconduct*." *Iqbal*, 129 S. Ct. at 1949 (emphasis added); *see also id.* at 1948 ("a plaintiff must plead that each Government-official defendant, through the official's *own individual actions*, has violated the Constitution.") (emphasis added)). These broad commands are not limited to discrimination claims, as recognized by both the four-justice dissent in *Iqbal, see id.* at 1957 (Souter, J., dissenting), and by courts in this Circuit interpreting *Iqbal*. *See Bellamy v. Mount Vernon Hosp.,* No. 07-1801, 2009 WL 1835939, at *4, *6 (S.D.N.Y. June 26, 2009); *Spear v. Hugles*, No. 08-4026, 2009 WL 2176725, at *2 (S.D.N.Y. July 20, 2009).[1]

Plaintiffs' suggestion that Appellants are advancing a theory of "absolute immunity" for supervisory officials is similarly mistaken. Plfs. Supp. Br. at 4. *Iqbal* instructs that supervisory officials can be held liable for their *own* actions that give rise to the alleged constitutional violation. *Iqbal*, however, *does* "abrogate[] several of the categories of supervisory liability" that were previously established in this Circuit. *Bellamy*, 2009 WL 1835939, at *6 (citing *Colon v.*

---

[1] Nor does the Supreme Court's citation to *Dunlop v. Munroe*, 7 Cranch 242, 264 (1812), support a broader interpretation. *Dunlop* was cited for the general proposition that *respondeat superior* does not apply in *Bivens* cases – a point of law that does not advance Plaintiffs' position.

Coughlin, 58 F.3d 865, 873 (2d Cir. 1995)). Plaintiffs continue to rely on all five categories of liability as stated in *Colon* and repeatedly refer to the "deliberate indifference" category as the applicable standard, *see* Plfs. Supp. Br. at 2, 6, 7, even though *Iqbal* effectively eliminated that category. Under *Iqbal's* "active conduct" standard, a supervisor can only be held liable by either (1) directly participating in the act that gave rise to the alleged violation, or (2) creating a policy that gave rise to the alleged violation. *See Bellamy*, 2009 WL 1835939, at *6. "The other *Colon* categories impose the exact types of supervisory liability that *Iqbal* eliminated – situations where the supervisor knew of and acquiesced to a constitutional violation committed by a subordinate." *Id.*

Thus, *Iqbal* precludes imposition of personal liability on the Wardens based on allegations of passive supervision such as deliberate indifference. And as the Wardens have repeatedly explained, Claims 5 (discrimination), 7 (interference with religious practices), 8 (confiscation of personal property), and 23 (unreasonable strip searches) are based entirely on acts committed by subordinate employees. The Wardens had no direct involvement in the acts at issue. Thus, these claims must be dismissed.

II. Plaintiffs Fail To Allege The Wardens' Involvement In The Claims At Issue.

Even under their erroneous interpretation of *Iqbal*, Plaintiffs must allege more than "knowledge" or "acquiescence" in a subordinate's conduct to support

their discrimination claim (Claim 5). *See* Plfs. Supp. Br. at 2. Plaintiffs argue that this claim survives *Iqbal* because they allege "systematic abuse, condoned by the wardens, explicitly directed at the detainees' religion, race, and ethnicity." *Id.* at 18.[2] Even assuming that the Complaint contains sufficient facts to support this proposition, "condoning" the discriminatory acts of subordinates at best represents "acquiescence" in discriminatory conduct, which is insufficient to state a claim under *Iqbal*. *See* 129 S. Ct. at 1949. Plaintiffs' discrimination claim is therefore squarely in *Iqbal's* crosshairs.

Moreover, Plaintiffs' discrimination claim fails to allege *any* facts that permit the inference that any of their subordinates' acts were "condoned" by the Wardens. Instead, they rely solely on conclusory allegations to that effect. *See* Plfs. Supp. Br. at 18. These allegations cannot survive *Iqbal's* plausibility requirement.

Similarly, for the remaining claims that involve acts that Plaintiffs allege were committed only by the Wardens' subordinates – Claims 7, 8 and 23 – Plaintiffs again fail to allege any facts linking the Wardens to that conduct. First, they argue that the Complaint "alleges the wardens' failure to respond to these

---

[2] This represents another concession on Plaintiffs' part – Plaintiffs limit their discrimination claims against the Wardens exclusively to harsh treatment committed by their subordinates, and not any alleged role the Wardens had in placing Plaintiffs in the ADMAX SHU. *See* Plfs. Supp. Br. at 18.

abuses" committed by subordinate officials. Plfs. Supp. Br. at 12. Yet they fail to explain how these general allegations pass *Iqbal's* requirement for factual allegations. Nor do Plaintiffs allege a single fact about how, where, or when the Wardens purportedly created and implemented the "policies and customs" that led to the violations alleged. Such conclusory allegations are precisely the kind of speculative pleading that *Iqbal* prohibits.

As for Plaintiffs' claims in which they challenge policies created by the Wardens' superiors – Claims 20 (Due Process) and 21-22 (Communications Blackout) – Plaintiffs' misinterpret the requisite standard. Plaintiffs admit that the Complaint and exhibits attached thereto *only* link the Wardens to the challenged policies by alleging that the Wardens implemented policies created by their superiors. *See* Plfs. Supp. Br. at 11-12. But mere policy-implementation is not sufficient to support a plausible claim for relief against the Wardens under *Iqbal*. *Iqbal* requires factual allegations that permit this Court to infer "more than the mere possibility of misconduct." *Iqbal*, 129 S. Ct. at 1950. Here the more likely inference – indeed, the "obvious alternative explanation" (*see id.* at 1951) – is that the Wardens acted only to implement policies that were promulgated by their superiors based on legitimate circumstances. *Id.* Accordingly, Plaintiffs' reliance on the Wardens' implementation of these orders at the MDC is to no avail.

In sum, it is *Plaintiffs'* burden to allege facts that render plausible the inference that the Wardens engaged in misconduct. They have failed. Further, contrary to Plaintiffs' contention, Pltfs. Supp. Br. at 13, discovery is *not* required where a complaint suffers from the fatal flaws described above. Indeed, *Iqbal* reconfirms that Plaintiffs' Complaint falls far short of meeting the pleading requirements as to the Wardens and must be dismissed.

CONCLUSION

For the foregoing reasons, and for those stated in the Wardens' other briefs, this Court should reverse the district court's decision with respect to Claims 5, 7, 8, and 20-23 and affirm the district court's decision with respect 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: July 28, 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 1,248 words (excluding the parts of the brief exempted by Fed. R. App. P.32(a)(7)(B)(iii)), which is within the 1,250-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: July 28, 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: July 28, 2009

/s/
David E. Bell

CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2009, two copies of the foregoing Reply in Support of the 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 July 28, 2009, I sent one signed original and ten 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