

A Primer on 42 U.S.C. § 1983

by Daniel J. McDonald

The Ku Klux Klan Act of 1871, more commonly referred to as "section 1983,"¹ is the operating system or software that allows citizens of the United States "or other person[s] within the jurisdiction thereof"² to utilize the hardware of the United States Constitution. The Constitution is generally not self-executing. Thus, in most cases litigants may not bring claims for money damages directly under the Constitution.³ Instead, litigants seeking redress for violations of federal constitutional rights generally must assert their claims *via* 42 U.S.C. §1983, which provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .⁴

Daniel J. McDonald joined NIELSEN & SENIOR as an associate in 1997 after graduating cum laude from the J. Reuben Clark Law School at Brigham Young University in 1997. Mr. McDonald graduated magna cum laude from the University of Utah in 1994 with a bachelor's degree in Sociology. He received an A.S. degree in human resource development from Ricks College in 1992.

Mr. McDonald served as Lead Articles Editor for the B.Y.U. Law Review during 1996-97 and is the author of the award-winning article *Regulating Sexually Oriented Businesses: The Regulatory Uncertainties of a "Regime of Prohibition by Indirection"* and the *Obscenity Doctrine's Communal Solution*, 1997 B.Y.U. L. Rev. 339. Mr. McDonald was the 1998 recipient of BYU's Douglas H. Parker Award for Outstanding Performance in Jurisprudence. In 1997, he received the Foundation Press Award, recognizing his expertise in constitutional law, the



Section 1983 litigation is a fairly recent phenomenon. Before the landmark United States Supreme Court decision of *Monroe v. Pape*⁵ in 1961, "§1983 was remarkable for its insignificance."⁶ "Indeed, one commentator found only 21 suits brought under this provision in the years between 1871 and 1920."⁷ However, in *Monroe* the Court overturned a long-standing assumption that §1983 reached only misconduct either officially authorized or so widely tolerated as to amount to a "custom or usage" of government by holding that §1983 was "meant to give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position."⁸ Since *Monroe*, there has been a literal explosion of §1983 litigation, ranging from suits brought by prisoners to land use cases brought by wealthy corporate developers.

Section 1983 now encompasses any action taken "under color" of state or local law, even when the actor is not, himself, a state or local official.⁹ Additionally, deprivations of non-constitutional,

Code-Co Publishing Co. Award, recognizing his accomplishments in the areas of legal research and writing, and the Scholarly Writing Award. He has received numerous other honors and distinctions.

Mr. McDonald was admitted to the Utah State Bar in October, 1997. He is a member of the Labor & Employment Law, Constitutional Law, and Litigation sections of the Utah State Bar. He is also a member of the American Bar Association.

*Mr. McDonald has expertise in the areas of civil rights (42 U.S.C. §1983), constitutional law, and employment law, and has been involved in several high-profile civil rights lawsuits, including *Bauchman v. West High School*. He also practices in the following areas: litigation, consumer protection law, natural resources law, and water law.*

Mr. McDonald is actively involved in civic and religious organizations and serves as pro bono counsel for the NAACP, the nation's oldest civil rights organization.

federal law are also remediable under §1983.¹⁰ However, with each expansion of §1983 liability there has been concomitant contractions, including a host of immunities and procedural hurdles such as heightened pleading requirements. In the wake of these developments, a complicated and often counterintuitive patchwork of precedents has emerged under §1983. This patchwork contains many traps for the unwary §1983 litigant.

It would be impossible to describe this entire patchwork within the confines of a single *Utah Bar Journal* article. However, it is possible – and, hopefully, helpful – to sketch a very general framework of §1983.

I. WHAT RIGHTS ARE REMEDIABLE UNDER 42 U.S.C. §1983?

Section 1983, itself, does not create any substantive rights.¹¹ As the Supreme Court has said, “one cannot go into court and claim a ‘violation of §1983’ – for §1983 by itself does not protect anyone against anything.”¹² Instead, it is the vehicle used to vindicate rights secured by the federal constitution or federal law.¹³

A. Violations of the federal constitution.

As mentioned, most violations of the federal Constitution must be remedied via a §1983 action.¹⁴ Thus to properly bring a §1983 claim for violation of a constitutional right, the litigant must properly plead the underlying constitutional violation and plead the requirements of §1983, itself. Although “[n]othing in the language of §1983 or its legislative history limits the statute solely to intentional deprivations of constitutional rights,” and although §1983 does not “contain a state-of-mind requirement,”¹⁵ many underlying constitutional provisions do have state-of-mind requirements.¹⁶ Therefore, §1983 plaintiffs must pay special attention to the substantive provisions of the underlying constitutional right they think has been violated. Once the underlying constitutional right has been identified and its violation properly plead, the §1983 litigant must also plead and prove the following two elements under §1983: first, that the defendant acted under color of state law; and second, that the action complained of deprived a person of rights, privileges, or immunities secured by the Constitution or laws of the United States.¹⁷

B. Violations of federal law

The rights, privileges, or immunities secured by the laws of the United States include non-constitutional, federal law. However, not every violation of federal law is actionable under §1983. “A plaintiff alleging a violation of a federal statute will be permitted

to sue under §1983 unless (1) ‘the statute [does] not create enforceable rights, privileges, or immunities within the meaning of §1983,’ or (2) ‘Congress has foreclosed such enforcement of the statute in the enactment itself.’”¹⁸

In determining the scope of the first exception – whether a federal statute creates enforceable rights, privilege or immunities within the meaning of §1983 – the Supreme Court has developed a three-part test. The Court asks (1) whether the statutory provision at issue “‘was intend[ed] to benefit the putative plaintiff.’”¹⁹ If so, then the statute is deemed to create an enforceable right unless (2) the provision “‘reflects merely a ‘congressional preference’ for a certain kind of conduct rather than a binding obligation on the governmental unit,’”²⁰ or unless (3) the plaintiff’s interest is so vague and amorphous as to be beyond the competence of the judiciary to enforce.²¹

In determining the scope of the second exception – whether Congress has foreclosed enforcement of the statute under §1983 in the enactment itself – the Supreme Court has admonished, “We do not lightly conclude that Congress intended to preclude reliance on §1983 as a remedy for the deprivation of a federally secured right.”²² Further, “[t]he burden is on the [defendant]

“Section 1983, itself, does not create any substantive rights.”

to show by express provision or other specific evidence from the statute itself that Congress intended to foreclose

such private enforcement.”²³ The Supreme Court has found “private enforcement foreclosed only when the statute itself creates a remedial scheme that is sufficiently comprehensive . . . to demonstrate congressional intent to preclude the remedy of suits under §1983.”²⁴ Thus, for example, sexual harassment suits under Title VII to the Civil Rights of 1964 are not actionable via §1983 because it has its own remedial scheme.²⁵

Finally, it should be noted that §1983 is not available to redress violations of state law, including violations of a state constitution.

II. WHO CAN AND CANNOT BE SUED UNDER §1983?

A. States and “arms” of the state

Generally speaking, unless a state has waived its Eleventh Amendment immunity it is not subject to a suit for damages in federal court under §1983. The Supreme Court has held that Congress did not abrogate the states’ Eleventh Amendment immunity when enacting §1983.²⁶ However, Eleventh Amendment immunity extends only to the states themselves and to those governmental entities that are “arms of the state” and not to political subdivisions.²⁷ The Supreme Court applies several factors to determine whether a governmental entity is an “arm”

of the state. These factors, set forth in *Mt. Healthy Board of Education v. Doyle*,²⁸ include: (1) the characterization of the entity under state law; (2) the guidance and control exercised by the state over the entity; (3) the degree of state funding received by the entity; and (4) the ability of the entity to fund itself or generate revenue through assessments or taxes.²⁹ Thus, for example, the Tenth Circuit held in *Ambus v. Granite Board of Education* that Utah school districts are not arms of the state because the Utah Constitution and the Utah Governmental Immunity Act characterize school districts as political subdivisions of the state, Utah school districts exercise a significant degree of autonomy, and Utah school districts obtain funding at least in part through locally administered property taxes.³⁰

States may also not be sued under §1983 in state court, not because they are entitled to Eleventh Amendment immunity, but because, according to the Supreme Court, a state "is not a person within the meaning of §1983."³¹ State entities that would be "arms of the state" under the Eleventh Amendment are also not "person[s]" within the meaning of §1983.³² Thus, the scope of the Eleventh Amendment and the scope of §1983 are analytically distinct but practically inseparable.

In short, states or arms of the state may not be sued for damages in federal court or state court under §1983.

B. State officials in their official capacity

According to the Supreme Court, "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office."³³ "As such, it is no different from a suit against the State itself."³⁴ Thus, state officials may not be sued for damages in their official capacity in federal court because of the Eleventh Amendment and may not be sued in their official capacity in state court because such officials are not "persons" within the meaning of §1983.³⁵

It should be noted that to the extent a plaintiff is seeking injunctive relief he may sue the individual defendants in their official capacities or the state as a state under §1983.³⁶

C. Political subdivisions of the state

In *Monell v. Department of Social Services of New York City*,³⁷ the Supreme Court held that "Congress *did* intend . . . local government units to be included among those persons to whom §1983 applies."³⁸ Consequently, local government units, such as cities and counties, "can be sued directly under §1983 for monetary, declaratory, or injunctive relief."³⁹ The Court also held that "local government officials sued in their official capacities are "persons" under §1983 in those cases in which . . . a

local government would be suable in its own name."⁴⁰ Additionally, in *Hess v. Port Authority Trans-Hudson Corp.*,⁴¹ the Supreme Court acknowledged that "cities and counties do not enjoy Eleventh Amendment immunity."⁴² Moreover, political subdivisions are not entitled to even qualified immunity, which is discussed more fully in Part III. A., below.⁴³ However, suing a political subdivision of the state under §1983 is no easy task.

Political subdivisions are not automatically liable for the acts of their officers, agents or employees under a theory of vicarious liability. As the Supreme Court has held:

Local governing bodies . . . can be sued directly under §1983 for monetary declaratory, or injunctive relief where . . . the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers. Moreover, although the touchstone of the §1983 action against a government body is an allegation that official policy is responsible for a deprivation of rights protected by the Constitution, local governments, like every other §1983 "person," by the

very terms of the statute, may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body's official decision making channels.

....

On the other hand[,] . . . a municipality cannot be held liable solely because it employs a tortfeasor -- or, in other words, a municipality cannot be held liable under §1983 on a *respondeat superior* theory.⁴⁴

Accordingly, a §1983 plaintiff will have to do more than allege that an officer, agent, or employee of a political subdivision deprived him of federally protected rights to hold the political subdivision liable. The §1983 plaintiff must show the political subdivision, itself, was somehow culpable.⁴⁵ This can be done by demonstrating, *inter alia*: (1) that the actions of an officer, agent, or employee who was a final policy maker for the political subdivision caused the violation;⁴⁶ (2) that the actions of an officer, agent, or employee who was not a final policy maker were ratified or sanctioned by a final policy maker;⁴⁷ or (3) that the actions of an officer, agent, or employee who was not a final policy maker were merely part of a broader spectrum of conduct engaged in or tolerated by the municipality to such an extent that it constitutes a "custom or usage with the force of law."⁴⁸

"Most violations of the federal Constitution must be remedied via a §1983 action."

D. Non-independent units of government entities

"Courts have routinely dismissed §1983 claims brought against legally non-independent units of government entities otherwise subject to suit under §1983."⁴⁹ For example, a high school, which typically has no independent legal status apart from the school district to which it belongs cannot be separately liable under §1983.⁵⁰

E. Individuals in their individual capacity

Unlike official-capacity suits, "personal-capacity suits seek to impose personal liability upon a government official for actions he takes under color of state law."⁵¹ An award of damages in a personal capacity suit "can be executed only against the official's personal assets," whereas in an official capacity suit the plaintiff "must look to the government entity itself."⁵² Since individual-capacity suits do not impose any liability on the state, the Eleventh Amendment is not implicated, though the named defendant holds public office, and though he acted under color of state law.⁵³ Thus, there is no Eleventh Amendment bar to an individual-capacity suit in federal court under §1983.⁵⁴ "While the plaintiff in a personal-capacity suit need not establish a connection to governmental 'policy or custom,' officials sued in their personal capacities, unlike those sued in their official capacities, may assert personal immunity defenses such as objectively reasonable reliance on existing law."⁵⁵ These "qualified immunity" defenses are discussed more fully in Part III.A, below. In sum, while state officials sued in their official capacities are entitled to Eleventh Amendment immunity and are not "persons" within the meaning of §1983, individuals sued in their individual capacities are not entitled to Eleventh Amendment immunity and are "persons" within the meaning of §1983.⁵⁶

III. IMMUNITIES, PLEADING REQUIREMENTS, AND OTHER PROCEDURAL BARRIERS

Once the §1983 plaintiff has decided what rights have been violated and who can be held accountable for violation of those rights, he must anticipate various procedural defenses and prepare his complaint accordingly. Some of these defenses are briefly outlined below.

A. Qualified immunity

Since damages claims cannot be brought or sustained against states or state officials in their official capacities, and since political subdivisions are not vicariously liable for the actions of their officers, agents, or employees, §1983 claims are frequently brought against individual government officials who acted "under color of law" in their individual capacities. However, the fear that

such individual liability would discourage anyone from seeking public employment or office led to the development of qualified immunity. Under the doctrine of qualified immunity, public employees are entitled to immunity "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."⁵⁷ Thus, if the right which has allegedly been violated was not clearly established at the time of the alleged violation or, even assuming the right was clearly established, if no reasonable person would have known of that right, the individual defendant is immune from suit and not subject to the jurisdiction of the court.

In analyzing the affirmative defense of qualified immunity courts "first ask if a plaintiff has asserted the violation of a constitutional right at all, and *then* assess whether that right was clearly established at the time of a defendant's actions."⁵⁸ In order for the law to be clearly established in the Tenth Circuit, "there must be a Supreme Court or Tenth Circuit decision on point, or the clearly established weight of authority from other courts must have found the law to be as the plaintiff maintains."⁵⁹ This can be a daunting task for the plaintiff in emerging, complex, or confused areas of the law, like the First Amendment, where

"A state is not subject to a suit for damages under §1983."

some have said that not even members of the Supreme Court are sure what the law is.⁶⁰

B. Pleading with particularity

Where qualified immunity is raised as an affirmative defense the Tenth Circuit requires the plaintiff to plead the alleged violation of his rights under §1983 with such particularity that "all the factual allegations necessary to sustain a conclusion that defendant violated clearly established law" are contained in the complaint.⁶¹ A complaint containing only conclusory allegations will be dismissed.⁶² This can often put §1983 plaintiffs in a "Catch-22" situation in which they seek to allege a constitutional violation but cannot plead detailed facts without the aid of discovery.⁶³ The only solace offered by the Tenth Circuit is that "the plaintiffs should pursue every possible avenue to obtain the necessary facts to support their legal claims prior to filing a complaint in federal court."⁶⁴

Utah state courts have not imposed a heightened pleading requirement in §1983 claims brought against individuals in their individual capacities. Indeed, in *Baker v. Angus*,⁶⁵ the Utah Court of Appeals, in reversing a dismissal of such a suit, held:

Admittedly, the [plaintiffs'] complaint is not a model of specificity in outlining the individual statutory provisions that establish [their] civil rights or the specific actions by

the state defendants violating those rights. However, Rule 8(a) of the Utah Rules of Civil Procedure provides only that "[a] pleading which sets forth a claim for relief . . . shall contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." . . . The [plaintiffs] are therefore not required in their complaint to provide an in-depth statutory analysis with an accompanying expansive narrative of the state defendants' alleged violations. . . . To survive dismissal, the [plaintiffs] need only allege sufficient facts that can reasonably be argued and that cannot, as a matter of law, be dismissed.⁶⁶

Accordingly, §1983 plaintiffs may want to bring their claims in state court where the Tenth Circuit's heightened pleading standard may pose a problem. Of course, defendants should remove these cases to federal court and then move to dismiss.

C. Statute of limitations

Congress provided no specific statute of limitations for actions brought under §1983. However, 42 U.S.C. §1988 "endorses for the Civil Rights Acts the 'settled practice' of adopting a state limitations period when the federal statute provides no such period, provided the state limitations period is not inconsistent with federal law or policy."⁶⁷ Under this standard, the Tenth Circuit rejected the Utah legislature's two-year statute of limitations for §1983 actions in *Arnold v. Duchesne County*, and held that Utah's four-year residual statute of limitations, Utah Code Ann. §78-12-25(3), applies to §1983 actions.⁶⁸

D. Exhaustion of administrative remedies

Patsy v. Board of Regents of Florida,⁶⁹ held that plaintiffs need not exhaust state administrative remedies before instituting §1983 suits in federal court. That holding was extended in *Felder v. Casey*,⁷⁰ where the Supreme Court held that the Wisconsin notice-of-claim statute was preempted with respect to §1983 actions brought in state court. The Court reasoned that the States' authority to prescribe rules and procedures governing suits in their courts "does not extend so far as to permit States to place conditions on the vindication of a federal right."⁷¹ To hold otherwise would mean that "those who sought to vindicate their federal rights in state courts could be required to seek redress in the first instance from the very state officials whose hostility to those rights precipitated their injuries."⁷² Generally speaking, there is no exhaustion of administrative remedies requirement for §1983 claims.⁷³

"Local government units, such as cities and counties, can be sued directly under §1983."

E. Absolute immunity from an award of damages

There are several other types of immunity available to defendants under §1983, which typically provide absolute immunity from an award of damages. These immunities include legislative immunity,⁷⁴ judicial immunity,⁷⁵ prosecutorial immunity,⁷⁶ and witness immunity.⁷⁷

IV. DAMAGES

Perhaps one of the biggest misconceptions about §1983 is that it authorizes an award of compensatory damages based on the fact finder's assessment of the value or importance of a substantive constitutional right. However, compensatory damages are not available for the deprivation of a constitutional right alone. Such an award must be grounded in a determination of the plaintiff's actual loss.⁷⁸ The Supreme Court has said, "Rights, constitutional and otherwise, do not exist in a vacuum. Their purpose is to protect persons from injuries to particular interests."⁷⁹ Thus, where no injury is present, no "compensatory" damages can be awarded.⁸⁰ Civil rights plaintiffs may typically recover only the kinds of damages traditionally available in tort. There is no additional award to vindicate the abstract or general value of

the constitutional right in question. In short, "the abstract value of a constitutional right may not form the basis for §1983 damages."⁸¹

An award of nominal damages is appropriate where a plaintiff fails to establish the factual basis for an award of compensatory damages but nonetheless establishes a violation of the Constitution.⁸² Punitive damages are available against individuals sued under §1983 but are not available against political subdivisions.⁸³

V. ATTORNEY'S FEES

The successful civil rights plaintiff is entitled to an award of his attorney's fees pursuant to 42 U.S.C. §1988(b), which provides, in pertinent part, "In any action or proceeding to enforce a provision of section[] . . . 1983 . . . of this title . . . the court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs."⁸⁴ While the text of §1988(b) seems to make fee awards discretionary, in fact, an award of fees to the successful plaintiff is required absent "special circumstances" that would render such an award unjust.⁸⁵ A prevailing defendant, by contrast, can recover fees only when the litigation is unreasonable, frivolous, meritless or vexatious.⁸⁶

A plaintiff need only succeed on "any significant issue" in the litigation and achieve "some of the benefit" sought in bringing the suit to be deemed a "prevailing party" under §1988.⁸⁷ How-

ever, “[p]urely technical or de minimus” success is inadequate to make one a “prevailing party.”⁸⁸ Instead, the plaintiff must achieve some “material alteration of the legal relationship of the parties.”⁸⁹ Thus, in theory, a plaintiff who recovers only nominal damages is a “prevailing party.” However, in *Farrar v. Hobby*⁹⁰ the Supreme Court concluded that where only nominal damages were obtained by the plaintiff in that case, the only fee that was “reasonable” under §1988 was no fee at all.⁹¹ However, in *Brandau v. State of Kansas*,⁹² the Tenth Circuit has recently made in-roads on *Farrar* by recognizing that *Farrar* can be limited to situations where the plaintiff wins a technical victory that serves no important public purpose. In *Brandau*, the Tenth Circuit allowed a plaintiff who was awarded only \$1 in nominal damages to recover more than \$41,000.00 in attorney’s fees because her victory put her employer on notice that it should reform its policies, which vindicates the rights of others, thereby serving an important public purpose.⁹³

VI. CONCLUSION

Since entire treatises have been written on the subjects only summarily covered herein, it is a bit intimidating to attempt a general outline of the §1983 basics, which I have attempted to do here. This article is the proverbial “tip of the iceberg.” The law of §1983 is constantly changing and evolving. However, the general framework set forth herein should give the §1983 neophyte a place to start.

¹42 U.S.C. §1983.

²*Id.*

³The Supreme Court has held that damages causes of action may be brought against federal officials directly under the United States Constitution. *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 395-96 (1971). However, direct actions under the Constitution against state officials are not appropriate. *Bauchman v. West High School*, 900 F. Supp. 254, 263 (D. Utah 1995). By enacting 42 U.S.C. §1983, “Congress has provided an alternative remedy which it explicitly declared to be a substitute for recovery directly under the Constitution and viewed as equally effective . . .” *Id.* (quoting *Carlson v. Green*, 446 U.S. 14, 18-19 (1980)).

⁴42 U.S.C. §1983.

⁵365 U.S. 167 (1961).

⁶Peter W. Low and John C. Jeffries, Jr., *CIVIL RIGHTS ACTIONS: §1983 AND RELATED STATUTES* 11 n.1 (2d ed. 1994).

⁷*Id.* at 11-12 (citing Comment, *The Civil Rights Act: Emergence of an Adequate Federal Civil Remedy?*, 26 Ind. L.J. 361, 363 (1951)).

⁸*Monroe*, 365 U.S. at 172.

⁹For example, in *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 146-50 (1970), where a §1983 action was brought against a nongovernmental party for violation of the Fourteenth Amendment to the federal Constitution, the Supreme Court held that the private party’s joint participation with a state official to discriminate would constitute both state action essential to show a violation of the Fourteenth Amendment and action “under color” of law under §1983. *Id.* at 152.

¹⁰See *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980).

First Annual Young Lawyers Division Spring Social Event Barbecue With The Judges

Join us, eat ribs, and meet other young lawyers and various trial and appellate court judges. (All young lawyers are invited.)

Wednesday, May 19, 1999

6:30 - 8:30 pm

Utah Law and Justice Center

\$12.00 per person

RSVP by Friday, May 7 to:

Nathan Wilcox (801) 534-1700 or nathan@aklawfirm.com

or to:

Scott Mayeda smayeda@sinclairoil.com

(1 hour CLE credit pending approval)

¹¹See *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 616-18 (1979).

¹²*Id.* at 617.

¹³*Id.* at 616-18.

¹⁴See note 3, *supra*.

¹⁵See *Daniels v. Williams*, 474 U.S. 327, 330 (1986) (citing *Parratt v. Taylor*, 451 U.S. 527, 534 (1981)).

¹⁶For example, in order to make a claim under the Equal Protection Clause, a plaintiff must show intentional discrimination. See *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977).

¹⁷*Parratt*, 451 U.S. at 535.

¹⁸*Wilder v. Virginia Hosp. Ass’n*, 496 U.S. 498, 508 (1990) (quoting *Wright v. Roanoke Redevelopment & Housing Auth.*, 479 U.S. 418, 423 (1987)).

¹⁹*Id.* at 509 (quoting *Golden State Transit Corp. v. Los Angeles*, 493 U.S. 103, 106 (1989)).

²⁰*Id.* (quoting *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 19 (1981)).

²¹*Id.*

²²*Id.* at 520 (quoting *Wright*, 479 U.S. at 423-24 (quoting *Smith v. Robinson*, 468 U.S. 992, 1012 (1984))).

²³*Id.* at 520-21 (quoting *Wright*, 479 U.S. at 423).

²⁴*Id.* at 521 (quoting *Middlesex County Sewerage Auth. v. National Sea Clammers Assn.*, 453 U.S. 1, 20 (1981)).

²⁵See *Starrett v. Wadley*, 876 F.2d 808, 813-14 (10th Cir. 1989).

²⁶See *Quern v. Jordan*, 440 U.S. 332, 340-41 (1979).

²⁷See *Ambus v. Granite Bd. of Educ.*, 995 F.2d 992, 994 (10th Cir. 1993).

²⁸429 U.S. 274, 280 (1977) (In determining whether an agency is protected by the Eleventh Amendment, the critical inquiry is whether the entity “is to be treated as an arm of the State partaking of the State’s Eleventh Amendment immunity, or is instead to be treated as a municipal corporation or other political subdivision to which the Eleventh Amendment does not extend.”)

²⁹See *Ambus*, 995 F.2d at 994.

³⁰*Id.* at 997.

- 31 *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 64 (1989).
- 32 *Id.* at 70.
- 33 *Id.* at 71.
- 34 *Id.*
- 35 *See id.*
- 36 *See id.* at n.10.
- 37 436 U.S. 658 (1978).
- 38 *Id.* at 690.
- 39 *Id.*
- 40 *Id.* n. 55.
- 41 513 U.S. 30, 47 (1994).
- 42 *Id.*
- 43 *See Owen v. City of Independence*, 445 U.S. 622, 650 (1980).
- 44 *Monell*, 436 U.S. at 690-91.
- 45 Recently, in *Board of County Comm'rs v. Brown*, 520 U.S. 397 (1997), the Supreme Court commented:
- As our §1983 municipal liability jurisprudence illustrates, however, it is not enough for a §1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights.
- Id.* at 404.
- 46 *See Pembaur v. City of Cincinnati*, 475 U.S. 469, 480 (1986).
- 47 *Butcher v. City of McAlester*, 956 F.2d 973, 977 n.2 (10th Cir. 1992) (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 127 (1988)).
- 48 *Id.* In *City of Canton v. Harris*, 489 U.S. 378, 389 (1989), the Supreme Court held that municipal liability based on a policy of inadequate training or failure to train requires proof of the municipality's "deliberate indifference" to its inhabitants. *Barney v. Pulsipher*, 143 F.3d 1299, 1307 (10th Cir. 1998) (citing *Harris*, 489 U.S. at 389). "The 'deliberate indifference' standard may be satisfied when the municipality has actual or constructive notice that its action or failure to act is substantially certain to result in a constitutional violation, and it consciously or deliberately chooses to disregard the risk of harm." *Id.*
- 49 *Bauchman v. West High School*, 900 F. Supp. at 263 (citations omitted).
- 50 *Id.* at 263-64.
- 51 *Kentucky v. Grabam*, 473 U.S. 159, 165 (1985).
- 52 *Id.* at 166.
- 53 *See Papanas v. Allain*, 478 U.S. 265, 278 & n.11 (citing *Scheuer v. Rhodes*, 416 U.S. 232, 237-39 (1974)).
- 54 *See Hajer v. Melo*, 502 U.S. 21, 30-31 (1991).
- 55 *Id.* at 25.
- 56 *Id.* at 31.
- 57 *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1981).
- 58 *The Gehl Group v. Koby*, 63 F.3d 1528, 1533 (10th Cir. 1995) (emphasis added) (citing *Siegert v. Gilley*, 500 U.S. 226, 232 (1991)).
- 59 *Medina v. City and County of Denver*, 960 F.2d 1493, 1498 (10th Cir. 1992).
- 60 *See Bauchman*, 900 F. Supp. at 265.
- 61 *Sawyer v. County of Creek*, 908 F.2d 663, 667 (10th Cir. 1990) (quoting *Pueblo Neighborhood Health Centers, Inc. v. Losavio*, 847 F.2d 642, 646 (10th Cir. 1988)). The Supreme Court has not squarely addressed the issue of this heightened pleading standard in the context of individual capacity suits. In *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993), the Court held that a federal court may not apply a heightened pleading standard to a complaint

asserting municipal liability under §1983. However, the Court expressly declined to decide whether federal courts may apply a heightened pleading standard where qualified immunity is at issue. *Id.* at 166-67.

62 *See Breidenbach v. Bolisb*, 126 F.3d 1288, 1293 (10th Cir. 1997).

63 *Cf. id.* at 1293-94.

64 *Id.* at 1294. Whether the Tenth Circuit's heightened pleading standard can survive the recent Supreme Court decision of *Crawford-El v. Britton*, 118 S. Ct. 1584 (1998), remains to be seen. In that case, the Court held that in an individual capacity suit against a government official in which the official's improper motive is a necessary element of the underlying claim, a plaintiff need not adduce "clear and convincing evidence" of the motive to defeat a summary judgment motion. The Court reasoned that "[n]either the text of §1983 or any other federal statute, nor the Federal Rules of Civil Procedure, provides any support for imposing" the heightened requirement. *Id.* at 1595. So far, courts within the Tenth Circuit have "continued to apply a heightened standard of pleading, even after *Crawford-El*." *Keys Youth Servs., Inc. v. City of Olathe*, 1999 WL 153096, *12 n. 4 (D. Kan. Feb. 23, 1999).

65 910 P.2d 427.

66 *Id.* at 432 (citations omitted).

67 *Arnold v. Duchesne County*, 26 F.3d 982, 984 (10th Cir. 1994), *cert. denied*, 115 S. Ct. 721 (1995) (citing *Wilson v. Garcia*, 471 U.S. 261, 266-67 (1985)).

68 *Fratus v. Deland*, 49 F.3d 673, 675 (10th Cir. 1995).

69 457 U.S. 496, 516 (1982).

70 487 U.S. 131 (1988).

71 *Id.* at 147.

72 *Id.*

73 *But see Batemen v. City of West Bountiful*, 89 F.3d 704, 708-09 (10th Cir. 1996) (when state provides an adequate procedure for seeking just compensation, property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation); *Landmark Land Co. of Oklahoma, Inc. v. Buchanan*, 874 F.2d 717 (10th Cir. 1989) (same).

74 *See Tenney v. Brandhove*, 341 U.S. 367, 376-79 (1951).

75 *See Pierson v. Ray*, 386 U.S. 547, 554-55 (1967).

76 *See Imbler v. Pachtman*, 424 U.S. 409, 420-30 (1976).

77 *See Brisco v. LaHue*, 460 U.S. 325, 335-46 (1983).

78 *See Memphis Community Sch. Dist. v. Stachura*, 477 U.S. 299, 306-08, 309-10 (1986).

79 *Carey v. Piphus*, 435 U.S. 247, 254 (1978).

80 *See id.* at 254-66.

81 *Stachura*, 477 U.S. at 308.

82 *See Carey*, 435 U.S. at 266-67.

83 *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

84 42 U.S.C. §1988(b).

85 Low & Jeffries, *supra*, note 6, at 571 (citing *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968)).

86 *Id.* (citing *Christiansburg Garment Co. v. E.E.O.C.*, 434 U.S. 412, 421 (1978) and *Hughes v. Rowe*, 449 U.S. 5 (1980)).

87 *See Texas State Teachers Assoc. v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-92 (1989).

88 *Id.* at 792.

89 *Id.* at 792-93.

90 506 U.S. 103 (1992).

91 *See id.* at 114-15.

92 ___ F.3d ___, 1999 WL 72239 (10th Cir. Feb. 16, 1999).

93 *Id.* at *3.