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Low-Profile Ruling Could Have High Impact

Justices make it tougher to bring civil rights lawsuits against municipalities

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For Connecticut municipalities, *Ricci v. DeStefano*, otherwise known as the New Haven firefighters' lawsuit, was easily this year's most watched Supreme Court case, but was *Ricci* this term's most important Supreme Court decision for local cities and towns? If we told you that another civil rights case from this term has been cited in 1,422 opinions in less than the four months compared to 20 opinions citing *Ricci* in two months, would you wonder why you have not heard more about the more widely cited case?

For those of you who are still with us instead of searching for another article on *Ricci*, it is time to take a second look at *Ashcroft v. Iqbal*, a civil rights case in which a cable technician who was living on Long Island was arrested after the Sept. 11 terrorist attacks and allegedly abused in a federal detention center in Brooklyn.

Javaid Iqbal, a Pakistani Muslim, believed that he was a victim of racial profiling, but he did not have the benefit of eight years of independent examinations into Bush administration anti-terrorism policies. When his lawyers filed his civil rights complaint, the allegations contained the legal elements of several civil rights claims, including allegations of supervisory liability for the U.S. attorney general and FBI director, but the complaint was admittedly thin on facts. Those facts, his lawyers believed, would be found during discovery. Mr. Iqbal's case survived a motion to dismiss and the Second Circuit then affirmed that ruling. But, in a 5-4 decision, the Supreme Court overturned both lower courts in what has quietly become one of the most controversial opinions of the October 2008 term.

So why is *Iqbal* so controversial — aside from the now standard allegations of the Bush Administration behaving badly? There are two primary reasons. The first is that the *Iqbal* court has made federal pleading requirements much more stringent, with some claiming that it marks the end of federal notice pleading. That holding has elicited vast majority of the citations and scholarly criticism of the decision. For many government officials, however, the second holding in *Iqbal* is just as important, because, as Justice David Souter suggests in a pointed dissent, the majority opinion arguably does away with supervisory liability in public sector civil rights cases.


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Notice Pleading

Although the *Iqbal* court reaches the issue of pleading requirements after addressing "supervisory liability," the claim that this decision marks the so-called "death of notice pleading"— or in the words of Justice Ruth Bader Ginsburg "messed up the Federal Rules" — represents the most significant impact of the case on municipal litigation.

Following *Iqbal*, it is now clear that a bare-bones recital of tort elements from a legal form book is not enough to survive a motion to dismiss. *Iqbal* established a new general pleading standard in which the "conclusory nature" of formulaic pleadings "disentitles them to the presumption of truth." Instead of merely presuming the truth of every allegation in a complaint, a court must now follow a two-pronged approach in which it first identifies conclusory pleadings that are "not entitled to the assumption of truth." Then, if "there are well-pleaded factual allegations," a court must determine "whether they plausibly give rise to an entitlement to relief." The plausibility standard is not a "probability requirement," but rather "asks for more than a sheer possibility that a defendant has acted unlawfully."

This "plausibility" determination will leave much to the discretion of the trial court, since, as the court noted, "Determining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." This reliance on "common sense," which many in academia fear will too often result in premature dismissals, is at the root of much of the growing controversy surrounding *Iqbal*.

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Supervisory Liability

But the secondary holding in *Iqbal*, namely that supervisory liability is inapplicable in *Bivens* and Section 1983 cases, has also sparked vociferous criticism of the majority opinion, most notably from Justice Souter, and it is a dispute that, in many ways goes back 30 years.

Since 1979, when the Supreme Court decided *Monell v. New York City Department of Social Services*, it has been settled that governmental entities cannot be held vicariously liable in Section 1983 actions for unconstitutional acts of their employees under the doctrine of *respondeat superior*. This doctrine, for those without easy access to their Latin-to-Lawyer dictionary, states that an employer is, in some instances, subject to liability for torts committed by employees acting within the scope of their employment. Despite this exclusion of liability, nearly all of the federal circuits have recognized some form of Section 1983 "supervisory liability" where a superior can be held liable for constitutional violations by their subordinates.

In the Second Circuit, supervisory liability could be could be found if the superior official had "personal involvement" in the deprivation of constitutional rights. Such personal involvement could be established by: 1) directly participating in the violation, 2) failing to remedy the violation after being informed of it by report or appeal, 3) creating a policy or custom under which the violation occurred, 4) gross negligence in supervising subordinates who committed the violation, or 5) being deliberately indifferent to the rights of others by failing to act on information that constitutional rights were being violated. This standard, which was explicitly relied on by the Second Circuit in affirming the district court in *Iqbal*, was rejected by a majority of the Supreme Court.

Speaking for the court, Justice Anthony Kennedy renounced both the term "supervisory liability" and the position that "knowledge and acquiescence" of discriminatory classifications amounts to a supervisor's violating the Constitution. The court held that, "the term 'supervisory liability' is a misnomer. Absent vicarious liability, each Government official, his or her title notwithstanding, is only liable for his or her own misconduct." As Justice Kennedy concluded, purpose, and not "mere knowledge" of unconstitutional discrimination, is necessary to impose Section 1983 liability.

Conclusion

Although both holdings in *Iqbal* bode well for municipalities, we should not prematurely announce the death of notice pleading and superior liability since the decision will likely spur a new round of questions and theories that will challenge both the contours of *Iqbal* and the "commonsense" that the court hopes will guide us. ■