

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
LUBBOCK DIVISION

|                                |   |                                |
|--------------------------------|---|--------------------------------|
| RAJIN PATEL,                   | ) |                                |
|                                | ) |                                |
| Plaintiff,                     | ) |                                |
|                                | ) |                                |
| v.                             | ) |                                |
|                                | ) |                                |
| TEXAS TECH UNIVERSITY, et al., | ) |                                |
|                                | ) |                                |
| Defendants.                    | ) | Civil Action No. 5:17-CV-174-C |

**ORDER**

The Court previously entered an order denying Defendants' Motion to Dismiss (ECF No. 9) without prejudice to the extent that it sought dismissal of Plaintiff's claims against Defendants Jones, Pasewark, Ricketts, and Todd (the Individual Defendants) based on qualified immunity. In a subsequent order, the Court clarified its rationale for this decision, noting that qualified immunity is an affirmative defense that must be raised by an answer and that the defense was not properly before the Court because none of the Defendants had yet filed an answer pleading it. *See Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982); *Schultea v. Wood*, 47 F.3d 1427, 1433 (5th Cir. 1995). The Individual Defendants took an interlocutory appeal challenging the Court's "refusal" to rule on the issue of qualified immunity. On July 11, 2018, the United States Court of Appeals for the Fifth Circuit, in an unpublished opinion, vacated and remanded "[w]ithout taking a position on the merits of the pleadings or the immunity defense." The Fifth Circuit instructed this Court on remand to follow the qualified immunity procedures laid out in *Backe v. LeBlanc*, 691 F.3d 645 (5th Cir. 2012), and *Lion Boulos v. Wilson*, 834 F.2d 504 (5th Cir. 1987).

It was never the Court's intention to refuse to consider a properly raised qualified immunity defense or ignore well-established Fifth Circuit qualified immunity procedures. But it remains the understanding of the Court that qualified immunity, like other affirmative defenses subject to waiver, must be specifically pleaded in an answer before it can be considered by the Court. *See Morgan Guar. Trust Co. of New York v. Blum*, 649 F.2d 342, 345 (5th Cir. 1981) ("All affirmative defenses must be *specifically pleaded in the answer* . . . or be deemed waived.") (emphasis added); *Gomez v. Toledo*, 446 U.S. 635, 640 (1980) ("Since qualified immunity is a defense, the burden of *pleading* it rests with the defendant.") (emphasis added); Fed. R. Civ. P. 7(a) (defining "pleadings" separately from "motions."). The Court simply intended to convey to Defendants that it would not consider the affirmative defense of qualified immunity until such a defense had been properly raised by pleading it in an answer; the Court always intended to address the qualified immunity issue promptly as soon as it was pleaded. *See Schulte*, 47 F.3d at 1433 ("When a public official *pleads the affirmative defense of qualified immunity in his answer*, the district court may, on the official's motion or his own, require the plaintiff to reply to that defense in detail.") (emphasis added). If Defendants intended their 12(b)(6) motion to simply challenge the sufficiency of Plaintiff's pleadings to overcome a defense of qualified immunity (essentially making a request for further specificity in a Rule 7(a) reply), then the Court misinterpreted their intention in filing such a motion.<sup>1</sup>

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<sup>1</sup>The Court notes that any misinterpretation was caused by the fact that Defendants did not phrase their 12(b)(6) motion to specifically request such relief but instead argued that Plaintiff's claims against them failed "as a matter of law" and that they should be dismissed with prejudice. Defendants thus appeared to seek a dispositive ruling on the merits of their qualified immunity defense through a 12(b)(6) motion, which this Court understands to be improper as stated above.

In *Backe*, the Fifth Circuit clarified its “careful procedure under which a district court may defer its qualified immunity ruling if further factual development is necessary to ascertain the availability of that defense.” *Backe*, 691 F.3d at 648. The Fifth Circuit described this procedure as follows:

. . . a district court must first find ‘that the plaintiff’s pleadings assert facts which, if true, would overcome the defense of qualified immunity. . . . Thus, a plaintiff seeking to overcome qualified immunity must plead specific facts that both allow the court to draw the reasonable inference that the defendant is liable for the harm he has alleged and that defeat a qualified immunity defense with equal specificity. After the district court finds a plaintiff has so plead, if the court remains ‘unable to rule on the immunity defense without further clarification of the facts,’ it may issue a discovery order ‘narrowly tailored to uncover only those facts needed to rule on the immunity claim.’

*Id.* (quoting *Lion Boulos*, 834 F.2d at 507–08). This Court is well aware of this procedure and routinely follows it in qualified immunity cases as soon as the affirmative defense of qualified immunity has been properly raised by a defendant. As explained in Footnote 1 above, the Court did not previously interpret Defendants’ 12(b)(6) as a challenge to the sufficiency of Plaintiff’s pleadings to overcome a defense of qualified immunity (instead interpreting it as an improper attempt to obtain a full dismissal of Plaintiff’s claims against the Individual Defendants) but will now do so consistent with the Fifth Circuit’s instruction to apply the procedures of *Backe* and *Lion Boulos* on remand.

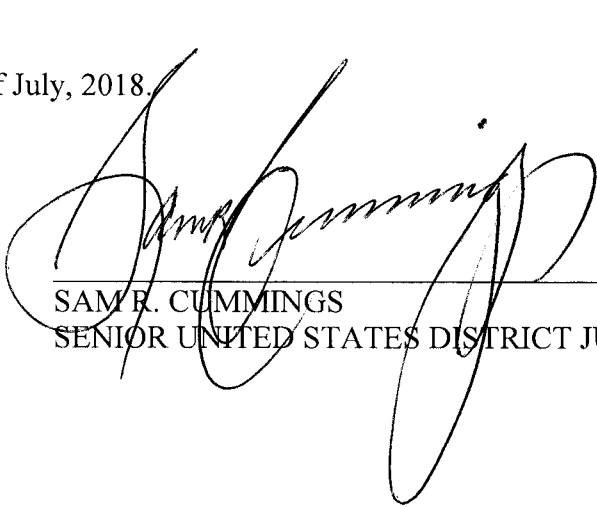
Defendants are **ORDERED** to answer Plaintiff’s Complaint within seven (7) days from the date of this Order and plead any affirmative defenses they wish to present to the Court, including qualified immunity.

Plaintiff is **ORDERED** to file a reply, pursuant to Federal Rule of Civil Procedure 7(a), to Defendants' assertion of qualified immunity within fourteen (14) days from the date of this order. Plaintiff's reply shall plead with particularity facts focusing specifically on the conduct of each individual who caused the Plaintiff's injury. *Reyes v. Sazan*, 168 F.3d 158 (5th Cir. 1999); *Schultea v. Wood*, 47 F.3d 1427 (5th Cir. 1995). Further, this order shall serve as notice that failure to comply with this order will result in dismissal of Plaintiff's claims against the parties asserting the defense of qualified immunity. *Reyes*, 168 F.3d at 161.

Defendants' Motion to Dismiss (ECF No. 9) is **DENIED** to the extent that it seeks a complete dismissal with prejudice of all claims against the Individual Defendants based on Plaintiff's initial pleadings. The Court will consider the Individual Defendants' qualified immunity defense after examining Plaintiff's Rule 7(a) Reply.

**IT IS ORDERED** that any discovery not related to the issue of qualified immunity is **STAYED** until the issue of qualified immunity has been decided by the Court, at which time the stay will be automatically lifted without further order. Defendants' Amended Motion for Temporary Protective Order and Stay of Discovery, filed June 20, 2018, is **GRANTED** to the extent stated in this Order.

SO ORDERED this 11 day of July, 2018.



SAM R. CUMMINGS  
SENIOR UNITED STATES DISTRICT JUDGE