U. S. Department of Justice

Civil Division

20-CV-B

Assistant Attorney General

Washington, D.C. 20530
FEB 26 2020

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NW
Washington, DC 20544

Dear Ms. Womeldorf:

I am writing on behalf of the United States Department of Justice to respectfully request that the Advisory Committee on Rules of Civil Procedure consider an amendment to Federal Rule of Civil Procedure 12(a)(4)(A).

Currently, the time to answer a complaint after a district court has denied a motion to dismiss is 14 days. *See* Federal Rule of Civil Procedure 12(a)(4)(A). Personal liability suits against federal officials brought under *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), however, are subject to immunity defenses that usually carry an immediate appeal right when they are rejected by a federal district court. The appeal time under such circumstances is 60 days, the same as in suits against the federal government itself. Requiring an answer when the appellate court might uphold the immunity defense is inconsistent with the idea of "suit immunity" underlying modern official immunity defenses. It also risks jump-starting the mandatory disclosure obligations and pretrial discovery that immunity is supposed to guard against. An official's timely compliance with Rule 12(a)(4)(A) might also create confusion as to whether she is foregoing appeal.

As discussed in more detail below, we propose consideration of an amendment to Civil Rule 12(a)(4)(A) that would extend the answer deadline in suits against government officers and employees in their individual capacity to 60 days from notice of the district court's action. Such an amendment would eliminate the official's need to respond to the complaint before the federal government has made an appeal decision.

<u>DISCUSSION</u>

A district court decision denying a dismissal motion asserting an official immunity defense is usually subject to an immediate appeal. *See Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009); *Behrens v. Pelletier*, 516 U.S. 299, 307-08 (1996). The Solicitor General must authorize the appeal if the government is to take it on the official's behalf. *See* 28 C.F.R. § 0.20(b). For that reason Federal Rule of Appellate Procedure 4(a)(1)(B)(iv) gives federal officers and employees 60 days in which to appeal even though the government itself is not a party. But while the Solicitor General considers appeal, the official remains subject to the requirement in

Federal Rule of Civil Procedure 12(a)(4)(A) that she serve an answer to the complaint 14 days after notice of the district court's ruling on his motion. The requirement that the official plead in response to the complaint's allegations is inconsistent with the immunity defense, which is conceived as "an *immunity from suit* rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

Both the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure recognize that the government is uniquely-situated among federal litigants and that the government's interests sometimes warrant special timing rules. Civil Rule 12(a) has long allowed the government 60 days in which to serve an answer to a complaint. Appellate Rule 4 has similarly allowed for 60 days to appeal when the government is a party. Over time both rules were amended to acknowledge the government's interests in personal-capacity suits based on its employees' official acts and the government's need for extended time to address them. For example, Civil Rule 12(a) was amended in 2000 to provide federal employees 60 days in which to respond to complaints in personal-capacity cases. That amendment now appears in Federal Rule of Civil Procedure 12(a)(3). The advisory committee note accompanying the amendment observed that "[t]ime is needed for the United States to determine whether to provide representation" to the employee and that if it does represent her "the need for an extended answer period is the same as in actions against" the government itself. Appellate Rule 4(a) was similarly amended in 2011 to ensure that personal-capacity suits against federal employees are covered by the 60-day "government" appeal time. The advisory committee note accompanying that amendment made a direct link to the extended response time in Civil Rule 12(a)(3) and the reasons supporting it. The Committee stated that the appeal-time amendment "is consistent with a 2000 amendment to Civil Rule 12(a)(3), which specified an extended 60-day period to respond to complaints[.]" It acknowledged that "[t]he same reasons justify providing additional time to the Solicitor General to decide whether to file an appeal." *Id.* (At the same time Rule 4 was amended, Congress amended 28 U.S.C. § 2107 to also provide for a 60-day appeal time in government-employee cases).

The extended time periods under these rules reflect two things. First, the government needs more time than private litigants to assess a case and determine a district court response. Second, the government, and the Solicitor General in particular, require an extended time to make an appeal decision. The same considerations also warrant allowing a government employee 60 days in which to answer a complaint after denial of a dismissal motion. The need for 60 days is especially acute when the order is appealable. The current 14-day response period requires an employee to answer a complaint before the Solicitor General has had time to decide whether to file an appeal. That undercuts the "suit immunity" protection official immunity defenses promise, and it risks creating confusion about whether the employee will forego appeal and instead defend in district court.

"The basic thrust of" qualified immunity and similar defenses "is to free officials from the concerns of litigation," *Iqbal*, 556 U.S. at 685. Those include "disruptive discovery," *id.*, but it also includes more. "One of the purposes of immunity, absolute or qualified, is to spare a defendant not only unwarranted liability, but unwarranted demands customarily imposed upon those defending a long drawn out lawsuit." *Siegert v. Gilley*, 500 U.S. 226, 232 (1990). The obligation to answer a complaint is one such customary litigation burden and one not properly imposed before immunity is resolved. The qualified-immunity defense presents a particularly good example. It is the most often-litigated immunity. It bars suit unless an official violated clearly-established rights. *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018). The point of making "clearly-established law" the immunity standard is to avoid as much as possible the need for officials to join issue on and to litigate the facts. *See Mitchell*, 472 U.S. at 526-27. By limiting liability to clearly-established violations, the qualified-immunity standard achieves that by narrowing the range of cases that require further pleading, discovery, or trial. It is why, for example, a genuine dispute of material fact on the underlying constitutional claim does not foreclose summary judgment when the law is not clearly established. *Saucier v. Katz*, 533 U.S. 194, 202 (2001), *overruled in part on other grounds, Pearson v. Callahan*, 555 U.S. 223 (2009).

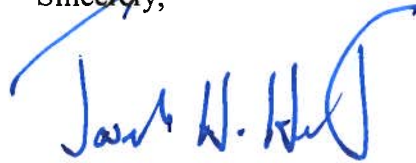
When an official *does* answer a complaint, the next likely event is an order for the parties to meet and confer and to plan for discovery and other pretrial activities. Those also are customary litigation burdens and ones qualified immunity is intended to guard against. *See Howe v. City of Enterprise*, 861 F.3d 1300, 1302 (11th Cir. 2017). Taken in that light, qualified immunity is properly understood as "a right not to be subjected to litigation beyond the point at which immunity is asserted." *Id.* At least so long as an immediate appeal might vindicate an official's immunity claim, the obligation to answer a complaint should lie beyond that point.

Answering the complaint would avoid the chance of default, but it risks causing confusion as to whether the official will appeal. And as just mentioned, answering also carries the risk that the court will require the parties to begin discovery and other pretrial activities. An official might seek an extension of time, but an impatient court might deny it or even condition relief on undertaking disclosure or engaging in discovery planning. The extended times already available under Civil Rule 12(a)(3) and Appellate Rule 4(a)(1) correctly reflect the insight that extension motions are not a sufficient safeguard for the government's interests in these cases.

The proposed amendment to Civil Rule 12(a)(4) would solve these problems. It is a modest proposal consistent with the 2000 amendment to Civil Rule 12(a)(3) and the 2011 amendment to Appellate Rule 4(a)(1). A sketch of the proposed amendment is included. The draft adapts the Rule 12(a)(3) extended-response time language to the situation in which a district court denies a federal officer or employee's motion to dismiss.

Please let me know if I can provide any more information regarding this proposal. Thank you for your consideration.

Sincerely,



Joseph H. Hunt
Assistant Attorney General

Attachment

Fed. R. Civ. P. 12

(a) Time to Serve a Responsive Pleading.

(1) *In General.* Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) *United States and Its Agencies, Officers, or Employees Sued in an Official Capacity*. The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) *United States Officers or Employees Sued in an Individual Capacity.* A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) *Effect of a Motion.* Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action except that a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve a responsive pleading within 60 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

* * * *

Sketch of Suggested Advisory Committee Note:

Rule 12(a)(4) is amended to provide a United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf with 60 days in which to serve a responsive pleading after a court denies a motion under this rule or postpones its disposition until trial. Suits against United States officers and employees often involve an official immunity defense and a right of immediate appeal if a court denies a motion asserting the defense. *See, e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 672 (2009); *Behrens v. Pelletier*, 516 U.S. 299 307-308 (1996). The 60-day period under amended Rule 12(a)(4) corresponds to the appeal time under Federal Rule of Appellate Procedure 4(a)(1)(B). The Committee Note to the 2011 amendment to that rule explains that if the United States provides representation to the defendant officer or employee additional time is needed for the Solicitor General to decide whether to file an appeal. Extending the time for serving a responsive pleading after denial of a motion under this rule avoids the potential for prejudice or confusion that might result from requiring a responsive pleading before an appeal decision is made.