



## Phillips v. County of Allegheny

515 F.3d 224 (2008) | Cited 13369 times | Third Circuit | February 5, 2008

PRECEDENTIAL

ARGUED JUNE 26, 2007

BEFORE: FISHER, NYGAARD, and ROTH, Circuit Judges.

OPINION OF THE COURT

Jeanne Phillips ("Phillips"), individually and in her capacity as administrator of the estate of her son, decedent Mark Phillips, appeals the District Court's dismissal of her claims against various defendants for violations of 42 U.S.C. § 1983. The District Court, in deciding a motion under FED.R.CIV.P. 12(b)(6), was required to accept as true all factual allegations in the complaint and draw all inferences from the facts alleged in the light most favorable to Phillips. *Worldcom, Inc. v. Graphnet, Inc.*, 343 F.3d 651, 653 (3d Cir. 2003). Moreover, in the event a complaint fails to state a claim, unless amendment would be futile, the District Court must give a plaintiff the opportunity to amend her complaint. *Shane v. Fauver*, 213 F.3d 113, 116 (3d Cir. 2000). Because the District Court did not follow these dictates, we will reverse in part and remand.

I.

As is typical with state-created danger cases, the facts here are inescapably tragic. Beginning in October of 2003, Michael Michalski, who was employed by the Allegheny County 911 Call Center as a dispatcher, used his position to surreptitiously gain access to unauthorized information. Specifically, Michalski ran multiple searches of the 911 Call Center's computer network and databases in an attempt to locate the whereabouts of his former girlfriend, Gretchen Ferderbar, and her then-boyfriend, Mark Phillips. By October 19, 2003, Daniel Nussbaum, who was Michalski's supervisor, became aware of Michalski's actions and placed Michalski on a one-week suspension, but allowed Michalski to remain on the job for a week. The day before the suspension took effect, Michalski again used the 911 Call Center's computer network and databases without authorization to access personal information regarding Mark Phillips. Michalski specifically accessed Mark Phillips' motor vehicle and license plate registrations in an effort to track and locate Mark Phillips' whereabouts.

During the evening hours of October 28, 2003, and the early morning hours of October 29, 2003, while on suspension, Michalski made numerous telephone calls to the 911 Call Center and spoke



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with Danielle Tush and Brian Craig. During those telephone calls, Michalski requested information that would assist him in locating Mark Phillips. Tush and Craig assisted Michalski, aware that they were accessing unauthorized personal information that had no relationship to their jobs as dispatchers for the 911 Call Center.

Gretchen Ferderbar contacted Nussbaum to inform him that Michalski had accessed the 911 Call Center's computer system in his position as a dispatcher to obtain information which enabled him to track and locate her and Mark Phillips at Mark Phillips' residence. After confirming that Michalski had improperly accessed information regarding Mark Phillips, Nussbaum met with Michalski at the 911 Call Center and confronted him about his repeated and unauthorized use of the 911 Call Center's computer system. Michalski admitted to Nussbaum that he had used the 911 Call Center's computer system to gain access to unauthorized information regarding Mark Phillips, and Nussbaum terminated Michalski's employment with the 911 Call Center.

Recognizing Michalski's "volatile appearance" and apparently concerned that Michalski might commit a violent act, Nussbaum placed two telephone calls. Nussbaum left either a voicemail message on Ferderbar's cellular telephone warning her to be careful and to be on guard for Michalski or Nussbaum warned her in person - the record is unclear. What is clear, however, is that Nussbaum also contacted the McCandless Township Police Department to notify them of Michalski's volatile state. Nussbaum made no effort, however, to contact the police departments of Shaler Township or the Borough of Carnegie where Federbar and Phillips, respectively, lived. Despite recognizing that Michalski had used the 911 Call Center's computer system to track Mark Phillips, Nussbaum made no effort to detain Michalski, to deter him from reaching Mark Phillips or to warn Mark Phillips of Michalski's potentially violent behavior.

Later that same day, Michalski contacted dispatchers at the 911 Call Center, including Tush, Craig, Leonard Deutsch, Ryan Ging, Susan Zurcher and Phillip Cestra, to explain the circumstances of his termination. Michalski indicated that he "had nothing left to live for" and that Ferderbar and Mark Phillips were going to "pay for putting him in his present situation." Despite this contact by Michalski, none of the dispatchers contacted either Ferderbar or Mark Phillips or the police departments of the Township of Shaler or the Borough of Carnegie. Later that afternoon, Michalski shot and killed Mark Phillips with a handgun. Michalski also shot and killed Ferderbar and her sister.

Jeanne Phillips, as Administratrix of her son's estate, sued numerous defendants, including Allegheny County, Allegheny County 911, 911 Supervisor Nussbaum and 911 Dispatchers Tush, Craig, Deutsch, Ging, Zurcher and Cestra, alleging violations of Mark Phillips' civil rights under 42 U.S.C. § 1983 and alleging, through pendant jurisdiction, a wrongful death action, and a survivorship action. In response, Appellees moved to dismiss Phillips' claims pursuant to Federal Rule 12(b)(6) and the district judge granted the motion.<sup>1</sup>

II.



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We have jurisdiction pursuant to 28 U.S.C. § 1291. The standard of review for a dismissal under FED.R.CIV.P. 12(b)(6) is de novo. *Omnipoint Communications Enters., L.P. v. Newtown Township*, 219 F.3d 240, 242 (3d Cir. 2000). Because this standard requires us to review the District Court's order anew and without any deference, we pause here to re-evaluate our de novo standard of review in light of the Supreme Court's recent decision in *Bell Atlantic Corp. v. Twombly*, - U.S. -, 127 S.Ct. 1955 (2007).<sup>2</sup>

After oral argument, we asked the parties to brief the *Twombly* decision's impact on pleading standards generally and on this appeal specifically. Few issues in civil procedure jurisprudence are more significant than pleading standards, which are the key that opens access to courts. In *Twombly*, the Supreme Court held that the plaintiffs failed to state a claim under § 1 of the Sherman Antitrust Act. The plaintiffs had alleged that defendants had engaged in parallel conduct, but had pleaded no set of facts making it plausible that such conduct was the product of a conspiracy. In reaching this decision, the Supreme Court rejected language that long had formed part of the Rule 12(b)(6) standard, namely the statement in *Conley v. Gibson*, 355 U.S. 41 (1957), that a complaint may not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Id.* at 45-46.

What makes *Twombly*'s impact on the Rule 12(b)(6) standard initially so confusing is that it introduces a new "plausibility" paradigm for evaluating the sufficiency of complaints. At the same time, however, the Supreme Court never said that it intended a drastic change in the law, and indeed strove to convey the opposite impression; even in rejecting *Conley*'s "no set of facts" language, the Court does not appear to have believed that it was really changing the Rule 8 or Rule 12(b)(6) framework. Therefore, our review of how *Twombly* altered review of Rule 12(b)(6) cases must begin by recognizing the § 1 antitrust context in which it was decided. See e.g., *Twombly*, 127 S.Ct. at 1963 ("We granted certiorari to address the proper standard for pleading an antitrust conspiracy through allegations of parallel conduct."). Outside the § 1 antitrust context, however, the critical question is whether and to what extent the Supreme Court altered the general Rule 12(b)(6) standard.

Before *Twombly*, that standard had been well-established for decades. Our typical statement of the standard has instructed that:

The applicable inquiry under Rule 12(b)(6) is well-settled. Courts are required to accept all well-pleaded allegations in the complaint as true and to draw all reasonable inferences in favor of the non-moving party. The inquiry is not whether plaintiffs will ultimately prevail in a trial on the merits, but whether they should be afforded an opportunity to offer evidence in support of their claims. Dismissal under Rule 12(b)(6) is not appropriate unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

In *re Rockefeller Ctr. Props., Inc. Sec. Litig.*, 311 F.3d 198, 215-16 (3d Cir. 2002) (internal citations omitted). Another common formulation of the standard, which does not include the "no set of facts"



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language, reads:

In evaluating the propriety of the dismissal, we accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief.

*Pinker v. Roche Holdings Ltd.*, 292 F.3d 361, 374 n.7 (3d Cir. 2002).

In determining how *Twombly* has changed this standard, we start with what *Twombly* expressly leaves intact. The Supreme Court reaffirmed that FED.R.CIV.P. 8 "'requires only a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the . . . claim is and the grounds upon which it rests,'" and that this standard does not require "detailed factual allegations." *Twombly*, 127 S.Ct. at 1964 (quoting *Conley*, 355 U.S. at 47). The Supreme Court also reaffirmed that, on a Rule 12(b)(6) motion, the facts alleged must be taken as true and a complaint may not be dismissed merely because it appears unlikely that the plaintiff can prove those facts or will ultimately prevail on the merits. See *id.* at 1964-65, 1969 n.8. The Supreme Court did not address the point about drawing reasonable inferences in favor of the plaintiff, but we do not read its decision to undermine that principle.

We find two new concepts in *Twombly*. First, in its general discussion of Rules 8 and 12(b)(6), the Supreme Court used certain language that it does not appear to have used before. The Court explained that "[w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's [Rule 8] obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 127 S.Ct. at 1964-65 (alteration in original) (internal citations omitted). The Court explained that Rule 8 "requires a 'showing,' rather than a blanket assertion, of entitlement to relief." *Id.* at 1965 n.3. Later, the Court referred to "the threshold requirement of Rule 8(a)(2) that the 'plain statement' possess enough heft to 'sho[w] that the pleader is entitled to relief.'" *Id.* at 1966. The Court further explained that a complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 1965 & n.3.

Second, the Supreme Court disavowed certain language that it had used many times before -- the "no set of facts" language from *Conley*. See *id.* at 1968. It is clear that the "no set of facts" language may no longer be used as part of the Rule 12(b)(6) standard. As the Court instructed, "[t]his phrase is best forgotten as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Twombly*, 127 S.Ct. at 1969. We find that these two aspects of the decision are intended to apply to the Rule 12(b)(6) standard in general. See *Iqbal v. Hasty*, 409 F.3d 143, 157 n.7 (2d Cir. 2007) ("[I]t would be cavalier to believe that the Court's rejection of the 'no set of facts' language from *Conley* . . . applies only to section 1 antitrust claims.").



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A.

While the Supreme Court's emphasis on Rule 8's requirement of a "showing" is new, the Court also expressly reaffirmed that Rule 8 requires only a short and plain statement of the claim and its grounds. *Twombly*, 127 S.Ct. at 1964, 1965 n.3 (citing *Conley*, 355 U.S. at 47). Even the dissent in *Twombly* did not believe that the requirement of a Rule 8 "showing," by itself, had any other meaning. See *Twombly*, 127 S.Ct. at 1979 n.6 (Stevens, J., dissenting) ("The majority is correct to say that what the Federal Rules require is a 'showing' of entitlement to relief. Whether and to what extent that 'showing' requires allegations of fact will depend on the particulars of the claim."). However, the *Twombly* decision focuses our attention on the "context" of the required short, plain statement. Context matters in notice pleading. Fair notice under Rule 8(a)(2) depends on the type of case - some complaints will require at least some factual allegations to make out a "showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 127 S.Ct. at 1964. Indeed, taking *Twombly* and the Court's contemporaneous opinion in *Erickson v. Pardus*, 127 S.Ct. 2197 (2007), together, we understand the Court to instruct that a situation may arise where, at some point, the factual detail in a complaint is so undeveloped that it does not provide a defendant the type of notice of claim which is contemplated by Rule 8. See *Airborne Beepers & Video, Inc., v. AT&T Mobility L.L.C.*, 499 F.3d 663, 667 (7th Cir. 2007). Put another way, in light of *Twombly*, Rule 8(a)(2) requires a "showing" rather than a blanket assertion of an entitlement to relief. We caution that without some factual allegation in the complaint, a claimant cannot satisfy the requirement that he or she provide not only "fair notice," but also the "grounds" on which the claim rests. See *Twombly*, 127 S.Ct. at 1965 n.3.

B.

The second important concept we take from the *Twombly* opinion is the rejection of *Conley*'s "no set of facts" language. The *Conley* language was problematic because, for example, it could be viewed as requiring judges to speculate about undisclosed facts. "This famous observation," the Court held, "has earned its retirement. The ['no set of facts'] phrase [in *Conley*] is best forgotten as an incomplete, negative gloss on an accepted pleading standard: Once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Twombly*, 127 S. Ct at 1969 n.8. After *Twombly*, it is no longer sufficient to allege mere elements of a cause of action; instead "a complaint must allege facts suggestive of [the proscribed] conduct." *Id.* The Supreme Court appears to have rejected a "hyper-literal" understanding of *Conley*'s "no set of facts" language. As the Supreme Court explained,

[t]his "no set of facts" language can be read in isolation as saying that any statement revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings. . . . On such a focused and literal reading of *Conley*'s no set of facts, a wholly conclusory statement of claim would survive a motion to dismiss whenever the pleading left open the possibility that a plaintiff might later establish some set of [undisclosed] facts to support recovery.



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Twombly, 127 S.Ct. at 1968 (alteration in original). See also Geoffrey C. Hazard, From Whom No Secrets Are Hid, 76 Tex. L. Rev. 1665, 1685 (1998) (explaining that "literal compliance" with Conley "could consist simply of giving the names of the plaintiff and the defendant, and asking for judgment") (cited for related proposition in Twombly, 127 S.Ct. at 1969). We have already recognized principles that preclude the hyper-literal reading of Conley's language rejected in Twombly.<sup>3</sup>

In rejecting the Conley language, the Supreme Court was careful to base its analysis in pre-existing principles. See *id.* at 1968-69 & n.8. The Court emphasized throughout its opinion that it was neither demanding a heightened pleading of specifics nor imposing a probability requirement. See *id.* at 1964, 1965, 1973 n.14, 1974. Indeed, the Court cited Twombly just days later as authority for traditional Rule 8 and 12(b)(6) principles. See Erickson, 127 S.Ct. at 2200.

Thus, under our reading, the notice pleading standard of Rule 8(a)(2) remains intact, and courts may generally state and apply the Rule 12(b)(6) standard, attentive to context and an showing that "the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Twombly, 127 S.Ct. at 1964. It remains an acceptable statement of the standard, for example, that courts "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Pinker*, 292 F.3d at 374 n.7. See also Twombly, 127 S.Ct. at 1969 n.8 (citing as consistent with its rejection of the "no set of facts" language the statement that "if, in view of what is alleged, it can reasonably be conceived that the plaintiffs . . . could, upon a trial, establish a case which would entitle them to . . . relief, the motion to dismiss should not have been granted") (citation omitted).

C.

The more difficult question raised by Twombly is whether the Supreme Court imposed a new "plausibility" requirement at the pleading stage that materially alters the notice pleading regime. See *id.* at 1988 (Stevens, J., dissenting) ("Whether the Court's actions will benefit only defendants in antitrust treble-damages cases, or whether its test for the sufficiency of a complaint will inure to the benefit of all civil defendants, is a question that the future will answer."). The answer to this question is difficult to divine. Numerous references to "plausibility" in Twombly seem to counsel reliance on the concept as a standard for notice pleading. The Court explained that a plaintiff must "nudge [his or her] claims across the line from conceivable to plausible" in order to survive a motion to dismiss. 127 S.Ct. at 1974. Relying on this, the Court of Appeals for the Tenth Circuit has held that the mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims.

*Ridge at Red Hawk, L.L.C. v. Schneider*, 493 F.3d 1174, 1177 (10th Cir. 2007). Yet, the Twombly decision repeatedly indicated that the Court was not adopting or applying a "heightened pleading





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standard." 127 S.Ct.at 1974 ("[W]e do not require heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face."). We are not alone in finding the opinion confusing. See e.g. *Iqbal v. Hasty*, 490 F.3d 143 (2d Cir. 2007) ("These conflicting signals create some uncertainty as to the intended scope of the Court's decision.").

The issues raised by *Twombly* are not easily resolved, and likely will be a source of controversy for years to come. Therefore, we decline at this point to read *Twombly* so narrowly as to limit its holding on plausibility to the antitrust context. Reading *Twombly* to impose a "plausibility" requirement outside the § 1 context, however, leaves us with the question of what it might mean. "Plausibility" is related to the requirement of a Rule 8 "showing." In its general discussion, the Supreme Court explained that the concept of a "showing" requires only notice of a claim and its grounds, and distinguished such a showing from "a pleader's 'bare averment that he wants relief and is entitled to it.'" *Twombly*, 127 S.Ct. at 1965 n.3. While Rule 12(b)(6) does not permit dismissal of a well-pleaded complaint simply because "it strikes a savvy judge that actual proof of those facts is improbable," the "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Id.* at 1965.

The Supreme Court's *Twombly* formulation of the pleading standard can be summed up thus: "stating . . . a claim requires a complaint with enough factual matter (taken as true) to suggest" the required element. *Id.* This "does not impose a probability requirement at the pleading stage," but instead "simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of" the necessary element. *Id.*

D.

As Professor Edward H. Cooper has pointed out, all of the foregoing discussion can be reduced to this proposition: Rule 8(a)(2) has it right. See Edward H. Cooper, *Notice Pleading: The Agenda After Twombly*, 5 (January 2008) (unpublished manuscript, on file with the Administrative Office of the United States Courts, Rules Committee Support Office), available at [www.uscourts.gov/rules/Agenda%20books/st2008-01.pdf](http://www.uscourts.gov/rules/Agenda%20books/st2008-01.pdf). This rule requires not merely a short and plain statement, but instead mandates a statement "showing that the pleader is entitled to relief." That is to say, there must be some showing sufficient to justify moving the case beyond the pleadings to the next stage of litigation. The complaint at issue in this case clearly satisfies this pleading standard, making a sufficient showing of enough factual matter (taken as true) to suggest the required elements of Phillips' claims.

III.

Under Section 1983, a plaintiff must plead a deprivation of a constitutional right and that the constitutional deprivation was caused by a person acting under the color of state law. *Kneipp v. Tedder*, 95 F.3d 1199, 1204 (3d Cir. 1996). Phillips alleges a deprivation of her son's right to life, liberty and bodily integrity under the Fourteenth Amendment to the Constitution. Individuals have a



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constitutional liberty interest in personal bodily integrity that is protected by the Due Process Clause of the Fourteenth Amendment. *D.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364, 1368 (3d Cir. 1992) (citing *Ingraham v. Wright*, 430 U.S. 651, 672-74 (1977)).

However, the Due Process Clause does not impose an affirmative obligation on the state to protect its citizens. See *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 195-96 (1989). The state-created danger theory operates as an exception to that general rule and requires plaintiffs to meet a four-part test: (1) the harm ultimately caused to the plaintiff was foreseeable and fairly direct; (2) the state-actor acted in willful disregard for the plaintiff's safety; (3) there was some relationship between the state and the plaintiff; and (4) the state-actor used his authority to create an opportunity for danger that otherwise would not have existed.<sup>4</sup> *Bright v. Westmoreland County*, 443 F.3d 276, 281 (3d Cir.2006) (quotations and footnotes omitted); see also *Rivas v. City of Passaic*, 365 F.3d 181, 194 (3d Cir. 2004). Here, the District Court dismissed Phillips' complaint under a Rule 12(b)(6) motion, based upon her failure to adequately plead the first, second and fourth elements of the test - that the harm was foreseeable, that the state actor's behavior "shocked the conscience," and that the defendant's conduct rendered Mark Phillips more vulnerable to danger. See *Bright*, 443 F.3d at 281; *Rivas v. City of Passaic*, 365 F.3d 181, 194 (3d Cir. 2004). Because the District Court erred in its analysis of several elements, we will discuss each in turn.

A.

We begin with the fourth element, the requirement of an affirmative act, because our conclusion obviates the need to analyze the other three elements with respect to the claim against Nussbaum. State actors must use their authority to create an opportunity that otherwise would not have existed for the third-party's crime to occur. *Kniepp*, 95 F.3d at 1208. In *Bright*, we stressed that under the fourth element of a state-created danger claim,

[l]iability . . . is predicated upon the states' affirmative acts which work to the plaintiff's detriment in terms of exposure to danger. It is the misuse of state authority, rather than a failure to use it, that can violate the Due Process Clause.

443 F.3d at 282 (emphasis added) (quoting *D.R. by L.R.*, 972 F.2d at 1374). The line between action and inaction may not always be clear. However, we have never found a state-created danger claim to be meritorious without an allegation and subsequent showing that state authority was affirmatively exercised in some fashion.

The allegations in the complaint against defendant Nussbaum do not sufficiently allege that he acted "affirmatively." Specifically, Phillips alleges that Nussbaum misused his authority by notifying the wrong authorities of the dangers Michalski posed to Mark Phillips. Also, Phillips alleges that Nussbaum misused his authority by deferring Michalski's employment suspension, with full knowledge that Michalski was using the 911 Call Center's computers to improperly access





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confidential information about Mark Phillips - information which he used to determine Mark Phillips' whereabouts, and to track his movements. This misuse of Nussbaum's authority, Phillips alleges, worked to Mark Phillips' detriment by exposing him to a continuing danger, and by allowing Michalski to harm Mark Phillips. Phillips' difficulty, however, is that these allegations, at their core, are omissions, not commissions - inactions rather than actions. To be sure, it has been sufficiently alleged that Nussbaum's performance worked to Mark Phillips' detriment in terms of exposure to danger. But, that is only a portion of our test.

Our jurisprudence requires that Phillips allege an affirmative action, rather than inaction or omission. *Bright*, 443 F.3d at 282 (citing *D.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364, 1374 (3d Cir.1992) (en banc)). Phillips' complaint does not make such an allegation against Nussbaum and, hence, no state-created danger claim has been sufficiently pleaded.

Nonetheless, the District Judge erred when he dismissed the complaint without offering Phillips the opportunity to amend her complaint. It does not matter whether or not a plaintiff seeks leave to amend. We have instructed that if a complaint is vulnerable to 12(b)(6) dismissal, a district court must permit a curative amendment, unless an amendment would be inequitable or futile. *Grayson v. Mayview State Hosp.*, 293 F.3d 103, 108 (3d Cir.2002) (citing *Shane v. Fauver*, 213 F.3d 113, 116 (3d Cir.2000)). In *Shane*, we held that when dismissing for a failure to state a claim:

[W]e suggest that district judges expressly state, where appropriate, that the plaintiff has leave to amend within a specified period of time, and that application for dismissal of the action may be made if a timely amendment is not forthcoming within that time. If the plaintiff does not desire to amend, he may file an appropriate notice with the district court asserting his intent to stand on the complaint, at which time an order to dismiss the action would be appropriate.

*Id.* at 116 (quoting *Borelli v. City of Reading*, 532 F.2d 950, 951 n. 1 (3d Cir.1976)). Because Phillips was not given such an opportunity, we will remand to allow her to decide whether to stand on her complaint or attempt an amendment so as to properly allege an affirmative act by defendant Nussbaum.

Turning to defendants Tush and Craig, we find that the complaint adequately alleges they acted affirmatively by providing Michalski with confidential 911 computer information about Mark Phillips that permitted Michalski to harm him. This allegation satisfies this element of our state-created danger analysis.

However, pleading an affirmative act by a state actor is not enough: the complaint must also plead a direct causal relationship between the affirmative act and plaintiff's harm. *Kaucher*, 455 F.3d at 432. The direct causal connection between the affirmative actions of Tush and Craig (actively providing Michalski with requested confidential information about Phillips) and the ultimate harm to Mark Phillips is well pleaded. The complaint alleges that after Tush and Craig provided Michalski with



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confidential information, Michalski used that information to hunt down and kill Mark Phillips.

In sum, under this element, Phillips has sufficiently alleged that Tush and Craig undertook affirmative actions which worked to Mark Phillips' detriment by exposing him to danger and that there is a direct causal relationship between their harm and the defendants' actions.

We divert our discussion here to rectify an incorrect holding by the District Court on this point. As to this fourth element of our state-created danger analysis, the District Court determined that Phillips had failed to allege that defendants Tush and Craig "rendered Mark Phillips more vulnerable to danger." Specifically, the District Court noted that the complaint fails to allege where the shooting took place, and reasoned that if the shootings did not occur at Mark Phillips' residence, the unauthorized information provided by Tush and Craig did not render him vulnerable to danger. This was simply wrong. Where Mark Phillips was killed is not dispositive. At this preliminary pleading stage, it is reasonable to infer that Michalski could have gained relevant information at Mark Phillips' house as to his whereabouts, which could have directly assisted Michalski in stalking and killing him.

Such an unduly crabbed reading of the complaint denies Phillips the inferences to which her complaint is entitled. Based on the allegations in Phillips' complaint and reasonable inferences drawn from those allegations, Phillips may well be able to prove facts that would satisfy the four elements of the state-created danger analysis with respect to Tush and Craig. Therefore, Phillips has alleged the deprivation of an actual constitutional right, the substantive due process right to life and liberty under the Fourteenth Amendment and we will reverse the District Court's contrary determination.

B.

To properly allege a state-created danger claim, a plaintiff must additionally plead that the harm ultimately caused was a foreseeable and a fairly direct result of the state's actions. *Morse v. Lower Merion School Dist.*, 132 F.3d 902, 908 (3d Cir. 1997). As to foreseeability, the District Court initially determined that since there were "no allegations in the complaint that Michalski had a history of violence or, if he did, that any of the defendants were aware of this history of violence," the harm caused by Michalski was not foreseeable. We have never held that to establish foreseeability, a plaintiff must allege that the person who caused the harm had a "history of violence." Indeed, these types of cases often come from unexpected or impulsive actions which ultimately cause serious harm. For example, in *Kneipp v. Tedder*, 95 F.3d 1199 (3d Cir. 1996), it was alleged that when a police officer left an intoxicated woman outside alone late at night, ordinary common sense and experience (in this instance attributed to the officer) sufficiently informed the officer of the foreseeability of harm to the woman. This information was sufficient to put him on notice that leaving the woman significantly enhanced the risk of harm to her. We concluded that the harm incurred by the woman in *Kneipp* was foreseeable. *Id.* at 1208.



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Also, in *Rivas*, supra., it was alleged that because the state actors were emergency medical technicians, their expertise equipped them with concrete information that a seizure victim should not be restrained. The information that they had was sufficient to put them on notice of the harm that would result if they failed to tell the police officers who arrived on the scene to assist the emergency medical technicians with the seizure victim. We concluded that, in the context of a state-created danger claim, the harm to the seizure victim was foreseeable. 365 F.3d at 194.

Conversely, in *Morse*, there was no allegation that the school district had sufficiently concrete information about the risk of violence presented by the perpetrator or other trespassers on school property to put the school district on notice of the harm that might result from a propped-open door. Therefore, when the school district employees, contrary to their own regulations, unlocked the door for the contractors to work, and the perpetrator of the violent incident entered through that open door, we held that the school district lacked sufficiently concrete information to consider its action a foreseeable cause of the harm to the teacher who was shot. As we explained, the harm was "too attenuated" because the only notice to the school district that the harm might occur was that the person who ultimately shot the teacher had been loitering in the hallways the week before the killing. *Morse*, 132 F.3d at 908-09. Knowledge of someone loitering, in and of itself, did not provide defendants with notice of a risk of violence. To adequately plead foreseeability then, we require a plaintiff to allege an awareness on the part of the state actors that rises to level of actual knowledge or an awareness of risk that is sufficiently concrete to put the actors on notice of the harm. Turning to the complaint here, such an awareness was clearly alleged as to Tush and Craig.

Tush and Craig were dispatchers at the Allegheny County 911 Call Center. Starting at paragraph 23, Phillips' complaint adequately establishes that Tush and Craig were actually aware based on concrete information of the risk of harm. First, paragraph 23 establishes that after being suspended from his job, Michalski called the 911 Call Center and spoke with Tush and Craig. Paragraph 24 alleges that Michalski requested information that would assist Michalski in locating Phillips. In paragraph 26, Phillips alleges that Tush and Craig assisted Michalski. The complaint additionally alleges (paragraph 27) that Tush and Craig were aware that the relationship between Ferderbar and Michalski had recently ended and that Michalski was in a distraught mental state as a result.<sup>5</sup>

At paragraph 40, the complaint alleges that Michalski again contacted the 911 Call Center and spoke with Tush and Craig, among others. During this conversation, Michalski allegedly indicated that he "had nothing left to live for" and that Ferderbar and Mark Phillips "were going to pay for putting him in his present situation." We view this allegation as putting Tush and Craig on notice that their actions in giving Michalski the unauthorized information about Mark Phillips significantly enhanced the risk of harm to him. The alleged statement by Michalski also made Tush and Craig actually aware of the risk to Mark Phillips. Therefore, the complaint adequately alleges foreseeability as to these two defendants and the District Court's determination to the contrary will be reversed.

The District Court noted that the only individuals who were alleged to have accessed Mark Phillips'



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personal information on the 911 computers were Tush and Craig. Therefore, the Court also dismissed the state-created danger counts against all other remaining defendants.

The gist of the allegations against the remaining individual defendants (Deutsch, Ging, Zurcher and Cestra) are found in paragraphs 40 and 41 of the complaint. Paragraph 40 alleges that Michalski contacted individual defendants Deutsch, Ging, Zurcher and Cestra and that Michalski explained the circumstances of his dismissal and also related that he "had nothing left to live for and that Ferderbar and Mark Phillips were going to pay for putting him in his present situation." Paragraph 41 alleges that the aforementioned defendants "made no effort to contact either Ferderbar, Mark Phillips or the police departments . . . ." These two paragraphs contain the only allegations that pertain to the remaining individual defendants specifically. Not only do these allegations fail to allege any affirmative actions, we further conclude that foreseeability was also not alleged against these remaining defendants.

The complaint also fails against these defendants because it has not been alleged that any actions on their part enhanced the risk of that harm. As the District Court indicated, these defendants were not accused of the actions attributed to defendants Tush and Craig or to defendant Nussbaum. No alleged actions of these remaining defendants could be viewed as enhancing the risk of harm to Mark Phillips and for that reason, "foreseeability" was not properly alleged here.

Once the foreseeability element of the state-created danger test has been determined, the complaint must also allege that the attack or harm is a "fairly direct" result of the defendant's acts. Such "directness" has been adequately pleaded against defendants Tush and Craig. Although this inquiry is unavoidably fact specific for each individual case, a distinction exists between harm that occurs to an identifiable or discrete individual under the circumstances and harm that occurs to a "random" individual with no connection to the harm-causing party. See *Morse*, 132 F.3d at 909 (to satisfy the first element "the harm visited on the plaintiffs [must be] more foreseeable than the random attack."). In *Estate of Smith v. Marasco*, 318 F.3d 497 (3d Cir. 2003), for example, we reversed the District Court's finding that the harm caused to the plaintiff was not foreseeable because it was not fairly direct. In so doing, we concluded that the fact that some of the police officers were aware of Smith's mental and medical conditions combined with the obviously stressful position they placed him in created the foreseeable possibility that Smith could be injured or killed, especially with the knowledge that he was without his medication. See *Smith*, 318 F.3d at 507.

In *Morse*, however, we held as a matter of law, that defendants could not have foreseen that allowing construction workers to use an unlocked back door could also permit a mentally disturbed individual to enter and cause harm to an individual in the school. See *Morse* 132 F.3d at 908. Put another way, the harm was not "fairly direct."

Here, the harm caused to Phillips was a fairly direct result of Tush and Craig's actions. First, unlike in *Morse*, Mark Phillips was not a random individual who "happened" to be in the path of danger.



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Rather, Mark Phillips was the new boyfriend of Michalski's former girlfriend. The complaint alleges that Michalski knew that Mark Phillips was Ferderbar's new boyfriend. The complaint also alleges that Tush and Craig knew that Michalski was distraught and that he had threatened to make Mark Phillips "pay." We conclude that this sufficiently pleads that the attack and murder of Mark Phillips was a "fairly direct" result of Tush and Craig's activities. Far from being unrelated to an intervening third party, for example, Mark Phillips was an individual directly affected by these defendants' decisions. It is reasonable to infer from the complaint that Michalski used the time, access and information given to him by the defendants to plan an assault on Mark Phillips and Ferderbar.

C.

Next, we turn to the question of whether Phillips has properly alleged that Tush and Craig acted with a degree of culpability that "shocks the conscience." *Bright*, 443 F.3d at 281. This determination depends largely on the circumstances of the case.

Our most recent discussion of the culpability element of the state-created danger test can be found in *Sanford v. Stiles*, 456 F.3d 298 (3d Cir. 2006), an opinion issued four months after our decision in *Bright*. In *Sanford*, the plaintiff was the mother of a 16-year-old boy who committed suicide a short time after he had spoken with a high school guidance counselor who had inquired as to the boy's welfare and whether he had any plans to harm himself. *Sanford*, 456 F.3d at 301. The boy, Michael Sanford, had sent a note to a former girlfriend in which he said "I've heard 3 different stories about you & Ryan. The one I heard almost made me want to kill myself." *Id.* at 299. The former girlfriend went to a guidance counselor with the note, expressing concern for Michael, as well as indicating that she wanted him to stop "bugging" her. *Id.* After reviewing the note, a guidance counselor, Pamela Stiles, called Michael into her office and had a discussion with him to explore whether he was upset. *Id.* Stiles expressly asked Michael if he had any plans to harm himself, to which he responded "definitely not." *Id.* Despite giving this answer, about one week after this meeting, Michael killed himself.

*Sanford* then filed a claim against Stiles and the school district in which she alleged that the defendants were liable for Michael's death under a state-created danger theory. *Id.* 301. In affirming the district court's summary judgment in favor of the defendants, the *Sanford* court concluded that *Sanford* had not established that Stiles acted with the requisite degree of culpability to sustain a claim grounded on a state-created danger theory. In so concluding, we held that there is a continuum upon which the degree of culpability required to establish such a claim must be measured, relating to the circumstances of each case.

The time in which the government actors had to respond to an incident is of particular significance. For example, in *Sanford*, we stated that "[t]he level of culpability required to shock the conscience increases as the time state actors have to deliberate decreases." *Id.* at 306. We then concluded that although intent to cause harm must be found in a "hyperpressurized environment," where officials



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are afforded the luxury of a greater degree of deliberation and have time to make "unhurried judgments," deliberate indifference is sufficient to support an allegation of culpability. *Id.* We further noted "the possibility that deliberate indifference might exist without actual knowledge of a risk of harm when the risk is so obvious that it should be known." *Id.* Finally, where the circumstances require a state actor to make something less exigent than a "split-second" decision but more urgent than an "unhurried judgment," i.e., a state actor is required to act "in a matter of hours or minutes," a court must consider whether a defendant disregarded a "great risk of serious harm rather than a substantial risk." *Id.*

Therefore, under *Sanford*, three possible standards can be used to determine whether state action shocked the conscience:

(1) deliberate indifference; (2) gross negligence or arbitrariness that indeed shocks the conscience; or (3) intent to cause harm. 456 F.3d at 306. Taking the allegations as true, the complaint leads us to conclude that defendants Tush and Craig were not acting in a "hyperpressurized environment." Instead, they had sufficient time to proceed deliberately. The complaint alleged that Michalski asked Tush and Craig for their help in obtaining confidential computer information on Ferderbar and Mark Phillips, assistance which they ultimately provided. Complaint paragraph 26. Also, at paragraph 40, Michalski telephones Craig and Tush (among others) and tells them that he has "nothing to live for" and that Ferderbar and Mark Phillips "would pay for putting him [Michalski] in this situation." There is no sense of urgency or emergency here either. The complaint does not allege any facts which would lead to an inference that Michalski was on his way to attack Phillips or that he told the dispatchers that he was at Phillips' house. The dispatchers here had no information which would have placed them in a "hyperpressurized environment." Hence, to "shock the conscience," they have to have behaved with deliberate indifference to the results of their actions.<sup>6</sup>

Phillips has alleged sufficient facts, which, if proven, would demonstrate that these defendants were deliberately indifferent, establishing a level of culpability that was conscience-shocking. Accepting the allegations of the complaint as true, the complaint alleges that Tush and Craig were aware that Michalski was distraught over his break up with Ferderbar and yet they assisted him in getting confidential information on Ferderbar and Phillips. Tush and Craig did not have to make any hurried judgments in responding to Michalski's requests for assistance. Unlike most state-created danger cases, Tush and Craig did not have to make a decision at all; they could have refused Michalski's inappropriate requests and terminated his telephone call immediately.

Taking these allegations as true and drawing reasonable inferences therefrom, the complaint does sufficiently allege facts that these defendants not only foresaw the danger of harm their actions presented, but were deliberately indifferent in providing Michalski more confidential information.

The District Court determined that Phillips failed to allege that the defendants' behavior "shocked the conscience" and concluded as a matter of law that the alleged conduct of Tush and Craig in





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providing Michalski with unauthorized personal information concerning Mark Phillips from the 911 Call Center's network and databases does not rise to the required level of conscience shocking action. The District Court opined that no reasonable dispatcher in the position of these dispatchers would have understood his or her conduct to be conscience-shocking. Cf. *Estate of Smith v. Marasco*, 430 F.3d 140, 154 (3d Cir. 2005). The District Court, again here, was wrong.

First, the District Court's conclusory reliance on *Estate of Smith* (Smith II), was inappropriate. The discussion in Smith II focused on the application of qualified immunity - not whether the plaintiff had appropriately alleged a state-created danger claim.<sup>7</sup> Although such a determination may be germane when deciding qualified immunity, it is not relevant to a determination at the 12(b)(6) dismissal stage. Second, our test for whether a plaintiff has alleged that an action "shocks the conscience" does not contain a requirement that the actor know his or her actions are "conscience-shocking." The District Court inappropriately imported an element of qualified immunity analysis into its state-created danger analysis.

D.

Finally, the state-created danger analysis requires that some relationship exist between the state and the plaintiff. The District Court did not analyze this element. To adequately allege such a relationship, a plaintiff need not plead facts that show the same "special relationship" basis for constitutional liability. *Morse*, 132 F.3d at 912. Instead, the relationship requirement of the third element "contemplates some contact such that the plaintiff was a foreseeable victim of the defendant's acts in a tort sense." *Morse*, 132 F.3d at 912. The relationship that must be established between the state and the plaintiff can be "merely" that the plaintiff was a foreseeable victim, individually or as a member of a distinct class. See *Rivas* 365 F.3d at 202. Such a relationship may exist where the plaintiff was a member of a discrete class of persons subjected to the potential harm brought about by the state's actions. *Morse*, 132 F.3d at 913; *Rivas*, 365 F.3d at 197.

Here, Mark Phillips was a member of a discrete group (namely, Ferderbar and himself) that was subjected to harm by the defendant's actions. He was specifically targeted for retribution by Michalski. Complaint at paragraph 40. Lending more support to Phillips' ability to satisfy this element, Mark Phillips was also in a close personal relationship with Ferderbar, with whom Michalski was infatuated. Tush and Craig were aware of this connection. Moreover, Mark Phillips was specifically contemplated in Michalski's threatened violence. Complaint at paragraph 40. Therefore, Phillips has adequately alleged that there was a relationship between plaintiff and the state for purposes of the state-created danger theory.

E.

In sum, the District Court erred in dismissing the state-created danger claims against defendants Tush and Craig. Although we find no error in the dismissal of the state-created danger claims



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against defendants Nussbaum, Ging, Zurcher and Cestra, we will remand to the District Court with instructions to permit Phillips an opportunity to amend her claims against defendant Nussbaum to allege - if she can - an affirmative act by Nussbaum. We conclude that it would be futile to permit amendment as to the remaining defendants because we conclude that Phillips cannot plead foreseeability on their part.

### IV.

Phillips' complaint additionally alleges violations of equal protection (Counts One and Two). Specifically, the complaint alleges that defendants' actions "were intentional and/or constituted willful disregard, gross recklessness and deliberate indifference for [Mark] Phillips' personal safety, well-being and right to life in derogation of the ... Equal Protection clause ... of the Fourteenth Amendment of the United States Constitution." The District Court recognized that Phillips raised a "class of one" equal protection claim, which is governed by the Supreme Court's holding in *Village of Willowbrook v. Olech*, 528 U.S. 562 (2000), but dismissed the complaint because Phillips failed to allege that the Defendants intentionally treated Mark Phillips differently from other similarly situated persons.

In *Olech*, a municipality conditioned water service for a property on the plaintiff-owner's granting a 33-foot easement, even though it required only a 15-foot easement from every other property owner. *Id.* at 563. The Supreme Court allowed the plaintiff to proceed on the class-of-one theory, recognizing claims where a "plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Id.* at 564. The Supreme Court stated that allegations of irrational and wholly arbitrary treatment, even without allegations of improper subjective motive, were sufficient to state a claim for relief under equal protection analysis. *Id.* at 565.

We have little jurisprudence discussing this "class of one" theory. Our only precedential opinion to discuss such claims held that Our court has not had the opportunity to consider the equal protection "class of one" theory at any length. From the text of *Olech* itself, however, it is clear that, at the very least, to state a claim under that theory, a plaintiff must allege that (1) the defendant treated him differently from others similarly situated, (2) the defendant did so intentionally, and (3) there was no rational basis for the difference in treatment.

*Hill v. Borough of Kutztown*, 455 F.3d 225 (3d Cir. 2006). So, to state a claim for "class of one" equal protection, a plaintiff must at a minimum allege that he was intentionally treated differently from others similarly situated by the defendant and that there was no rational basis for such treatment.

Although our jurisprudence does not discuss class-of-one equal protection claims in detail, the Court of Appeals for the Second Circuit has gone further and we find its analysis of pleading requirements for these type of claims persuasive. In *Demuria v. Hawkes*, 328 F.3d 704 (2d Cir. 2003), the Court of



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Appeals for the Second Circuit reversed a district court's determination that Demuria had failed to adequately plead a "class of one" equal protection violation. Demuria involved a neighbor-to-neighbor dispute concerning water run-off. The plaintiffs had made a "general" and "relatively bare" allegation that the defendant police officer gave them a different standard of police protection than that typically afforded a resident [of the town] and alleged facts that the officer was in violation of his duty as an officer. *DeMuria*, 328 F.3d at 707. The District Court found the allegation that the police officer had treated the DeMurias differently from other citizens to be insufficiently specific for the purpose of maintaining an equal protection claim because the DeMurias did not name any similarly situated individuals or identify any differently-handled disputes.

The Court of Appeals reversed and held that the Supreme Court's holding in *Olech* does not establish a requirement that a plaintiff identify in a complaint actual instances where others have been treated differently for purposes of equal protection. *Id.* at 707. The Supreme Court pointed out that "[i]ndeed, it appears that *Olech* herself did not 'name names' in her complaint, but made the more general allegation that similarly situated property owners had been asked for a different easement." *Id.* The Supreme Court determined that such an allegation could "fairly be construed" as a sufficient allegation for stating an equal protection claim. *Id.* quoting *Olech*, 528 U.S. at 565. In *Demuria*, the plaintiffs made a general allegation that defendant Hawkes gave them a different standard of police protection than that typically afforded a resident of the town. The Court of Appeals found this general allegation to be sufficient and we agree with that determination.

Although *Demuria* does relax the "class of one" pleading requirements by negating the need for specificity, an allegation of an equal protection violation still must contain a claim that a plaintiff has been treated differently from others who are similarly situated. The District Court here dismissed the complaint because it determined that Phillips had not alleged that the defendants treated the decedent differently from others similarly situated. Phillips' complaint does raise very general accusations. For example, Count One alleges claims against Allegheny County and the Allegheny County 911 Services. In Paragraph 45 of Count One, Phillips alleges that "the actions of the defendant were intentional and/or constituted willful disregard, gross recklessness and deliberate indifference for Phillips' personal safety, well-being and right to life in derogation of the Due Process and Equal Protection clauses of the Fourteenth Amendment." Count Two of the complaint alleges claims against the individual defendants Nussbaum, Tush, Craig, Deustch, Ging, Zurcher and Cestra. In Paragraph 54, the complaint alleges that "the actions of the defendants were intentional and/or constituted willful disregard, gross recklessness and deliberate indifference for Phillips' personal safety, well-being and right to life in derogation of the Due Process Clause and Equal Protection clauses of the Fourteenth Amendment of the United States Constitution."

Clearly, both of these counts specifically refer to the Equal Protection Clause. Furthermore, Paragraphs 50 and 58 specifically allege that the defendants' conduct deprived Phillips of his right to life in violation of the Equal Protection Clause. But, these general accusations and the invocation of



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the Equal Protection Clause are not enough.

We note that the *Olech* decision does not establish a requirement that a plaintiff identify in the complaint specific instances where others have been treated differently for the purposes of equal protection. See *DeMuria*, 328 F.3d at 707. Indeed, in reversing the dismissal of the complaint in *DeMuria*, the Court of Appeals indicated that while the plaintiffs in that case "face[d] a significant hurdle in finding evidence to prove their allegations of selective enforcement and unequal treatment, such concerns should not defeat their claim at the pleading stage." *Id.* Here, however, Phillips' complaint does not contain specific allegations that he was treated differently. The facts section of the Complaint (Paragraphs 17-42) reveals the egregious actions of various individuals at the 911 computer center - actions that are alleged to have led to Phillips' death. However, there is no allegation that these actions resulted in him being treated differently from other individuals - individuals whose personal information is in the 911 database. Paragraph 26 of the Complaint, for example, indicates that "Defendants Tush and Craig assisted Michalski knowing that they were accessing unauthorized personal information that had absolutely no relationship to their functions as dispatchers and [sic] a 911 emergency call center." This allegation, however does not aver that Phillips was treated differently.

The Complaint, in Counts One and Two, does contain a specific reference to the Defendants' intentional actions, which resulted in a violation of the Phillips' rights under the Equal Protection Clause of the Fourteenth Amendment. See e.g. Complaint at Paragraphs 45, 54. Again, however, there is no allegation that Phillips was treated differently.

In opposition to a motion to dismiss in the District Court, and again before this Court on appeal, Phillips argues that her complaint alleges that, although other persons similarly situated had personal information accessed only for legitimate 911 purposes, [Mark Phillips] was discriminated against by the individual defendants in that they accessed his personal information to assist Michalski in his attempt to track and eventually kill him. We agree with the District Court's determination that, on the face of the complaint, no such allegation was made. Even under the less stringent pleading standards set forth in *Olech* and *Demuria*, Phillips' class-of-one equal protection claim is inadequately pleaded. Nonetheless, dismissal at this stage was premature and hence, error.

As we indicated above, if a complaint is subject to a Rule 12(b)(6) dismissal, a district court must permit a curative amendment unless such an amendment would be inequitable or futile. *Alston v. Parker*, 363 F.3d 229, 235 (3d Cir. 2004). Moreover, we have instructed that a district court must provide the plaintiff with this opportunity even if the plaintiff does not seek leave to amend. *Id.* Accordingly, even when plaintiff does not seek leave to amend his complaint after a defendant moves to dismiss it, unless the district court finds that amendment would be inequitable or futile, the court must inform the plaintiff that he or she has leave to amend the complaint within a set period of time. See *Grayson*, 293 F.3d at 108. A district court may dismiss the action if the plaintiff does not submit an amended pleading within that time, or if the plaintiff files notice with the district court of his



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intent to stand on the complaint. See *Shane*, 213 F.3d at 116 (citation omitted).

The District Court's memorandum opinion indicates that it dismissed Phillips' Section 1983 claims with prejudice after receiving the parties' briefs on the motion to dismiss. There is no indication that the District Court informed Phillips that she would have leave to amend her complaint. Moreover, the memorandum opinion contained neither a finding that a curative amendment would be inequitable or futile, nor a finding that Phillips had failed to file a timely amended pleading or had filed notice of her intention to stand on the complaint. There is no indication that Phillips wishes to stand on the complaint for purposes of this appeal. Indeed, Phillips argues that, in the event we determine she has failed to state a claim, we remand the matter to the District Court with instructions to permit amendment. See *Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 851 n. 5 (3d Cir. 1992).

V.

Standards of pleading are not the same as standards of proof. We express no opinion on whether Phillips will ultimately be able to prove her case. At this pleading stage, however, the District Court erred in several respects. Hence, we will reverse the District Court's dismissal of Tush, Craig and Nussbaum, and will remand with instructions to the District Court to permit Phillips an opportunity to amend her state-created danger claims against Nussbaum. We will affirm the District Court's dismissal of the remaining defendants.

Although we conclude that the District Court did not err in its analysis of Phillips' equal protection claim, we will remand this claim as well, once again instructing the District Court to provide Phillips an opportunity to amend her complaint.

ROTH, Circuit Judge, Concurring

I concur in the opinion of the majority. I write separately to note a potential issue that could be created by broad application of the "class of one doctrine."

In the context of a substantive due process claim, the Supreme Court has established that to recover a plaintiff must establish that the behavior of the government "shocks the conscience" of a reasonable observer. *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). That is, the government's behavior must be not just arbitrary and capricious, but shocking.

In contrast, a plaintiff proceeding under an equal protection "class of one" theory may recover if she can establish that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment. *Village of Willowbrook v. Olech*, 428 U.S. 562 (2000). Phillips is proceeding here on such a theory.



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A broad reading of *Olech* could allow any plaintiff with an insufficiently shocking due process claim to resurrect her constitutional claim by repleading her case as representing a "class of one" victimized by the particular government action at issue.<sup>8</sup> I do not believe that the Supreme Court intended *Olech* to undermine *Lewis* in this fashion, and I would urge the District Court to be mindful of this issue as it conducts further proceedings in this case.

1. Rather than filing its own motion to dismiss, Allegheny County filed a motion for stay of time to file a responsive pleading pending resolution of the motion to dismiss. Phillips did not oppose the motion to stay and the District Court granted it. After consideration of the papers, the District Court granted the motion to dismiss the complaint and in its final order lifted the stay, granted the motion to dismiss in its entirety, and entered judgment for all defendants. The District Court declined to exercise supplemental jurisdiction over Plaintiff's remaining state law claims and transferred the case to the Court of Common Pleas of Allegheny County. Appellee Allegheny County 911 did not join in the motion to stay, and the District Court apparently never required it to file a responsive pleading, most likely because the District Court considered Allegheny County 911 to be part of or coextensive with either Northwest (which filed a motion to dismiss) or Allegheny County (which filed a motion to stay). Although the District Court closed the case by entering judgment for all defendants on all counts, the Court did not have before it a motion to dismiss from the County or Allegheny County 911. The parties on appeal do not mention this issue, presumably because it makes no difference in light of the fact that the Supreme Court's decision in *Monell v. Dep't of Social Services*, 436 U.S. 658 (1978) bars § 1983 suits against municipalities based on respondeat superior and Phillips failed to allege facts supporting an official pattern or practice claim giving rise to constitutional injury.
2. See *In re Paoli R.R. Yard PCB Litigation*, 221 F.3d 449, 461 (3d Cir. 2000) ("de novo means [that] . . . the court's inquiry is not limited to or constricted by the record . . . nor is any deference due the . . . conclusions [under review]").
3. Recent cases in which we recited the Conley language but did not apply it in the hyper-literal sense which Twombly rejects include (in addition to those cited above), *Leuthner v. Blue Cross and Blue Shield of Ne. Pa.*, 454 F.3d 120, 129-131 (3d Cir. 2006) (compare majority opinion and dissent), *Pryor*, 288 F.3d at 564-65, and *Levy v. Sterling Holding Co.*, 314 F.3d 106, 119 (3d Cir. 2002).
4. Neither party addresses whether Nussbaum, Tush and Craig are indeed state-actors. The complaint alleges that these defendants were both employees of the Northwest Corporation and Allegheny County, and accepting this allegation as true, we will treat them as state-actors for purposes of this appeal.
5. At paragraph 27, the complaint alleges that "[d]efendants were aware that the relationship between Ferderbar and Michalski had recently ended and that Michalski was distraught over this." While this paragraph does not specifically aver that Tush and Craig were aware of this, they certainly are "defendants" in this case and the generic use of that term includes them.
6. Sanford is specific: "We again clarify that in any state-created danger case, the state actor's behavior must always shock the conscience. But what is required to meet the conscience-shocking level will depend upon the circumstances of each case, particularly the extent to which deliberation is possible. In some circumstances, deliberate indifference will be





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sufficient. In others, it will not." 456 F.3d at 309.

7. To decide if an individual government official is entitled to qualified immunity, a court must first "determine whether the plaintiff has alleged the deprivation of an actual constitutional right at all." *Wilson*, 212 F.3d at 786 (citation omitted). If plaintiff has alleged such a deprivation, a court should thereafter "proceed to determine whether that right was clearly established at the time of the alleged violation." *Id.* Although it is important to resolve qualified immunity questions at the earliest possible stages of litigation, the importance of resolving qualified immunity questions early "is in tension with the reality that factual disputes often need to be resolved before determining whether defendant's conduct violated a clearly established constitutional right." *Curley v. Klem*, 298 F.3d 271, 277-78 (3d Cir. 2002). A decision as to qualified immunity is "premature when there are unresolved disputes of historical facts relevant to the immunity analysis." *Id.* at 278. Following *Wilson*, the District Court should have first decided whether Phillips has alleged the deprivation of a constitutional right. If he has, then, the Court should have determined whether that right was clearly established at the time the individual defendants allegedly violated that right.

8. On the facts of *Lewis* itself, the representatives of the deceased motorcycle passenger could argue that while the officer's actions in beginning a high speed pursuit might not shock the conscience, the officer did treat that particular motorcyclist differently than other similarly situated motorcyclists and that there was no rational basis for such a decision.

