No. _____

In The
Supreme Court of the United States

TRACEY L. JOHNSON and DAVID JAMES, JR.,

Petitioners,

versus

CITY OF SHELBY, MISSISSIPPI,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

PETITION FOR WRIT OF CERTIORARI

JIM WAIDE
WAIDE AND ASSOCIATES, P.A.
Attorneys at Law
Post Office Box 1357
Tupelo, MS 38802
Telephone: (662) 842-7324
Facsimile: (662) 842-8056
Email: waide@waidelaw.com

Counsel for Petitioners

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

1. This Court has determined that Fourteenth Amendment property rights "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – . . . ." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). May lower courts restrict property rights to entitlements based on state contract law?

2. Does a Fourteenth Amendment property interest include entitlements stemming from state tort law?

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. Tracey L. Johnson, Petitioner;
2. David James, Jr., Petitioner; and
3. City of Shelby, Mississippi, Respondent.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW..... 1

JURISDICTION..... 1

CONSTITUTIONAL AMENDMENT CONSTRUED... 1

STATEMENT OF THE CASE..... 2

REASON FOR GRANTING THE WRIT..... 4

THE FIFTH CIRCUIT HELD THAT THE FOURTEENTH AMENDMENT PROPERTY DOES NOT ENCOMPASS A PUBLIC EMPLOYEE'S REASONABLE EXPECTANCY OF CONTINUED EMPLOYMENT CREATED BY COMMON LAW SOUNDING IN TORT. THIS HOLDING CONTRAVENES THIS COURT'S GUIDANCE ON THE MEANING OF PROPERTY IN THE FOURTEENTH AMENDMENT 4

CONCLUSION..... 9

TABLE OF CONTENTS – Continued

Page

APPENDICES

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT OPINION, 2016 WL 1138301 (5th Cir. 2016) (Unpublished) ... APPENDIX 1

UNITED STATES DISTRICT COURT MEMORANDUM OPINION, 2:10CV-36 (N.D. Miss., June 30, 2015) ..... APPENDIX 14

UNITED STATES DISTRICT COURT JUDGMENT, 2:10CV-36 (N.D. Miss., June 30, 2015) ..... APPENDIX 24

TABLE OF AUTHORITIES

Page

FEDERAL CASES:

Bishop v. Wood, 426 U.S. 341 (1976).....5

Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972) 4, 7, 8

Community Care of Aberdeen v. Barrentine, 160 So.3d 216 (Miss. 2015) 8

Goldberg v. Kelly, 397 U.S. 254 (1970) 7

Goss v. Lopez, 419 U.S. 565 (1975).....5

Johnson v. City of Shelby, Miss., ___ U.S. ___, 135 S.Ct. 346 (2014).....2

Johnson v. City of Shelby, Miss., 2015 WL 3966238 (N.D. Miss. 2015) 1

Johnson v. City of Shelby, Miss., 2016 WL 1138301 (5th Cir. 2016).....2, 4, 7

McArn v. Allied Bruce Terminix Co., 626 So.2d 603 (Miss. 1993) 4, 8

Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1 (1978) 5, 7

Paracelsus Health Care Corp. v. Willard, 754 So.2d 437 (Miss. 1999) 8

Roop v. Southern Pharmaceuticals Corp., 188 So.3d 1179 (Miss. 2016) 8

Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748 (2005).....5, 6, 7, 8

TABLE OF AUTHORITIES – Continued

Page

AMENDMENTS:

Amendment Fourteen 1, 4, 9

STATUTES:

28 U.S.C. § 1254(1) 1
42 U.S.C. § 1989 2

OPINIONS BELOW

The unpublished decision of the United States Court of Appeals for the Fifth Circuit is found at 2016 WL 1138301 (5th Cir. 2016), and is attached as Appendix 1-13. The unpublished opinion of the United States District Court for the Northern District of Mississippi is attached as Appendix 14-23, and is found at 2015 WL 3966238 (N.D. Miss. 2015). The unpublished Judgment of the district court is Appendix 24.

JURISDICTION

This Court has jurisdiction to review the decision of the United States Court of Appeals for the Fifth Circuit decided on March 23, 2016, by writ of *certiorari* under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AMENDMENT CONSTRUED

The United States Constitution Amendment Fourteen provides:

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property,

> without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Johnson v. City of Shelby, Miss., ___ U.S. ___, 135 S.Ct. 346 (2014), reversed the United States Court of Appeals for the Fifth Circuit, which had upheld a grant of summary judgment for Respondent because Petitioners failed to cite 42 U.S.C. § 1983 in the complaint. On remand, the District Court for the Northern District of Mississippi again granted summary judgment, Appendix 14-23, and the Fifth Circuit again affirmed. Appendix 1-13. The Fifth Circuit held that while state law "may have allowed [Petitioners] to bring a state tort action, it did not give them a constitutionally-protected property interest in their employment." *Johnson v. City of Shelby, Miss.*, 2016 WL 1138301, at *5 (5th Cir. 2016); Appendix 12.

Petitioners are former police officers employed by Respondent City of Shelby, Mississippi. Petitioners were fired because they reported and refused to participate in illegal criminal activity by City Alderman Harold Billings. Petitioner James openly disagreed with Billings' plans to bring illegal prostitution to the city, and was concerned about Billings' operation of illegal gambling activities at his nightclub. Petitioner James reported Billings to the chief of police, and asked permission to arrest Billings. Permission was refused, although the chief of police did allow Petitioner James to

take his complaints of criminal activity to outside agencies. Thereafter, Petitioner James complained to the Mississippi Attorney General, the Mississippi State Gaming Commission, and the Mississippi Bureau of Narcotics about Billings' suspected criminal activity.

Alderman Billings told Petitioner Johnson that she could keep her police job if she would get the "low down" on Petitioner James.

Billings was able to control the board of aldermen. Billings employed one of the aldermen at his nightclub. A second aldermen was told that her business would be boycotted if she did not vote to fire Petitioner James.

The city's police handbook requires that a police officer not be discharged except with the recommendation of the police chief. The police chief assured Petitioners that they would retain their jobs because he would not recommend their discharge.

Despite the chief's assurance of job security, the board of aldermen voted to fire Petitioners, with the three (3) financially-interested aldermen all voting for the firings. The city attorney notified the Petitioners by letter that they had been fired claiming, falsely, that they had been harassing citizens.

Petitioners complained that the board of aldermen was not an impartial hearing tribunal, and that they were not allowed to present evidence before the board. The Fifth Circuit held, however, that since Petitioners did not have a property interest in their employment,

they were not entitled to due process. The Fifth Circuit held that under Mississippi law "an employee who refuses to participate in an illegal act [is] not . . . barred by the common law rule of employment at will from bringing an action in tort for damages against his employer." *Johnson v. City of Shelby, Miss.*, 2016 WL 1138301, at *5; Appendix 11, quoting *McArn v. Allied Bruce Terminix Co.*, 626 So.2d 603, 607 (Miss. 1993). Nevertheless, the Fifth Circuit upheld dismissal of Petitioners' suit because Mississippi law "allows [Petitioners] to bring a state tort action, [but] it does not give [Petitioners] a property interest" in their employment. *Johnson*, 2016 WL 1138301, at *5; Appendix 12.

REASON FOR GRANTING THE WRIT

THE FIFTH CIRCUIT HELD THAT THE FOURTEENTH AMENDMENT PROPERTY DOES NOT ENCOMPASS A PUBLIC EMPLOYEE'S REASONABLE EXPECTANCY OF CONTINUED EMPLOYMENT CREATED BY COMMON LAW SOUNDING IN TORT. THIS HOLDING CONTRAVENES THIS COURT'S GUIDANCE ON THE MEANING OF PROPERTY IN THE FOURTEENTH AMENDMENT.

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1977), held that Fourteenth Amendment property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits

and that support claims of entitlement to those benefits."

Memphis Light, Gas and Water Division v. Craft, 436 U.S. 1, 11 (1978), found a property interest to have been created by a Tennessee state case establishing that public utility service could not be discontinued "except for good and sufficient cause,. . . ."

Goss v. Lopez, 419 U.S. 565, 574 (1975), found that a property interest existed based on state statute which recognized "a student's legitimate entitlement to a public education as a property interest. . . ."

On the other hand, *Bishop v. Wood*, 426 U.S. 341, 345 (1976), found no property interest where lower courts, based upon their "understanding of state law," found that "petitioner 'held his position at the will and pleasure of the city.' "

This Court gave its last clarification of the meaning of "property" over a decade ago in *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748 (2005). The issue in that case was whether there was a property right in the enforcement of a state court's domestic violence restraining order. This Court concluded there was no property interest since enforcement of a state restraining order was a benefit which "government officials may grant or deny it in their discretion." *Id.* at 756. Further, " . . . provisions of Colorado law truly [did not make] enforcement of restraining orders *mandatory.*" *Id.* at 760 (emphasis in original). *Town of Castle Rock, Colo.* also found that the state statute did not provide

for " . . . conferral of a benefit on a specific class of people." *Id.* at 765. The right involved did not "have some ascertainable monetary value,. . . ." *Id.* at 766. The benefit to plaintiff, who was not the subject of the restraining order, accrued " . . . only indirectly or incidentally,. . . ." *Id.* at 767. Finally, *Town of Castle Rock, Colo.* emphasized the existence of property " . . . despite its state-law underpinnings, is ultimately one of federal constitutional law." *Id.* at 756-57.

The Fifth Circuit Court of Appeals departed from the above precedents when it determined that state law was the final word on the meaning of "property," and that property rights may arise from only state law contract theory, but not from state law tort theories. As put by the Fifth Circuit:

> Finally, [Petitioners] argue that they have a property interest because under Mississippi state law, police officers are required to enforce the law and cannot be discharged for refusal to participate in illegal activities. In *McArn v. Allied Bruce Terminix Co.*, 626 So.2d 603, 607 (Miss. 1993), the Mississippi Supreme Court established a narrow common law exception to the employment at-will doctrine, such that "an employee who refuses to participate in an illegal act [is] not . . . barred by the common law rule of employment at will from bringing an action in tort for damages against his employer." While the common law exception allows the employee to bring a state tort action, it does not give the employee a property interest. . . . Therefore, although the *McArn* doctrine may have allowed Johnson

> and James to bring a state tort action, it did not give them a constitutionally-protected property interest in their employment.

Johnson, 2016 WL 1138301, at *5 (some citations omitted); Appendix 11-12.

Contrary to the arbitrary distinction this draws between state legal theory and state contract theory, this "Court has eschewed rigid or formalistic limitations on the protection of procedural due process,. . . ." *Board of Regents of State Colleges*, 408 U.S. at 572. This Court has recognized that a "legitimate claim of entitlement," *Board of Regents of State Colleges*, 408 U.S. at 577, may arise from varying sources, such as a "State Department of Social Services' Official Regulations," *Goldberg v. Kelly*, 397 U.S. 254, 257 (1970); or state common law, *Memphis Light, Gas & Water Division v. Craft*, 446 U.S. at 11. The issue is not which legal theory supports the claim, but whether the claim is the type upon "which people rely in their daily lives, reliance that must not be arbitrarily undermined." *Board of Regents of State Colleges*, 408 U.S. at 577.

The Fifth Circuit's holding runs afoul of *Town of Castle Rock*, *Colo.*, that "despite its state-law underpinnings [whether one has a property interest], is ultimately one of federal constitutional law." *Town of Castle Rock, Colo.*, 545 U.S. at 756-57. The Fifth Circuit also ignores the teaching of *Town of Castle Rock, Colo.*, that this Court looks to whether the entitlement in question is "mandatory," rather than "discretionary." *Id.* at 760. The Fifth Circuit ignores the *Town of Castle*

Rock, Colo. which considers whether the applicable state law provides for " . . . conferral of a benefit on a specific class of people." *Id.* at 765; whether the law in question provides a direct benefit to a plaintiff, *id.* at 767; and whether the right in question has some " . . . ascertainable monetary value,. . . ." *Id.* at 766.

Much confusion results from the Fifth Circuit's elevation of the state legal theory above state tort theory. When Mississippi first adopted its public policy exception to employment at-will, it did state that such an action sounds "in tort." *McArn*, 626 So.2d at 607. By the time Petitioners were discharged, however, the Mississippi Supreme Court had held the action for discharge in violation of public policy was "but another form of tortious breach of contract." *Paracelsus Health Care Corp. v. Willard*, 754 So.2d 437, 442 (Miss. 1999). It was not until years after Petitioners were discharged that Mississippi law – while still clearly recognizing that Petitioners could not be discharged for refusing to participate in illegal activity – reverted to its original view, that actions for "wrongful discharge in violation of public policy are independent *tort* actions." *Community Care of Aberdeen v. Barrentine*, 160 So.3d 216, 219 (Miss. 2015) (emphasis added); accord, *Roop v. Southern Pharmaceuticals Corp.*, 188 So.3d 1179, 1185 (Miss. 2016) (quoting *McArn*'s holding that "an employee who is discharged for reporting illegal acts of his employer . . . is not barred by the employment at will doctrine from bringing action *in tort*. . . .") (emphasis added). Surely, the broad and majestic term "property," *Board of Regents of State Colleges v. Roth*, 408

U.S. at 570, should not depend upon shifting the state law theory as to whether a particular "legitimate claim of entitlement" sounds in contract law or sounds in tort law.

CONCLUSION

This Court should grant the Writ in order to correct the Fifth Circuit's unauthorized and arbitrary limitation of the meaning of the term "property" contained in the Fourteenth Amendment.

Respectfully submitted,

JIM WAIDE
WAIDE AND ASSOCIATES, P.A.
Attorneys at Law
Post Office Box 1357
Tupelo, MS 38802
Telephone: 662-842-7324
Facsimile: 662-842-8056
Email: waide@waidelaw.com

Counsel for Petitioners

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 15-60511
Summary Calendar

TRACEY L. JOHNSON; DAVID JAMES, JR.,

Plaintiffs-Appellants

v.

CITY OF SHELBY, MISSISSIPPI,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 2:10-CV-36

(Filed Mar. 23, 2016)

Before JOLLY, DENNIS, and PRADO, Circuit Judges.

PER CURIAM:*

After their employment was terminated, former police officers Tracey L. Johnson and David James, Jr. filed suit against the City of Shelby, Mississippi, alleging the City had terminated them in violation of their

---

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

substantive and procedural due process rights, and former individual defendant Harold Billings had maliciously interfered with their employment under state law.[1] The district court granted the City of Shelby summary judgment because Johnson and James were at-will employees with no property interest in continued employment. For the reasons discussed below, we AFFIRM.

I. BACKGROUND

On September 1, 2009, the City of Shelby's Board of Aldermen voted to terminate Johnson and James, allegedly based on "citizen complaints about the officers profiling, targeting, and harassing people." Johnson and James claim that they were terminated because they refused to ignore the alleged illegal activities of City Alderman Billings. As police officers, Johnson and James were employees of the City of Shelby.

Employees of the City of Shelby, including police officers, are covered by the City of Shelby Employee Information Handbook (the "Employee Handbook"), a revised version of which was adopted by the City in 2003. In pertinent part, this handbook states: "There is no contract of employment between the City and any one or all of its employees. Employment security cannot be guaranteed for or by any employee," and, "The right of the employee or the City to terminate the employment

[1] In a prior motion for summary judgment and subsequent appeal, the state law claim was finally decided and therefore is not at issue in this appeal.

relationship '***At Will***' is recognized and affirmed as a condition of employment. '***At Will***' means that an employee's employment can be terminated at any time with or without notice." The City of Shelby Police Department supplemented the handbook with its own Standard Operating Procedures, which gave police officers firmer guidance on what conduct was unacceptable and possible disciplinary steps the department could take. Prior to the City of Shelby Board Meeting in which Johnson and James were terminated, the police department used a set of Standard Operating Procedures that were adopted in 2008 ("2008 SOP"). In April of 2009, the chief of police told James that under the 2008 SOP, an officer could not be terminated without the chief's recommendation. In the same meeting that the aldermen voted to terminate Johnson and James, the aldermen voted to rescind the 2008 SOP and to reinstate the Standard Operating Procedures from 2006 ("2006 SOP"). In March 2010, Johnson and James filed suit against the City of Shelby and City Alderman Billings alleging that the City violated their due process rights and that Billings maliciously interfered with their employment.

After discovery was completed, the City of Shelby moved for summary judgment. The district court granted this initial motion for summary judgment because the constitutional claim had not been brought under 42 U.S.C. § 1983 and the state law claim did not comply with Mississippi's procedural requirements. Johnson and James appealed. A panel of this court

affirmed the dismissal of the state law claim for procedural reasons and the constitutional claim for failing to invoke § 1983. *Johnson v. City of Shelby*, 743 F.3d 59 (5th Cir. 2013). The United States Supreme Court granted certiorari and reversed, but only as to the dismissal of the constitutional claim, holding that Johnson and James did not need to specifically invoke § 1983 to state a successful claim. *Johnson v. City of Shelby*, 135 S. Ct. 346, 347 (2014). After being remanded to the district court, the City of Shelby renewed its motion for summary judgment.

The district court again granted summary judgment, holding that Johnson and James did not have a protected property interest in their employment because they were at-will employees under Mississippi law and as described in the City's employee handbook. *Johnson v. City of Shelby*, No. 2:10-CV-00036-MPM, 2015 WL 3966238, at *4 (N.D. Miss. June 30, 2015). Johnson and James timely appealed.

II. STANDARD OF REVIEW

In general, "[t]his court reviews a district court's grant of summary judgment de novo, applying the same standards as the district court." *E.E.O.C. v. WC&M Enters., Inc.*, 496 F.3d 393, 397 (5th Cir. 2007). Therefore, we "must view the facts in the light most favorable to the non-moving party and draw all reasonable inferences in its favor." *Id.* If the trial court's evidentiary rulings are also at issue, "we review those rulings for abuse of discretion," while still applying de

novo review to the grant of summary judgment. *Keller v. Coastal Bend Coll.*, No. 15-40710, 2015 WL 6445751, at *2 (5th Cir. Oct. 26, 2015).

III. DISCUSSION

The central issue in this case is whether Johnson and James had a property interest in continued employment that would allow them to bring a Fourteenth Amendment claim. Johnson and James raise four main arguments on appeal: (1) the district court erroneously relied on the employee handbook because it was unauthenticated; (2) the district court should have found that either the 2008 SOP or 2006 SOP created a property interest in continued employment; (3) the district court should have found that the verbal statements made by the police chief created a property interest; and (4) the district court should have held that Mississippi state law created a property interest.

A. The City of Shelby Employee Handbook

Johnson and James first argue that the district court erred in relying on the employee handbook because it was not authenticated. In a motion for summary judgment, the court may only consider evidence that is presented to it and admissible. *Hernandez v. Yellow Transp., Inc.*, 670 F.3d 644, 651 (5th Cir. 2012) (citing Fed. R. Civ. P. 56(c)(2)). We review the district court's admissibility rulings for abuse of discretion. *Tex. A&M Research Found. v. Magna Transp., Inc.*, 338

F.3d 394, 401 (5th Cir. 2003). For evidence to be admissible, it must be authenticated. Fed. R. Evid. 104(b), 901. An employee handbook issued by a city government can be self-authenticating as a publication "issued by a public authority." Fed. R. Evid. 902(5); *see Smith v. Halliburton Co.*, No. H-06-0462, 2006 WL 1342823, at *2 (S.D. Tex. May 16, 2006) (holding that regulations and instructions published by the U.S. Department of Defense were self-authenticating under Rule 902(5)); *see also Kuba v. Sea World, Inc.*, 428 F. App'x 728, 732 (9th Cir. 2011) (holding that excerpts and hyperlinks from a municipal website were self-authenticating under Rule 902(5)). The City of Shelby attached a copy of the employee handbook – which was clearly labelled "City of Shelby Employee Information Handbook" with a 2003 revision date – to its motion for summary judgment.[2] And the district court implicitly found the handbook authenticated and admissible because it relied on the document in granting summary judgment. Johnson and James have presented no evidence that undermines the authenticity of the handbook. Therefore, the district court did not abuse its discretion in admitting and relying on the handbook.

B. The 2006 SOP and 2008 SOP

Next, Johnson and James claim that either the 2006 SOP or 2008 SOP created a property interest in

[2] The document was listed in the defendant's initial motion for summary judgment, and this motion was incorporated into the defendant's renewed motion for summary judgment in March 2015.

continued employment. While the parties dispute which SOP is controlling, we need not reach this issue because neither SOP created a property interest when read in conjunction with the employee handbook.

To have a valid Fourteenth Amendment claim for deprivation of property in violation of substantive or procedural due process, a plaintiff must have a protected property interest. *Perry v. Sindermann*, 408 U.S. 593, 599 (1972). An employee can have a property interest in continued employment if it is "created directly by state statute or by a written contract, or by a 'mutually explicit understanding' enforceable under state law as an implied contract." *Johnson v. Sw. Miss. Reg'l Med. Ctr.*, 878 F.2d 856, 858 (5th Cir. 1989). Under Mississippi law, an employee is considered an at-will employee unless an express or implied contract, state law, or local ordinance indicates otherwise. *Levens v. Campbell*, 733 So. 2d 753, 763 (Miss. 1999). An employer who does not explicitly characterize the employment relationship as "at will" can create a property interest in continued employment if it creates a detailed manual outlining a binding infraction and disciplinary scheme. *Bobbitt v. Orchard, Ltd.*, 603 So. 2d 356, 361 (Miss. 1992). However, if an employer's handbook simply lists employee expectations and possible grounds for termination, it does not override the presumption of at-will employment. *See McCrory v. Wal Mart Stores, Inc.*, 755 So. 2d 1141, 1145 (Miss. Ct. App. 1999) (citing *Hartle v. Packard Elec.*, 626 So. 2d 106, 110 (Miss. 1993)). The employer's policies must be detailed enough that the employer is bound to the procedures set out in them.

Bobbitt, 603 So. 2d at 361. Further, if the employer has explicitly characterized an employment relationship as at will, an employee handbook outlining disciplinary procedures does not modify the relationship. *Hartle*, 626 So. 2d at 110.

The Mississippi Supreme Court found that the employer in *Bobbitt v. Orchard, Ltd.*, who did not include a disclaimer preserving its right to terminate at will, created a property right when it issued a manual that listed specific infractions, grouped those infractions by severity level, and then created a detailed disciplinary system based on the level of infraction. *Bobbitt*, 603 So. 2d at 359-61. Accordingly, a former employee could sue when she had been fired for an offense that, according to the manual, should have resulted in counseling and formal written warnings. *Id.* at 360-61.

By contrast, in *Hartle v. Packard Electric* the Mississippi Supreme Court found that the employee handbooks at issue there were not specific enough to alter the at-will status of the plaintiff. 626 So. 2d at 109-10. The handbooks explained "the conditions of employment, policies, practices, responsibilities, rules of conduct and benefits for employees," as well as a list of reasons for which an employee could be discharged. *Id.* at 109. The court held that even though "certain acts were identified as conduct that might lead to discharge[, this] did not indicate that those acts were the exclusive permissible grounds for discharge." *Id.* at 110 (citing *Reid v. Sears, Roebuck & Co.*, 790 F.2d 453, 460 (6th Cir. 1986)). The employee's status as "at will" was

further reinforced by specific disclaimers in the employee handbooks. *Id.* at 109. *See also McCrory*, 755 So. 2d at 1145 ("[Through] the mere act of listing . . . certain conduct that might warrant immediate discharge, Wal-Mart did not create a reasonable contractually-based expectation in its employees that any offense not so listed would require Wal-Mart to engage in the 'Coaching for Improvement' process.").

The 2006 SOP lists expectations for Shelby police officers, as well as possible disciplinary actions and processes. However, it cautions that the manual's policies and procedures are subject to change and that not all possible disciplinary actions are included. Unlike the employer's manual in *Bobbitt*, which had detailed disciplinary procedures based on the severity of the offense, the 2006 SOP lists possible infractions without indicating their severity and explains only one general disciplinary procedure. *See* 603 So. 2d at 357. The City of Shelby did not create an expectation of continued employment merely by listing actions that are grounds for discipline. *See Hartle*, 626 So. 2d at 110; *McCrory*, 755 So. 2d at 1145. Further, just as the Mississippi Supreme Court held in *Hartle* that listing dischargeable infractions does not override an employer's disclaimer that the employment is at-will, we cannot find that listing infractions in the 2006 SOP overrode the City's disclaimers in the employee handbook. *See* 626 So. 2d at 109-10.

The 2008 SOP also lists possible infractions and possible disciplinary measures, but it uses even more permissive language than the 2006 SOP. For example,

it states, "Discharge from the department may be imposed for a first offense and may be imposed at any point in a progressive chain"; "The department has the sole right to determine the disciplinary process applicable"; and "An officer or civilian employee may be disciplined or terminated for a number of reasons including, but not limited to. . . ." This permissive language, unlike the manual in *Bobbitt*, does not indicate that the City of Shelby was bound by the procedures set forth in the SOP. 603 So. 2d at 357. Therefore, the City of Shelby did not alter its disclaimers in the employee handbook by listing possible infractions and disciplinary procedures in the 2008 SOP. *See Hartle*, 626 So. 2d at 110; *McCrory*, 755 So. 2d at 1145. Accordingly, because neither the 2006 SOP nor the 2008 SOP created an expectation of continued employment in contradiction to the employee handbook, Johnson and James were at-will employees and had no property interest in continued employment.

C. Verbal Statements Made by the Chief of Police

Third, the appellants argue that statements made by the police chief to James created a property interest by showing an explicit mutual understanding that Johnson and James could not be fired at will. However, a "mutually explicit understanding" between an employer and employee creates a property interest in continued employment only when that understanding is "enforceable under state law as an implied contract." *Johnson*, 878 F.2d at 858. Johnson and James do not

argue that these statements created an understanding that was enforceable under Mississippi law. In fact, Johnson and James argue that enforceability under state law is irrelevant. Therefore, the appellants forfeited the argument that the police chief's statements created an enforceable understanding and property interest.

D. Mississippi Law

Finally, Johnson and James argue that they have a property interest because under Mississippi state law, police officers are required to enforce the law and cannot be discharged for refusal to participate in illegal activities. In *McArn v. Allied Bruce Terminix Co.*, 626 So. 2d 603, 607 (Miss. 1993), the Mississippi Supreme Court established a narrow common law exception to the employment at-will doctrine, such that "an employee who refuses to participate in an illegal act [is] not . . . barred by the common law rule of employment at will from bringing an action in tort for damages against his employer." While the common law exception allows the employee to bring a state tort action, it does not give the employee a property interest. *See Stark v. Univ. of S. Miss.*, 8 F. Supp. 3d 825, 840 (S.D. Miss. 2014) ("[T]he Court is unaware of, and the Plaintiff fails to cite any authority holding that *McArn* establishes a *contractual* right to continued employment and a resulting property interest that is protected under the Due Process Clause."); *Papagolos v. Lafayette Cnty. Sch. Dist.*, 972 F. Supp. 2d 912, 929, 931 (N.D. Miss. 2013) (analyzing a *McArn* claim only as a

state law tort claim, and not mentioning it as a basis for a property interest protected by the Constitution); *Stephen v. Winston Cnty.*, No. 1:07CV118-SA-JAD, 2008 WL 4813829, at *5-7 (N.D. Miss. Nov. 4, 2008) (same); *Harris v. Miss. Valley State Univ.*, 873 So. 2d 970, 985-86 (Miss. 2004) (same). Therefore, although the *McArn* doctrine may have allowed Johnson and James to bring a state tort action, it did not give them a constitutionally-protected property interest in their employment.

Johnson and James also argue that the definition of a police officer under Mississippi Code § 45-6-3(c) gives them a property interest. Section 45-6-3(c) merely defines a law enforcement officer as "any person appointed or employed full time by the state or any political subdivision thereof, . . . whose primary responsibility is the prevention and detection of crime, the apprehension of criminals and the enforcement of the criminal and traffic laws. . . ." This definition does not give police officers any continued expectation of employment as long as they enforce the law. Rather, it defines who is a police officer. Section 45-6-3(c) does not create a property interest.

Because Johnson and James were at-will employees with no property interest in continued employment, their Fourteenth Amendment claim for deprivation of property without due process fails as a matter of law.

IV. CONCLUSION

For the above-mentioned reasons, the judgment of the district court is AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

TRACEY L. JOHNSON
and DAVID JAMES, JR. **PLAINTIFFS**

VS. **CASE NO. 2:10-cv-00036-MPM-SAA**

CITY OF SHELBY, MISSISSIPPI
and HAROLD BILLINGS **DEFENDANTS**

MEMORANDUM OPINION

(Filed Jun. 30, 2015)

Before the court is Defendant City of Shelby's (the "City") motion for summary judgment. Plaintiffs Tracey L. Johnson and David James, Jr. (collectively "Plaintiffs") have responded, and Defendant replied. Having considered the filings and relevant law, the court is prepared to rule.

This case began in 2010 when Plaintiffs Tracey Johnson and David James, Jr. filed a constitutional claim for deprivation of property without due process against the City of Shelby, Mississippi and filed a malicious interference with employment claim against Harold Billings in his individual capacity. This court granted defendants' motion for summary judgment because the constitutional claim was not brought through 42 U.S.C. § 1983 and the malicious interference claim did not comply with the pre-suit requirements of the Mississippi Tort Claims Act. Plaintiffs

appealed the judgment and, in November 2013, the 5th Circuit affirmed this court's opinion in full. Plaintiffs subsequently appealed to the United States Supreme Court, which reversed the 5th Circuit's affirmance on the plaintiffs' constitutional claim. In particular, the Supreme Court reversed 5th Circuit precedent that, to bring a constitutional claim against a governmental entity, a plaintiff must specifically set forth in the complaint that the claim was being pursued through 42 U.S.C. § 1983. The Supreme Court did not address alternative grounds for dismissal or the dismissal of claims against Billings for failure to comply with the MTCA. Instead, the Supreme Court remanded the case for further proceedings consistent with its opinion. The only remaining claim is Plaintiffs' constitutional claim against the City of Shelby, Mississippi for deprivation of property without due process.

FACTS

Tracey L. Johnson and David James, Jr. were hired as police officers for the City of Shelby, Mississippi in 2007. In September of 2009, the City's Board of Aldermen, which has sole authority over the City's employment decisions, terminated Johnson and James, for violation of City residents' rights and police procedure. Among the complaints against Plaintiffs were a warrantless arrest of a woman accused of stealing a beer from a convenience store and allegations of profiling and harassment by the residents of an apartment complex, who filed a petition to the Board of Aldermen calling for the termination of Plaintiffs.

After the Board voted to terminate Plaintiffs, James requested and obtained a grievance hearing from the City. The Board upheld their terminations.

The City of Shelby has a city employee handbook, covering police officers, adopted in 1997 and revised in 2003, that states: "There is no contract of employment between the City and any one or all of its employees. Employment security cannot be guaranteed for or by any employee." Plaintiffs, in fact, did not have an employee contract with the City. In 2006, the City also adopted the City of Shelby Police Department Standard Operating Procedures Manual, which provided that officers were responsible for complying with the city employee handbook. In 2008, however, the Board of Alderman adopted a new Standard Operating Procedures Manual which included policies and procedures the police department should follow in the case of disciplinary action, including termination. Plaintiffs claim that language in the 2008 manual provides that police officers may only be terminated for cause. Plaintiffs do not point to specific language in the manual, but instead seem to rely on the overall scheme and structure of the manual, which lays out the reasons and procedures for disciplinary action. In September of 2009, the Board of Aldermen rescinded the 2008 manual and readopted the previous 2006 manual. This readoption occurred during the same meeting, but before, the termination of Plaintiffs. While the Board may have shown bad form in their pursuit of legal advantage, such action is not fatal to defendant's motion.

Plaintiffs argue they had a property interest in continued employment with the City and that they were deprived of that property interest without due process. Plaintiffs claim that, due to the policies and procedure in effect during their employment (but rescinded before their termination), they could only be discharged for a legitimate cause and upon recommendation of the police chief. Therefore, Plaintiffs maintain, they had a reasonable expectation of continued employment.

The City responds that Plaintiffs did not have employment contracts with the City and therefore their employment was at-will employment. The City also argues that the policies the plaintiffs relied on were rescinded prior to Plaintiffs' termination, and that, even if the relied upon policies were in place at the time of Plaintiffs' termination, Plaintiffs would still not have a property interest because the City of Shelby Employee Handbook states:

> There is no contract of employment between the City and any one or all of its employees. Employment security cannot be guaranteed for or by any employee. At all times during employment with the City of Shelby, employees shall retain the right to leave employment if they choose. Likewise, we retain the right to separate any employee from employment at any time with or without notice.

STANDARD OF REVIEW

Summary judgment is appropriate when there is "no genuine issue of material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). The facts and evidence are taken in a light most favorable to the non-moving party. *LeMaire v. La. Dep't of Transp. & Dev.*, 480 F.3d 383, 386 (5th Cir.2007).

A dispute regarding a material fact is "genuine" if the evidence is such that a reasonable jury could return a verdict in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). Summary judgment is appropriate if "critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the non-movant." *Armstrong v. City of Dallas*, 997 F.2d 62, 67 (5th Cir. 1993). A party opposing a properly supported motion for summary judgment "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial." *Anderson*, 477 U.S. at 248. If the nonmoving party fails to meet this burden, the motion for summary judgment must be granted.

ANALYSIS

The threshold issue in this case is whether Plaintiffs had a property interest in continued employment with the City, which would trigger the need for due process. *Board of Regents v. Roth*, 408 U.S. 564, 569-70

(1972). The existence of a property right in employment is determined by state law. *Johnson v. Southwest Miss. Reg'l Med. Ctr.*, 878 F.2d 858 (5th Cir. 1989) (citations omitted). A property interest may be created by statute, written contract, or "a 'mutually explicit understanding' enforceable under state law as an implied contract." *Id.* (citing *Perry v. Sindermann*, 408 U.S. 593, 601-02 (1972)). The Mississippi Supreme Court has held that at-will employees have no constitutionally protected property interest in continued employment. *Levens v. Campbell*, 733 So.2d 753, 763 (Miss. 1999) ("Because [plaintiff] was an employee at will, she had no valid claim of entitlement in employment").

In *McMillian v. City of Hazlehurst*, the 5th Circuit ruled that Mississippi municipal police officers are at will employees without a protected property interest in continued employment. 620 F.2d 484, 485 (5th Cir. 1980) (citing MISS. CODE ANN. § 21-3-5; *Sartin v. City of Columbus Util. Comm'n*, 421 F.Supp. 393 (N.D. Miss. 1976)). Mississippi common law also holds to a strong presumption that employment is at will. *Relliford v. Holly Springs, MS*, 1995 WL 1945432, at *4 (N.D. Miss. Aug. 21, 1995) (citing *Perry v. Sears, Roebuck & Co.*, 508 So.2d 1086, 1088 (Miss. 1987)). In general these cases stand for the proposition that municipal police officers do not have a property interest in their employment.

However, employers can adopt policies creating such a property right. In this instance, Plaintiffs argue City policies concerning police created a protected property right. In *Bobbitt v. Orchard, Ltd.* the Mississippi Supreme Court held an employee handbook could

create employer obligations. 603 So.2d 356, 361 (Miss. 1992); *see also Robinson v. Bd. of Trs. of East Cent. Jr. Coll.*, 477 So.2d 1352 (Miss. 1985). In making its decision the court framed the issue asking:

> when an offense specifically covered by the employer's own manual provides no more severe disciplining than a warning or counseling of the employee, may the employer pay no attention to the manual and fire the employee instead?

Id. The court answered its question "[w]e hold the employer to its word." *Id.*

Despite this holding, language in the employment manual disclaiming a contractual relationship is fatal to Plaintiffs' arguments and Plaintiffs' at-will employment status is preserved. In *Bobbitt* there was no express disclaimer of a contractual relationship between the parties. Because of the absence of a disclaimer, the *Bobbitt* court construed the employment manual as part of an employment contract. The *Bobbitt* court distinguished two similar cases[1] where the employee was held to be an at-will employee in part because of an express provision in the employment manual that declared the employee an at-will employee.

In the instant case, we find a similar situation. The City's employee handbook, which applies to all employees of the City, specifically disclaims a contractual

---

[1] *See Shaw v. Burchfield*, 481 So.2d 247 (Miss. 1985); *Perry v. Sears, Roebuck & Co.*, 508 So.2d 1086 (Miss. 1987).

relationship: "There is no contract of employment between the City and any one or all of its employees. Employment security cannot be guaranteed for or by any employee."

Where there is "something in the employee handbook disclaiming a contract of employment, the rule developed in *Bobbitt* does not apply." *McDaniel v. Mississippi Baptist Med. Ctr.*, 869 F.Supp. 445, 453 (S.D. Miss. 1994). Further, "disclaimers in employees' manuals having their purpose of preserving the employment at-will relationship cannot be ignored." *McCrory v. Wal-Mart Stores, Inc.*, 755 So.2d 1141, 1144-45 (Miss.Ct.App. 1999).

In the instant case, the 2008 policy manual appears to have been hastily copied from a sister city's manual, for reasons unknown and unfathomable by this court. For instance, the 2008 manual, at one point, identifies the city of Cleveland police department as the applicable agency. Nevertheless, the 2008 manual provides guidance on how to handle disciplinary actions taken by the City of Shelby. Plaintiffs contend that these policies and procedures provide that an officer may only be terminated "for cause." However, the court does not find that these policies were intended to override the officers' at-will status as employees. In fact, the language grants discretion to the department: "In cases of serious misconduct such as major breaches of policy or violations of law, procedures contained in this policy may be disregarded." The 2008 manual contains myriad instances of permissive language as well:

"Progressive discipline *may* include . . . " and "Discharge from the department *may* be imposed for a first offense . . . " (emphasis added). Discretionary and permissive language in an employment manual, as is the case here, does not override the employees' at-will status. *See, e.g. Senseney v. Miss. Power. Co.*, 914 So.2d 1225, 1229 (Miss.Ct.App. 2005). Due to this discretionary language and the express language in the City employee manual stating that city employees are at-will employees, Plaintiffs' at-will employment status is maintained. Therefore, Plaintiffs do not have a property interest in their continued employment.

This finding is consistent with a number of cases in Mississippi. *See Hartle v. Packard Elec.*, 626 So.2d 106 (Miss. 1993) (holding that disclaimer in handbook preserved employer's right to terminate employee at will); *Perry v. Sears, Roebuck & Co.*, 508 So.2d 1086 (Miss. 1987) (holding that an employee handbook cannot be considered a contract between employer and employee where it explicitly states that the employee may be terminated at will); *McCrory v. Wal-Mart*, 755 So.2d 1141 (Miss.Ct.App. 1999) (reasoning that disclaimers in employee manuals have the purpose of preserving the employment at-will doctrine); *Byrd v. Imperial Palace of Miss.*, 807 So.2d 433 (Miss. 2001) (holding employee handbook with disclaimer does not create a contractual obligation that would override the at-will doctrine). This finding is also consistent with a prior holding by this court in *Hall v. Bolivar Cnty.*, No. 2:08-CV-174, 2010 WL 3861078, at *4 (N.D. Miss. Sept. 24, 2010). In *Hall v. Bolivar Cnty.* this court found that

an employment manual's language amounted to a disclaimer preserving the at-will status of its employees.

The City is correct in asserting that Plaintiffs were at-will employees and did not have a property interest in continued employment. For the foregoing reasons defendant's motion for summary judgment [94] will be GRANTED. A separate judgment will be entered this date, pursuant to Fed. R. Civ. P. 58.

So ORDERED this the 30th day of June, 2015

/s/ MICHAEL P. MILLS
UNITED STATES
DISTRICT JUDGE
NORTHERN DISTRICT
OF MISSISSIPPI

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

TRACEY L. JOHNSON
and DAVID JAMES, JR. **PLAINTIFFS**

VS. **CASE NO. 2:10-cv-00036-MPM-SAA**

CITY OF SHELBY, MISSISSIPPI
and HAROLD BILLINGS **DEFENDANTS**

JUDGMENT

(Filed Jun. 30, 2015)

Pursuant to the memorandum opinion issued this day, it is hereby ordered and adjudged that this case is dismissed.

This the 30th day of June, 2015.

/s/ MICHAEL P. MILLS
UNITED STATES
DISTRICT JUDGE
NORTHERN DISTRICT
OF MISSISSIPPI