IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 92-4387
(Summary Calendar)

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Elton J. Senegal and
Marquis Seveat

Plaintiffs-Appellants,

versus

Jefferson County, et al.,

Defendants-Appellees.

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Appeal from the United States District Court
for the Eastern District of Texas
(91-CV-819)

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( May 13, 1993)

Before KING, DAVIS, and WIENER, Circuit Judges.

PER CURIAM:[*]

In this Texas public employment lawsuit under, inter alia, 42 U.S.C. §1983, implicating claims of due process violations, Plaintiffs-Appellants Elton Senegal and Marquis Seveat, who are Jefferson County deputy sheriffs (collectively, the Deputies) appeal the district court's dismissal of their action for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). Finding

[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

that the Deputies have not alleged facts sufficient to state a claim, we affirm.

## I

## FACTS AND PROCEEDINGS

The Deputies, employees of the Jefferson County Sheriff's Department, challenge the disciplinary actions brought against them as a result of an altercation between Senegal and his superior officer, George Miller. The altercation, occurring early in September 1990, allegedly involved Miller's striking Senegal while he was restrained by an inmate at the direction of Miller. Subsequently, Seveat allegedly recorded a statement from the inmate that another officer, Darrin Cassidy, had attempted to coerce the inmate into stating that Senegal had initiated the fight.

Following the September incident, the Jefferson County Sheriff Department (the County), suspended the Deputies pending a disciplinary board hearing. At the hearing, Senegal faced a charge of misconduct for insubordination and assault; Seveat faced a charge of misconduct for interfering with internal affairs. The disciplinary board recommended suspension without pay and probation for both officers. The board also recommended that Miller receive a letter of reprimand for his participation in the incident.

Sheriff Carl Griffith, Jr. (the Sheriff) carried out the board's first recommendation. He suspended Senegal for forty days without pay and placed him on probation for a period of six months. The Sheriff also suspended Seveat, imposing a six months

probationary period and a suspension without pay for fifteen days. But the Sheriff failed to take any action against Miller.

The Deputies filed suit against the County and the Sheriff, both individually and in his official capacity, for deprivation of their right to due process. The Deputies list a series of alleged deprivations, including insufficient notice of the nature of the charges and of the appropriate standards of proof. The Deputies also complain that the disciplinary board erred by excluding evidence regarding Miller's violent background. Moreover, the Deputies claim that their exclusion from the proceedings, resulting in their inability to confront and cross examine their accusers, constitutes a deprivation of due process. The Deputies' final claim is one implicating impermissible bias by the board, caused by the membership of one Ray Cates thereon. According to the Deputies, the main reason for Cates' presence was to influence the other board members.

In its answer, the County denied the allegations and pleaded, as an affirmative defense, that the Deputies had failed to state a claim upon which relief could be granted. The Deputies filed a response to the County's answer, asserting that dismissal for failure to state a claim would be inappropriate. The district court, noting that the issue had been briefed and argued by both sides, elected to treat the County's answer as a motion to dismiss pursuant to Fed. R. P. 12(b)(6), and dismissed the case for failure to state a claim.

## II

## ANALYSIS

### A. Standard of Review

This court reviews de novo a trial court's dismissal for failure to state a claim upon which relief can be granted.[1] A trial court's decision to grant a Rule 12(b)(6) motion may be upheld "only if it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations."[2] Although we accept the well-pleaded allegations in the complaint as true,[3] the contents of the complaint must amount to more than "mere conclusory [sic] allegations."[4]

### B. Procedural Error

The Deputies contend that the district court's dismissal constitutes a procedural error. Their argument has two prongs. First, they advance the proposition, wholly devoid of support, that they "were entitled to explore and exhaust all discovery mechanisms available to flush out any recognizable property interest which could trigger protectible due process rights." This is simply

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[1] FDIC v. Ernst & Young, 967 F.2d 166, (5th Cir. 1992); Barrientos v. Reliance Standard Life Insurance Co., 911 F.2d 1115 (5th Cir. 1990), cert. denied 59 U.S.L.W. 3502 (Jan. 22, 1991) (No. 90-6353).

[2] Baton Rouge Building and Construction Trades Council v. Jacobs Constructors, Inc., 804 F.2d 879, 881 (5th Cir. 1986).

[3] O'Quinn v. Manuel, 773 F.2d 605, 608 (5th Cir. 1985).

[4] Guidry v. Bank of LaPlace, 954 F.2d 278, 281 (5th Cir. 1992) (quoting Elliott v. Foufas, 867 F.2d 877, 881 (5th Cir. 1989)).

wrong. A motion to dismiss pursuant to Rule 12(b)(6) is decided solely on the pleadings; thus, the degree of discovery conducted is irrelevant to a Rule 12(b)(6) motion.

Second, the Deputies urge that the district court engaged in "deceptive tactics" by construing a motion to dismiss as a motion for summary judgment, thereby denying the Deputies an opportunity to "equally defend themselves." They fail, however, to direct us to any contents of the record that would support this extreme allegation. The trial court's opinion limits itself to a discussion of the pleadings and properly treats the complainants' allegations as true. Moreover the court, citing Conley v. Gibson,[5] correctly notes that a motion to dismiss should not be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitled [sic] him to relief." As a result, we find that the court properly characterized and construed the motion as one to dismiss for failure to state a claim, and limited its consideration to the Deputies' pleadings.

C. "At-will" Employment

The Deputies also assert two virtually indistinguishable claims attacking the "at will" employment doctrine of the state of Texas. The basis of these claims is unclear--a problem exacerbated by the Deputies' failure to cite a single authority in support of either claim. The arguments commingle claims that the "at will" doctrine is unconstitutional and that it threatens the very fabric

[5] 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

of our democratic society. As intriguing as this argument may be, the Deputies did not present it in their complaint and it was not considered by the district court, so it is not preserved for appeal. D. Due Process Claim

The issue at the core of this suit is whether the Deputies, as employees of the Sheriff, have a property interest in their jobs that entitles them to due process.[6] Under well-established case law, each has a property interest sufficient to trigger the Due Process Clause only if he can demonstrate a legitimate entitlement to continued employment.[7] The sufficiency of the entitlement, which can arise from a statute, a local ordinance, or a mutually explicit understanding,[8] is determined by reference to state law.[9]

There is no dispute that Texas law grants virtually unlimited discretion to a sheriff in the hiring and firing of deputies; specifically, "[a] deputy serves at the pleasure of the sheriff."[10] As a result of this clear statement of law, this court previously

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[6] Although the two officers also alleged a deprivation of their liberty interests in their complaint, they have failed to raise this issue in their brief. Accordingly, we do not consider this argument.

[7] Board of Regents v. Roth, 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972); Irby v. Sullivan, 737 F.2d 1418, 1421 (5th Cir. 1984) (citing Conley v. Board of Trustees of Grenada County Hosp., 707 F.2d 175, 179 (5th Cir. 1983)).

[8] Bishop v. Wood, 426 U.S. 341, 344, 96 S.Ct. 2074, 48 L.Ed.2d 684 (1976); Perry v. Sindermann, 408 U.S. 593, 601-02, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972).

[9] Bishop, 426 U.S. at 344.

[10] Tex. Loc. Gov't Code Ann. § 85.003(c) (Vernon 1988). See Murray v. Harris, 112 S.W.2d 1091 (Tex. Civ. App.SQAmarillo 1938, writ dism'd).

has held that "deputy sheriffs have no legal entitlement to their jobs as public employees; the sheriff may fire them for many reasons or for no articulable reason at all."[11]

The only remaining question, therefore, is whether the Deputies can establish an entitlement to continued employment based on their complaint, which alleges that "the policies, procedures and catalogues of Jefferson County" grant them protectible property rights. In a footnote to Irby v. Sullivan, we rejected the argument that a policy statement could create an entitlement to continued employment. There we reasoned that "the Sheriff had no authority under state law to abrogate `the important option placed in him by law to terminate the employment [of his deputies] at his will or pleasure.'"[12] Therefore, a policy statement that restricted a sheriff's discretion would be void.[13]

The Deputies do not even cite Irby in their brief, much less attempt to distinguish its application. Our independent research, however, reveals two recent Texas appellate cases, El Paso County Sheriff's Deputies' Association, Inc. v. Samaniego[14] and Renken v.

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[11] Barrett v. Thomas, 649 F.2d 1193, 1199 (5th Cir. 1981). See also White v. Thomas, 660 F.2d 680 (5th Cir. 1981). As the Barrett and White cases demonstrate, a sheriff's unfettered discretion to terminate employment does not permit him to violate the civil rights of his employees. County of El Paso v. Hill, 754 S.W.2d 267 (Tex. App.--El Paso 1988, writ dism'd).

[12] Irby 737 F.2d at 1422 n.4 (quoting Murray, 112 S.W.2d at 1093)).

[13] Id.

[14] 802 S.W.2d 727 (Tex. App.--El Paso 1990, writ dism'd).

Harris County,[15] which hold that a collective bargaining agreement can abrogate the statutory "at will" provision. In Samaniego, a state intermediate appellate court ruled that a sheriff could enter into a contract, in that case a collective bargaining agreement establishing grievance procedures, that operates to abrogate the sheriff's statutory right to terminate his employees at will.[16] In Renken, another intermediate court of appeal in Texas, whose ruling that the policy before it did not create a property interest, also recognized implicitly that an employment manual's clear and explicit limitation of a sheriff's ability to terminate employees at will would effectively modify the statutory provision.[17]

Importantly, the employment manuals at issue in Samaniego and Renken were negotiated pursuant to state law,[18] although neither case emphasizes this distinction. The existence of state law authorizing the sheriff to limit his discretion to discharge his employees at will is a key distinction under Irby, which emphasizes that the sheriff has no authority under state law to alter his power to terminate his deputies at will. As seen in Samaniego and Renken, however, state law does grant the sheriff the ability to negotiate employment terms.

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[15] 808 S.W.2d 222 (Tex. App.--Houston 1991, no writ).

[16] Samaniego, 802 S.W.2d at 728.

[17] Renken, 808 S.W.2d at 225.

[18] Specifically, both agreements were negotiated pursuant to TEX. REV. CIV. STAT. ANN. art. 5154c-a.

In contrast, the Deputies in the instant case allege: "Plaintiffs would show that they were maliciously denied protectible property interests in and to the policies, procedures and catalogues of Jefferson County by virtue of Defendant's capricious disciplinary action against Plaintiffs." It is these very policies and catalogues which the Deputies seek in discovery. Wholly lacking from their complaint is any allegation that these policies, procedures, and catalogues were negotiated under the authority of state law. Without such an allegation, the Deputies may not recover as a matter of law. Consequently, they have failed to state a claim upon which relief could be granted.

For the foregoing reasons, the district court's dismissal is AFFIRMED.