

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 94-60416  
Summary Calendar

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JACKIE RENEE MITCHELL, ,

Plaintiff-Appellant,

versus

JIMMY L. WILSON, Individually  
and in his capacity as Chief  
of Police of Jackson, Mississippi,  
ET AL.,

Defendants-Appellees.

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Appeal from the United States District Court  
for the  
Southern District of Mississippi  
CA 3:93 771)

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March 29, 1995

Before JOHNSON, KING, and DEMOSS, Circuit Judges.

JOHNSON, Circuit Judge:<sup>1</sup>

Appellant Jackie Mitchell ("Mitchell") appeals the district court's dismissal of her sections 1981 and 1983 action against Police Chief Jimmy Wilson ("Wilson") and the City of Jackson, Mississippi (the "City").<sup>2</sup> Because we agree with the district

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<sup>1</sup>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 Pursuant to this Rule, the Court has determined that this opinion should not be published.

<sup>2</sup>For the first time on appeal, Mitchell raises the issue that the district court erred in overruling her motion to compel

court that Mitchell has failed to state a claim against either Wilson or the City, we affirm.

### I. Facts and Procedural History

On August 29, 1983, Mitchell was pulled over by a City police vehicle driven by Officer Effa McDonald ("McDonald"). Mitchell alleges that McDonald approached her car, handcuffed her, and then instructed her to do as he said under threat of jail. Thereafter, Mitchell maintains that McDonald drove her to a dark alley where he threatened her with a pistol and raped her.

Based on this incident, Mitchell filed suit against the City and Wilson, alleging violations of 42 U.S.C. §§ 1981 and 1983. She claims, first, that Wilson failed to use reasonable care in hiring McDonald and, second, that the City is liable for Wilson's actions since Wilson was acting within the scope of his employment as police chief when he hired McDonald.

Mitchell alleges that her assailant was hired as a police officer by Wilson in November, 1992. She maintains that McDonald had a "propensity for sexual violence" and was "incompetent and unfit" to be a City police officer. Mitchell claims that Wilson is liable under sections 1981 and 1983 since he "breached the duty he

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discovery. Issues raised for the first time on appeal are not reviewable by this Court unless they involve purely legal questions and failure to consider them would result in manifest injustice. *Varnado v. Lynaugh*, 920 F.2d 320, 321 (5th Cir. 1991). A district court has broad discretion in supervising discovery. *See McLean v. International Harvester Co.*, 817 F.2d 1214, 1223 (1987). A determination as to whether Mitchell's allegation that the district court abused its discretion during discovery has merit necessarily includes a determination of factual issues; therefore, the issue will not be reviewed for the first time by this Court on appeal.

owed to the citizens of Jackson" in hiring and retaining McDonald. She claims that he "knew or should have known" that McDonald was incompetent and unfit to be a policeman, that McDonald presented a threat to City residents, that he had been investigated on similar charges of sexual misconduct, and that he had no regard for his oath or obligations as a Jackson police officer. She maintains that Wilson's hiring and retention of McDonald under these circumstances constituted wilful and wanton conduct, justifying an award of punitive damages. Mitchell alleges that the City is vicariously liable for any misconduct of Wilson since he was acting within the course and scope of his duties as police chief in wrongfully hiring McDonald.

Wilson and the City moved to dismiss on the ground that Mitchell has failed to state a claim under either 42 U.S.C. § 1981 or 42 U.S.C. § 1983. The district court agreed with Wilson and the City, and dismissed Mitchell's suit pursuant to FED. R. CIV. P. 12(b)(6). Because we agree that no claim for which relief can be granted has been stated by Mitchell against the City or Wilson, we affirm the dismissal.

## II. Discussion

This Court reviews the district court's grant of a defendants' motion to dismiss under FED. R. CIV. P. 12(b)(6) de novo. *See Cinel v. Connick*, 15 F.3d 1338, 1341 (5th Cir.), *cert. denied*, 115 S. Ct. 189 (1994). All well-pleaded facts must be accepted as true and viewed in the light most favorable to the plaintiff. *Id.* The complaint is subject to dismissal if it appears beyond a doubt that

the plaintiff can prove no set of facts in support of her claim which would entitle her to relief. *See Chrissy F. v. Mississippi Department of Public Welfare*, 925 F.2d 844, 846 (5th Cir. 1991).

A. 42 U.S.C. § 1981

Section 1981 prohibits race discrimination in the making and enforcement of contracts. 42 U.S.C. § 1981; *see Walker v. South Central Bell Telephone Co.*, 904 F.2d 275, 276 (5th Cir. 1990). Mitchell failed to plead any facts showing that she was discriminated against on the basis of race in the making and enforcement of any contract. Because Mitchell has wholly failed to advance any argument entitling her to relief under section 1981, we agree with the district court that the Rule 12(b)(6) motion should be granted as to this claim.

B. 42 U.S.C. § 1983

1. § 1983 Claim Against Chief Wilson

To obtain relief under section 1983, the plaintiff must prove that she was deprived of a constitutional or federal statutory right and that the person depriving the plaintiff of that right acted under color of state law. 42 U.S.C. § 1983; *see Hernandez v. Maxwell*, 905 F.2d 94, 95 (5th Cir. 1990). Under section 1983 supervisory official are not liable for the actions of subordinates on any theory of vicarious liability. *Thompkins v. Belt*, 828 F.2d 298, 303 (5th Cir. 1987). A supervisory official may be held liable for a subordinate's violation of constitutional rights if the supervisor is personally involved in the constitutional violation or there is a sufficient causal connection between the

supervisor's wrongful conduct and the constitutional violation. *Id.* at 304. Supervisory liability can exist without overt personal involvement if the supervisor implemented a policy so deficient that the policy "itself is a repudiation of constitutional rights" and is "the moving force of the constitutional violation." *Id.* (citations omitted). Additionally, the existence of a constitutionally deficient policy cannot be inferred from a single wrongful act. *Thompkins* 828 F.2d at 304-05. Additionally, negligence alone is not actionable under section 1983. *Daniels v. Williams*, 474 U.S. 327, 328 (1986).

Mitchell argues that Wilson is liable, because in hiring McDonald he breached his duty to the people of Jackson by failing to use reasonable care in his hiring practices. Mitchell contends that Wilson's hiring and retention under the circumstances caused McDonald to rape Mitchell. Mitchell's complaint sounds in negligence, which is not actionable under section 1983. Mitchell does not allege that Wilson instituted an inadequate hiring or supervision policy or procedure, but instead Mitchell bases her claim only on the one incident of McDonald's employment. Because a single incident of negligent hiring is not actionable under section 1983, Mitchell can prove no set of facts in support of her claim which would entitle her to relief against Wilson. Therefore, Mitchell failed to state an actionable claim, and the district court did not err in dismissing her complaint against Wilson.

## 2. § 1983 Claim Against the City

A municipality cannot be held liable under section 1983 unless

the plaintiff has alleged that an official policy or custom of the municipality caused the constitutional violation. *Monell v. Department of Social Services*, 436 U.S. 658, 690-94 (1978). The plaintiff must prove that the policy in and of itself violates constitutional rights, that the policy evidences a "deliberate indifference" to constitutional rights, or that the municipality has a custom of depriving persons of their constitutional rights. *Id.* The first inquiry in any case alleging municipal liability under section 1983 is whether there is a direct causal link between a municipal policy or custom and the alleged constitutional deprivation. See *City of Canton v. Harris*, 489 U.S. 378, 385 (1989). Vicarious liability does not provide a basis for municipal liability. See *Monell*, 436 U.S. at 690-95.

In her complaint, Mitchell did not allege that a municipal policy or custom caused her constitutional violation. Instead, she vaguely based her claim against the City on vicarious liability—which is not a basis for section 1983 liability on the part of a municipality.<sup>3</sup> Therefore, Mitchell did not properly plead her claim against the City and the district court did not err in dismissing that complaint as well.

### III. Conclusion

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<sup>3</sup>On appeal, Mitchell argues that she was denied discovery which would have allowed her to prove an unconstitutional custom or policy as required by §1983. However, in the district court Mitchell failed to so much as allege the existence of such a policy or custom. She merely relied on a vicarious liability theory based on Wilson's negligence. Because vicarious liability alone without allegation of unconstitutional policy or custom cannot serve as a ground of municipality liability, Mitchell has failed to even state a claim upon which relief can be granted.

We agree that with the district court that Mitchell has failed to state a claim upon which relief can be granted in this action since neither negligence nor vicarious liability are actionable under section 1983. Therefore, we affirm the district court's dismissal.

AFFIRMED.