2008-CA-00922 t

MISSISSIPPI SUPREME COURT
MISSISSIPPI COURT OF APPEALS

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NO. 2008-CA-00922

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NIKKI HATTEN NIOLET

APPELLANT

VERSUS

PHIL RICE

APPELLEE

## CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Nikki Hatten Niolet, Appellant;

2. Jim Waide, Esq., Attorney for Appellant;

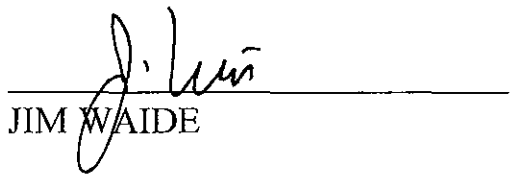
3. Waide & Associates, P.A., Attorneys for Appellant;

4. Phil Rice, Appellee;

5. David M. Thomas, II, Esq., Attorney for Appellee; and

6. Balch & Bingham, LLP, Attorneys for Appellee.

This the 21st day of August, 2008.



JIM WAIDE

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## STATEMENT OF THE ISSUES

1. Whether the Circuit Court erred in determining that Niolet's claims of assault and battery were within the arbitration agreement.

2. Whether the Circuit Court erred in determining that Rice was a third party beneficiary of the arbitration agreement.

## STATEMENT REGARDING ORAL ARGUMENT

Nikki Niolet respectfully requests oral argument because this case involves the issue of whether a non-signatory of an arbitration agreement can invoke its protections.

## STATEMENT OF THE CASE

*A. Statement of the Proceedings*

1. On September 21, 2007, Nikki Hatten Niolet filed her Complaint in the Circuit Court of Madison County, Mississippi, against Phil Rice, alleging assault and battery, and malicious interference with employment. [R:2-4]

2. On November 20, 2007, Phil Rice filed his Motion to Compel Arbitration and Stay Proceedings, [R:9] with Memorandum. [R-33]

3. On December 6, 2007, Niolet responded to Rice's motion, conceding her claim of malicious interference with employment. [R:89]

4. On March 17, 2008, the Circuit Court issued an Order allowing Niolet to file a Supplemental Brief. [R:115]

5. On March 24, 2008, Niolet filed her Supplemental Brief. [R:116]

6. On May 9, 2008, the Circuit Court granted Rice's Motion to Compel Arbitration, holding that: (1) there existed a valid, written agreement for arbitration; (2) Plaintiff's claims are within the scope of the arbitration agreement, and (3) Defendant is an intended third-party beneficiary of the arbitration agreement. [R:147]

7. On May 27, 2008, Niolet timely filed her appeal to the Mississippi Supreme Court. [R:148]

*B. Statement of the Facts*[1]

Nikki Niolet worked for Telepak Networks, Inc., as a salesperson and Phil Rice was her supervisor. Nikki Niolet and Phil Rice enjoyed a good relationship until October 2006.

In October 2006, Niolet was required to accompany Rice to a business convention in Florida. During the business convention in Florida, and specifically on or about October 11, 2006, Rice became intoxicated and repeatedly sexually assaulted Niolet by grabbing her, attempting to have sexual relations with her and engaging in prolonged and detailed sexually-charged language with her.

Niolet reported the sexual harassment to Telepak. Telepak investigated the incident and informed Niolet that it believed that the sexual assault had occurred but that Rice had "blacked out," and because of this, he was not responsible for what he had done.

Telepak assured Niolet that there would be no further retaliatory action against her, and requested that Niolet continue to work with Rice. Niolet agreed to do so because she did not want to see Rice lose his job.

However, following the incident, Rice began to place extremely onerous paperwork requirements upon Niolet and other salespersons.

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[1]All assertions of fact are cited to the Complaint. [R:2-4]

Niolet ultimately lost her job as a result of her reporting the sexual assault by Phil Rice.

Niolet filed a Complaint in the Circuit Court of Madison County against Phil Rice, alleging assault and battery, and malicious interference with employment.

After Nikki Niolet filed her Complaint in the Circuit Court, Phil Rice filed a motion to compel arbitration, even though Rice was not a signatory to the arbitration agreement. Rice relied upon an arbitration agreement which Telepak had with all its employees, including Nikki Niolet, sign, as a condition of employment.

The Telepak "Dispute Resolution Program" contains the following pertinent provisions regarding the scope of the agreement to arbitrate:

> "In consideration of the Company considering you for employment, you and your employer further agree that, in the event that you, anyone on your behalf or your employer seek relief in a court of competent jurisdiction for a dispute covered by this Agreement, your employer or you may, at any time within sixty (60) days of the service of a complaint by one party against the other at either party's option, require all or part of the dispute to be arbitrated...
>
> This **pre-dispute resolution agreement will cover all matters directly or indirectly related to your recruitment, potential employment, or possible termination of employment**, including, but not limited to, claims involving laws against discrimination whether brought under federal and/or state law, and/or claims involving and/or against the Company, employees, supervisors, officers, and/or directors of Telapex, Inc, or any affiliates, as well as any other common law claims for wrongful discharge or other similar claims. This pre-dispute resolution agreement does not cover claims under unemployment or workers'

compensation laws or the National Labor Relations Act..."

[R:21-22]

In her response to Rice's motion to compel, Niolet conceded her malicious interference with employment claim because it arguably was covered by the employment arbitration agreement. However, the assault and battery clearly was not since it was not a claim involving her recruitment or termination. Notwithstanding, the Circuit Court granted Rice's motion to compel arbitration and dismissed the case.

## SUMMARY OF THE ARGUMENTS

By the clear terms of the contract, Niolet only agreed to arbitrate claims concerning her recruitment for employment and her termination. She never agreed to arbitrate claims of assault and battery, and the Circuit Court erred in holding that she did. The arbitration agreement Niolet signed, as a condition of her employment, was an employment contract, whereby Niolet waived her right to a judicial action against Telepak for employment disputes. Assault and battery is not an employment dispute.

While Niolet waived her right to litigate certain employment disputes with Telepak as a condition of being hired with Telepak, she did not waive her right to litigate her claims of assault and battery against Rice, a non-signatory to the agreement. Rice should not be allowed to invoke the protections of the arbitration

agreement, under a theory of equitable estoppel, or any other theory.

## STANDARD OF REVIEW

"The grant or denial of a motion to compel arbitration is reviewed *de novo.*" *East Ford, Inc. v. Taylor,* 826 So.2d 709, 713 (Miss.2002); *Webb v. Investacorp, Inc.,* 89 F.3d 252, 256 (5th Cir.1996); *Adams v. Greenpoint Credit*, LLC, 943 So.2d 703, 707 (Miss.2006).

## ARGUMENT I.

### THE CIRCUIT COURT ERRED IN FINDING THAT NIOLET'S CLAIMS FOR ASSAULT AND BATTERY WERE WITHIN THE ARBITRATION AGREEMENT.

According to the Mississippi Supreme Court:

> Under the FAA, this Court must conduct a two-step inquiry: first, whether the parties intended to arbitrate the dispute, and second, if they did intend to arbitrate, "whether legal constraints external to the parties' agreement foreclosed the arbitration of those claims." *East Ford,* 826 So.2d at 713 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth,* 473 U.S. 614, 628, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985)).

*Qualcomm Inc. v. American Wireless License Group, LLC*, 980 So.2d 261, 268-269 (Miss. 2007).

> Under the second prong, applicable contract defenses available under state contract law such as fraud, duress, and unconscionability may be asserted to invalidate the arbitration agreement without offending the Federal Arbitration Act. *Id.* (citing *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686, 116 S.Ct. 1652, 134 L.Ed.2d 902 (1996)).

*Amsouth Bank v. Quimby*, 963 So.2d 1145, 1147 -1148 (Miss. 2007)

Niolet's Complaint contained allegations concerning assault and battery that occurred in October 2006. The Complaint also contained a claim concerning Plaintiff's loss of employment that occurred in September 2007.

Only the claim for malicious interference with employment could possibly be covered by the arbitration agreement. The arbitration agreement says that it covers only "matters directly or indirectly related to your recruitment, potential employment, or possible termination of employment."

The assault and battery committed against Niolet is separate from the her termination of employment, which occurred a year later. The assault and battery was not a matter directly or indirectly related to her recruitment for employment or her termination of employment. The arbitration agreement Niolet signed, as a condition of her employment, was an employment contract, whereby Niolet waived her right to a judicial action against Telepak for employment disputes. Assault and battery is not an employment dispute.

The purpose of the arbitration agreement was to protect the employer, Telepak, from employment disputes, i.e., claims arising out of acts of employees committed in the course and scope of employment. Assault and battery is not an employment dispute. Mississippi law is plain that an assault and battery, under state law, is not

committed within the course and scope of employment.

In *Tanks v. Lockheed Martin Corp.*, 417 F.3d 456 (5th Cir. 2005), the United States Court of Appeals, applying Mississippi law, concluded that an assault and battery is not within the course and scope of employment. The Court said: "An intentional violent assault on a co-worker is quite obviously neither committed as a means of accomplishing the purpose of the employment nor of the same general nature as authorized conduct." *Tanks v. Lockheed Martin Corp.*, 417 F.3d at 463. (Citing *Adams v. Cinemark USA, Inc.*, 831 So.2d 1156, 1159 (Miss. 2002)("It is obvious that Thomas's tortious act of assaulting Adams was not authorized or in furtherance of Cinemark's business."). *See also Hawkins v. Treasure Bay Hotel & Casino,* 813 So.2d 757, 759 (Miss. App. 2001)(holding intentional assault by co-worker to be outside the course and scope of employment); *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742, 757 (1998) (general rule is that sexual harassment by supervisor is not conduct within scope of employment for purposes of employer liability under agency principles); *Jones v. B.L. Development Corp.*, 940 So.2d 961, 966 (Miss. App. 2006) ("The general rule is that sexual harassment by a supervisor is not conduct within the scope of employment"); *Wood v. United States,* 995 F.2d 1122, 1123 (1st Cir. 1993) (sexual harassment amounting to assault and battery "clearly outside the scope of employment").

Employment arbitration contracts are intended to protect an employer from employment disputes, such as wrongful termination. It is inconceivable that an employer intended to protect an employee when the employee commits an intentional wrong, such an assault and battery, which was not within the course and scope of employment.

It is analogous to the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-1 *et. seq.*, which covers negligent actions of state employees, but does not cover intentional torts, such as assault and battery.

In *Jessie N. Williams, Jr. v. City of Horn Lake and Rich Kimmel*, Slip Opinion, Civil Action No. 2:04-CV-5, the Honorable Judge Michael P. Mills, a former Justice on the Mississippi Supreme Court, stated:

> While the MTCA does not define "malice," the court agrees with plaintiff that the allegations raised in the complaint, accepted as true, raise claims of wrongdoing against Kimmel which potentially fall outside of the "course and scope" of his duties as planning director.
>
> The essence of plaintiff's complaint is that Kimmel maliciously sought to carry out a personal vendetta against him by seeking to encourage Jenkins to make baseless accusations of sexual harassment against Plaintiff. In enacting the MTCA, the Legislature elected not to personally immunize employees for their own tortious acts committed outside the course and scope of their employment, and it likewise chose not to waive the sovereign immunity enjoyed by governmental entities as to such tortious acts. The **court concludes that the allegations raised in this complaint, accepted as true, involve claims as to which**

**the Legislature intended neither to immunize Kimmel personally, nor to waive its own sovereign immunity.**

(Exhibit "1," Slip Opinion)(emphasis added)

It should be against Mississippi public policy for an employer to use an employment arbitration agreement to shield an employee from an intentional tort committed by that employee. The Mississippi legislature decided not to immunize its employees from the intentional torts they commit, non-governmental employers should not be allowed to do so either.

Further, recent cases from the Mississippi Supreme Court make it clear that Plaintiff's claim for assault and battery against the Defendant Rice is not subject to the mandatory arbitration provisions.

In *Amsouth Bank v. Quimby*, 963 So.2d 1145 (Miss. 2007), a bank customer brought an action against the bank alleging that a failure pay to benefits under a credit disability insurance policy was a breach of contract. The defendant moved to compel arbitration based upon an arbitration agreement, which provided that deposit agreements were subject to arbitration. The Mississippi Supreme Court held that arbitration was not required since the clear terms of the agreement governed as to whether arbitration was mandatory. The Mississippi Supreme Court said:

> Despite the federal policy favoring arbitration, our courts are required to submit to arbitration only what the parties agreed to submit to arbitration. *Adams v. Greenpoint Credit, LLC* 943 So.2d 703, 708 (Miss.2006) (citing *AT & T Technologies, Inc. v. Communications Workers of America,* 475 U.S. 643, 648, ... (1986)).

*Quimby*, 963 So.2d at 1152.

In this case, the parties agreed to arbitrate only those claims involving "recruitment, potential employment or possible termination of employee." Just as the Mississippi Supreme Court held in *Quimby* that a party could be required to arbitrate only those claims which he agreed to arbitrate, this Court should hold that since Niolet did not agree to arbitrate her claims of assault and battery, she cannot be required to arbitrate such claims.

Still another recent Mississippi Supreme Court case stating that the plain terms of the arbitration agreement must be followed is *Qualcomm*. There, corporate officers sought to enforce, for their benefit, an arbitration agreement which gave the corporation the right to arbitration. The Mississippi Supreme Court held that the plain terms of the arbitration agreement must be followed, and that an arbitration agreement would be enforced only as to those matters which were specifically listed as requiring arbitration, and as to those parties who are covered by the agreement. The Mississippi Supreme Court stated:

> The issue in this case is a rather simple question of contract interpretation. By the plain terms of the contract, it is evident that the parties simply did not agree to extend to non-signatories the benefit of the arbitration clause, for they easily could have stated so. The contract clearly reads that disputes may be submitted to arbitration at the election of either Buyer or Seller. Because the defendants are neither the Buyer nor Seller, they are not entitled to enforce arbitration. As we have stated before, this Court must "accept the plain meaning of a contract as the intent of the parties if no ambiguity exists."

*Qualcomm, Inc.*, at 268-269.

By the clear terms of the contract, Niolet only agreed to arbitrate claims concerning her recruitment for employment and her termination. She never agreed to arbitrate claims of assault and battery. Mississippi public policy should prevent employers from shielding their employees from intentional torts. The District Court erred in holding that the arbitration agreement covered claims of assault and battery.

## ARGUMENT II.

### THE CIRCUIT COURT ERRED IN FINDING THAT RICE WAS AN INTENDED BENEFICIARY OF THE ARBITRATION AGREEMENT.

The Circuit Court determined that Rice was an intended third party beneficiary of the arbitration agreement. The cases cited dealing with this issue primarily are concerned with whether a non-signatory may be bound by the agreement. The real issue in this case is whether a non-signatory may invoke the protections of the

agreement. Under Mississippi law and the facts of this case, Rice may not.

According to the Fifth Circuit:

> . . . a non-signatory to a contract containing an arbitration provision may compel arbitration against a signatory, when that signatory "raises allegations of substantially interdependent and concerted misconduct by both the non-signatory and one or more of the signatories to the contract." *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524, 527 (5th Cir.2000).

*Pride v. Ford Motor Co.*, 341 F.Supp.2d 617, 621 (N.D. Miss. 2004)

That is not the case here where Niolet only alleges wrongdoing on the part of Rice, and not, Telepak. Niolet does not raise any claims against Telepak, and asserts no concerted conduct between Rice and Telepak. In fact, Niolet alleges that Rice's actions were outside the course and scope of his employment with Telepak.

Further,

> Absent allegations of substantially interdependent and concerted misconduct between a non-signatory and a signatory who have a close legal relationship, the Mississippi law of equitable estoppel should first be examined to determine if conditions are present where equity should allow a non-signatory to compel arbitration. Other jurisdictions have declined to adopt the theory in situations similar to *Grigson. See Ervin v. Nokia, Inc.*, 349 Ill.App.3d 508, 285 Ill.Dec. 714, 812 N.E.2d 534 (2004) (where the court declined to adopt the expanded interpretation of equitable estoppel).

*B.C. Rogers Poultry, Inc. v. Wedgeworth*, 911 So.2d 483, 492 (Miss. 2005)

As Mississippi Appellate Courts have held:

> Nonetheless, equitable estoppel "should only be used in exceptional circumstances and must be based on public policy, fair dealing, good faith, and reasonableness." *Id.* (citing *PMZ Oil Co. v. Lucroy,* 449 So.2d 201, 206 (Miss.1984)).

*Eagle Management, LLC v. Parks*, 938 So.2d 899, 904 (Miss. App. 2006).

The reason is simple:

> We are concerned here with a doctrine which has its roots in the morals and ethics of our society. See *Kelso v. Robinson,* 172 Miss. 828, 840, 161 So. 135, 137 (1935); *Stokes v. American Central Insurance Co.,* 211 Miss. 584, 589, 52 So.2d 358, 360 (1951). Fundamental notions of justice and fair dealings provide its undergirding. Whenever in equity and good conscience persons ought to behave ethically toward one another the seeds for a successful employment of equitable estoppel have been sown.

*PMZ Oil Co. v. Lucroy*, 449 So.2d 201, 206 (Miss. 1984).

The doctrine of unclean hands provides that "he who comes into equity must come with clean hands." *In re Estate of Richardson*, 903 So.2d 51, 55 (Miss.2005)(citing *Thigpen v. Kennedy,* 238 So.2d 744, 746 (Miss.1970)).

In is hard to comprehend that a person with unclean hands, like Rice, who commits sexual assault and battery should be able to invoke the protections of a doctrine which has its roots in the morals and ethics of our society.

In *B.C. Rogers Poultry*, this Court declined to extend equitable estoppel to allow a non-signatory to compel arbitration:

> Under Mississippi law, equitable estoppel exists where there is a(1)

belief and reliance on some representation; (2) a change of position as a result thereof; and (3) detriment or prejudice caused by the change of position. *Cothern v. Vickers, Inc.,* 759 So.2d 1241, 1249 (Miss.2000); *Covington County v. Page,* 456 So.2d 739, 741 (Miss.1984).

We must consider the traditional elements of equitable estoppel, as defined by this Court, before expanding its application to deny litigants their constitutional right to a jury trial. We are bound by our prior rulings which have defined equitable estoppel as follows:

Equitable estoppel is 'defined generally as the principle by which a party is precluded from denying any material fact, induced by his words or conduct upon which a person relied, whereby the person changed his position in such a way that injury would be suffered if such denial or contrary assertion was allowed.'*Dubard v. Biloxi H.M.A., Inc.,* 778 So.2d 113, 114 (Miss.2000) (quoting *Koval v. Koval,* 576 So.2d 134, 137 (Miss.1991)).

The record before us fails to satisfy the requirements for the application of equitable estoppel as defined by our courts. It cannot be said that, when Wedgeworth signed the Broiler Growing Agreement with Rogers, the Bank (1) believed and relied on the representation (2) changed its position as a result of the Broiler Growing Agreement and finally that (3) it suffered detriment or prejudice as a result thereof. There is no proof that the Bank relied to its detriment that Wedgeworth would arbitrate any claim he had against the Bank.

*B.C. Rogers Poultry, Inc. v. Wedgeworth,* 911 So.2d 483, 492-493 (Miss. 2005)

Similarly, in this case, it cannot be said that Rice believed or relied upon a representation, nor changed his position as a result of the agreement to arbitrate and suffered detriment as a result of the arbitration agreement between Niolet and Telepak. Rice, as a non-signatory, should not be allowed to invoke equitable estoppel

to compel arbitration.

As this Court has stated:

> This Court has embraced a "liberal federal policy favoring arbitration agreements" and will liberally construe agreements with a presumption in favor of arbitration. *Terminix Int'l, Inc. v. Rice,* 904 So.2d 1051, 1054 (Miss.2004). However, because arbitration provisions are contractual in nature, the general rule is that "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Adams v. Greenpoint Credit, LLC,* 943 So.2d 703, 708 (Miss.2006) (internal citations and quotations omitted). Thus, **while "we will read the reach of an arbitration agreement between *parties* broadly, [that] is a different matter from the question of who may invoke its protections.**" *Westmoreland v. Sadoux,* 299 F.3d 462, 465 (5th Cir.2002) (emphasis supplied). **This is so because "[a]n agreement to arbitrate is a waiver of valuable rights that are both personal to the parties and important to the open character of our state and federal judicial systems-an openness this country has been committed to from its inception.**" *Id.*

*Qualcomm Inc.,* at 268-269 (emphasis added).

While Niolet waived her right to litigate certain employment disputes with Telepak as a condition of being hired with Telepak, she did not waive her right to litigate her claims of assault and battery, committed outside her employment, against Rice, a non-signatory to the agreement. Niolet has asserted no claims against Telepak, so her claims against Rice cannot be intertwined with any claims against Telepak. Rice cannot demonstrate that equitable estoppel should be invoked. Rice should not be allowed to invoke the protections of the arbitration agreement, under

a theory of equitable estoppel or any other theory.

## CONCLUSION

While Niolet waived her right to litigate certain employment disputes with Telepak as a condition of being hired with Telepak, she did not waive her right to litigate her non-employment claims of assault and battery against Rice, a non-signatory to the agreement. Niolet has made no claims against Telepak and Rice should not be allowed to invoke the protections of the arbitration agreement, under a theory of equitable estoppel or any other theory.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Jim Waide, attorney for Plaintiff/Appellant, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing, as well as a 3.5 WP Disk, to the following:

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Hon. William E. Chapman, III
Circuit Court Judge
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Canton, MS 39046

THIS the 21st day of August, 2008.

JIM WAIDE

**MISSISSIPPI SUPREME COURT**
**MISSISSIPPI COURT OF APPEALS**

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**NO. 2008-CA-00922**

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**NIKKI HATTEN NIOLET**

**APPELLANT**

**VERSUS**

**PHIL RICE**

**APPELLEE**

## CERTIFICATE OF COMPLIANCE

Pursuant to Miss. R. Civ. P. 32, the undersigned certifies this brief complies with the type-volume limitations of Rule 32.

1. Exclusive of the exempted portions in Rule 32(c), the brief contains:

   A. 3,655 words in proportionally spaced typeface.

2. The brief has been prepared:

   A. In proportionally spaced typeface using WordPerfect 12.0 in Times New Roman, 14 point.

3. If the Court so requires, the undersigned will provide an electronic version of the brief and/or a copy of the word or line printout.

4. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the type-volume limits in Rule 32, may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

This, the 21st day of August, 2008.

BY: _____
JIM WAIDE

~~3:04~~
9-30-04

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

JESSIE N. WILLIAMS, JR. — PLAINTIFF

VS. — CIVIL ACTION NO. 2:04CV5

CITY OF HORN LAKE, MISSISSIPPI and
RICH KIMMEL — DEFENDANTS

ORDER

This cause comes before the court on the motion [11-1] of defendants City of Horn Lake Mississippi and Rich Kimmel, pursuant to Fed. R. Civ. P. 12(b)(6), to dismiss, or alternatively, for summary judgment. Plaintiff Jessie N. Williams has responded in opposition to the motion, and the court, having considered the memoranda and submissions of the parties, along with other pertinent authorities, concludes that the motion should be granted in part and denied in part.

This case involves state and federal claims arising out of plaintiff's termination as a building inspector for the Horn Lake Planning Department. In his complaint, plaintiff alleges that he was terminated in retaliation for having exercised his First Amendment rights to free speech and association by criticizing Rick Kimmel, the manager of the Planning Department. On June 4, 2003, Williams and other employees of the Planning Department appeared before mayor Mike Thomas to register complaints regarding the job being done by Kimmel. Specifically, Williams contends that the employees raised complaints regarding Kimmel's allegedly giving "unwarranted preferential treatment to certain business owners by allowing them to violate the ordinances and regulations of

the City" and by generally "failing to do the job for which he was paid by the city taxpayers." Plaintiff alleges that Kimmel became extremely angry at him for having issued the complaint, going so far as to "pull a firearm" on him. Plaintiff filed a formal criminal complaint against Kimmel in connection with the firearm incident.

Plaintiff alleges that Kimmel soon found a pretext to retaliate against him, in the form of what plaintiff characterizes as a harmless private joke between himself and the mayor. This "joke" involved a comment by plaintiff to the mayor, who is single, that the mayor "would be the first person to have sex" with Mary Jenkins, a new female employee. Plaintiff asserts that he and the mayor are close personal friends and that neither individual found the joke to be offensive. Upon observing plaintiff and the mayor laughing, Kimmel inquired as to what they were laughing about. Plaintiff alleges that, upon being told of the remark, Kimmel informed Jenkins thereof and that he "prodded, coerced and intimidated" her into filing charges of sexual harassment against plaintiff. This charge was taken to the City Board of Aldermen, and, on June 20, 2003, three of the five aldermen voted to terminate plaintiff's employment. On August 22, 2003, Williams filed the instant complaint, asserting state law claims that Kimmel and the City had maliciously interfered with his contract of employment and asserting also a First Amendment retaliation claim pursuant to 42 U.S.C. § 1983. Kimmel and the City have each filed motions to dismiss under Fed. R. Civ. P. 12(b)(6), or, alternatively, for summary judgment.

The court first considers defendants' motion to dismiss plaintiff's state law claims against them. In the court's view, the only state law claim properly raised by plaintiff is his

malicious/tortious interference with contract claims against Kimmel individually.[1] Plaintiff has failed to comply with any of the procedural pre-requisites for asserting state law claims against the City, and there is considerable doubt regarding whether that defendant would face any substantive liability under the Mississippi Tort Claims Act (MTCA) regardless.

The complaint asserts that Kimmel acted maliciously in interfering with plaintiff's at-will employment contract, and, as discussed *infra*, claims based on allegations of "malice" fall outside the scope of the MTCA. Specifically, Miss. Code. Ann. § 11-46-7(2) provides as follows:

> (2) An employee may be joined in an action against a governmental entity in a representative capacity if the act or omission complained of is one for which the governmental entity may be liable, but no employee shall be held personally liable for acts or omissions occurring within the course and scope of the employee's duties. For the purposes of this chapter an employee shall not be considered as acting within the course and scope of his employment and a governmental entity shall not be liable or be considered to have waived immunity for any conduct of its employee if the employee's conduct constituted fraud, *malice*, libel, slander, defamation or any criminal offense.

While the MTCA does not define "malice," the court agrees with plaintiff that the allegations raised in the complaint, accepted as true, raise claims of wrongdoing against Kimmel which potentially fall outside of the "course and scope" of his duties as planning director.

The essence of plaintiff's complaint is that Kimmel maliciously sought to carry out a personal vendetta against him by seeking to encourage Jenkins to make baseless accusations of sexual harassment against Plaintiff. In enacting the MTCA, the Legislature elected not to personally immunize employees for their own tortious acts committed outside the course and scope of their employment, and it likewise chose not to waive the sovereign immunity enjoyed by governmental

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[1]Plaintiff correctly notes that this tort is given various names in different cases, and the court is not overly concerned with nomenclature at this juncture.

entities as to such tortious acts. The court concludes that the allegations raised in this complaint, accepted as true, involve claims as to which the Legislature intended neither to immunize Kimmel personally, nor to waive its own sovereign immunity.[2] The court therefore concludes that the MTCA entitles the City to dismissal of all state law claims against it, but that the Act provides no protection to Kimmel personally, based on the allegations of the complaint.

The fact that the MTCA provides no personal immunity to Kimmel at this juncture does not, of course, indicate that plaintiff's tortious interference claim against him has merit. Accepting the allegations of the complaint as true, however, the court interprets recent Mississippi Supreme Court authority as potentially supporting plaintiff's ability to assert state law claims of tortious interference against Kimmel. The Supreme Court recently clarified that a cause of action for tortious interference with an at-will employment contract exists under Mississippi law. Specifically, the Supreme Court held that

> this Court concludes that a claim for tortious interference with at-will contracts of employment is viable in this state as well. An action for tortious interference with contract ordinarily lies when a party maliciously interferes with a valid and enforceable contract, causing one party not to perform and resulting in injury to the other contracting party. The elements of tortious interference with a contract include: 1) the acts were intentional and willful; 2) that they were calculated to cause damages to the plaintiffs in their lawful business; 3) that they were done with the unlawful purpose of causing damage and loss, without right or justifiable cause on the part of the defendant; and 4) that actual loss occurred. It must also be proven that the contract would have been performed but for the alleged interference.

*Levens v. Campbell*, 733 So.2d 753, 760-61 (Miss. 1999), (citations omitted). Prior to *Levens*, at

[2]In so concluding, the court is accepting the allegations of the complaint as true, as it is required to do at the 12(b)(6) stage. If the evidence should establish that Kimmel did not act maliciously and outside the scope of his employment, then this would obviously affect the court's analysis on this issue. At this juncture, however, it seems clear that plaintiff alleges that Kimmel was motivated by his own personal vendetta in this case, rather than by any desire to comply with the City's sexual harassment policy.

least one federal judge had interpreted prior Mississippi jurisprudence, in particular *Shaw v. Burchfield*, 481 So.2d 247 (Miss. 1985) as precluding a cause of action for tortious interference with an at-will employment contract. *Mann v. City of Tupelo*, 1995 WL 1945433 (N.D. Miss. 1995).

The Supreme Court in *Levens* made it clear that a claim for tortious interference with an at-will employment contract may properly be brought under Mississippi law, although the court did note that, under *Shaw*, a privilege may exist for a supervisory official to tortiously interfere with an at-will employee's contract, as long as he acted in good faith in doing so. *Levens* at 761. The Supreme Court in *Levens* appeared to assert, however, that this privilege is only enjoyed by supervisors with "authority over staffing," noting that

> [a]s Chief Operating Officer, Campbell had no authority over staffing, therefore, any actions taken by Campbell which may have interfered with Levens' employment would fall outside the chain of privilege referred to in *Shaw*.

*Id.* It is not clear whether, as head of the Horn Lake Planning Department, Kimmel had authority over staffing matters. Regardless, the court agrees with defendants that Kimmel had a privilege to report incidents which he, in good faith, believed to constitute violations of the city's sexual harassment policy. The implementation of any such policy requires the cooperation of employees, and the court has little doubt that the Mississippi Supreme Court would find that employees are privileged to make good-faith reports of sexual harassment.

It is the issue of Kimmel's good faith, or lack thereof, which is most problematic for defendants. Defendants argue that the facts asserted in the complaint support no finding of bad faith on the part of Kimmel in reporting the alleged sexual harassment incidents and that the privilege referenced in *Shaw/Levens* applies in this case. This assertion is subject to considerable dispute. The allegations of the complaint, considered in the light most favorable to the non-moving party,

raise considerable doubt regarding whether Kimmel was, as he asserts, merely engaged in good-faith attempts to combat sexual harassment in the workplace in this case. In so concluding, the court would initially note that Kimmel's reports of sexual harassment occurred within two weeks of plaintiff having made his report to the mayor regarding Kimmel's alleged wrongdoing in his capacity as head of the Planning Department and mere days after plaintiff filed a criminal complaint against him. As such, there is considerable evidence of a motive on the part of Kimmel to seek to retaliate against plaintiff.

Moreover, it is questionable whether Kimmel could have reasonably believed that the private remark between Plaintiff and the mayor constituted sexual harassment as defined in the Horn Lake sexual harassment policy. This policy defines sexual harassment as follows:

> Unwelcome sexual advances (either verbal or physical), requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when
> (1) submission to such conduct is made either explicitly or implicitly a term or condition of employment;
> (2) submission or rejection of the conduct is used as a basis for making employment decisions, or
> (3) the conduct has the purpose or effect of interfering with work performance or creating an intimidating, hostile, or offensive work environment.

It appears to be undisputed that, but for Kimmel's having interjected himself into the private remark between Plaintiff and the mayor, and subsequently informing Jenkins of the comment, Jenkins would have never even learned of the comment in question. Under these circumstances, it is questionable whether Kimmel could have reasonably believed that the comment in question constituted "sexual harassment" as defined by the previously quoted policy.

Defendants note that "jokes" are included in the policy manual as potential examples of sexual harassment, but it appears that the manual merely references such jokes as potential examples

of harassment as defined a[illegible]. As quoted above, the policy manual defines sexual harassment as conduct which affects the te[illegible] conditions of the person allegedly being harassed, and it is unclear how plaintiff's joke could [illegible]terfered with the terms or conditions of Jenkins' employment when she was unaware of it.[3]

In the court's view, [illegible]esolution of the issue of Kimmel's good faith (or lack thereof) will depend in part upon the re[illegible] of the evidence regarding the circumstances which caused Jenkins to make her report of sexu[illegible]assment. Plaintiff asserts that Jenkins informed him that she was not offended by the statem[illegible] was "prodded, coerced and intimidated" by Kimmel into filing harassment charges against [illegible]iff. Plaintiff further asserts that he has been prevented by the City from speaking further wi[illegible]s and that he should be given an opportunity to depose her to develop the record in this [illegible]. The court agrees. If the evidence should establish that Kimmel not only reported the remar[illegible]estion to Jenkins, but "intimidated" her into filing charges against plaintiff, this would signifi[illegible]buttress plaintiff's claims that Kimmel exceeded the scope of any privilege he might have [illegible]o report alleged acts of sexual harassment.

The court reserves [illegible]nt on the issue of law as to whether even a subjective malicious motive on the part of Ki[illegible]ould be sufficient to expose him to personal liability for doing nothing more than [illegible]ting plaintiff's lewd remark to Jenkins. While the court shares plaintiff's doubts regardi[illegible]mmel's good faith in reporting the "joke" to Jenkins, the court is somewhat hesitant to inv[illegible]sissippi law as, in effect, establishing a civil cause of action for

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[3]The court w[illegible]e that, even as a private joke among friends, the comment in question was, at bes[illegible], at worst, quite reprehensible. However, the issue for the court's purposes is n[illegible] statement in question was proper, but, rather, whether Kimmel acted in ba[illegible]ting it.

being a "tattle-tale." [illegible] record establishes that Kimmel not only reported the remark to Jenkins, but that he [illegible] idated her into making a report of sexual harassment, when she otherwise was not [illegible] so, and that he did so in order to maliciously interfere with plaintiff's at-will employ[illegible] ract, then this arguably does enter the realm of tortious conduct within the meaning of [illegible] y rate, the court's analysis of these issues will be facilitated by additional discovery, and [illegible] declines to dismiss the state law claims against Kimmel at this juncture.

The court now [illegible] dants' motion to dismiss plaintiff's federal claims against them.

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In seeking recovery u[illegible] Williams alleges that the City terminated him based on his having exercised his First A[illegible] t to free speech and assembly in reporting Kimmel's allegedly deficient job perfor[illegible] yor. To prove a First Amendment retaliation claim, Williams must show (1) that h[illegible] dverse employment decision"; (2) that his speech involved "a matter of public co[illegible] his "interest in commenting on matters of public concern ... outweigh[s] the De[illegible] in promoting efficiency"; and (4) that his speech motivated the adverse employme[illegible] *ris v. Victoria Indep. Sch. Dist.*, 168 F.3d 216, 220 (5th Cir.), cert. denied 528 U.S. [illegible] t. 533, 145 L. Ed.2d 413 (1999).[4] Assuming that this showing is made, the burden [illegible] fendants to show by a preponderance of the evidence that they would have come to [illegible] sion in the absence of the protected conduct. *Mt. Healthy City Sch. Dist. Bd. of Edu[illegible]* U.S. 274, 287, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977).

In seeking to [illegible] t the City on his retaliation claim, plaintiff faces significant

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[4]The court re[illegible] on whether the activity reported by plaintiff involves a "matter of public c[illegible]

obstacles. In the simil… *eattie v. Madison County School Dist.*, 254 F.3d 595 (5th Cir. 2001), the Fifth Circuit … order to hold a school board liable for the alleged termination of a teacher based on her … ported a particular candidate for superintendent, the teacher was required to show that t… rd had "actual knowledge of the alleged improper basis" for her termination. *Beattie*, … 604. The Fifth Circuit in *Beattie* held such a showing to be required even in cases … ere, the plaintiff alleges that his supervisor had the retaliatory motive and that the go… dy merely "rubber-stamped" the supervisor's recommendation to terminate. *Id.* The … further indicated that the school board could defeat liability by establishing, such as t… ted testimony of board members, that they would have taken the same decision even a… tiff's exercise of her First Amendment rights.[5]

In light of the … ority, there is considerable doubt as to whether plaintiff will be able to sustain his bur… gainst the City on his § 1983 claims. At the same time, the court concludes that pla… ven an opportunity to conduct discovery to attempt to meet the heavy burden wh… Any dismissal pursuant to Rule 12(b)(6) would be premature, and the City's mo… § 1983 claims against it is due to be denied.

In light of the … s ordered that defendants' motion to dismiss or alternatively for

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[5]It is und… asserts a § 1983 retaliation claim against Kimmel personally. Ass… claim is asserted, it is due to be dismissed. The Fifth Circuit held in *Beattie* …

> [The sup… did not fire Beattie directly, but merely recommended her term… which made the final decision. If [the supervisors] did not c… ployment action, they cannot be liable under § 1983, no matte… ual their motives.

*Beattie*, 254 F.3… e, it is undisputed that Kimmel did not actually terminate Williams, and he … be held liable under § 1983 based on Williams' retaliation claims.

summary judgm[illegible] d in part and denied in part. As to plaintiff's state law claims, Kimmel's moti[illegible] d, but the City's motion to dismiss is granted. As to plaintiff's federal claims, [illegible] dismiss is denied, but any federal retaliation claims which plaintiff might as[illegible] personally are hereby dismissed. Defendants' alternate motion for summary jud[illegible] e, given the early stage of the proceedings, and this motion for summary judgm[illegible] missed without prejudice.

SO ORD[illegible] of September, 2004.

MICHAEL P. MILLS
UNITED STATES DISTRICT JUDGE