IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DEBRA L. WINTERS — APPELLANT

VS. — CAUSE NO. 2007-CA-00476

CALHOUN COUNTY SCHOOL DISTRICT and
CALHOUN COUNTY BOARD OF EDUCATION — APPELLEES

APPEAL FROM THE CHANCERY COURT OF CALHOUN COUNTY, MISSISSIPPI

ORAL ARGUMENT NOT REQUESTED

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BRIEF OF THE APPELLEES

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James A. Keith
Mississippi State Bar No. [redacted]
R. Jarrad Garner
Mississippi State Bar No. [redacted]
Laura A. Ford
Mississippi State Bar No. [redacted]
Adams and Reese LLP
111 East Capitol Street, Suite 350 (39201)
Post Office Box 24297
Jackson, Mississippi 39225-4297
Telephone: 601-353-3234
Facsimile: 601-355-9708

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 the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. James A. Keith, R. Jarrad Garner, and Laura A. Ford, Adams and Reese LLP, and Paul Moore, Jr. , Moore &Moore, attorneys of record for Appellees;
2. David Burks Langford, Billie Jo White, Matthew Daniel Wilson, Langford & Associates, PLLC, attorneys of record for Appellant;
3. Debra L. Winters, Appellant;
4. Calhoun County School District and Calhoun County Board of Education;
5. Beth Hardin, Calhoun County Superintendent of Education;
6. Dale Hays, Principal, Calhoun City High School;
7. Grover Eddington, Member, Calhoun County Board of Education;
8. Susan Hardin, Member, Calhoun County Board of Education;
9. Billy McCord, Member, Calhoun County Board of Education;
10. Danny Harrelson, Member, Calhoun County Board of Education;
11. Bozzie Edwards, Member, Calhoun County Board of Education;
12. Barry Black, Former Member, Calhoun County Board of Education;
13. Phil Yarbrough, Former Member, Calhoun County Board of Education.

This the 4th day of October, 2007.

James A. Keith

James A. Keith

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STANDARD OF REVIEW

This Court reviews *de novo* the dismissal of a case by the lower court. *Ralph Walker, Inc. v. Gallagher,* 926 So. 2d 890 (Miss. 2006). When reviewing *de novo* a trial court's decision on a motion to dismiss for failure to state a claim, the Supreme Court sits in the same position the trial court did. *Id.;* Miss. R. Civ. P. 12(b)(6).

A court should dismiss a plaintiff's complaint for failure to state a claim under Rule 12(b)(6) when the plaintiff is unable to prove any set of facts entitling him or her to relief; conclusory allegations or legal conclusions do not suffice. *Miss. R. Civ. P.* 12(b)(6); *Poindexter v. Southern United Fire Ins. Co.*, 838 So. 2d 964, 965 (Miss. 2003). "**Conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to defeat a motion to dismiss**." *Penn Nat'l Gaming, Inc. v. Ratliff*, 954 So. 2d 427, 431 (Miss. 2007) (emphasis added) (reversing lower court's denial of defendant's motion to dismiss where plaintiff relied on conclusory, self-serving allegations).

In order to withstand a Motion to Dismiss under 12(b)(6), Appellant must show that her Petition for Appeal before the chancery court demonstrated a set of facts entitling her to relief. Appellant did not do so, and her Petition was appropriately dismissed.

Moreover, even if the Court accepts Plaintiff's argument that the lower court should have considered the District's Motion to Dismiss under the summary judgment standard established in

Rule 56, judgment for the District is still appropriate.[1] Like a 12(b)(6) motion, this court conducts *de novo* review of a trial's grant of summary judgment. *Rosen v. Gulf Shores, Inc.* 610 So. 2d 366, 368 (Miss. 1992). In analyzing a summary judgment motion, the trial court must review all of the evidentiary matters before it. *Id.* If there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law, summary judgment should be granted in its favor. *Id.;* Miss. R. Civ. P. 56(c). Appellant did not raise this issue at the trial court level, and she never moved the chancery court to consider the District's Motion to Dismiss as a summary judgment motion. Nevertheless, she had ample and repeated opportunity to respond with supporting documentary or other evidence to counter the evidence submitted by the District and utterly failed to do so. Instead, she continually relied on the same generalized, unsupported statements and assertions (primarily asserted through her counsel during oral argument) without presenting competent evidence or support of any kind. Therefore, even if the Court reviews the chancery court's decision under the summary judgment standard, judgment in favor of the District must be upheld.

It is well settled that this Court may affirm the trial court's judgment on grounds other than those on which the trial court relied. *Askew v. Askew*, 699 So. 2d 515, 519 (Miss. 1997). "It is a familiar rule that this Court will affirm the lower court where the right result is reached, even though we may disagree with the reason for the result." *Stewart v. Walls*, 534 So. 2d 1033, 1035 (Miss. 1988). Specifically applicable in this instance is a recent decision by the Mississippi Court of Appeals upholding a dismissal even though the Court held that the judgment should

[1] It should be noted that the chancery court here made no distinction in its order whether its ruling was made pursuant to Miss.R.Civ.P. 12(b)(6) or Miss.R.Civ.P. 56. It is, however, clear that the chancery court considered the evidence submitted by the District in rendering its ruling. Interestingly, Appellant and her counsel did not object to the chancery court doing so, instead voluntarily choosing to submit no rebuttal evidence to the chancery court. Rather, Appellant continued to rely upon the unsubstantiated and unsworn allegations in her Petition and corresponding arguments made by her counsel in pleadings, briefs, and oral argument. Appellant did so at her own peril, and the chancery court was under no duty to force or require Appellant to submit her own evidentiary support for her position.

have been granted under Rule 56(c) instead of Rule 12(b)(6). *Bolton v. Equiprime, Inc.*, 2007 WL 900979, ¶ 15 (Miss. Ct. App. March 27, 2007). The Court held that granting the defendant's 12(b)(6) motion when evidence outside the pleadings had been considered was not reversible error because the defendant was entitled to summary judgment. *Id.* The same is true here and the chancellor's Order should be affirmed by this Court.

STATEMENT OF THE CASE

I. Nature of the Case

This case was filed by Appellant after the District renewed her teaching contract and assigned her to the alternative school, where her duties and responsibilities were substantially the same as her position during the previous school year. In addition, her salary under the new contract was higher than her salary during the previous school year. Appellant refused to sign the new contract, and challenged the transfer under the District's internal grievance policy, which does not permit an appeal to the chancery court. In spite of this, Appellant filed a Petition for Appeal from the Board's decision to uphold the transfer in the chancery court. Appellant alleged in her Petition that the District's renewal of her contract and reassignment to the alternative school constituted a demotion that violated her rights under Miss. Code Ann. § 37-9-101 *et seq.* and that the assignment was based on unlawful considerations of sex, gender, and age in violation of Title VII of the Civil Rights Act of 1964 and Section 901(a) of Title IX of the Education Amendments of 1972.

II. Course of Proceedings and Disposition Below

The Appellant filed a Petition to Appeal from the Calhoun County Board of Education, Request for a Temporary Restraining Order, and Preliminary Injunction, Permanent Injunction,

Damages and Other Relief with the chancery court on August 29, 2006. (R. 005-015; RE 1-11).[2] The Calhoun County School District ("District") removed the case to the United States District Court for the Northern District of Mississippi based on federal question jurisdiction on September 8, 2006. (R.016-062; RE 12-17). However, by agreed order on November 2, 2006, Appellant dismissed with prejudice her claims arising under Title IX of the Education Amendments of 1972 and the No Child Left Behind Act, as well as her claims arising under Title VII of the Civil Rights Act of 1964. (R. 063-064; RE 18-19). Pursuant to the same agreed order, all remaining issues were remanded to the state chancery court. *Id.*

The sole remaining issue before the Court was that relating to Petitioner's attempted appeal under Miss. Code Ann. 37-9-101, *et seq.*, titled Education Employment Procedures Law of 2001 ("EEPL"). On December 21, 2006, the District filed a Motion to Dismiss Petitioner's Notice of Appeal and Petition for Appeal arguing that the EEPL was not applicable and, in the alternative, that Appellant had waived any rights to appeal under EEPL. (R. 070-075; RE 20-25). Following a hearing, the chancery court dismissed Appellant's Petition with prejudice on February 28, 2007. (R. 205-206; RE 97-98). The court specifically based its dismissal on finding that Appellant was not demoted by the District, and that therefore the EEPL did not apply. Additionally, the court held that even if the EEPL did apply, Appellant had waived her right to pursue a remedy or an appeal under the EEPL. *Id.* Appellant filed her Notice of Appeal on March 20, 2007. (R. 207-208; RE 99-100).

III. Statement of Facts

Appellant was employed as a teacher by the Calhoun County School District ("District") during the 2005-2006 school year. (R. 008, 076; RE 4, 26). This contract provided that "the employee agrees to reassignment during the school term to any area for which a valid license is

[2] Citations to specific pages in the Court Record are designated as "R" while citations to pages in Appellees' Record Excerpts are designated as "RE."

held." *Id.* Likewise, the employee handbook also contains a statement that the employee agrees to reassignment by the district. (R. 114, *et seq.*; RE 62 *et seq.*). Appellant, like all District employees, signed a document stating that she had received a copy of this handbook and agreed to abide by the regulations, policies, and procedures it contained. (R. 204; RE 96). The contract itself further provided that Appellant's annual salary would be $35,620.00. (R. 076; RE 26). Appellant was offered a renewal contract by the District in April 2006 for the 2006-2007 school year. (R. 077; RE 27). This contract was identical to the 2005-2006 contract except that Appellant's annual salary was increased to $36,100.00. *Id.* Under the new contract, Appellant would remain a teacher with the District for the 2006-2007 school year, just as she had been during the 2005-2006 school year. Petitioner's only dissatisfaction with the new contract, which she attempted to appeal to the trial court, was that it would require her reassignment to teach at the Alternative School. (R. 009-012; RE 5-8). Appellant refused to sign the new contract and chose instead to accept a teaching position with the Grenada County School District, which is more convenient since her home is actually located in that District.

The employee handbook created by the District clearly references the Board policies that pertain to due process. (R. 131; RE 79). One of the referenced policies, GBN-R, establishes the process to be invoked in the event of a non-renewal and refers to and follows the Mississippi non-renewal statutes, the EEPL. (R. 198-203; RE 90-95) Miss. Code Ann. § 37-9-101 *et seq.* Those statutes allow for an appeal of the school board decision to non-renew a teacher's contract to the appropriate chancery court. Miss. Code Ann. § 37-9-113(2). A separate Board policy, GAE-R, is a general internal grievance policy that does *not* allow for an appeal to a state court. (R. 101-103; RE 49-51). These two policies set out entirely different procedures. For example, among other things, the non-renewal statutes and corresponding District policy GBN-R require that a request in writing be made for the reasons for the non-renewal and an **immediate** hearing

before the board. Miss. Code Ann. § 37-9-109(a) (R. 198-203; RE 90-95). In contrast, the grievance policy establishes a series of "levels" where an employee's grievance can be heard by various administrators in the school system. (R. 101-103; RE 49-51). Appellant chose not to follow the procedures in the non-renewal policy, which incorporates the requirements of the non-renewal statutes. Instead, she clearly chose to pursue **only** the internal grievance procedures. Appellant had the advice of counsel at the time she chose to request a hearing under the internal grievance policy and throughout the entire grievance process.

In May, 2006, Appellant requested a "Level I" Grievance Hearing with the Calhoun City High School principal pursuant to the District's grievance policy. (R. 010, 101-103; RE 6, 49-51). Following the hearing in May, the principal upheld Appellant's reassignment to the alternative school. (R. 010; RE 6). Appellant subsequently requested and was given a "Level II" Grievance Hearing with the Calhoun County Superintendent of Schools. (R. 011; RE 7). Following that hearing in June, 2006, the superintendent also upheld Appellant's reassignment to the alternative school. *Id.* Finally, Appellant requested and was given a "Level III" Grievance Hearing with the school board pursuant to the policy. *Id.* Following a hearing in July, 2006, the school board took no action. (R. 012; RE 8).

Appellant next filed a Petition for Appeal from the Calhoun County Board of Education, Request for Temporary Restraining Order, Preliminary Injunction, Permanent Injunction, Damages, and Other Relief in the Chancery Court of Calhoun County on September 8, 2006. (R. 005-015; RE 1-11). She alleged that the reassignment to the Alternative School constituted a demotion that violated her rights under Miss. Code Ann. § 37-9-101 *et seq.*, Title VII, and the Civil Rights Act of 1964. The District removed the case to the United States District Court for the Northern District of Mississippi based on federal question jurisdiction. After Appellant agreed to dismiss her claims under Title VII and Civil Rights Act of 1964, the remaining issues

were remanded back to the Chancery Court of Calhoun County. (R. 063-064; RE 18-19). The District then filed a Motion to Dismiss Petitioner's Notice of Appeal and Petition for Appeal under Miss. R. Civ. P. 12(b)(6) on December 21, 2006. (R. 070-075; RE 20-25). The court granted the District's motion and dismissed Appellant's claims with prejudice. (R. 205-206; RE 97-98). The order of dismissal specifically stated that Appellant's reassignment did not constitute a demotion and therefore did not trigger the provisions of the EEPL, and that even if the EEPL did apply, Appellant had waived her right to appeal or pursue a remedy under the EEPL's provisions. *Id.* From there, Appellant filed her Notice of Appeal.

SUMMARY OF THE ARGUMENT

The chancery court was correct in dismissing Appellant's claims. The chancery court correctly held that Appellant's contract was not non-renewed and therefore the provisions of the Education Employment Procedures Law ("EEPL") were not invoked. Miss. Code Ann. § 37-9-101 *et seq.* Appellant never characterized her reassignment as a "demotion" or attempted to invoke the provisions of the EEPL until she attempted to appeal the District's decision to the chancery court, some four (4) months after the reassignment had taken place. (*See* R. 227-228; RE 109-110). There is little doubt that the EEPL was established to provide a mechanism for educators to challenge a District's decision to non-renew their contracts. In this case, however, there has been no non-renewal to trigger the application of the statute. A reassignment may be considered a demotion where (1) the teacher receives less pay or has less responsibility in the new position, (2) the new position requires a lesser skill than the old position, or (3) the new position requires the teacher to teach outside her certification or experience level. Appellant's argument focuses on the third factor. However, Appellant's teaching certification, license, and

experience level meet every requirement for teaching at the alternative school. Therefore, her argument fails as a matter of fact and as a matter of law.

The chancery court correctly held that in the alternative, even if Appellant's reassignment constitutes a non-renewal for purposes of the EEPL, she has waived any rights to pursue an appeal before the courts of this state under those statutes. Appellant had actual, and at the very least constructive, knowledge of her due process rights under the EEPL. The District's Employee Handbook and corresponding policies clearly enumerated the rights and procedures available to Appellant. Nonetheless, she voluntarily, and with the advice of counsel, chose to initiate the procedures established by the District's internal grievance policy and, more importantly, she chose *not* to challenge her transfer as a non-renewal pursuant to the EEPL and corresponding Board Policy GBN-R. The EEPL and the internal grievance policies are entirely separate and distinct in substance and procedure. Appellant chose to pursue the grievance policy and procedures, which do not permit an appeal to state courts, to the exclusion of the procedures set out under the EEPL and Board Policy GBN-R, and she has therefore waived any rights that could have been asserted under the provisions of the EEPL. Appellant should not be permitted to now retrospectively assert a claim under the EEPL and proceed under those statutory requirements and privileges.

ARGUMENT

I. The Chancery Court was correct in determining that Appellant's teaching contract was not non-renewed.

Under any standard employed by this Court, the chancery court correctly determined that Appellant's contract was never non-renewed by the District so as to invoke the provisions of the

Education Employment Procedures Law ("EEPL").[3] Miss. Code Ann. § 37-9-101 makes non-renewal a pre-requisite for application of the EEPL:

> It is the intent of the Legislature to establish procedures to provide for accountability in the teaching profession; to provide a mechanism for the **nonrenewal** of licensed education employees in a timely, cost-efficient and fair manner; to provide public school employees with notice of the reasons for not offering an employee a renewal of his contract; to provide an opportunity for the employee to present matters in extenuation or exculpation; to provide the employee with an opportunity for a hearing to enable the board to determine whether the recommendation of nonemployment is a proper employment decision and not contrary to law and to require **nonrenewal** decisions to be based upon valid educational reasons or noncompliance with school district personnel policies. It is the intent of the Legislatures not to establish a system of tenure.

Miss. Code Ann. § 37-9-101 (emphasis added).

The District agrees with Appellant's claim that a demotion may be considered a non-renewal decision that can trigger the provisions of the EEPL. The District also concurs with Appellant's recitation of Mississippi law regarding the definition of a "demotion" for purposes of the EEPL. According to *Board of Education for Holmes County Schools v. Fisher*, 874 So. 2d 1019 (Miss. App. 2004), reassignment may be considered demotion where (1) the teacher receives less pay or has less responsibility in the new position, (2) the new position requires a lesser skill than the old position, or (3) the new position requires the teacher to teach outside her certification or experience level. *Fisher*, 874 So. 2d at 1022 (*quoting Montgomery v. Starkville Mun. Sep. Sch. Dist.*, 665 F.Supp. 487, 492 (N.D. Miss. 1987)). Appellant's transfer was not a demotion. Appellant has not disputed the fact that she was going to be paid more under the new contract to teach at the alternative school than she had been paid to teach at the junior high and high schools. (*See* R. 073, 105; RE 23, 53). In addition, the alternative program position as a

[3] Relevant provisions of the EEPL are contained in Apellees' Record Excerpts, submitted with this brief.

science teacher clearly would not have required a lesser responsibility or a lesser degree of skill than her 2005-2006 position as a science teacher. At the alternative school she would have continued to teach science and would have additionally supervised a teacher's aide or teacher's assistant. She also would have been responsible for students of a wider age range. (*See* R. 105; RE 53). The courses at the alternative school are not "remedial," and she would have been teaching the same materials at the same academic level as she did at the high school and junior high. *(See* R. 071; RE 21). The only difference was the particular school setting where she was to teach. Appellant produced absolutely no evidence to the chancery court in briefs or other documentary evidence, or through argument of counsel, disputing these facts.

The only argument Appellant has asserted to support her claim that the reassignment should be considered a demotion is based on the third element defined in *Fisher*. 874 So. 2d at 1022. She argues that the position at the alternative school would place her outside her certification or experience level. However, her assertions are simply untrue and she only placed unsworn and unsubstantiated assertions before the chancery court in support of this argument. The chancery court was not bound to take these unsworn and unsubstantiated assertions as true in ruling on Appellees' Motion to Dismiss. Simply put, "[c]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to defeat a motion to dismiss." *Penn Nat'l Gaming, Inc. v. Ratliff*, 954 So. 2d 427, 431 (Miss. 2007). To the contrary, the District has proven with competent evidence that these assertions are both factually and legally inaccurate.

Specifically, the Mississippi Department of Education requires that to teach in an alternative program in the state of Mississippi a teacher must merely hold a valid teaching license or certificate. (R. 111-113; RE 59-61). Appellant holds a valid teaching license and certificate. *Id.* The Mississippi Department of Education does not require that a teacher

teaching in an alternative program be certified in every subject area that she might teach. *Id.* Without question, Appellant's teaching certification and license meet that requirement and her certification is perfectly sufficient for the position. Therefore, any argument Appellant may make as to the third element fails as a matter of fact and, more importantly for purposes of this appeal, as a matter of law inasmuch as she has failed to show that any genuine issues of material fact exist on this issue.

Appellant also contends that teaching children with behavioral problems is outside her experience level. However, such an argument (which, again, is only supported by unsworn allegations made by Appellant and her counsel) cannot be taken seriously in light of the fact that Appellant, by her own admission, has at least ten years of teaching experience, most if not all of which has been spent teaching at the junior high and high school levels. (R. 008; RE 4). It necessarily follows that she has been required to manage disciplinary and behavioral issues with classrooms full of teenage students for many years. In fact, Appellant has admitted as much in her Petition. She admits that she does have at least "limited" experience teaching students with behavioral problems. (Appellant's Brief at 15). She also admits that the administration had been working with her to improve "classroom control." (Appellant's Brief at 15). It is inherent that "classroom control" problems must stem at least partially from unruly or disruptive students, so Appellant's argument that she has not had substantial experience within a reasonably current period cannot be accurate. *Id.* Appellant's conclusory, unsubstantiated, and most importantly, self-serving allegation that she has "limited experience teaching students with behavioral problems" is not sufficient to preclude dismissal under M.R.C.P. 12(b)(6) or under M.R.C.P. 56. If such an argument had merit, virtually every assignment of a teacher by any school district in

the State of Mississippi to an alternative program would be considered a demotion.[4] This is not the intent of the EEPL or its procedures, and the EEPL does not provide a procedural due process mechanism for school district employees who are merely unhappy with a reassignment or who would prefer to avoid reassignment.

Appellant further states that the Chancellor was forced to make a decision based solely on the facts set forth in the Appellant's Petition because "the District failed to transcribe a record of [Appellant's] hearing before the School Board." (Appellant's Brief at 16). However, Appellant cannot use the fact that there is no hearing transcript to excuse her failure to present any additional evidence demonstrating her lack of experience in handling students with behavioral problems. The District is not required to produce a transcript for hearings held pursuant to the internal grievance policy, GAE-R, which is the procedural mechanism expressly requested by Appellant and provided by the District. (R. 101-103; RE 49-51). The District provided documentary support for its position, and Appellant had an extended opportunity to do the same. Given that opportunity, she failed to submit any affidavits, not even her own, or any other documents to support her argument that the reassignment was a demotion. Appellant cannot rely on conclusory allegations "masquerading as factual conclusions" to defeat a motion to dismiss or a motion for summary judgment. *Ratliff*, 954 So. 2d at 431 (addressing 12(b)(6) dismissals); *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986) (addressing dismissal under Rule 56). Such conclusory, self-serving allegations are insufficient to create an issue of *material* fact to overcome a motion for summary judgment. *Id.*

[4] If this Court accepts Appellant's argument in this regard and reverses the judgment of the chancery court, its decision would have a chilling effect in the school districts across this state. Specifically, school districts would effectively be prohibited from ever assigning a teacher to the alternative program *unless* that teacher had previous experience in the alternative program or expressly agreed to the assignment. This would severely hamper school districts' ability to manage and administer their alternative programs, which are mandated by law. Miss. Code Ann. § 37-13-92.

Appellant's reassignment, therefore, was not a demotion. The District clearly offered Appellant a renewal contract that did not change her position as a "teacher" and offered her an increase in salary. Her only dissatisfaction was that she was assigned to teach at the alternative school. She expressed this dissatisfaction with her transfer to the alternative school through the District's generalized grievance procedures. That grievance procedure does not permit appeal to the chancery court. Regardless, Appellant's claims do not and cannot fall under the non-renewal statutes since she was not demoted, and therefore Appellant cannot appeal her transfer to this chancery court or to this Court under the EEPL.[5]

II. Alternatively, the Chancery Court was correct in its determination that even if Appellant's reassignment constitutes a non-renewal that triggers the EEPL, Appellant has waived any rights under the EEPL procedures.

The chancery court properly held that even if the EEPL applies to Ms. Winter's Petition, she has waived her right to pursue an appeal or remedy under the EEPL procedures. Mississippi law defines a waiver as "full knowledge of a right existing, and an intentional surrender or relinquishment of that right." *Taranto Amusement Co., Inc. v. Mitchell Associates, Inc.*, 820 So. 2d 726, 729 (Miss. 2002). In this case, Appellant cannot dispute that she had actual, or at the very least constructive, knowledge of her potential due process rights under the EEPL. She nevertheless voluntarily chose a procedural mechanism other than the EEPL to challenge her transfer and has waived her rights, if any, under the EEPL.

Appellant has essentially argued to the trial court that her ignorance of the law and the requirements of the EEPL should permit her to now retroactively assert a claim under the EEPL and be heard in the chancery court. However, it is a fundamental principle of Mississippi law that ignorance of the law is no excuse. *Womack v. Nobles*, 382 So. 2d 1081, 1083 (Miss. 1980).

[5] Appellant has requested that this Court reverse the chancery court's Order and hold that she was demoted so that her federal law claims will not be "inhibited" by the state court's holding. *See* Appellant's Brief at 17. However, the District vigorously contends that such an argument is entirely insufficient to overturn the holding of the chancery court where the chancery court did not abuse its discretion in determining that Appellant did not suffer a demotion.

It is undisputed that Petitioner had the advice of counsel at the time she chose to request a "Level I" grievance hearing rather than pursuing any potential rights she may have had under the EEPL. This fact makes her "ignorance of the rules" argument transparent. Moreover, and even if Appellant had not had the advice of counsel at the time, "all persons are charged with knowledge of the provisions of statutes and must take notice of the procedures adopted by them..." *Womack*, 382 So. 2d at 1083 (Miss. 1980)(quoting *Tally v. The Board of Supervisors of Smith County*, 323 So. 2d 547 (Miss. 1975)).

Interestingly, Petitioner does not and cannot dispute that neither she nor the District ever treated this matter as a non-renewal under the EEPL and that she did not clearly invoke the EEPL until she filed her Notice and Petition seeking review of the District's decision in the chancery court. In fact, Appellant is clear in her appeal that she chose to proceed strictly under the District's grievance policies and procedures. (*See* Appellant's Brief at 17-19). In the process of doing so, she made absolutely no effort to trigger the procedural due process mechanism of the EEPL. Appellant has not refuted the fact that she never made a written request for information or a hearing under or pursuant to Miss. Code Ann. §§ 37-9-109 and 37-9-111, and that she never made any other reference to the EEPL throughout her grievance proceedings. The fact that Appellant pursued the internal grievance procedure under Board Policy GAE-R is essentially irrelevant. The problem is that she did *not* proceed under the requirements of the EEPL. She certainly had every right to do both if she had chosen to do so, and was not precluded from simultaneously pursuing the grievance policy and the EEPL procedures.

Appellant essentially contends that by pursuing the procedures set out in the Board's grievance policy, she has impliedly fulfilled the EEPL requirements as well. (Appellant's Brief at 17). She asserts that she "accurately operates from the assumption that the Grievance Policy is consistent with the EEPL." *Id.* However, the due process procedures set out by Board Policy

GBN-R and Miss. Code Ann. § 37-9-101 *et seq.* are *entirely* different in purpose and substance from the general internal grievance policy established by Board Policy GAE -R. Appellant's assumption that the internal grievance policy and procedures are sufficient to meet the requirements of the EEPL has no reasonable basis, and Appellant cites no authority in support of this proposition. It cannot be disputed that the District's internal grievance proceedings are not governed or guided by the EEPL, and the EEPL is an entirely different procedural mechanism altogether. The grievance policy is a generalized policy that establishes general procedures for employee concerns and complaints. The EEPL and Policy GAE-R specifically apply to demotion situations.

The differences between the EEPL procedures and the District's internal grievance procedures under Policy GAE-R are numerous and distinct. There are too many specific distinctions to catalogue every one here, though a few of the most substantial differences will be highlighted by way of example. First, there is a specific burden of proof established under the EEPL: at the hearing before the Board, the Board is to review a nonrenewal decision to "conclude whether the proposed nonreemployment is a proper employment decision, is based upon a valid educational reason or noncompliance with school district personnel policies and is based solely upon the evidence presented at the hearing." Miss. Code Ann. § 37-9-111(5). The District's grievance policy is far more general in scope and does not establish any particular "burden of proof" or other similar standard. (*See* R. 100-103; RE 48-51).

Second, the EEPL imposes more specific and detailed obligations and duties on both parties than the grievance policy. Under the EEPL, a non-renewed employee is required to submit a "written request" to the District within ten days of being notified of a demotion. Miss. Code Ann. § 37-9-109(a). In response to such a request, the District is required to provide the employee with "written notice of the specific reasons for nonreemployment, together with a

summary of the factual basis therefore, a list of witnesses and a copy of the documentary evidence substantiating the reasons intended to be presented at the hearing..." *Id.* The employee is then required to provide the district "a response to the specific reasons for nonreemployment, a list of witnesses, and a copy of the documentary evidence in support of the response intended to be presented at the hearing." *Id.* The employee must do so not less than five days before the date of the hearing, and if the employee fails to provide the required information, then they lose the right to a hearing under the statute. *Id.* At the hearing itself, the EEPL affords the parties "a fair and reasonable opportunity to present witnesses and other evidence pertinent to the issues *and to cross-examine witnesses presented at the hearing.*" § 37-9-111(3)(emphasis added). The District's grievance policy imposes no analogous right to provide a written explanation for the employment decision or obligation to exchange documentary evidence. Additionally, there is no right to cross examination established in the grievance policy and no provision for the District to provide evidence at the hearing to rebut the employee. The District's grievance policy simply requires oral notice by an employee to initially report a grievance. (*See* R. 101; RE 49). The policy then requires simple written notice by an employee that they intend to appeal to the superintendent (a "Level Two" hearing) and then to the Board (a "Level 3" hearing). (R. 102; RE 50). Appellant followed these procedures by providing the requisite written notice of appeal at the "Level Two" and Level Three" stages. Neither of her written notices mentioned the EEPL or indicated that she considered the reassignment a demotion such as to trigger the provisions of the EEPL. She first cited the EEPL in a letter to the Board dated August 18, 2006, notifying them of her intent to appeal from the result of the grievance procedure to the chancery court. (R. 227-228; RE 109-110).

Third, the EEPL requires the District to transcribe the hearing before the Board. § 37-9-111(4). The District's grievance policy imposes no such requirement at any level of the process.

Finally, and perhaps most importantly for this case, the EEPL permits an employee to appeal a final decision by the school board to the chancery court. § 37-9-113(2). The District's grievance policy is designed to be purely internal and its procedures terminate with the "Level 3" hearing before the Board. (R. 103; RE 51). The policy makes no provision for an appeal to the trial court. *Id.* The obligations and procedures are vastly different under the EEPL and under the District's internal grievance policy. Both the employee and the District are bound by a very specific set of procedural requirements once the EEPL is triggered by a non-renewal or invoked by an employee asserting that she has been demoted and therefore nonrenewed for purposes of the EEPL. Those procedural requirements (and the intertwined substantive requirements) were not followed by Appellant or the District, as Appellant chose to proceed under the grievance policy and failed to invoke the EEPL until she filed her Petition with the lower court. Appellant should not be permitted to now retrospectively assert a claim under the EEPL and proceed under those specific statutory requirements and privileges. Such a claim or appeal would be fundamentally flawed as neither Appellant nor the District followed the very specific requirements of the EEPL during the actual process.

Appellant also asserts that if the grievance policy and EEPL procedures are separate and distinct, then the Board's implementation of the grievance policy is in violation of state law. In support of this proposition, Appellant cites Miss Code Ann. § 37-7-301(1), which states in pertinent part that a school board may "prescribe and enforce rules and regulations not inconsistent with law or with the regulations of the State Board of Education for their own government and for the government of the schools." That is exactly what the District has done in establishing the grievance policy, and it is non-sensical to label the grievance policy a violation of state law. The general, internal grievance policy is in place to provide a mechanism for employees to express grievances of all kinds. (*See* R. 101-103; RE 49-51). The EEPL

procedures and corresponding Board policy *specifically* provide procedures for challenging a *non-renewal.* Miss. Code Ann. § 37-9-101 *et seq.*; (R. 198-200; RE 90-92). Appellant voluntarily chose to pursue the internal grievance procedures without invoking the EEPL and the process that was outlined clearly in the Board's policies (and the statutes) and available to Appellant.

Appellant, of her own free will and accord (and with advice of counsel), chose to challenge her reassignment through the internal grievance procedures and, more importantly, chose *not* to pursue the reassignment as a nonrenewal and invoke the procedures set up for non-renewals in Board Policy GBN-R and the analogous statutes, Miss. Code Ann. § 37-9-101 *et seq.* The policies are clearly different enough in their substance and procedure that Appellant cannot argue that by pursuing the internal grievance process, she was pursuing any rights established under the non-renewal statutes. Additionally, Appellant had the advice of counsel when she chose to pursue the grievance procedure at the exclusion of the EEPL procedures, and she was represented by counsel throughout the grievance process. The fact that the District has a grievance policy that establishes a mechanism for addressing general employee grievances does not in any way prevent or preclude an employee aggrieved with an EEPL-triggering employment decision from utilizing its procedural due process mechanism, and is certainly not unlawful or illegal.

Finally, Appellant's assertion that "[c]ompliance with the Grievance Policy is mandatory" and that such compliance is the exclusive procedural due process mechanism contained in the District's personnel policy is patently false. (Appellant's Brief at 18, emphasis in original). To the contrary, the District's enmployee handbook explicitly and unambiguously states that "[a]ll employees are entitled to due process as detailed in Board Policy GAE-R; GBK; GBN-R." (R. 131; RE 79). The District's internal grievance policy and procedure are set forth

under Board Policy GAE-R. (R. 101-103; RE 49-51). However, Board Policy GBN-R is entitled "Rules of Procedure Under the Education Employment Procedure Law" and mirrors the provisions set forth under the EEPL, including the rights of employees thereunder. (R. 198-203; RE 90-95). Those rights include the right to appeal the School Board's final ruling on non-renewal decisions to the chancery court. *Id.* Prior to the 2005-2006 school year, Appellant acknowledged receipt of the Staff Handbook and agreed to be "responsible for reading and complying with the regulations and policies detailed in the handbooks." (R. 204; RE 96). For this reason, Appellant cannot legitimately argue that she believed the grievance policy to be the only mechanism available to her or that proceeding under its provisions precluded her from invoking the procedures of the EEPL.

The fact that the District has a grievance policy that establishes a mechanism for addressing general employee grievances does not in any way prevent or preclude an employee aggrieved with an EEPL-triggering employment decision from utilizing its procedural due process mechanism. Instead, Appellant simply *elected* to proceed under the District's grievance policies and procedures, despite being fully aware that the EEPL and its procedural mechanism existed and were potentially available and despite the fact that she knew the District had an explicit policy pertaining to the EEPL. More importantly, Appellant *elected not* to pursue the procedures specified in the EEPL and Board Policy GBN-R. The grievance policies and procedures that she proceeded under are separate and distinct from those set forth under the EEPL (and, of course, are distinct from the District's own policy addressing the EEPL), and do not provide for an appeal beyond the final decision of the school board. If the Court determines that Appellant's transfer constitutes a demotion that triggers the provisions of the EEPL, Appellant has waived any rights that could be asserted under the EEPL by failing to assert them at any point prior to filing an Appeal with the chancery court.

CONCLUSION

Appellant's reassignment did not constitute a demotion to trigger the provisions of the EEPL, and Appellant did not characterize it as a demotion or attempt to invoke the EEPL until she filed her Petition for Appeal with the chancery court. In addition, the internal grievance policy and procedure that Appellant chose to pursue is separate from any procedures under the EEPL and does not provide for an appeal to the chancery court. Appellant knowingly chose the due process procedure for challenging her reassignment, followed that procedure to its conclusion, chose *not* to invoke the provisions of the EEPL, and cannot now retroactively pursue a remedy under the EEPL. Therefore, even if this Court considers Appellant's transfer a demotion to which the EEPL applies, Appellant has voluntarily waived any right she may have had to proceed under the EEPL by failing to invoke and follow its provisions. Appellant cannot now "bootstrap" her appeal under the District's grievance policies and procedures into an appeal under the EEPL. Accordingly, this Court should uphold the chancery court's dismissal of Appellant's claims with prejudice.

Respectfully submitted, this the 24 day of October, 2007.

CALHOUN COUNTY SCHOOL DISTRICT AND CALHOUN COUNTY BOARD OF EDUCATION

By: _____
Their Counsel

OF COUNSEL:

James A. Keith
Mississippi State Bar No. [redacted]
R. Jarrad Garner
Mississippi State Bar No. [redacted]
Laura A. Ford
Mississippi State Bar No. [redacted]
Adams and Reese LLP
111 East Capitol Street, Suite 350 (39201)
Post Office Box 24297
Jackson, Mississippi 39225-4297
Telephone: 601-353-3234
Facsimile: 601-355-9708

CERTIFICATE OF SERVICE

I, R. Jarrad Garner, do hereby certify that I have this day mailed, by United States mail, a copy of the above document to the following:

David Burks Langford
Matthew Daniel Wilson
Langford & Associates, PLLC
212 East Main Street
Starkville, Mississippi 39759
Attorneys for Appellant

This the 4th day of October, 2007.

James A. Keith