

IN THE SUPREME COURT OF MISSISSIPPI

GARY HEMBA

APPELLANT

v.

CASE NUMBER 2007-TS-0177

MISSISSIPPI DEPARTMENT OF CORRECTIONS

APPELLEE

APPEAL FROM THE CHANCERY COURT
OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY
HONORABLE KENT MCDANIEL, CHANELLOR

Gary Hemba v. MDOC, Cause Number G2005-2130 S/2

BRIEF OF PLAINTIFF/APPELLANT GARY HEMBA

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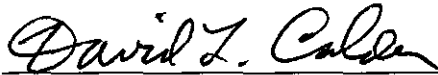
CERTIFICATE OF INTERESTED PERSONS

Appeal from: Gary Hemba v. Mississippi Department of Corrections, Case Number G2005-2130 S/2 in the Chancery Court of the First Judicial District of Hinds County, Mississippi.

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.

Plaintiff/Appellant Gary Hemba respectfully submits that the following persons may be interested in this litigation:

1. Gary Hemba - - Plaintiff/Appellant
2. Mississippi Department of Corrections - - Defendant/Appellee
3. All employees of MDOC who were terminated under the authority granted in Section 13 of House Bill 1279 in the 2004 Legislative Session, 2004 Miss. ALS 595, Section 13; 2004 Miss. Laws 595, Section 13; 2004 Miss. H.B. 1279, Section 13. There were at least 163 other MDOC employees who were also wrongfully terminated from their employment under the authority of Section 13.



David L. Calder, MSB [REDACTED]

Attorney of Record for Plaintiff/Appellee Gary Hemba

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I. STATEMENT OF ISSUES

1. Whether the Chancery Court erred in finding that Section 13 of House Bill 1279 which was enacted by the Mississippi Legislature in the 2004 Legislative Session was not facially unconstitutionally, because it purported to amend portions of the Mississippi Statewide Personnel "Procedures" without specifically referring to any statute, rule or regulation that was to be altered, amended or superceded by the legislation.

2. Whether Section 13, HB 1279 should be construed, interpreted and applied to remove the protections afforded to MDOC employees by "**Personnel Board Procedures**," while retaining the protections against termination with just cause, notice and a due process hearing that is provided by Miss. Code Ann. §§ 25-9-107, 127, 129, and 131.

3. Whether the chancery court erred in granting the Mississippi Department of Corrections's Motion to Dismiss, because there are genuine issues of material fact in regard to whether the purported amendments to the Mississippi Statewide Personnel Procedures as set forth in Section 13 of House Bill 1279 were properly applied in Plaintiff's case.

4. Whether the interpretation and application of Section 13, HB 1279 resulted in a discriminatory employment practice that violated Mississippi law because MDOC employees who worked at three agency facilities that had predominantly black employees were wrongfully targeted for termination, and because the firings had a disparate impact on black employees because of their race.

II. STATEMENT OF THE CASE

A. NATURE OF THE CASE

This case is about the wrongful termination of Plaintiff/Appellant Gary Hemba's employment with the Mississippi Department of Corrections. Mr. Hemba was fired on June 21, 2004 after seventeen (17) years of service with the MDOC. The instant case was not Mr. Hemba's first confrontation with MDOC management, as he had previously filed suit against MDOC officials for wrongfully imposing employment sanctions against him for alleged violations of MDOC employment rules. Mr. Hemba won that suit in 2002, *Hemba v. Mississippi Dept. of Corrections*, 848 So.2d 909 (Miss. App. 2003). In regard to the case at bar, Mr. Hemba believes that he may have been targeted for termination because of his prior conflicts with MDOC officials as evidenced in that case.

The case at bar centers on the unconstitutional acts by the Mississippi Legislature in adopting House Bill 1279 during the 2004 Legislative Session. This bill included numerous provisions that were allegedly designed to "reduce state budget costs and increase state revenues." 2004 Miss. ALS 595; 2004 Miss. Laws 595; 2004 Miss. H.B. 1279. Section 13 of House Bill 1279 provided:

Section 13:

(1) For the period beginning upon the effective date of this section and through June 30, 2005, the **PERSONNEL ACTIONS of the Mississippi Department of Corrections regarding employees** at the central offices of the department, the State Penitentiary at Parchman and the Central Correctional Facility in Rankin County **shall be exempt from State Personnel Board PROCEDURES**. However, all new employees of the Department of Corrections at those locations shall meet the criteria of the State Personnel Board that presently exists for employment. Whenever an employee at any of those locations is dismissed or involuntarily terminated under the authority of this section during

that period of time, that employee's position shall be eliminated.

(2) The Department of Corrections shall consult with the Office of the Attorney General before taking personnel actions permitted by this section to **review those actions for compliance with applicable state and federal law.**

2004 Miss. ALS 595, Section 13; 2004 Miss. Laws 595, Section 13; 2004 Miss. H.B. 1279, Section 13 (emphasis added). Significantly, the authority granted under this Section **DID NOT EXTEND TO ALL EMPLOYEES OF MDOC, but only to those persons who employed at three MDOC locations: “the central offices of the department, the State Penitentiary at Parchman, and the Central Correctional Facility in Rankin County.”** This selective targeting of certain groups of MDOC employees for termination points to questionable motives in the passage of this legislation, as discussed further below. Miss. Code Ann. § 25-9-149 prohibits discriminatory employment practices in State agencies. The net affect of the staff terminations by MDOC in 2004 under the presumed authority of HB 1279 was a racially discriminatory disparate impact on African American MDOC employees at the three locations that were targeted in the bill.

Finally, as an alternative ground for his claim, Plaintiff asserts that the actions by the MDOC in terminating over 160 employees, MDOC failed to “... consult with the Office of the Attorney General before taking personnel actions permitted by this section to review those actions for compliance with applicable state and federal law.” This was a specific requirement under Section 13 of HB 1279, and there is no evidence in the record in this case that this was done. Plaintiff should be entitled to develop proof concerning this issue. The question of whether MDOC conferred with the Attorney General before firing Mr. Hembra is a genuine issue of material fact that cannot be resolved on a Motion to Dismiss.

B. COURSE OF THE PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

On June 21, 2004, Plaintiff/Appellant, Gary Hemba, received a formal notice from the Mississippi Department of Corrections [MDOC] that his seventeen year tenure with the Department was being terminated on June 30, 2004, without cause, notice, or an opportunity for a due process hearing. The notice explained that his termination was pursuant to the authority granted in Section 13 of House Bill 1279, as passed by the Legislature in 2004. [R. 00002.] That notice also indicated that Mr. Hemba's position as "Branch Director II, PIN #1538 shall be eliminated effective June 30, 2004." [R. 00002].

On June 20, 2005, Mr. Hemba notified MDOC Commissioner Christopher Epps that he was asserting claims against MDOC under the Mississippi Tort Claims Act, Miss. Code Ann. § 11-46-11, et seq. for the wrongful termination of his employment. [R. 00003]. ON August 9, 2005, MR. HEmba received notice from MDOC's third party administrator, Cannon Management Services, Inc., that his administrative claim for wrongful termination had been denied. [R. 00003].

On November 7, 2005, Mr. Hemba, filed his Complaint against MDOC in the Chancery Court of the First Judicial District of Hinds County, Civil Action No. G2005-2130 S/2. [R. 0001]. The case was assigned to Honorable William Hale Singletary. After the Attorney General was served with process on behalf of the State, MDOC filed a Motion to Dismiss the Complaint. [R. 000007.]

After the parties submitted their briefs, the lower court refused to grant oral argument on the Motion, and on September 10, 2007 issued an Order that granted MDOC's Motion to

Dismiss. [R. 36.] This appeal followed.

C. ORAL ARGUMENT REQUESTED

Counsel for Plaintiff/Appellant, Gary Hemba, respectfully submits that this case involves matters of Constitutional importance, as well as due process and equal protection rights. Therefore, in order to more effectively communicate the legal grounds of the Complaint and subsequent appeal, counsel requests that oral argument be granted by the Supreme Court.

D. STANDARD OF REVIEW

MDOC filed a Motion to Dismiss this action pursuant to Rule 12(b) of the Mississippi Rules of Civil Procedure, and that motion was granted by the lower court. A motion to dismiss for failure to state a claim under Rule 12(b)(6) raises an issue of law. *Tucker v. Hinds County*, 558 So.2d 869, 872 (Miss.1990); *Lester Eng'g Co. v. Richland Water & Sewer Dist.*, 504 So.2d 1185, 1187 (Miss.1987). An appellate court reviews questions of law *de novo*. *Mississippi Transp. Comm'n v. Fires*, 693 So.2d 917, 920 (Miss.1997). Under such circumstances, all allegations set forth in the Complaint **are taken as true**, and all inferences that would support the Plaintiff's claims should be weighted in favor of the Plaintiff.

A Motion to Dismiss should not be granted, nor should it be affirmed in this Court, unless it appears beyond doubt that the Plaintiff will be unable to prove any set of facts in support of his claims. *Lowe v. Lowndes County Building Inspection Department*, 760 So.2d 711 (Miss. 2000); *Butler v. Board of Supervisors*, 659 So.2d 578, 581 (Miss.1995); *Overstreet v. Merlos*, 570 So.2d 1196,1197 (Miss. 1990). *See generally*, *Sennett v. U. S. F. & G. Co.*,757 So.2d 206, 209 (Miss. 2000).

In the case at bar, for the reasons set forth below, Plaintiff respectfully submits that there

are genuine issues of material fact that preclude the granting of MDOC's Motion to Dismiss. Therefore, Plaintiff respectfully requests that this COurt remand this matter to the trial court for further proceedings.

E. SUMMARY OF THE ARGUMENT

Section 13 of H B 1279 is unconstitutional. Unlike other sections of HB 1279 which referenced **specific statutes** that were being amended, Section 13, as interpreted and applied by MDOC, purported to approve whatever subjective determinations MDOC made about which of its employees at only three of its facilities could be fired after they were excluded from the "State Personnel Procedures." MDOC's goals was to have absolute freedom to terminate the employees that the top officials selected, without any questions or oversight from anyone, and without the need for any showing of a reason that would justify their termination, and without the usual requirement of notice and an opportunity for a due process hearing.

To the extent Section 13 of H.B. 1279 purported to authorize actions by MDOC which were in violation of the terms of existing statutory law concerning sate employment, it was an improper attempt to amend State law, and, therefore, invalid. Furthermore, to the extent Section 13 of H.B. 1279 delegated to MDOC the unilateral authority to alter the affirmative statutory law of Mississippi, it was an improper delegation of authority to an Executive Department Agency, and thus an invalid, unconstitutional act. Finally, the manner in which MDOC elected to conduct the firings of certain employees had a **disparate impact on African American employees**, and violated Mississippi law which prohibits discrimination in employment decisions by a State Agency.

III. STATEMENT OF FACTS

A. **Background of the controversy between MDOC and Gary Hemba which forms the basis of his claim that his firing constituted an unlawful retaliatory discharge.**

Plaintiff/Appellant Gary Hemba began his employment with the Mississippi Department of Corrections in March 1987. At one time he served as the State Director of Therapeutic Recreation and General Library Services, and during his initial 13 year career with MDOC, Mr. Hemba's personnel file was exemplary. However, because of conflicts and controversies that arose between Mr. Hemba and certain individuals who were his supervisors, in April 2000 MDOC began an investigation which ultimately resulted in formal misconduct charges and employment sanctions against Mr. Hemba.

An administrative review hearing was conducted on these charges under the Statewide Personnel Act, Miss. Code Ann. § 25-9-101, et seq., which governs the rights and remedies of state employees. Significantly, the hearing officer found that MDOC's charges and actions against Mr. Hemba were "**arbitrary and capricious.**" *Hemba v. Mississippi Dept. of Corrections*, 848 So.2d 909, ¶ 15 (Miss. App. 2003). The hearing officer concluded that Hemba's suspension from duty without pay should be reversed and all charges dismissed, and that MDOC should reimburse Mr. Hemba for the wages he had lost as a result of a suspension, as well as the \$50 filing fee, and that all formal charges of misconduct and employment sanctions against Mr. Hemba should be dismissed. That decision by the State Personnel Board hearing officer was appealed by MDOC to the Mississippi Employee Appeals Board. The Full Board affirmed the decision of the hearing officer. *Id.* at ¶ 15.

MDOC then appealed to the Hinds County Circuit Court, which reversed the decision of

the Mississippi Employee Appeals Board. Id. at ¶ 20. That decision was appealed by Mr. Hemba, and that Mississippi Court of Appeals reversed and rendered the Circuit Court's decision, and reinstated the hearing officer's decision in favor of Mr. Hemba and against MDOC. Id. at ¶ 20.

In view of these facts, Mr. Hemba asserts that his firing by MDOC in 2004 was retaliatory, because of his contentious relationship with some of the administrative officials at MDOC, and the fact that he had prevailed in the prior suit. Even though a large number of MDOC employees were terminated in 2004, Mr. Hemba believes that he was included in retaliatory for his past conflicts with MDOC.

Because the lower court granted MDOC's motion to Dismiss, Mr. Hemba was never give the opportunity to establish these facts. Clearly these circumstances give rise to a genuine issue of material fact that is not appropriate for resolution on a Motion to Dismiss.

B. The passage of House Bill 1279(13) by the Mississippi Legislature in 2004.

In 2004, Mississippi faced a serious budget shortfall. As a result, Governor Haley Barbour heavily lobbied the Mississippi Legislature to pass what he dubbed "**Operation Streamline.**" One of the goals of this plan was to cut the State's budget by enabling the unilateral firing of certain state employees under the guise of "reorganization" of state agencies.¹

¹Governor Barbour's political allies in the Mississippi Senate proposed an amendment to HB 1279 that would have expanded the scope of Section 13 to include the Division of Medicaid, the Department of Finance and Administration; the Department of Human Services; the Department of Public Safety; the Bureau of Narcotics; the Emergency Management Agency; the Mississippi Development Authority; the Department of Environmental Quality; and the Employment Security Commission and its successor agency the Department of Employment Security. However, that amendment was not adopted. Mississippi Senate Proposed Amendment, 2004 Reg. Sess. H.B. 1279 (not adopted) [Copy attached as **Exhibit B** in Appendix.]

House Bill 1279 was signed into law on May 27, 2004 and subsequently published as Chapter 595 in the 2004 Session Laws of Mississippi. The full "Title" of that Act was as follows:

Title: AN ACT TO REDUCE STATE BUDGET COSTS AND INCREASE STATE REVENUES; TO AMEND SECTIONS 27-103-125, 27-103-139 AND 27-103-211, MISSISSIPPI CODE OF 1972, TO REVISE THE PERCENTAGE LIMITATION ON LEGISLATIVE APPROPRIATIONS FROM THE STATE GENERAL FUND FOR FISCAL YEAR 2005; TO AMEND SECTION 27-103-135, MISSISSIPPI CODE OF 1972, TO REQUIRE STATE AGENCIES THAT MAINTAIN FUNDS IN ACCOUNTS THAT ARE NOT IN THE STATE TREASURY TO FURNISH THE LEGISLATIVE BUDGET OFFICE WITH DETAILED INFORMATION ABOUT THE AMOUNT OF THOSE FUNDS THAT THE AGENCY HAS ON HAND AND THE LOCATION OF THOSE FUNDS; TO REQUIRE EACH AGENCY, DEPARTMENT AND INSTITUTION OF THE STATE TO SUBMIT A REPORT TO THE CHAIRMEN OF THE HOUSE AND SENATE APPROPRIATIONS COMMITTEES AND THE STATE AUDITOR ON THE USAGE OF CELLULAR TELEPHONES BY THE AGENCY, DEPARTMENT OR INSTITUTION DURING FISCAL YEAR 2004; TO DIRECT THE STATE FISCAL OFFICER TO TRANSFER CERTAIN SPECIAL FUNDS INTO THE BUDGET CONTINGENCY FUND DURING FISCAL YEARS 2004 AND 2005; TO AMEND SECTION 27-65-75, MISSISSIPPI CODE OF 1972, TO DELAY UNTIL 2005 THE SALES TAX DIVERSION THAT IS TO BE DEPOSITED INTO THE SPECIAL FUNDS TRANSFER FUND; TO AMEND SECTION 4, CHAPTER 556, LAWS OF 2003, TO CONFORM TO THE PRECEDING SECTION; TO AMEND SECTION 27-25-506, MISSISSIPPI CODE OF 1972, TO PROVIDE THAT UNTIL FISCAL YEAR 2006, \$10,000,000.00 OF THE STATE'S SHARE OF OIL AND GAS SEVERANCE TAXES SHALL BE DEPOSITED INTO THE STATE GENERAL FUND AND THE REMAINDER SHALL BE DEPOSITED INTO THE BUDGET CONTINGENCY FUND TO BE APPROPRIATED FOR THE SUPPORT OF THE MISSISSIPPI ADEQUATE EDUCATION PROGRAM; TO AMEND SECTION 43-13-407, MISSISSIPPI CODE OF 1972, AS AMENDED BY HOUSE BILL NO. 438, 2004 REGULAR SESSION, TO PROVIDE THAT IN FISCAL YEARS 2005 THROUGH 2009, CERTAIN SUMS SHALL BE TRANSFERRED FROM THE HEALTH CARE TRUST FUND TO THE HEALTH CARE EXPENDABLE FUND; TO PROVIDE THAT IN FISCAL YEAR 2010 AND EACH FISCAL YEAR THEREAFTER, THE AVERAGE ANNUAL AMOUNT OF THE DIVIDENDS, INTEREST AND OTHER INCOME EARNED ON THE FUNDS IN THE HEALTH CARE TRUST FUND DURING THE PRECEDING FOUR FISCAL YEARS SHALL BE TRANSFERRED TO THE HEALTH CARE EXPENDABLE FUND; TO PROVIDE THAT THE PRECEDING PROVISIONS

MAY NOT BE CHANGED EXCEPT UPON A THREE-FIFTHS VOTE OF EACH HOUSE OF THE LEGISLATURE; TO EXTEND THE REPEALER ON CERTAIN PROVISIONS OF THAT SECTION TO JULY 1, 2009; **TO PROVIDE THAT THROUGH JUNE 30, 2005, THE PERSONNEL ACTIONS OF THE DEPARTMENT OF CORRECTIONS REGARDING EMPLOYEES AT THE CENTRAL OFFICES, THE STATE PENITENTIARY AND THE CENTRAL CORRECTIONAL FACILITY SHALL BE EXEMPT FROM STATE PERSONNEL BOARD PROCEDURES**; TO PROVIDE THAT WHENEVER AN EMPLOYEE AT ANY OF THOSE LOCATIONS IS DISMISSED DURING THAT PERIOD OF TIME, THAT EMPLOYEE'S POSITION SHALL BE ELIMINATED; TO AMEND SECTION 27-3-79, MISSISSIPPI CODE OF 1972, AS AMENDED BY HOUSE BILL NO. 611, 2004 REGULAR SESSION, TO REQUIRE THE STATE TAX COMMISSION TO DEVELOP A TAX AMNESTY PROGRAM; TO PROVIDE THAT THE PROGRAM WILL BEGIN ON SEPTEMBER 30, 2004, AND END ON DECEMBER 31, 2004, AND WILL APPLY TO ALL TAXES REQUIRED TO BE COLLECTED BY THE STATE TAX COMMISSION AND WHICH WERE DUE AND PAYABLE FOR THE YEAR 1999 AND AFTER; TO PROVIDE THAT TAX AMNESTY WILL NOT BE AVAILABLE TO TAXPAYERS SUBJECT TO TAX-RELATED CRIMINAL INVESTIGATIONS OR PROSECUTIONS, OR WHERE TAXES HAVE BEEN PREVIOUSLY ASSESSED BY THE STATE TAX COMMISSION OR TO ESTIMATED INCOME TAX PAYMENTS; TO PROVIDE THAT DURING FISCAL YEAR 2005, ANY INTEREST EARNED ON STATE-SOURCE SPECIAL FUNDS OF THE DEPARTMENT OF TRANSPORTATION SHALL BE DEPOSITED INTO THE STATE GENERAL FUND; TO AMEND SECTION 65-1-111, MISSISSIPPI CODE OF 1972, IN CONFORMITY TO THE PRECEDING PROVISION; TO AMEND SECTIONS 41-29-107, 41-29-108, 41-29-111 AND 45-1-2, MISSISSIPPI CODE OF 1972, TO PROVIDE THAT THE MISSISSIPPI BUREAU OF NARCOTICS SHALL BE AN OFFICE WITHIN THE DEPARTMENT OF PUBLIC SAFETY; TO PROVIDE THAT THE DIRECTOR OF THE BUREAU OF NARCOTICS SHALL BE APPOINTED BY THE COMMISSIONER OF PUBLIC SAFETY; TO PROVIDE FOR THE TRANSFER OF ALL FUNDS, PROPERTY AND PINS OF THE BUREAU OF NARCOTICS TO THE DEPARTMENT OF PUBLIC SAFETY; TO PROVIDE FOR AN OFFICE OF HOMELAND SECURITY WITHIN THE DEPARTMENT OF PUBLIC SAFETY; TO REPEAL SECTION 1, CHAPTER 520, LAWS OF 1972, WHICH PROVIDES THAT FUNDS APPROPRIATED TO THE BUREAU OF NARCOTICS SHALL BE KEPT SEPARATE FROM THE FUNDS OF THE DEPARTMENT OF PUBLIC SAFETY; TO AMEND SECTION 77-1-21, MISSISSIPPI CODE OF 1972, TO TRANSFER THE LAW ENFORCEMENT FUNCTIONS OF THE PUBLIC SERVICE COMMISSION TO THE MISSISSIPPI DEPARTMENT OF TRANSPORTATION; TO AMEND

SECTION 75-76-129, MISSISSIPPI CODE OF 1972, TO PROVIDE THAT DURING FISCAL YEAR 2005, 25% OF THE STATE'S SHARE OF GAMING LICENSE FEES SHALL BE DEPOSITED INTO THE BUDGET CONTINGENCY FUND; TO AMEND SECTION 37-61-33, MISSISSIPPI CODE OF 1972, TO DIVERT, UNTIL JULY 1, 2005, A PORTION OF EDUCATION ENHANCEMENT FUNDS THAT ARE ALLOCATED FOR CLASSROOM SUPPLIES TO THE BUDGET CONTINGENCY FUND; TO AMEND SECTION 49-6-3, MISSISSIPPI CODE OF 1972, TO DELETE THE PROVISIONS THAT REQUIRE THE DEPARTMENT OF WILDLIFE, FISHERIES AND PARKS TO DEPOSIT A PERCENTAGE OF HUNTING AND FISHING LICENSE FEES COLLECTED EACH MONTH INTO THE WILDLIFE, FISHERIES AND PARKS MOTOR VEHICLE FUND; AND FOR RELATED PURPOSES.

MS Bill History, 2004 Reg. Sess. H.B. 1279 [Copy attached as Exhibit "A" in Appendix].

This act, which became known as House Bill 1279, was relied on by MDOC to impose draconian measures that arbitrarily targeted MDOC employees for termination, by removing the usual protections afforded by the Statewide Personnel System set forth in the Miss. Code Ann. § Miss. Code Ann. § 25-9-101 (2004). MDOC contended that HB 1279(13) authorized the unilateral terminate MDOC employees at will, without any justification, and without any need for notice or due process hearings. The relevant portion of HB 1279, Section 13 provided:

SECTION 13.

(1) For the period beginning upon the effective date of this section and through June 30, 2005, **the PERSONNEL ACTIONS of the Mississippi Department of Corrections regarding employees** at the central offices of the department, the State Penitentiary at Parchman and the Central Correctional Facility in Rankin County **shall be exempt from State Personnel Board PROCEDURES.** **However, all new employees of the Department of Corrections at those locations shall meet the criteria of the State Personnel Board that presently exists for employment. Whenever an employee at any of those locations is dismissed or involuntarily terminated under the authority of this section during that period of time, that employee's position shall be eliminated.**

(2) The Department of Corrections shall consult with the Office of the Attorney General before taking personnel actions permitted by this section to review those actions for compliance with applicable state and federal law.

2004 HB 1297 (as signed by the Governor). Thus, Section 13 of HB 1279, as interpreted and applied by MDOC, provided the head of the agency with absolute unbridled discretion to terminate current employees at will without cause, while still being empowered to hire new employees.

C. The MDOC terminations of employees in reliance on Section 13, HB 1279.

Section 13 of HB 1279 was relied on by MDOC to unilaterally fire over 160 employees, including Plaintiff/Appellant Gary Hemba, without cause or justification. However, Plaintiff/Appellant asserts that Section 13 is **constitutionally defective**, and therefore was void for this purpose, because the legislation violated Section 61 of the Mississippi Constitution which provides:

Section 61. Amendment or revival by reference to title prohibited

No law shall be revived or amended by reference to its title only, but the section or sections, as amended or revived, shall be inserted at length.

Miss. Const., Art. IV, § 61 (1890) (emphasis added). **Unlike the other 25 Sections of HB 1279, which each referred to specific sections of the Mississippi Code Annotated that were being altered or amended by the bill, there is no reference in Section 13 of House Bill 1279 to any portion of the Mississippi Code that was being amended or changed. To the contrary, Section 13 referred not to any statute, but merely to the “State Personnel Board PROCEDURES.”**

Therefore, Section 13 of HB 1279 was constitutionally ineffective to supercede the Mississippi Statutes such as Miss. Code Ann. §§ 25-9-127, 129 and 131 which provided Mr. Hemba with an expectation of tenure in his employment with MDOC, and which protected him from termination without some justification, notice, and an opportunity for a due process hearing.

Rather than referring to any section of the Mississippi Code Annotated that Section 13 of HB 1279 was intended to amend, suspend or supercede, Section 13 merely stated that under the authority of this bill, “the **“PERSONNEL ACTIONS”** of the Mississippi Department of Corrections regarding employees **at the central offices of the department, the State Penitentiary at Parchman and the Central Correctional Facility in Rankin County** **shall be exempt from State Personnel Board PROCEDURES.**” 2004 Miss. Laws 595, Section 13. This language was not sufficient to amend any Mississippi statute either specifically or by implication or by reference.

The State Personnel Board was created by statute, Miss. Code Ann. § 25-9-109, and pursuant to Miss. Code Ann. § 25-9-111, the Board was empowered to adopt rules, regulations and procedures to govern its operation. Under Miss. Code Ann. § 25-9-119, the Board appointed a State Personnel Director who was authorized to create the Board’s “procedures” by submitting for Board approval “... proposed **rules and regulations** which shall require a **uniform system of personnel administration** within all agencies included in this chapter.” This statute further provides in part:

2(c). To submit for board approval proposed rules and regulations which shall require a uniform system of personnel administration within all agencies included in this chapter. Such rules and regulations, when approved by the board, **shall be binding upon the state departments, agencies and institutions covered by this chapter** and shall include provisions for the establishment and maintenance of classification and compensation plans, the conduct of examinations, employee recruiting, employee selection, the certification of eligible persons, appointments, promotions, transfers, demotions, separations, reinstatement, appeals, reports of performance, payroll certification, employee training, vacation and sick leave, compensatory leave, administrative leave, standardized record keeping forms and procedures for leave earned, accrued and used, and all other phases of personnel administration. Such rules and regulations shall not be applicable to the emergency hiring of employees by the

Public Employees' Retirement System pursuant to Section 25-11-15(7). Copies of the rules and regulations, or modifications thereto, as are approved by the State Personnel Board, shall be provided to the Chairmen of the Fees, Salaries and Administration Committee of the Senate and the Fees and Salaries of Public Officers Committee of the House of Representatives, the Lieutenant Governor and the Governor at least sixty (60) days before their effective date. The respective parties may submit comments to the board regarding such rules and regulations before their effective date; ...

Miss. Code Ann. § 25-9-119 (West 2004). In addition, under Miss. Code Ann. § 25-9-133 the Board was required to "... recommend policies and procedures for the efficient and economical use of employment positions." Thus, it is clear that the Mississippi Personnel Board adopted and enforced its own Policies and Procedures that were separate and distinct from the Mississippi Statutes that governed state employees.

Plaintiff respectfully submits that since Section 13 of HB 1279 did not reference any particular statute or section of the Mississippi Code Annotated of 1972, but rather, only references the "**State Personnel Board Procedures**" that were to be suspended by the Act, HB 1279 was not effective to cancel the statutory protections provided to State Employees such as Mr. Hemba in statutes such as Miss. Code Ann. §§ 25-1-127, 129 and 131.

This interpretation of Section 13 of HB 1279 is supported by the second part of that Section which required MDOC to consult with the Attorney General "**before taking personnel actions permitted by this section to review those actions for compliance with applicable state and federal law.**" 2004 Miss. Laws 595, Section 13(2); 2004 Miss. H.B. 1279, Section 13(2). The term "**personnel actions**" is defined in the State Personnel Statutes, Miss. Code Ann. § 25-9-171, as: "**an action that affects an employee's promotion, demotion, transfer, work assignment or performance evaluation.**"

This provision in Section 13 of HB 1279 clearly implies that there were sections Mississippi law that still protected State Employees such as Mr. Hemba, and that compliance with those requirements was required before any “personnel action” could be taken by MDOC against Mr. Hemba. This gives rise to a genuine issue of material fact in the case at bar, so that granting the State’s Motion to Dismiss was improper.

IV. ARGUMENT

A. **Section 13 of House Bill 1279 (2004) is unconstitutional because it violated Section 61 of the Mississippi Constitution.**

Unlike all the other sections of House Bill 1279, **Section 13 did not contain any reference to any specific Mississippi statutes** that were to be amended by Section 13. This constituted a *per se* violation of Section 61 of the Mississippi Constitution. Section 13 as it was adopted simply provided that from the time of its enactment (which was May 27, 2004) until June 30, 2005, the “**PERSONNEL ACTIONS**” of MDOC regarding only those persons employed at “**THE CENTRAL OFFICES, THE STATE PENITENTIARY AND THE CENTRAL CORRECTIONAL FACILITY** would be exempt from “**STATE PERSONNEL BOARD PROCEDURES.**” There is no explanation as to why all MDOC personnel were not subject to this same rule. However, it is clear that the employees at these MDOC locations were targeted by the persons who drafted the bill, presumably with the input of MDOC officials.

As initially proposed, House Bill 1279 included many provisions that were apparently controversial in the Legislature. Therefore, on February 23, 2004, the bill was referred to the Select Committee on Fiscal Stability. [Exhibit F, Appendix.] After certain amendments, the bill was sent to conference twice, with amendments attempted by the Senate but rejected by the

House. Finally, the HB 1279 was approved by the Legislature on May 14, 2004 and signed by the Governor on May 27, 2004. There was never any justification presented for why Section 13 of HBG 1279 targeted only the MDOC employees at the three locations identified in the legislation, and not **all MDOC employees**. Certainly the latter would have been appropriate if the goal truly was to reorganize the entire MDOC.

Significantly the Senate Committee which considered this bill recognized that the House version was Constitutionally defective. In fact, the Senate approved an amendment to HB 1279 that would arguably have cured the deficiency. The Senate's proposed amendment to this bill included an Amended Title and referred to a specific statute that was to be amended by Section 13. The proposed Senate Amendment broadened the scope of the bill to State agencies other than MDOC, and provided:

**THIS IS TO INFORM YOU THAT THE SENATE HAS ADOPTED THE
AMENDMENTS SET OUT BELOW:
AMENDMENT NO. 1**

Amend by striking all after the enacting clause and inserting in lieu thereof the following:

SECTION 1. Section 25-9-127, Mississippi Code of 1972, is amended as follows:

25-9-127. (1) No employee of any department, agency or institution who is included under this chapter or hereafter included under its authority, and who is subject to the rules and regulations prescribed by the state personnel system may be dismissed or otherwise adversely affected as to compensation or employment status except for inefficiency or other good cause, and after written notice and hearing within the department, agency or institution as shall be specified in the rules and regulations of the State Personnel Board complying with due process of law; and any employee who has by written notice of dismissal or action adversely affecting his compensation or employment status shall, on hearing and on any appeal of any decision made in such action, be required to furnish evidence that the reasons stated in the notice of dismissal or action adversely affecting his

compensation or employment status are not true or are not sufficient grounds for the action taken; provided, however, that this provision shall not apply (a) to persons separated from any department, agency or institution due to curtailment of funds or reduction in staff when such separation is in accordance with rules and regulations of the state personnel system; (b) during the probationary period of state service of twelve (12) months; and (c) to an executive officer of any state agency who serves at the will and pleasure of the Governor, board, commission or other appointing authority.

(2) The operation of a state-owned motor vehicle without a valid Mississippi driver's license by an employee of any department, agency or institution that is included under this chapter and that is subject to the rules and regulations of the state personnel system shall constitute good cause for dismissal of such person from employment.

(3) Beginning July 1, 1999, every male between the ages of eighteen (18) and twenty-six (26) who is required to register under the federal Military Selective Service Act, 50 USCS App. 453, and who is an employee of the state shall not be promoted to any higher position of employment with the state until he submits to the person, commission, board or agency by which he is employed satisfactory documentation of his compliance with the draft registration requirements of the Military Selective Service Act. The documentation shall include a signed affirmation under penalty of perjury that the male employee has complied with the requirements of the federal selective service act.

(4) For a period of one (1) year after the effective date of this act, the provisions of Section 25-9-127(1) shall not apply to the personnel actions of the following executive agencies:

- (a) Division of Medicaid, Office of the Governor;
- (b) Mississippi Department of Corrections;**
- (c) Mississippi Department of Finance and Administration;
- (d) Mississippi Department of Human Services;
- (e) Mississippi Department of Public Safety and the Mississippi Bureau of Narcotics;
- (f) Mississippi Emergency Management Agency;
- (g) Mississippi Development Authority;
- (h) Mississippi Department of Environmental Quality;
- (i) Mississippi Employment Security Commission and its successor agency the Department of Employment Security, Office of the Governor.

All new employees in the executive agencies named above shall meet criteria

of the State Personnel Board as presently exists for employment.

Mississippi Senate Amendment, 2004 Reg. Sess. H.B. 1279 [**Appendix Exhibit B** (emphasis added).]

However, the Senate amendment to HB 1279 were **never approved** by the House of Representatives, and House version of the bill which was signed into law by the Governor remained constitutionally deficient.

The fact is that Miss. Code Ann. § 25-9-127 (West 2004) was never formally amended by HB 1279. The 2004 West Publishing version of this statute (as well as the 2007 version), as printed in the Mississippi Code, provides:

§ 25-9-127. Dismissals; promotions; selective service registration

(1) No employee of any department, agency or institution who is included under this chapter or hereafter included under its authority, and who is subject to the rules and regulations prescribed by the state personnel system may be dismissed or otherwise adversely affected as to compensation or employment status except for inefficiency or other good cause, and after written notice and hearing within the department, agency or institution as shall be specified in the rules and regulations of the State Personnel Board complying with due process of law; and any employee who has by written notice of dismissal or action adversely affecting his compensation or employment status shall, on hearing and on any appeal of any decision made in such action, be required to furnish evidence that the reasons stated in the notice of dismissal or action adversely affecting his compensation or employment status are not true or are not sufficient grounds for the action taken; provided, however, that this provision shall not apply (a) to persons separated from any department, agency or institution due to curtailment of funds or reduction in staff when such separation is in accordance with rules and regulations of the state personnel system; (b) during the probationary period of state service of twelve (12) months; and (c) to an executive officer of any state agency who serves at the will and pleasure of the Governor, board, commission or other appointing authority.

(2) The operation of a state-owned motor vehicle without a valid Mississippi driver's license by an employee of any department, agency or institution that is included under this chapter and that is subject to the rules and regulations of the state personnel system shall constitute good cause for dismissal of such person

from employment.

(3) Beginning July 1, 1999, every male between the ages of eighteen (18) and twenty-six (26) who is required to register under the federal Military Selective Service Act, 50 USCS App. 453, and who is an employee of the state shall not be promoted to any higher position of employment with the state until he submits to the person, commission, board or agency by which he is employed satisfactory documentation of his compliance with the draft registration requirements of the Military Selective Service Act. The documentation shall include a signed affirmation under penalty of perjury that the male employee has complied with the requirements of the federal selective service act.

CREDIT(S)

Laws 1980, Ch. 303, § 9(1); Laws 1994, Ch. 523, § 2, eff. July 1, 1994; Laws 1999, Ch. 411, § 2, eff. July 1, 1999.

Miss. Code Ann. § 25-9-127 (West 2004) [**Appendix, Exhibit G.**]²

Similarly, the Lexis Publishing version of this statute reveals that it was not formally amended by HB 1279 in 2004. However, Lexis does include an “**Editor’s Note**” which references Section 13. The Lexis version provides:

MISSISSIPPI CODE of 1972 ANNOTATED
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*** ARCHIVE DATA ***

*** CURRENT THROUGH THE 2004 REGULAR SESSION ***

*** AND 1ST, 2ND AND 3RD EXTRAORDINARY SESSIONS ***

*** STATE COURT ANNOTATIONS CURRENT THROUGH May 6, 2005 ***

TITLE 25. PUBLIC OFFICERS AND EMPLOYEES; PUBLIC RECORDS
CHAPTER 9. STATEWIDE PERSONNEL SYSTEM
PERSONNEL ADMINISTRATION SYSTEM

Miss. Code Ann. § 25-9-127 (2005)

²A copy of the 2004 “official” version of Miss. Code Ann. § 25-9-127 (2004) as published by Lexis is attached in the Appendix as **Exhibit “H.”**]

§ 25-9-127. Prerequisites to dismissal or action adversely affecting compensation or employment status; exceptions; operating state vehicle without license good cause grounds for dismissal; male state employees required to register with selective service

(1) No employee of any department, agency or institution who is included under this chapter or hereafter included under its authority, and who is subject to the rules and regulations prescribed by the state personnel system may be dismissed or otherwise adversely affected as to compensation or employment status except for inefficiency or other good cause, and after written notice and hearing within the department, agency or institution as shall be specified in the rules and regulations of the State Personnel Board complying with due process of law; and any employee who has by written notice of dismissal or action adversely affecting his compensation or employment status shall, on hearing and on any appeal of any decision made in such action, be required to furnish evidence that the reasons stated in the notice of dismissal or action adversely affecting his compensation or employment status are not true or are not sufficient grounds for the action taken; provided, however, that this provision shall not apply (a) to persons separated from any department, agency or institution due to curtailment of funds or reduction in staff when such separation is in accordance with rules and regulations of the state personnel system; (b) during the probationary period of state service of twelve (12) months; and (c) to an executive officer of any state agency who serves at the will and pleasure of the Governor, board, commission or other appointing authority.

(2) The operation of a state-owned motor vehicle without a valid Mississippi driver's license by an employee of any department, agency or institution that is included under this chapter and that is subject to the rules and regulations of the state personnel system shall constitute good cause for dismissal of such person from employment.

(3) Beginning July 1, 1999, every male between the ages of eighteen (18) and twenty-six (26) who is required to register under the federal Military Selective Service Act, 50 USCS App. 453, and who is an employee of the state shall not be promoted to any higher position of employment with the state until he submits to the person, commission, board or agency by which he is employed satisfactory documentation of his compliance with the draft registration requirements of the Military Selective Service Act. The documentation shall include a signed affirmation under penalty of perjury that the male employee has complied with the requirements of the federal selective service act.

HISTORY: SOURCES: Laws, 1980, ch. 303, § 9(1); Laws, 1994, ch. 523, § 2; Laws, 1999, ch. 411, § 2, eff from and after July 1, 1999.

NOTES:

EDITOR'S NOTE. --Laws, 2004, ch. 595, § 13 provides:

"SECTION 13. (1) For the period beginning upon the effective date of this section and through June 30, 2005, the personnel actions of the Mississippi Department of Corrections regarding employees at the central offices of the department, the State Penitentiary at Parchman and the Central Correctional Facility in Rankin County shall be exempt from State Personnel Board procedures. However, all new employees of the Department of Corrections at those locations shall meet the criteria of the State Personnel Board that presently exists for employment. Whenever an employee at any of those locations is dismissed or involuntarily terminated under the authority of this section during that period of time, that employee's position shall be eliminated.

"(2) The Department of Corrections shall consult with the Office of the Attorney General before taking personnel actions permitted by this section to review those actions for compliance with applicable state and federal law."

Miss. Code Ann. § 25-9-127 (Lexis Archives 2004). The versions of the Mississippi Code Annotated published by Westlaw and Lexis clearly indicate that Miss. Code Ann. 25-9-127 was not formally amended by Section 13 of House Bill 1279 in 2004.

B. Impermissible racial discrimination resulted from the mass firings of MDOC employees in 2004 under the authority of Section 13 of HB 1279.

A joint news release dated August 30, 2004 was issued by Governor Barbour and MDOC Commissioner Epps which explained some of the results of "Operation Streamline" which implemented the provisions of Section 13 of HB 1279. This included the mass firings of 164 MDOC employees. However, the employees targeted for firing only worked at the MDOC Central Office, at Parchman or at the Central Mississippi Correctional Facility, and not at other MDOC facilities or divisions. [See **Exhibit D**, Appendix (chart of locations of majority black MDOC personnel).] This press release provided in part:

Governor Haley Barbour along with Mississippi Department of Corrections (MDOC) Commissioner Chris Epps today announced cost savings of over \$11 million in the agency's effort to streamline day-to-day operations. Cost containment measures identified by the MDOC include **reduction in staff**,

elimination of positions and reorganization. "The Department has worked hard to find cost savings which are a part of our **'Operation: Streamline' efficiency plan** that will aid in eliminating Mississippi's now \$411 million budget shortfall," said Governor Barbour. **"I appreciate the Legislature's moving the MDOC out from underneath the Personnel Board so we could have the authority to make that agency more efficient. This proves that, working together, we can dig Mississippi out of this budget hole."**

MDOC reports an 11.8% decrease in personnel during the first eight months of the calendar year, lowering the agency's annual salary cost by \$11.6 million resulting in a 9.4% decrease in annual salary cost. Annual staff salaries were \$123 million in January 2004 compared to August 2004 annual salaries of \$112 million (includes state employee insurance hikes).

"Operation Streamline and House Bill 1279 allowed us to move the agency forward by focusing in on those employees who were abusing the system," said Commissioner Chris Epps. **"By terminating employees who were not coming to work, a significant savings was produced - not just in salaries, but in overtime costs as well."**

The agency has **ELIMINATED 164 POSITIONS** during June, July and August resulting in an annual cost savings of \$5.6 million for the state. These personnel actions were carried out under the authority of Section 13, House Bill 1279 which exempts employees at the central offices of MDOC, the State Penitentiary at Parchman and the Central Correctional Facility in Rankin County from State Personnel Board procedures for one year. The Bill went into effect on May 27, 2004.

"These terminations in no way affect the safety at our correctional facilities. **Many of the terminated employees were not coming to work consistently** which means they were not providing protection in the first place," said Epps. "It was time for the Department of Corrections to address our staffing situation, and I am thankful to finally have the opportunity to streamline that inefficiency."

[Appendix, **Exhibit C**, (emphasis added); also available on the MDOC web site at the following address: <http://www.mdcc.state.ms.us/PressReleases/2004NewsReleases/Cut%20Budget.htm>].

What Commissioner Epps and Governor Barbour failed to explain in their press release was that **by its own terms**, Section 13 of HB 1279 did not move all MDOC employees "out from underneath the Personnel Board." Rather, Section 13 only purported to exempt the employees at three MDOC locations. In addition, the press release failed to explain that the

mass firings by MDOC of employees at these three locations targeted MDOC employees who were predominantly **African American**.

Section 13 specifically provided that not all MDOC employees would be affected, but only those employed at “**the central offices of the department, the State Penitentiary at Parchman, and the Central Correctional Facility in Rankin County.**” 2004 Miss. ALS 595, Section 13; 2004 Miss. Laws 595, Section 13; 2004 Miss. H.B. 1279, Section 13 (emphasis added). There are currently 1,239 employees at the Mississippi State Penitentiary at Parchman, 604 employees at Central Mississippi Correctional Facility, and 515 Employees at South Mississippi Correctional Facility.³

There has never been any explanation offered by anyone as to why the other employees of MDOC were not included in Section 13. In addition, there has never been any explanation as to why these 164 employees were targeted for termination, especially in light of the total number of MDOC employees. Certainly Commissioner Epps’ assertion that these employees “**were not coming to work**” did not apply to Mr. Hemba. In view of his exemplary work record, it appears that the reason Mr. Hemba was terminated was in retaliation for his past conflicts with his supervisors at MDOC.

MDOC employs hundreds of people, including personnel at three State Prison sites: (1) Mississippi State Penitentiary at Parchman; (2) Central Mississippi Correctional Facility in Rankin County, and (3) South Mississippi Correctional Institution in Greene County. Of these three prisons, only South Mississippi has a majority of white employees. However, South

³See information on the MDOC web site:
http://www.mdod.state.ms.us/division_of_institutions%20State%20Prisons.htm

Mississippi was not included in Section 13 of HB 1279, and none of its employees were fired in 2004.

In addition to the state prisons, MDOC operates 11 Regional Facilities, and 17 Community Work Centers which house inmates. MDOC also has employees who work in Administration, Probation and Parole. A majority of the employees in these divisions of MDOC are white. These other divisions of MDOC were not encompassed in Section 13 of HB 1279, and no MDOC employees in these sections were unilaterally fired in 2004.

A summary of the race of the persons known to Plaintiff who were fired by MDOC in 2004 is attached as **Exhibit E** in the Appendix. Out of 137 employees fired under the authority of HB 1279 whose race is known to Plaintiff, there were **122 black employees and only 15 white employees.**

These facts point to **one inescapable conclusion:** The manner in which MDOC exercised the authority it assumed under Section 13 of HB 1279 resulted in racial discrimination against its minority employees, either intentionally, or by the disparate impact that resulted on black employees because of MDOC's employment decisions. This violated Miss. Code Ann. § 25-9-149, which provides:

§ 25-9-149. Prohibition of discriminatory practices

It is the intent of the legislature that no person seeking employment in state service, as defined in section 25-9-107, Mississippi Code of 1972, or employed in state service, as defined in section 25-9-107, Mississippi Code of 1972, shall be discriminated against on the basis of race, color, religion, sex, national origin, age or handicap.

Miss. Code Ann. § 25-9-149 (West 2004) (emphasis added). Certainly, MDOC cannot contend that Section 13 cancelled this protection under Mississippi law.

Racial discrimination that occurs either intentionally or as a result of a disparate impact on minority employees because of the manner in which a particular policy is interpreted or applied **should not be tolerated by this Court.** Therefore, Plaintiff respectfully submits that this case should be remanded to the Chancery court, so that these facts can be properly developed and presented for consideration.

C. Plaintiff should be allowed to conduct discovery before the merits of this case are addressed.

The case now under consideration centers on the unconstitutionality of Section 13 of House Bill 1279 which was enacted during the 2004 Legislative Session. This bill included numerous provisions that were allegedly designed to “reduce state budget costs and increase state revenues.” *2004 Miss. ALS 595; 2004 Miss. Laws 595; 2004 Miss. H.B. 1279.*

The Supreme Court has held that the Mississippi Constitution “... is a document presumed capable of ordering human affairs decades beyond the time of its ratification under circumstances beyond the prescience of the draftsmen.” *Dye v. State ex rel. Hale*, 507 So.2d 332, 342 (Miss.1987); *Frazier v. State of Mississippi*, 504 So.2d 675, 694 (Miss.1987); *Alexander v. State ex rel. Allain*, 441 So.2d 1329, 1333 (Miss.1983).

In *Van Slyke v. Board of Trustees of State Institutions of Higher Learning*, 613 So.2d 872, 876 (Miss. 1993), the Court explained that when considering the constitutionality of a statute, “... the statute should be so construed as to render it constitutional, if possible, and a statute will not be declared invalid unless it is clearly apparent that it conflicts with the organic law after resolving all doubts in favor of its validity.” *Id* at 867 (citing *State ex rel. Jordan, District Attorney v. Gilmer Grocery Co.*, 156 Miss. 99, 125 So. 710, 714 (1930)). See also,

Lovorn v. Hathorn, 365 So.2d 947, 949-950 (Miss.1979); Board of Education v. Educational Finance Commission, 243 Miss. 782, 138 So.2d 912, 925-926 (1962)).

In *Van Slyke* the Court also explained that Mississippi had approved the general standard that: “[t]he judiciary will interfere with acts of the legislative body only where they are beyond the bounds prescribed by the constitution, and a legislative usurpation of power should be clear, palpable, or oppressive, and the claimed infringement of the constitution should be real to justify interposition.” *Id.*

Plaintiff/Appellant respectfully submits that based on the uncontested facts, this standard has arguably been satisfied in the case at bar, and this case should be remanded to the trial court so these facts may be properly developed and presented.

D. Section 13 of House Bill 1279 was improperly applied to Plaintiff/Appellant because the Attorney General was not consulted concerning his termination.

As an alternative ground for his claims, Plaintiff respectfully submits that if this Court concludes that Section 13 of HB 1279 is not constitutionally deficient, then the actions of MDOC in terminating Mr. Hemba’s employment arguably violated the requirements of Section 13 itself, since the act required MDOC to consult with the Office of the Attorney General before firing Mr. Hemba.

There has been no evidence offered in this case that MDOC followed this directive, or reviewed this action “... **for compliance with applicable state and federal law.**” This was a specific requirement under Section 13, and since there is no evidence in the record in this case that this was done, there remains the a possibility that Plaintiff could prove facts that would show that his termination was improper even under the terms specified by Section 13, HB 1279.

Furthermore, the language of Section 13 still recognizes that Plaintiff retained certain rights in his employment under Mississippi law, and this would at a minimum prevent him from being fired in retaliation for the prior lawsuit that he had brought against MDOC, which Plaintiff won. Finally, Plaintiff contends that Section 13 can be read, interpreted and applied in conjunction with Miss.Code Ann.. §§ 25-9-107, 127, 129 & 131, so that Plaintiff still retained his property interest in the expectation of his continued employment unless there was some cause that would justify termination.

Plaintiff asserts that his rights were not properly and adequately protected by MDOC, and as a tenured state employee, Mr. Hemba was entitled rely on the standards that had been established under the Mississippi Statutes, not by the “procedures” of the State Personnel Board to establish and verify that he was being treated as the law required.

Plaintiff respectfully requests that he be freed from his subjugation to the secret decision-making by MDOC officials that resulted in the termination of his employment.

That can only occur if this Court remands this case to the trial court for further proceedings.

Without the relief requested in the Complaint, Plaintiff will be irreparably harmed. Without the relief requested, MDOC’s actions which were undertaken in the dark, in secret, and without any objective standards or sense of fairness, will be ratified and condoned. Such conduct by a State agency should not be countenanced by this Court.

E. State employees are generally protected by Miss. Code Ann. §§ 25-9-127, 129 and 131, so that employees may only be discharged for “good cause” after notice and a formal hearing.

In 1980, the Mississippi Legislature developed a comprehensive policy to protect state employees from discharge without good cause. These protections are codified in Title 25 of the

Mississippi Code which is commonly known as the Statewide Personnel System. The legislative purpose of these statutes has been clearly expressed:

Personnel Administration System
§ 25-9-101. Legislative purposes

It is the purpose of this chapter to establish in the State of Mississippi a system of personnel administration based on sound methods of personnel administration governing the establishment of employment positions, classification of positions and the employment conduct, movement and separation of state employees; to **build a career service in government which will attract, select and retain the best persons, with incentives in the form of equal opportunities for initial appointment and promotions in the state service; and to establish a system of personnel management that will ensure the effective and efficient use of employees in the state service.**

Miss. Code Ann. § 25-9-101 (West 2004) (emphasis added).

The State Personnel System was intentionally structured to retain employees based on their performance, assure fair treatment of employees, and to provide a mechanism for abolishing employment positions within state agencies.

§ 25-9-103. State personnel system; establishment

The State Personnel Board herein established shall administer a state personnel system in accordance with the following principles:

- (a) To recruit, select and advance employees on the basis of their relative ability, knowledge and skills, including open consideration of qualified applicants for initial appointment;
- (b) To provide equitable and adequate compensation;
- (c) To train employees, as needed, to assure high quality performance;
- (d) To retain employees on the basis of the adequacy of their performance, to correct inadequate performance, and to separate employees whose inadequate performance cannot be corrected;**
- (e) To assure fair treatment of applicants and employees in all aspects of personnel administration without regard to political affiliation, race, national origin, sex, religious creed, age or disability;**
- (f) To assure that employees are free from coercion for partisan or political purposes and to prohibit employees from using their official authority for the purpose of interfering with or affecting the result of an election or a**

nomination for office;

(g) To provide authority for the establishment and abolishment of employment positions within the departments, agencies and institutions covered under the provisions of this chapter.

Miss. Code Ann. § 25-9-103 (West 2004) (emphasis added).

In 1983, Miss. Code Ann. § 25-9-131 was amended to provide in pertinent part:

(1) ...The employee appeals board may modify the action of the department, agency or institution but may not increase the severity of such action on the employee. Such appointing authority shall promptly comply with the order issued as a result of the appeal to the employee appeals board.

(2) Any employee aggrieved by a final decision of the employee appeals board shall be entitled to judicial review thereof in the manner provided by law.

It is the intent of Sections 25-9-127 and 25-9-131 to supercede and replace any existing statutory procedure conflicting in whole or in part which provides for the discharge of state employees in any state agency.

Miss. Code Ann. § 25-9-131 (1972, as amended) (emphasis added).

Thus, under the State Personnel System, employees of the Mississippi Department of Corrections were protected by Miss. Code Ann. §§ 25-9-127 and 25-9-131 (West 2004). *See, e.g., King v. Mississippi Dep't of Corrections*, 721 So. 2d 1126, 1128 (Miss. App. 1998) (employee was entitled to due process hearing upon termination “for cause”).

In *Johnson v. Mississippi Dep't of Corrections*, 682 So. 2d 367 (Miss. 1996), the court explained that an MDOC employee whose employment was terminated “for cause” was entitled to appeal her termination to the State Employees Appeals Board, “... in accordance with the provisions of Miss. Code Ann. § 25-9-131 (1972) and the Rules of the State Personnel Board (SPB).” *Id.* at 368-369. The Court also explained that under the State Personnel Board Rules and Miss. Code Ann. § 25-9-127, MDOC state employees may only be discharged “for

negligence, inefficiency or other good cause.” Id. at 370.

As a result of this statutory enactments, MDOC employees such as Gary Hemba acquired valuable property and due process rights in their status as state employees. Plaintiff has previously availed himself of those rights. *Hemba v. Miss. Dep’t of Corr.*, 848 So. 2d 909 (Miss. App. 2003). In that case, Plaintiff had been sanctioned by his supervisors for certain allegedly wrongful conduct in his job with MDOC. However, on appeal, that adverse employment decision was found to be unsupported, and the decision was reversed and Plaintiff was reinstated. After that decision was rendered on June 24, 2003, Plaintiff was subsequently terminated from his employment with MDOC on or about June 21, 2004. These facts clearly raise a factual issue about whether the termination of his employment was politically motivated and/or retaliatory.

F. State Employees have a vested property interest in continued employment absent good cause for termination.

Miss. Code Ann. § 25-9-107 defines state service employees as “all employees of state departments, agencies and institutions as defined herein, except those officers and employees excluded by this chapter.” Miss. Code Ann. § 25-9-107(b) (West 2004). Plaintiff/Appellant contends that he was a state service employee with property interests in his state employment which could not be taken away without compliance with the procedures enumerated in Miss. Code Ann. § 25-9-127 (West 2004).

As a state employee, Mr. Hemba had a vested property interest in his state service job. *Lollar v. Baker*, 196 F.3d 603, 607-08 (5th Cir. Miss. 1999). Specifically, Miss. Code Ann. § 25-9-127 (West 2004) guaranteed that there would be no loss in “compensation or employment status” except for “inefficiency or other good cause.” Id. See *Montgomery v. Mississippi*, 498

F.Supp.2d 892, 911 (S.D. Miss. 2007).

As a general rule, public employees who have a property right in continued employment cannot be deprived of that property right by the state without the protections afforded by the Due Process Clause. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-39, 105 S.Ct. 1487 (1985). The essential requirements of due process are notice and an opportunity to respond, i.e., the opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. *See Arnett v. Kennedy*, 416 U.S. 134, 170-171, 94 S.Ct. 1633, 1652-1653 (1974); *Bishop v. Wood*, 426 U.S. 341, 344, 96 S.Ct. 2074, 2077 (1976) (stating: "a property interest in employment can, of course, be created by ordinance or by an implied contract ... in either case, however, the sufficiency of the claim of entitlement must be decided by reference to state law").

In the case at bar, Mr. Hemba was terminated without cause, and he was denied any due process hearing concerning his termination, in violation of Miss. Code Ann. §§ 25-9-107, 127, 129 & 131 (West 2004). Therefore, this case should be remanded so that he can develop the facts relating to his claim.

G. Plaintiff/Appellant has stated a viable claim that is of substantial public importance, so that he should be entitled to conduct discovery and to proceed with the suit.

Taking the well pleaded facts of the Amended Complaint as true, Plaintiff/Appellant has stated a claim on which he is entitled to relief. Mr. Hemba has demonstrated the existence of a duty, the past and on-going breach of that duty, the refusal by MDOC to correct that breach of

duty, the harm he has suffered proximately and directly as a result of MDOC's wrongful actions, and his request for proper and appropriate relief. Given the facts properly before the Chancery Court, i.e., the matters contained in the Complaint and the statutory law of Mississippi, a justiciable cause of action has been stated, and it is possible that Plaintiff can prevail on his claims. Therefore, this case should be remanded to the trial court for further proceedings.

Although Plaintiff respectfully submits that far more has been established in the case at bar, the test for surviving a Motion to Dismiss, is whether the Plaintiff can establish that there was some possibility, no matter how small, that he would be able to prove some set of facts in support of his claim. *See, e.g., Lowe v. Lowndes County Building Inspection Department*, 760 So.2d 711 (Miss. 2000); *Butler v. Board of Supervisors*, 659 So.2d 578, 581 (Miss.1995); *Overstreet v. Merlos*, 570 So.2d 1196, 1197 (Miss. 1990). *See generally, Sennett v. U. S. F. & G. Co.*, 757 So.2d 206, 209 (Miss. 2000). Plaintiff respectfully submits that he has well exceeded this low threshold in this case.

H. Standards for repeal of a statute by implication.

The general standard for statutory construction is that reviewing courts will support the interpretation and application of a statute "... which would purge the legislative purpose of any invalidity, absurdity or **unjust inequality**." *Quitman County v. Turner*, 196 Miss. 746, 18 So.2d 122, 125 (Miss.1944) (citing *Robertson v. Texas Oil Company*, 141 Miss. 356, 106 So. 449).

The Mississippi Supreme Court has, on numerous occasions, upheld the **strong presumption against the repeal of legislative enactments by implication.** *Lamar County School Board of Lamar County v. Saul*, 359 So.2d 350 (Miss. 1978); *Brown v. McCoy*, 362 So.2d 186 (Miss. 1978); *Jackson Municipal Airport Authority v. Shivers*, 206 So.2d 190 (Miss.

1968); *Roberts v. Republican Party State Executive Committee*, 465 So.2d 1050 (Miss. 1985).

However, with regard to the principles of statutory construction, it is also presumed that all acts of the Legislature are presumed to be valid, and new laws should be interpreted, if possible, so as to give effect both to their terms and to the terms of previously existing statutes. *Arant v.*

Hubbard, 824 So.2d 611 (Miss. 2002).

Repeal by implication is “seldom permitted except on grounds of repugnancy, and never when the former act can stand together with the new act,” *Lamar County, supra*, 359 So.2d at 353, and “is limited to situations where later statutes are plainly, unavoidably, and irreconcilably repugnant to an earlier enactment.” *Brown, supra*, 362 So.2d at 189. **Statutes on the same subject should, if possible, be construed in harmony with each other to give effect to each.** *Lamar County, supra*, 359 So.2d at 353. If both acts can by any reasonable construction be construed together, both will be sustained. Jackson Municipal Airport Authority, *supra*, 206 So.2d at 193. Only where there is an irreconcilable conflict between two statutes does the latter repeal for the former to the extent of the conflict. *Id.* See also MS AG Opinion., Palmer (January 5, 1993).

Section 13 of House Bill 1279 does not, by its express terms, amend, modify or repeal any section of the Mississippi Code, and specifically it does not address Miss. Code Ann. §§ 25-9-127, 129 and 131, which provide **STATUTORY PROTECTION, NOT PERSONNEL BOARD “PROCEDURES,”** for job security of state employees, so that state employees could only be discharged for “good cause” after notice and a formal hearing. Section 13 waived the protection afforded by the procedures that the Personnel Board had developed, but not the basic protections afforded by the statutes.

Plaintiff respectfully submits that the correct analysis of Section 13, HB 1279 must focus on the question of whether it can be interpreted and given reasonable force and effect without resorting to the “repeal by implication analysis” in regard to the existing statutes. Plaintiff respectfully submits that they can, because Section 13 fails to mention any statute, and only references State Personnel Board **Procedures**. In addition Section 13 recognizes that any terminations of MDOC employees at the three agency locations that were targeted **must still comply with Mississippi law**.

The language Section 13, HB 1279 is not repugnant to the general application and continued enforcement of Miss. Code Ann. §§ 25-9-127, 129 and 131 in Plaintiff’s case. Therefore, it is not necessary or appropriate to conclude that Section 13 amended or destroyed by reference or implication the statutory rights and protections that Plaintiff had under Mississippi law.

I. The cases relied on by the trial court in granting the Motion to Dismiss are distinguishable from the facts presented in the case at bar.

The lower court relied on *City of Belmont v. Mississippi State Tax Commission*, 860 So.2d 289 (Miss 2003) for the proposition that Section 61 of the Mississippi Constitution “does not prohibit the legislature from amending a statute by implication when the amending statute is complete in itself.” [R. at 37.] While that is a correct statement of the law as expressed under the facts presented in *Belmont*, the trial court in the case at bar then made what Plaintiff respectfully submits is an erroneous factual determination that: “Section 13 is an amendment by implication which is complete within itself.” [R. 37.]

In *Belmont*, certain cities brought an action against the Mississippi State Tax

Commission seeking declaratory and injunctive relief, so as to force MSTC to comply with state law concerning the distribution of state sales tax revenues to municipalities. *Belmont*, 860 So.2d at 292. Subsequent to the filing of the suit, the Legislature passed a bill that endorsed the method previously employed by the MSTC for calculating sales tax payments due to cities. *Id.* at 293. After the circuit court dismissed the Complaint pursuant to Rule 12(b)(6), Miss. R. Civ. P., the cities appealed. The Supreme Court affirmed the dismissal. *Belmont*, 860 So.2d at 302.

Significantly, however, the Court held that the legislation in question did not substantively amend the statute in question, and therefore there was no constitutional infirmity under Section 61. *Belmont*, 860 So.2d 289, ¶ 39 & ¶ 42 (Miss. 2003). That is clearly a different scenario from that presented in the case at bar, where Section 13 of HB 1279 as interpreted and applied by MDOC, constituted a substantive amendment and cancellation of the statutory protections afforded to state employees that prevented the termination of their employment without just cause, notice and a due process hearing.

Plaintiff respectfully submits that the interpretation of Section 13 of HB 1279 and the scope of its application is a matter addressed to the discretion and responsibilities of the Courts of this State, and MDOC's interpretation and application of Section 13 carries no weight or presumption as to its correctness.

In the case at bar, Plaintiff respectfully submits that Section 13 only applies to certain locations of MDOC operations to identify employees that were to be exempted from "State Personnel Board Procedures." This parsing of MDOC employees into a "protected" group and an "unprotected" group presents serious due process and equal protection problems. The Personnel Board protections were not sought to be cancelled for all MDOC employees, but only

for a certain group.

Furthermore, the term “procedures” as it is used in Section 13 is clearly not the same as the “statutes” which created the substantive property rights that Plaintiff held in the expectation of his continued employment by MDOC. These statutory rights could not be amended or rescinded by Section 13, because the statute was not “complete within itself.”

In fact, Section 13 purported to continue all the protections afforded by old rules under the State Personnel Statutes to “new employees,” while stripping the existing MDOC employees at three facilities of their protections so that secret decisions could be made that selectively chose who would be fired and who would be retained. This left the MDOC employment structure wide to favoritism for some who had the right political or friendship connections, and retaliatory firing for others who were not so connected.. It is exactly that sort of biased employment decision making that our state personnel laws are designed to defeat. Surely our public agencies should not function in this manner. Such an interpretation and application of Section 13 violated Plaintiff’s constitutional rights to due process and equal protection under the law.

V. CONCLUSION

Based on the facts and legal arguments presented above, Plaintiff/Appellant respectfully submits that Section 13 of House Bill 1279 (2004) is constitutionally deficient, and therefore, this section of the law should be invalidated.. In the alternative, Plaintiff asserts that the language of Section 13, HB 1279 is not repugnant to the general application of Miss. Code Ann. §§ 25-9-127, 129 and 131, and other statutes that provided Plaintiff with property interests and due process rights in his expectation of continued employment with MDOC, absent some justification as to why he should be terminated.

In addition, Plaintiff asserts that even if Section 13 is deemed valid, there is a genuine issue of material fact as to whether the statute was properly applied in his case, since there has been no proof that the Attorney General was consulted to determine that the requirements of Mississippi law were followed, as Section 13 requires. This provision clearly indicates that there are still in force certain aspects of Mississippi law that protected Plaintiff's employment even after Section 13 was enacted.


Finally, Plaintiff respectfully submits that the method in which MDOC applied Section 13 resulted in a racially discriminatory employment practice, as it improperly targeted MDOC employees in groups that were predominantly African American, and had a disparate impact on those employees because of their race.

In conclusion, Plaintiff respectfully submits that if he is allowed to develop the evidence in this case, he believes that it will show that the employment "positions" of the MDOC employees who were fired in 2004 were not "eliminated" as Section 13 required. To the contrary, Plaintiff believes that new employees were hired to fill the positions of those who were fired. In addition, many of those who were fired have now been rehired by MDOC, usually at lower pay scales and with a loss of seniority, because the positions were touted as being duplicative or unnecessary were in fact essential. Plaintiff requests the opportunity to develop evidence on this issues.

Accordingly, Plaintiff respectfully requests that this Court reverse the chancery court's decision and remand this case to the lower court for further proceedings on Plaintiff's claim of wrongful termination.

Respectfully submitted, this the 20th day of February, 2008.

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CERTIFICATE OF SERVICE

I, David L. Calder, attorney for Plaintiff/Appellant, GARY HEMBA, certify that I have this day served a true and correct copy of Plaintiff's Initial Brief on Appeal by United States mail, postage prepaid, or comparable overnight delivery service on the following persons at these addresses:

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This the 20th day of February, 2008.


David L. Calder, MSB 

SUPPLEMENTAL CERTIFICATE OF SERVICE

The undersigned hereby certifies he has served via United States Mail, first class postage prepaid, copies of **Plaintiff/Appellant's Initial Brief on Appeal, Record Excerpts, and Corrected Appendix**, to the following persons:

Trial Court Judge

Hon. James Kent McDaniel
P.O. Box 1599
Brandon, MS 39043

The undersigned hereby certifies he has served via United States Mail, first class postage prepaid, copies of **Plaintiff/Appellant's Corrected Exhibits "D" and "E" of the Appendix**, to the following persons:

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Respectfully submitted, this the 28th day of February, 2008.

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