2009-CA-00825 - -T

BRIEF OF APPELLANT

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 this Court may evaluate possible disqualification or refusal:

1. THE PARTIES LISTED IN THE TITLE OF THE CASE;
2. E. Michael Marks, Trial and Appellate attorney for Appellant;
3. Julie Ann Epps, counsel for Appellant on appeal;
4. Gary E. Friedman and W. Brett Harvey, Phelps Dunbar LLP, Attorneys for Appellees at trial and on appeal;.
5. Tori L. Winfield, Attorney for Appellees in the trial court;
6. Honorable Samac S. Richardson, Circuit Court Judge, Madison County.

This, the 26 day of October, 2009.

E. Michael Marks
COUNSEL FOR APPELLANT

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STATEMENT OF THE CASE

(i) Course of the Proceedings and Disposition in the Court Below:

Plaintiff-Appellant, Janice Elline Peeples, filed suit in the Circuit Court of the Madison County, Mississippi, against Robot Couple, Inc. and Frankie Deel and C.R. Redding, alleging negligence and gross negligence, breach of contract and tortuous breach of contract, negligent and intentional infliction of emotional distress regarding her employment and subsequent discharge from that employment by Robot Couple, Inc. R.I/1-11.

The Defendants answered and denied all wrong-doing. R.I/25-34. Defendants then moved for summary judgment. R.I/81-191. The Circuit Court subsequently granted the Defendants' motion for summary judgment as to all claims and dismissed Ms. Peeples's action with prejudice. R.II/208-212, RE ~~~

Ms. Peeples timely filed a notice of appeal to this Court. R.II/213-24, RE 8-9.

(ii) Statement of Facts:

Ms. Peeples was hired by Robot-Coupe in April of 2001 as an assistant to the company's credit manager. Her supervisor was defendant Frankie Deel. Defendant C.R. Redding is Robot-Coupe's Vice President of Finance. RE 10.

Ms. Peeples claimed that Deel and Redding subjected her to repeated bullying and harassment during her employment and that Robot-Coupe knew about and condoned their actions. R/I/5-6. In 2006, Ms. Peeples suffered a number of non-work related events which caused her to become depressed. Her depression was exacerbated by her treatment by the Defendants which had been on-going since about 2002. R.I/90.

Specifically, Defendants Deel and Redding spoke negatively and lied about Peeples to other employees, were hypercritical and interfered with her ability to do her work, harassed her sexually and otherwise—all in violation of numerous rules and regulations promulgated by Robot-Coupe enacted to protect employees from such bullying. R.I/90, 97-98, 110.

Robot-Coupe's manual states:

> This manual provides answers to most of the questions you may have about Robot-Coupe U.S.A., Inc.'s benefit programs, as well as the **company policies and procedures we abide by,** our responsibilities to you and your responsibilities to Robot-Coupe U.S.A., Inc. If anything is unclear, please discuss the matter with your manager. **You are responsible for reading and understanding this Employee Manual,**

Robot-Coupe also represented that its employees are also "expected to observe certain standard of behavior including: . . . generally accepted courteous behavior to clients, **co-workers** and the public. . . . [emphasis added]." R.I/149.

Robot-Coupe's manual also has a specific provision dealing with sexual harassment:

> 1.34 SEXUAL HARASSMENT
> Robot-Coupe U.S.A., Inc. will not tolerate the sexual harassment of any individual. Sexual harassment is unacceptable; it is grounds for disciplinary action, or possible discharge, and constitutes a violation of federal law. It is the responsibility of each employee to create an atmosphere free of harassment.

R.I/152.

Sexual harassment is defined by Robot-Coupe to include, among other things: includes, but is not limited to:

> Unwelcome sexual advances; requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . . **and [u]nreasonably interfering with work performance or creating an otherwise offensive working environment** [emphasis added].

R.II/152.

In addition Robot-Coupe states in the manual:

> This organization maintains **a strict policy prohibiting unlawful harassment, including sexual harassment.** (See Sexual Harassment policy in this handbook.) If at any time you feel that you have been treated unfairly or that some policy of the company is not being followed, you are encouraged to bring the problem to the company's attention [emphasis added].

R.II/153.

Robot-Coupe also established a complaint system for "harassment of **any** type [stating it] should be reported to a supervisor stating that "[t]he Company expressly

prohibits any form of retaliation against an employee for filing a sexual harassment complaint or for assisting in an investigation [emphasis added]." R.II/153.

The company also set up a system of what it describes as "'progressive Discipline'" in which corrective discipline may take several forms each progressively more forceful - ranging from verbal reprimands, to written warnings, to suspension, to final termination Some situations that are so serious which require immediate, stern measures, and thus make the application of progressive discipline clearly inappropriate." R.II/153.

The company states that it will investigate complaints and respond. R.II/154. Notwithstanding these several statements by the company that it will investigate complaints of bullying, abusive language and harassment, when Peeples complained to CEO Jay Williams in 2005, she was told she was imagining things and that if she couldn't take it, she could quit. R.II/6, 100.

Examples of behavior that may subject an employee to **immediate** discharge include: "[p]hysical, **mental or verbal abuse of any . . . employee**," "immoral or indecent conduct on the premises," not complying with company policies and procedures, and "[a]ctions on the job that endanger **individual safety** to such an extent that continued employment of that individual would be too great a risk to the health and well-being of **coworker**s and clients [emphasis added]. R.II/157-58.

If repeated, the following behaviors would cause an employee to be dismissed: "[v]iolation of company or departmental work rules, procedures or policies," and "[w]hile on the premises, engaging in or encouraging any of the following: horseplay, scuffling, wrestling, throwing things, fighting, or **attempting any injury to others,**

practical joking, unnecessary noise, shouting, using profanity, **threatening or abusive language to others**, acting in a disorderly manner, etc." R.II/158.

Despite complaints by Peeples, Deel, Redding and management ignored her complaints. R.I/5. Finally, the Defendants retaliated against her in direct contravention of company policies for making complaints about their behavior.

On December 12, 2006, Peeples checked into a psychiatric hospital for in-patient psychiatric treatment and requested a leave of absence from work. She notified the company by letter dated December 13, 2006. R.I/115. In January of 2007, Robot-Coupe received a letter dated January 10, 2007, from her physician stating that Peeples was unfit to return to work and would remain unfit until February 15, 2007. ~~~.

Robot-Coupe terminated Peeples effective January 10, 2007, because the company claimed she was in violation of the company's leave policy by being absent from work for too long even though the company expressly provided for extended disability leave of absence and Peeples had a letter from her doctor requesting such leave. RE 11. Robot-Couple's manual expressly provides that employees such as Peeples are entitled to: "Disability Leave of Absence; Paid Holidays; Sick Leave; and Personal Leave." R.I/140.

ARGUMENT

I. THE CHANCELLOR COMMITTED REVERSIBLE ERROR IN GRANTING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON ONE OF MORE OF HER CLAIMS AS SHOWN IN THE FOLLOWING ASSIGNMENTS OF ERROR.

A. *Standard of Review:*

The standard for summary judgment is set out in Rule 56 of the Mississippi Rules of Civil Procedure which provides that the judgment sought should be rendered if the

pleadings, depositions, answers to interrogatories and admissions in the file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. *Hudson v. Bank of Edwards*, 469 So.2d 1234, 1238 (Miss. 1985).

In determining whether the trial court was correctly granted summary judgment, this Court employs a *de novo* standard of review. *Owen v. Pringle,* 621 So.2d 668, 670 (Miss.1993). Summary judgment is proper if all evidentiary matters before the trial court, which includes admissions in the pleadings, answers to interrogatories, depositions, affidavits, and etc., when viewed in the light most favorable to the party against whom the motion has been made, reveals that there exists no genuine issue of material facts. *Newell v. Hinton,* 556 So.2d 1037, 1041 (Miss.1990). "A material fact is one which resolves any 'of the issues, properly raised by the parties.' "*Strantz ex rel. Minga v. Pinion,* 652 So.2d 738, 741 (Miss.1995); *Pontillo v. Warehouse Bar & Grill, L.L.C.*, 2009 WL 3260586, 2 (Miss.App. 2009).

Where the trial court's ruling is based on an error of law, this Court reviews the lower court's decision *de novo. Meeks v. State*, 781 So.2d 109 (Miss. 2001).

B. *The Merits:*

a. THE TRIAL COURT ERRED IN HOLDING THAT PEEPLES'S STATUS AS AN AT-WILL EMPLOYEE PRECLUDED HER FROM RECOVERING FOR BREACH OF CONTRACT AND TORTUOUS BREACH OF CONTRACT.

Peeples conceded in her deposition that she had signed a statement included in the Employee Handbook that she understood "that no contract of employment other than 'at will' has been expressed or implied and that no circumstances arising out of my employment will alter my 'at will' employment relationship unless expressed in writing .

. . ." R.I/121. Accordingly, the trial court concluded that Ms. Peeples was an "at will" employee who had no employment contract. That doctrine allows an employer to fire an at-will employee "may be terminated for a good reason, a wrong reason, or no reason . . . ." *DeCarlo v. Bonus Stores, Inc.*, 989 So.2d 351, 354 (Miss. 2008) [quoting *Kelly v. Miss. Valley Gas Co.*, 397 So.2d 874, 875 (Miss. 1981). The court dismissed Peeples's claims that Robot-Coupe had breached any employment contract or that Deel or Redding had tortuously interfered with any contract. RE 11-12.

1. Public Policy Exception:

The trial court erred in dismissing Ms. Peeples's complaint based on her status as an at-will employee. Mississippi's at-will doctrine is not absolute. First of all, the Mississippi Supreme Court in *McArn v. Allied Bruce-Terminix Co., Inc.*, 626 So.2d 603 (Miss. 1993) established a public policy exception allowing suits for wrongful termination where an employer fired an employee who refused to participate in an illegal act or who reported an illegal act. *DeCarlo, supra.* In *McArn*, the Court allowed the employee to sue for wrongful discharge where the employee alleged he had been fired because he had reported his supervisor for receiving money under false pretenses.

Although the Mississippi courts have not addressed the specific situation here, Peeples argued that her firing resulted because Robot-Coupe refused to take action against employees who bullied her and subjected her to sexual and other harassing behavior in violation of their own employment manual and public policy and state and federal laws prohibiting sexual harassment.

The *McArn* court did not limit the public policy exception to the factual situation confronted in *McArn.* Rather, the Mississippi Supreme Court intimated that there were

additional exceptions to the doctrine to be identified in the future that might apply. *Id.* at 607 ["We are of the opinion that there should be **at least** two [exceptions] . . . . "[emphasis added].

As one court has explained the rationale for public policy exceptions to the at-will doctrine:

> 'The term 'public policy' is inherently not subject to precise definition. In *Maryland Casualty Co. v. Fidelity & Casualty Co.*, 71 Cal.App. 492, at page 497, 236 P. 210 [at page] 212, the court stated: 'The question, what is public policy in a given case, is as broad as the question of what is fraud.'
>
> ***
>
> In 72 C.J.S. Policy, at page 212, it is stated that public policy 'is the principles under which freedom of contract or private dealing is restricted by law for the good of the community. Another statement, sometimes referred to as a definition, is that whatever contravenes good morals or any established interests of society is against public policy.'

Petermann v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 396 174 Cal.App.2d 184, 188-189, 344 P.2d 25, 27 (Cal.App.1959). Insofar as this case is concerned, Mississippi's public policy is expressed in numerous state and federal statutes prohibiting discriminating against people based on gender.

In short, Mississippi's public policy prohibits harassment and bullying of employees in the workplace where it is based at least in part on gender, as in this case. Ms. Peeples testified in her deposition that more than once Redding made sexually inappropriate remarks to her and other women employees and that she would catch him looking at her like a stalker. R.I/97-98, 110-12.

Moreover, Mississippi should adopt a public policy against workplace bullying. In this case, Ms. Peeples was subjected to repeated harassment in direct violation of company policy. The harassment was so severe that it resulted in physical and

psychological harm and was such that a reasonable person would have found the conduct of Deel, Redding and Robot-Coupe injurious and advanced no legitimate company goals. That a reasonable person would have found the conduct offensive cannot be in doubt. The company's own manual makes it against company policy and provides for immediate disciplinary action, including termination, against serious offenders.

Workplace bullying has serious consequences driving up the cost of doing business because it leads to increased accidents and absenteeism, lower morale and productivity, higher turnover and attendant training costs, litigation, workers compensation claims, and the loss of corporate image in the community. http://www.nytimes.com/2008/03/25/health/25well.html?_r=1&em&ex=1206676800&en=31b986ad49824972&ei=5087%0A and *http:// burlingtonbpw.org /BPWBullyingCampaignPowerPoint15min.pdf.*

The trial court erred, therefore, in granting summary judgment based on Ms. Peeples's status as an at-will employee.

2. *Implied Contract Exception:*

The court erred in granting summary judgment based on at-will doctrine for another reason. Mississippi has created a second exception to the employment at-will doctrine in *Bobbit v. The Orchard, Ltd.,* 603 So.2d 603, 607 (Miss. 1993), which Peeples argues is applicable to her case.

In *Bobbit,* the Court held that where an employer publishes an employee manual setting forth the procedures for disciplinary action or termination in the event of an employee rule's violation, then the employer must abide by those published procedures even if the employment relationship is at-will.

Subsequently, in *Byrd v. Imperial Palace of Mississippi*, 807 So.2d 433 (Miss. 2001), the Court held that an employer could exercise an at-will termination without following grievance procedures for terminated employees set forth in employee handbook, where the handbook contained a disclaimer expressly providing that the employment relationship between employee and employer was at-will and could be terminated at any time, for any reason, by either party and also stated that employer did not intend by promulgating handbook to waive its right to unilaterally terminate an at-will employee.

In the instant case, the handbook contains a disclaimer that "that no contract of employment other than 'at will' has been expressed or implied and that no circumstances arising out of my employment will alter my 'at will' employment relationship unless expressed in writing . . . ." R.I/121. The disclaimer in the instant case is a far cry from the unambiguous declaration found in *Byrd v. Imperial Palace* stating that the handbook created no rights. Moreover, the policies expressed in the handbook are written. A reasonable person would infer from the handbook that she had a right to be free from workplace harassment such as that engaged in by Deel and Redding. Moreover, she had a right to infer that the company would not only protect her from such harassment but would protect her from retaliation if she complained to management.

For example in *Aiello v. United Air Lines, Inc.*, 818 F.2d 1196 (5th Cir. 1987), a Texas case, the Fifth Circuit considered an employee handbook which contained a disclaimer that the employee handbook's regulations and policies "are not intended to be, and do not constitute, a contractual arrangement or agreement between the company and its employees of any kind, ... that all employment is 'at will.'" *Id.* at 1198.

As here, the same employee handbook, however, set up procedures for employee firings. *Id.* Accordingly, the Fifth Circuit held that the handbook created a contract which modified the at-will doctrine and that the disavowal of the detailed regulations as constituting a contract was not controlling. *Id.* at 2000.

In the instant case, not only does the employee handbook set up detailed rules on employee firings, the handbook also sets forth certain policies of Robot-Coupe as to vacation, sick leave and unpaid leave. Moreover, it specifically guarantees employees a safe workplace and freedom from harassment, sexual or otherwise, by other employees of the company. Finally, it guarantees that Robot-Coupe would protect its employees from retaliatory firing for filing complaints.

Insofar as Ms. Peeples was concerned, Robot-Coupe allowed 10 days of paid sick leave a year, as well as 10 days of paid vacation. R.II/161. In addition, the uncontradicted testimony of Ms. Peeples in her deposition was that Robot-Coupe also gave employees seven days of leave over the Christmas holidays because the factory was closed during that time. R.I/117. Moreover, the company provided that employees could apply for unpaid leave in the case of an extended illness. R.II/161.

On December 12, 2006, Ms. Peeples still had three days of vacation time for 2006. In addition, she was entitled to the seven days off given to the other employees for the Christmas holidays. In addition, she received an additional ten days of sick leave and an additional ten days of sick leave and another ten days of vacation in January of 2007. R.I/161. Thus, when she was terminated on January 10th, Ms. Peeples not only had an application for disability leave pending, she may not even have exceeded her allowable leave time as the company claimed.

In firing Ms. Peeples without notice while her application for extended leave was pending, Robot-Coupe violated the implied contractual obligations of its own employee handbook which required managers to consider requests for extended leave. Rather than considering Ms. Peeples's request, Redding fired her. A reasonable juror could find that that firing was designed to retaliate against Peeples for her complaints about Redding and Deel to the CEO of the company.

Moreover, in not taking action to ensure that Ms. Peeples had a safe workplace free from the sort of harassment Robot-Coupe had expressly promised to prohibit, Robot-Coupe and its agents, Frankie Deel and C.R. Redding, breached their obligations under the implied contract created by the handbook. In any event, it is well settled that "an employer may be held liable for intentional acts of its employees if [. . .] the act was committed within the scope of employment." *Thatcher v. Brennen,* 637 F.Supp. 6, 8 (S.D. Miss. 1996) citing *Horton v. Joes,* 44 So.2d 397 (Miss. 1950).

Specifically, the handbook promises to protect its employees from harassment, sexual or otherwise and establishes grievance proceedings to investigate and deal with violations of its policy. Robot-Coupe totally failed to comply with its promises to Ms. Peeples made in the employment manual. There is thus no principled rationale for distinguishing the implied contract created in the handbook in *Aeillo* from the one created in this case by the handbook.

This case presents a classic example of a genuine factual dispute where more than one reasonable inference can be drawn and summary judgment denied. *American Legion Ladiner Post No. 42, Inc. v. City of Ocean Springs,* 562 So.2d 103 (Miss. 1990). Jurors could reasonably conclude that Defendants' repeated violation of the employee

handbook's proscriptions against harassment over the course of a number of years amounted to more than mere "interpersonal disagreements." "Summary judgment is not a substitute for trial where disputed factual issues exist." *Carpenter v. Nobile,* 620 So.2d 961, 965 (Miss. 1993) citing *Smith v. H.C. Bailey Companies,* 477 So.2d 224 (Miss. 1985).

The trial court, therefore, erred as a matter of law in holding that the defendants were entitled to summary judgment because Ms. Peeples was an at-will employee, either because Mississippi's public policy exception covers her case and/or because the implied contractual exception applies.

b. THE TRIAL COURT ERRED IN FINDING THAT DEFENDANTS WERE ENTITLED TO SUMMARY JUDGMENT ON PEEPLES'S CLAIM OF TORTUOUS INTERFERENCE.

Even at-will employees may sue for tortuous interference with their employment agreements. *Levins v. Campbell,* 733 So.2d 753, 760 (Miss. 1999). In order to establish such a claim, a plaintiff must show:

(1) the acts were intentional and willful;

(2) they were calculated to cause damages to the plaintiff in her lawful business;

(3) they were done with the unlawful purpose of causing damage and loss without right or justifiable cause by the defendants; and

(4) actual loss occurred.

Id. at 761.

Here there can be no doubt that the acts of the Defendants were intentional and willful. The employee handbook specifically precluded harassment, sexual or otherwise, and provided that the company would protect one who complained against retaliatory

actions, including firing. Defendants could have had no lawful purpose and it seems clear that a jury could find that the conduct was done with the object of harming Peeples and causing her damage to her work. The constant interruptions and criticisms could have had no other effect. Finally, Peeples suffered damages as a direct result of the bullying of Deel and Redding and the failure of Robot-Coupe's CEO to enforce its own policies. She suffered financial damage in the loss of her job and her medical costs. She suffered damage to her reputation and her mental and physical health.

The trial court erred in granting summary judgment on her tortuous interference claim.

c. THE TRIAL COURT ERRED IN FINDING THAT THE DEFENDANTS WERE ENTITLED TO SUMMARY JUDGMENT ON THE GROUND THAT DEFENDANTS DID NOT OWE MS. PEEPLES A "DUTY AND OBLIGATION OF FOOD FAITH AND FAIR DEALING."

Because the trial court found that Ms. Peeples was an employee at-will, the trial court found that the Defendants were entitled to summary judgment because, according to the Court:

> under Mississippi law, 'at-will employment relationships are not governed by a covenant of good faith and fair dealing' *Young v. North Miss. Med. Ctr.*, 783 So.2d 661, 663-64 (Miss. 2001). Since Plaintiff was an at-will employee, the Defendants owed her no duty of good faith and fair dealing.

RE 12.

In the preceding assignment of error, however, Ms. Peeples has demonstrated that the employee handbook guaranteed not only a general covenant of good faith and fair dealing, but guaranteed certain specific rights as well. Specifically, Robot-Coupe guaranteed the right to a harassment free workplace and the right to be free from retaliatory firing.

Accordingly, the trial court erred in granting summary judgment because Ms. Peeples presented sufficient evidence to show that Defendants failed to deal in good faith or fairly with her.

d. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT ON MS. PEEPLES'S CLAIMS OF INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS.

In her deposition, Ms. Peeples testified to numerous incidents of harassing and bullying behavior by Ms. Deel, her immediate supervisor, and C.R. Redding, from 2002 until she was hospitalized for stress in December of 2006. In addition, she also testified that Mr. Redding "stalked" her and made numerous sexually inappropriate remarks to her and other female employees. R.I/90, 97-98, 101. All of these actions are expressly prohibited by company policy and are grounds for immediate termination from employment at Robot-Coupe. *See,* discussion in the Statement of Facts, *supra.*

In recognition of the seriousness of such behavior and its deleterious effect on workers, Robot-Coupe set up grievance procedures for employees to complain to their superiors when co-workers engaged in harassing behavior, sexual or otherwise. *Id.*

Significantly, Robot-Coupe specifically promised its employees that it would protect them from retaliation for calling such inappropriate behavior to the attention of management. *Id.*

In the instant case, Ms. Peeples complained to CEO Jay Williams about the behavior of Deel and Redding in 2005. R/I/100. Rather than investigate the truth of the allegations as required by the handbook, Mr. Williams, the CEO of the company, summarily dismissed her allegations and told her she was imagining things and if she couldn't take it, she could quit. R.I/100. There can be no doubt that Ms. Deel and Mr.

Redding were agents of Robot-Coupe and that Robot-Coupe is vicariously liable. *Horton v. Jones,* 44 So.2d 397 (Miss. 1950).

In short, it cannot be doubted that both Ms. Deel and Mr. Redding were aware that bullying and harassing other employees, sexually or otherwise, was strictly prohibited by company policy. Since one is presumed to intend the natural consequences of one's actions, a jury might well find that Defendants' actions were intended to inflict emotional distress on Ms. Peeples. *See e.g., Morris Newspaper Corporation v. Allen,* 932 So.2d 810 (Miss. App. 2006) [to recover mental anguish damages in breach of contract case, employee need prove that anguish was a foreseeable consequence of breach of implied covenants in employment contract].Therefore, a jury could conclude that the actions of Ms. Deel and Mr. Redding in continuing to bully and harass Ms. Peeples were intentionally done for no reason other than to inflict emotional distress upon her.

Furthermore, the failure of management to even investigate Ms. Peeples's complaints--in direct contravention of express company policy--was intentional and was done without regard to her emotional distress because of the continued harassment of her colleagues. *Id.* This is not a case, where the plaintiff suffered vague emotional symptoms. Ms. Peeples has shown that she suffered symptoms of stress and depression which were sufficient to require hospitalization and extensive treatment.

In *Gamble ex rel. Gamble v. Dollar General Corp.,* 852 So.2d 5, 11 (Miss. 2003), the Mississippi Supreme Court summarized the law concerning infliction of emotional distress:

> Where there is no physical injury, recovery for mental anguish can be appropriate under certain circumstances when the defendant's conduct evokes outrage or revulsion. [citation omitted]. Furthermore, expert testimony showing actual harm or proof of physical or mental injury is not

always required. Where there are claims involving only sleeplessness, mental anguish, and humiliation, compensatory damages can be awarded based "on the nature of the incident from which the damages flow." *Whitten v. Cox*, 799 So.2d 1, 10-11 (Miss.2000). In cases in which there is evidence of **willful, wanton, malicious, outrageous *or* intentional wrongs, and where mental or emotional stress is a foreseeable result of the conduct of the defendant, a court can assess damages for mental and emotional distress.** *Adams v. U.S. Homecrafters, Inc.* 744 So.2d 736, 743 (Miss.1999) (a claim of mental anguish based on simple negligence did not require evidence of physical manifestation). See also *American Bankers' Ins. Co. v. Wells*, 819 So.2d 1196, 1208-09 (Miss.2001); *Mississippi Valley Gas Co. v. Estate of Walker*, 725 So.2d 139, 148 (Miss.1998); *Means*, 680 So.2d at 806; Devers, 405 So.2d at 902; *Lyons v. Zale Jewelry Co.*, 246 Miss. 139, 149, 150 So.2d 154, 158 (1963). "If there is outrageous conduct, no injury is required for the recovery of infliction of emotional distress or mental anguish." Means, 680 So.2d at 806 (citing *Leaf River Prods. Inc. v. Ferguson*, 662 So.2d 648, 659 (Miss.1995)). The plaintiff does not have to present further proof of injury. The nature of the act itself, rather than the seriousness of the consequences, can justify an award for compensatory damages. *Devers*, 405 So.2d at 902. [emphasis added].

In this case, a jury could find that the conduct of one or more of the Defendants was unethical, violated company policy and was unnecessary to any legitimate business purpose. Moreover, it was unnecessarily cruel. In such cases, the Mississippi courts have approved the award of damages for infliction of emotional distress. *See, discussion in Gamble, supra at 11-12 for cases allowing awards. See also, Dean v. Ford Motor Co., supra.* The trial court, therefore, incorrectly granted Defendants' motion for summary judgment on Ms. Peeples' claims of intentional infliction of emotional distress.

e. THE TRIAL COURT ERRED IN HOLDING THAT MS. PEEPLES'S CLAIMS OF NEGLIGENCE, GROSS NEGLIGENCE AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS WERE BARRED BY MISSISSIPPI'S WORKERS' COMPENSATION ACT.

The trial court erroneously held that Ms. Peeples's claims of negligence, gross negligence and negligent infliction of emotional distress were barred by Mississippi's

Worker's Compensation Act. RE 11. The exclusivity provision of the Mississippi Workers' Compensation Act found at Miss. Code Ann. §71-3-9 preempts an employee from suing an employer for negligent acts. Mississippi's exclusivity statute, however, does not prohibit employee suits based on negligent acts. Rather it prohibits suits based on negligent "injuries." Specifically, the statute, as it relates to this case, states that

> [t]he liability of an employer to pay compensation shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next-of-kin, and anyone otherwise entitled to recover damages at common law or otherwise from such employer on account of such **injury** [emphasis added].

§71-3-9, Miss. Code Ann.

As it applies to this case, Miss. Code Ann. §71-3-3(b) defines an "injury" as follows:

> "Injury" means **accidental injury** or accidental death arising out of and in the course of employment without regard to fault which results from an untoward event or events, if contributed to or aggravated or accelerated by the employment in a significant manner. Untoward event includes events causing unexpected results [emphasis added].

In short then, the exclusivity provision excludes suits only where the injury was the result of an accident, rather than those which result from intentional acts. An accidental injury, as defined by the courts,

> is said to be that which happens without design or expectation. *Williams v. United States Mutual Acc. Ass'n*, 60 Hun 580, mem., 14 N.Y.S. 728, 730, opinion in full, reversed on other grounds 133 N.Y. 366, 31 N.E. 222.
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> In *Burkhard v. Travelers' Insurance Co.*, 102 Pa. 262, 268, 48 Am.Rep. 205, accident is said to be an event proceeding from an unknown cause, or happening without the design of the agent, where the injury was not designed nor the danger known. In *Moyer v. Union Boiler Mfg. Co.*, 151 Pa.Super. 477, 30 A.2d 165, 166, it is held that an accident within the Workmen's Compensation Act, 77 P.S. § 1 et seq., involves an undesigned occurrence.

2. Hon. Samac S. Richardson, Circuit Court Judge, PO Box 1662, Canton, Mississippi 39046.

This, the 28 day of October, 2009.

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