SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS of the STATE OF MISSISSIPPI
Cause # 2009-CA-01332

DRUCILLA McCOOL — PLAINTIFF/ APPELLANT

VS

COAHOMA OPPORTUNITIES INCORPORATE
MAYO WILSON, JIMMIE SELLERS, KATHY
MCDOUGAL — DEFENDANT /APPELLEES

****

ON APPEAL FROM THE CIRCUIT COURT OF COAHOMA COUNTY, MISSISSIPPI,
CIRCUIT COURT CASE # 14-CI-06-0032

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APPELLANT'S BRIEF
ORAL ARGUMENTS REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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 disqualifications or recusal.

1. Drucilla McCool, Appellant

2.Ruby White, Attorney for Appellant

3. Minnie Pearl Howard, Attorney for Appellant

4. Allison Vance, Attorney for Appellee

5. Paula Ardelean, Attorney for Appellee

6. Mayo Wilson, Appellee

7. Jimmie Sellers, Appellee

8. Kathy McDougal, Appellee

9. Johnny McGlowan, Appellee

10. Albert Smith, Judge

RUBY WHITE
Attorney of Record
for Appellant Drucilla McCool

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STATEMENT OF ISSUES

The following issues are submitted for review, to wit:

1. Whether the court erred in granting summary judgment since a genuine issue of material facts existed as to existence of a written contact of employment and where there are provisions within the personnel manual which conflicts with and under the terms of the personnel manual supersede the at will provision?

2. Whether the court erred in finding that despite Appellee COI's failure to remit monies withheld from Appellant's earnings to the payee for FICA and Federal Taxes that Appellant suffered no damages, and therefore, Appellee did not convert funds of Appellant?

3. Whether the court erred in granting summary judgment since a genuine issue of material facts existed whether the exclusive remedy for negligence was the Mississippi Workmen Compensation Act?

4. Whether the court erred in ruling the claim for intentional infliction of emotional distress was barred by the one year statute of limitation or, alternatively, did not rise to the level of extreme and outrageous to support a cause of action?

STATEMENT OF THE CASE

1. Nature of the Case

This matter is before the court on appeal from the Circuit Court of Coahoma County, Mississippi, the Honorable Albert Smith presiding. This appeal is taken from an order entered July 15th, 2009 granting a Summary Judgment with regards to Appellant's claims for breach of contract, conversion, infliction of emotional distress and negligence.

This court has jurisdiction over this appeal pursuant to MCA Sec. 11-15-3, and the Mississippi Supreme Court Rules of Appellate Procedure.

2. Course of the Proceedings

On March 26 2006, Appellant filed an action in the Coahoma County Circuit Court alleging four (4) causes of action, to wit:

(1) Breach of contract under Appellee COI's written policies and procedures resulting in wrongful termination, (1a) actions , omissions and conduct undertaken against Appellant that were wrongful, tortious, intentional and contrary to COI's written policies and procedures;

(2) Conversion by wrongfully withholding or misappropriating portion of Appellant's wages, or alternatively, negligent failure to implement and enforce sound fiscal and accounting practices;

(3) Negligence due to Appellees' failure to investigate the facts and circumstances surrounding Appellate's termination, breach of duties by not effectuating the proper procedures and/or fully investigating the situation surrounding the improper, irresponsible, and illegal accounting and35 financial practices and omissions which pervade said corporate entity; and

(4) Intentional Infliction of Emotional Distress despite duty not to wrongfully and maliciously

terminate Appellant's employment and to prevent any purposeful retaliation and failure to investigate the extreme and outrageous circumstances surrounding her termination.

Appellants and Appellee filed Motions for Summary Judgment. A hearing was held on July 8, 2009.

3. Disposition in the Court Below

On July 15, 2009 the court entered An Order of Summary Judgement adopting the arguments in Appellees' Motion for Summary Judgement. Appellant's Motion for Summary Judgment was dismissed as moot. The Court granted Appellee's Motion for Summary Judgment on all counts and dismissed the action with prejudice.

1. On the breach of contract claim, the court ruled as follows:

(a) The action was barred by the 1 year statute of limitation applicable to unwritten contracts of employment as Appellant was not named within the personnel manual; (b) The Appellant was attempting to escape the language disclaiming formation of a contract by asking the court to look outside the personnel manual to certain federal regulation; (c) If the claim was not barred by the statute of limitation, it failed because COI's personnel manual contains express language disclaiming formation of a contract and maintaining the employment at will relationship; (d) The provision in the personnel manual stating any provisions conflicting with funder's regulations would be superseded by the federal regulation did not provide a private right of action and did not prohibit an employment at-will contract; (e) Appellant was judicially estopped from making a federal claim due to her position in Federal Court objecting to jurisdiction in which she asserted she was making state claims only; (f) The clause within the Personnel Manual disclaiming creation of a contract was valid and did not create contractual obligations between Appellees and Appellant;

2. On the conversion claim, the court ruled as follows:

(a) Appellee had simply prioritized its debts and eventually paid all monies withheld for bankruptcies and insurances; (b) Monies withheld from Appellant's checks for FICA and Taxes but not remitted were too speculative and as a result Appellant suffered no damages;

3. On the negligence claim, the court ruled that the claim was related solely to Appellant's employment and therefore was barred by the exclusive remedy provision of the Mississippi Workers' Compensation Law, Miss. Code Ann 71-3-9 (Rev 1989);.

4. On the intentional infliction of emotional distress claim the court ruled as follows:

(a) The action was barred by the 1 year statute of limitation as Appellant was terminated on July 28, 2004 but did not file the action until March 23, 2006; (b) or, in the alternative, the conduct alleged does not rise to the level of "extreme and outrageous" required to state a claim for intentional infliction of emotional distress.

Being aggrieved by the decision , the Appellant filed this appeal.

STATEMENT OF FACTS

Appellee Coahoma Opportunities Incorporated (hereinafter COI) is a 501(c)(3) corporation headquartered in Clarksdale, Mississippi. (TR-366). COI operates a number of programs including a Head Start Program in Coahoma County, Mississippi. (TR 52-53). Approximately 158 employees worked for COI during the relevant time in this case. COI is funded primarily through grants from Federal and State sources. (TR 53). It is governed by a Board of Directors.

At all times relevant Appellee Johnny McGlowan was the Chairman of the Board of Directors. The day to day operation of COI is the responsibility of the Executive Director. Appellee Mayo Wilson became Executive Director of COI in January 2004 and remained in that

position at all times relevant. Appellee Jimmie Sellers was employed as the Human Resources Director for COI at all times relevant.

COI's Head Start Program is funded primarily through federal funds from the Department of Health and Human Services (hereinafter HHS).(TR 53). COI's Head Start Program decision making or governing body is the Policy Council. (TR 326). In January 2004 Appellee Kathy McDougal was employed by COI as the Head Start Program Director and charged with the day to day operation of the Head Start Program. Appellant Drucilla McCool was employed with the Head Start Program operated by COI and at all times relevant worked as a teacher.

Under HHS Regulations at 45 CFR 1301.31 (a), grantees receiving funds from HHS to operate a head start program, such as COI, must establish and implement written personnel policies for staff that are approved by the policy council and made available to all staff. (TR 331). The directive further provides that at a minimum such policies must include description of staff position, description for procedure for recruitment, selection and termination of staff, standards of conduct and a description of employee-management relations procedures for managing employee grievances and adverse actions.

HHS' directive at 45 C.F.R. 1304.50 (a)(1)(i) requires establishment of a Policy Council by head start grantees funded by it. HHS directive at 45 C. F. R. 1304.50 (d)(1)(xi) provides the policy council must work in partnership with key management to review, approve and/or disapprove decisions to hire or terminate any person who works primarily for the Early Head Start or Head Start program. (TR 276-277). Section 1304.50 Appendix A in defining "must approve or disapprove" states that when the directive states the policy council must approve or disapprove, it means the group must be involved in the decision making process prior to seeking

approval. If it does not approve, a proposal cannot be adopted or the proposed action taken, until agreement is reached between the disagreeing groups. (TR 280). According to Appellee Wilson the Policy Council approves and disapproves all hiring and firings and approves all things that pertain to the Head Start. (TR 326). The Policy Council is the governing body of COI's Head Start Program. (TR 326).

In compliance with HHS directives at 45 C.F. R. 1304.50, as reflected in its ByLaws, COI established a Policy Council. The Policy Council is defined by COI as its decision making body. (TR 192). In compliance with 45 C.F.R. 1301. 31 requirement that grantees establish and implement written personnel policies, COI Board of Directors and Policy Council approved and adopted a 180 page Personnel Manual (hereinafter The Manual). Considerable training efforts are spent on the manual. All employees are provided a copy of the manual. (TR 328). Upon leaving employment of the agency all employees are required to return the Manual or pay an assessment of $20.00. (TR 60). A copy of the manual is provided at each of COI's work sites. A policy committee is established consisting of Board members, administrative staff and other staff to review the manual yearly.

The Manual covers staffing, non-discrimination and affirmative action, employee performance, management, personnel administration, standards of conduct and grievance procedures. In regards to termination, the manual provides all full time employee voluntarily terminating their employment should give at least two-week advance notice in writing to their program director through their immediate supervisor. All employees whose employment is involuntarily terminated for causes beyond their control, such as reorganization, unscheduled or anticipated termination of a program shall receive a two-week notice whenever feasible.

The Manual provides in the event an employee proves unsatisfactory according to established procedures and/or performance, the supervisor will present to the Project Director proof of cause for a recommendation of termination. The Project Director will recommend to the Executive Director when a decision to terminate is made, and the decision is forwarded to the Board (except for Head Start staff, the decision is forwarded to the Policy Council) for approval. (TR 82). The Head Start Program Director is not authorized to terminate Head Start Program employees.

The manual provides the within named policies and procedures do not constitute a contract of employment nor should any part be construed to grant to an employee the expectation of employment for a definite period of time, or any employment other than strict at will employment. (TR 61). The manual further provides the policies contained herein shall in no way supersede or conflict with directives of funding agencies. Should a conflict occur in the future, directives of the funding agencies will take precedence. (TR 68).

The Manual states if the Executive Director or the Board/Policy Council (as appropriate) decides to take any adverse actions(fire, suspend or terminate) against any employee for any reasons, the following due process procedures safeguards will be followed:

1. Provide an explanation of the established procedure for removal of employees;

2. Give reasons for the action;

3. Inform the individual of his right to a hearing and to be represented by counsel at all stages of the proceedings at his expense;

4. Inform the individual of his rights to present witnesses on his behalf and to cross examine witnesses presented in support of the board or policy council; and

5. The right to receive and examine copy of any documents which will be relied upon by the

Board or policy council to support the adverse action. (TR 71).The Head Start Program Director is not granted authority to take adverse action in the nature of firing, suspending or terminating Head Start Program employees.

The Manual provides in the event an employee proves unsatisfactory according to established procedures and/or performance, the supervisor will present to the Project Director proof of cause for a recommendation of termination. The Project Director will recommend to the Executive Director when a decision to terminate is made, and the decision will be forwarded to the Board (except for Head Start staff, the decision is forwarded to the Policy Council) for approval. (TR 82). The Head Start Program Director is not authorized to terminate Head Start Program employees.

The Manual provides that the Personnel Action Form will be used to tract all personnel action from hiring to termination. (TR 82). On September 5, 2003, Appellant signed a Personnel Action Form reflecting a change in position from lead teacher to teacher at the Aaron Henry Center at an annual salary of $20,080.09 to be paid bi-weekly at $1085.41. The change was effective August 28, 2003 but retroactive to January 1, 2003. The content is agreed to by Appellant and approved by Appellees McDougal and the Former Executive Director of COI Dorothy Banks. (TR 337). There is no personnel action form reflecting Appellant's termination.

At the July 21, 2003 board meeting COI was aware of its financial status. A lack of internal controls were noted. Failure to perform timely reconciliation of bank statements, untimely audits and trial balances being out of balance were noted as early as 1999. The July 21, 2003 minutes noted a need for COI to strengthen controls and stop spending. These problems were found to have existed for four and one-half years prior to the July 2003 meeting. (TR 522).

In the summer of 2003 COI's former Executive Director Dorothy Banks determined COI did not have sufficient funds to operate to the end of the 2003 school year. In response Banks devised a scheme to keep COI operating. Under Banks' scheme, the 158 employees would work through the end of the year. Employees would receive their regular pay stubs reflecting their correct earnings with deductions for items such as child support, garnishments, bankruptcies, insurance, FICA, and taxes. The employees were able to cash the net sum reflected on their check stubs. However, the sums reflected as withheld were not remitted to the payees. (TR 334-336). Appellant was not informed of this scheme.

Appellant was paid bi-weekly. During this time period Appellant's gross wages were $1085.41 bi-weekly. Withholdings consisting of $80.31 in federal taxes, $83.03 in FICA, $ 44.00 state taxes, $29.60 for American Family, $14.36 American Fidelity, $21.78 for Freedom Life, $22.86 Gulf Guaranty and $304.50 for garnishment for Chapter 13 bankruptcy were taken out bi-weekly. Appellant's net pay was $391.38 per pay period. (TR 19).

In January and February 2004 some employees, including Appellant, learned the sums withheld from their checks in September, October, November and December 2003 were not being remitted to the payees. Appellant ascertained money withheld for her Chapter 13 Bankruptcy were not being sent to the Chapter 13 Trustee.(TR 24, 25). Appellant contacted Appellee COI through Fiscal Officer Simpson and Human Resource Office Appellee Sellers. Sellers advised Appellant she thought she would work with them and the money had gone to pay agency bills. Sellers testified the money was used to pay allowable agency expenses. Being dissatisfied with their answer, Appellant contacted COI Board of Directors members Anderson and McGlowan. (TR 507). Appellant's bankruptcy payments were then $2300.00 in arrears.

Appellee McGlowan advised Appellant that the former Executive Director Dorothy Banks knew in the summer of 2003 that COI did not have enough money to operate through the end of the year and that Banks had devised a plan in the summer of 2003 to use sums deducted from all employees paychecks to continue operating the agency. (TR 334-336). The plan continued in place in 2004. (TR 445).

HHS conducted an onsite review of COI between November 24-26 2003 and found 16 separate findings under Accounting and Budget Practices. HHS informed COI it did not have proper internal controls in place to ensure federal assets could be safeguarded. (TR 518). At the December 18, 2003 Board of Directors meeting the Executive Director noted the financial predicament stemmed from circumventing the process, co-mingling funds and lack of control by the Project Directors on expenditures related to the respective projects. (TR 518). COI reported in February 2004 that unpaid bills for 2003 included deductions made from staff checks for bankruptcy, child support, state taxes, returned checks, loan payments and insurance payments as well as state taxes and unemployment taxes. (TR 520).

At the April 19, 2004 Board meeting the Account Manager reported the system and payroll did not equal . On May 24, 2004 the Head Start Director stated the figures in the budget report basically coincided with the Account Managers amounts and that a "surplus was floating around in certain areas". When a board member questioned the areas with large amounts of unexpended monies the Head Start Director stated this would be taken care of. (TR 519-520).

Because COI had not timely remitted the payments to the Bankruptcy Trustee, a motion to dismiss Appellant's bankruptcy case was filed. Appellant was paying her house payment through the bankruptcy. In February 2004 the bankruptcy was $1409.07 in arrears. (TR 24). In

March 2004 the payments were $2242.15 in arrears. (TR 25). On April 5, 2004 Appellee COI submitted 4 months of payments to the Chapter 13 Trustee to prevent dismissal of the case. (TR 18). As of May 2, 2004 Appellant's insurance policy to Freedom Life had only been paid through August 10, 2003. (TR 38). As of July 2008 FICA and Taxes for 2003 were still owed by COI for its employees. Appellee Wilson estimated approximately $300,000.00 in back taxes, FICA and penalties were owed for years 2001, 2002, and 2003. (TR 365-366).

At the end of the 2003/2004 school year Appellant received evaluations for the 2003/2004 school year dated and signed by Appellee McDougal. The evaluation rated Appellant superior in all categories.

On July 28 2004 Appellee McDougal sent a 2 sentence letter to Appellant stating "in review of your continuous display of actions, which jeopardized funding for the agency, your services are no longer needed in Coahoma Opportunities, Inc., head start program. The appeal flow chart is attached if you wish to appeal". (TR 16). The appeal flow chart was taken from the Manual.(TR183.) The letter was sent under the signature of the Head Start Program Director Appellee Kathy McDougal. Appellee Wilson's signature was affixed immediately below that of McDougal.(TR16). Prior to the letter of July 28, 2004 Appellant had no indication COI was dissatified with her or her work.

According to Wilson, the letter of July 28, 2004 was to inform Appellant she would not have a job the following year. However, he stated it was not a termination letter. Wilson as well as McDougal and Sellers, all stated McDougal did not have the power to terminate McCool. (TR 328, TR 331). Under the Manual the Executive Director of COI could terminate Head Start employees with approval of the Policy Council. The Head Start Program Director was not given

authority to terminate. The matter had not been submitted to nor approved by the Policy Council. No letter was sent by Executive Director Wilson nor by the Policy Council to Appellant. COI's Policy Council did not authorize McDougal to send the letter of July 28, 2004. McDougal knew she did not have the authority to terminate Appellant or other Head Start workers. According to Wilson the letter of July 28, 2004 was not a termination letter. In a termination letter it is a final determination. In this it provides for a review and establishment of defense or cause. It is my feeling that a termination letter is final. A termination letter is final after all review have been exhausted including a complete hearing above the board. The letter is not the final act of termination. (TR 333).

Appellee McDougal testified Appellant had jeopardized funding by making false allegations against the agency about her money not being properly remitted. McDougal stated McCool had contacted the Attorney General' Office, HHS Regional Office in Atlanta, HHS Office in Washington, the newspaper, and Board members regarding failure of COI to remit payments. McDougal further testified Appellant, Gilbert and Tenner were working against her. McDougal stated that of all the scrutiny that COI had gone through there were no finding of wrongdoing but was strictly because of the false allegation made by employees Gilbert, Tenner and McCool When asked the name, date, details of any inquiries caused by Appellant, McDougal could not provide any. When asked who called about McCool reporting the use of her funds by COI, McDougal did not know who called, or when they called . no record of the call existed, and no attempt was made to inquire of McCool, Gilbert or Tenner if they made the call. (TR 350).

On August 4th 2004 Appellant requested review in accordance with the procedure attached to the July 28, 2004 letter. (TR 399). Several hearing were scheduled but none held.. (Tr 415-419). On October 17, 2004 the Policy Council Chair submitted a letter to the Board of Directors requesting reinstatement of Appellant due to failure of COI to follow proper due process procedures. (TR 503).

SUMMARY OF THE ARGUMENT

The decision of the court granting summary judgement is against the overwhelming weight of evidence. It glosses over conflicting and irreconcilable genuine issues of facts that are outcome determinative and should have been preserved for the trier of fact.

Contrary to the court's finding this is not an instance of an unwritten contract of employment. In this case, Appellant signed a document with COI setting forth that effective January 1, 2003 she would be work as a teacher at the Aaron Henry Center. The document changed Appellant from lead teacher to teacher. It further stated a definite salary to be paid bi-weekly. Every essential element to constitute a binding contract is present. There is an offer, an acceptance and from January 2003 until August 2004 performance by Appellant by teaching at the Aaron Henry Center. In exchange Appellee COI purportedly paid Appellant wages of $1085.42 bi-weekly. As there is a written contract, the applicable statute of limitation is 3 years as provided in 15-1-49 and not 1 year as ruled by the court. Therefore, this action is not barred by the statute of limitation.

A related issue has to do with the issue of whether appellant was an employee at will and therefore subject to termination without cause or due process. As a recipient of funds from HHS COI was required to establish and implement a manual setting forth the procedure for hiring and

terminating head start employees. The directive further provides that at a minimum such policies must include a description for procedure for recruitment, selection and termination of staff. The manual provides very specific due process steps that are required either to suspend or to terminate an employee. Additionally, it provides very definite and specific lines of authority regarding who has authority to take adverse action against employees. Finally, it states unequivocally the procedure that must be use to terminate an employee of the head start with the role the supervisor, head start project director, executive director and policy council play in this procedure. The manual was provided to all employees. According to Appellee Wilson lots of time and resources were spent on the manual. A copy of the manual is provided at each of its work sites. When an employee leaves COI employment they are required to return the manual or be assessed a fee for replacement cost. As part of the letter of July 28, 2004 a flow chart from the manual was attached as the appeal procedure. The cumulative facts strongly support the conclusion this document falls within the Bobbitt exception of having established a specific disciplinary scheme which COI had published to its employees. Accordingly, COI should be required to follow the procedures established in the manual. The manual has changed the at-will status. This case is more akin to what Bobbitt describes as "the employer promising something other than pure-at-will employment" and the contract provisions will overcome the at-will relationship.

Furthermore, under the provisions of the manual, any provisions of the manual conflicting with directives from funders are superseded by the funders' directives. Under funder HHS' directives COI is required to establish and implement written personnel manual for hiring and termination of Head Start workers. Furthermore, under the funder's regulations any decision

to terminate head start employees must be approved by the Policy Council. COI complied with these directives by implementing the personnel manual. The manual includes provision requiring termination of Head Start employees be approved by the policy council. COI is required to follow the due process procedures it has established. Based on the terms in the manual, the funders directives supersedes any provision that conflicts with these requirement. Application of the at-will principle conflicts with the requirement of establishing and implementing written personnel policies. It further conflicts with the due process scheme set forth in the manual. Finally, as applied by COI, it conflicts with the authority to hire and fire Head Start workers set forth in the manual and federal directive. In this instance, the written personnel policies set forth due process requirements and establishes definite line of authority. COI obligated itself to follow these provision in regards to head start employees. The conflict creates an issue of fact that is outcome determinative that should be resolved by the trier of fact.

The court dismissed without comment the tortious interference claim against Appellee McDougal, Wilson and Sellers. In the instant case, it is uncontradicted McDougal did not have legal authority to terminate Appellant. COI as a legal entity has set out the powers and authority of its employees. Other than the authority granted her by COI, McDougal has no authority in regards to Appellant's position with COI. The manual specifically states the project Director can recommend to the Executive Director who then must seek and obtain the approval of the Policy Council. In violation of Appellant's contract to serve as a teacher at the Aaron Henry Center, Appellant McDougal took actions that interfered with Appellant fulfilling the terms of her contract. McDougal had no legal authority to interfere. As a result, Appellant has suffered and continues to suffer damages.

In regards to the conversion of funds, Appellees excuse characterizes the untimely and failure of COI to remit funds withheld from Appellant's wages to prioritization of debt. Under the terms of the contract signed by Appellant, she was to be paid $1084.41 bi-weekly. Appellant was entitled to her wages in accordance with the contract. The fact that COI decided to pay other vendors does not legally excuse its action. According to Wilson, as of July 2008 funds withheld from employees wages for FICA and Federal taxes were still owed. COI behavior in exercising dominion and control of funds it stated in checks stubs it had withheld from Appellant's wages falls within the definition of conversion. Case law states an intention to do wrong is not required.

In regards to the negligence claim, the court ruled the action was related solely to Appellant's employment and was barred by the exclusive remedy provision of the Workman Compensation Law. The Workman Compensation law covers accidental injury. The behavior complained of is COI lack of internal controls that allowed funds to be diverted from their intended purpose. The problem was a longstanding one that HHS had previously brought to COI's attention. Their failure to act is not within the category of actions covered by workman compensation.

Finally, on the intentional infliction of emotional distress, the court erroneously concluded the action is barred by the 1 year statute of limitation or does not rise to the level of extreme and outrageous. The evidence in this regard shows no basis for McDougal's decision to send the letter alleging Appellant had jeopardized funding. According to McDougal, she did not interview Appellant. She had no information on who or when Appellant allgedly took action that jeopardized the agency funding. McDougal alleged Appellant made false statements about the agency using funds withheld from her checks. The statement was true. However, the proof shows

COI's problems had nothing to do with Appellant. HHS visited COI in November 2003. It issued findings in December 2003 noting 16 areas of concern. Subsequent visits were follow ups because of deficiencies identified by their on-site visit. Appellant did not become aware her money was not being remitted until February 2004. Despite the lack of logic in McDougal's belief, she took steps to act on this belief. She was allowed to send with impunity a letter she had no authority to send. Wilson, McDougal and Sellers all testified McDougal lacked authority to terminate Appellant. Even though it is clear and uncontradicted McDougal lacked the authority she exercised, COI has yet to take action to correct the action of McDougal. The behavior in this regards meets the outrageous in character, extreme in degree to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable standard. The action here is more than mere insults, indignities, threats, annoyances, petty oppression or other trivialities. The court has stated it is the nature of the act itself as opposed to the seriousness of the consequences which gives impetus to legal redress. The action of McDougal which COI failed to correct falls within the standards and is clearly outrageous and extreme.

This Court applies a de novo standard of review on appeal from a grant of summary judgment by the trial court. Hardy v. Brock, 826 So.2d 71, 74 (Miss.2002). Jenkins v. Ohio Cas. Ins. Co., 794 So.2d 228, 232 (Miss.2001); Russell v. Orr, 700 So.2d 619, 622 (Miss. 1997); Richmond v. Benchmark Constr. Corp., 692 So.2d 60, 61 (Miss.1997); Northern Elec. Co. v. Phillips, 660 So.2d 1278, 1281 (Miss.1995). Rule 56(c) of the Mississippi Rules of Civil Procedure provides that summary judgment shall be granted by a court if "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact." M.R.C.P. 56(c). The moving party

has the burden of demonstrating there is no genuine issue of material fact, while the non-moving party should be given the benefit of every reasonable doubt. Tucker v. Hinds County, 558 So.2d 869, 872 (Miss. 1990); see also Heigle v. Heigle, 771 So.2d 341, 345 (Miss.2000) If there is no genuine issue of material fact and, the moving party is entitled to judgment as a matter of law, summary judgment should forthwith be entered in his favor. Otherwise, the motion should be denied.. Williamson v. Keith, 786 So.2d 390, 393 (Miss.2001). Issues of fact sufficient to require denial of a motion for summary judgment obviously are present where one party swears to one version of the matter in issue and another says the opposite." Tucker, 558 So.2d at 872 .If our review uncovers any genuine issue of material fact, the decision of the lower court must be reversed. Id. (quoting Mabus v. Saint James Episcopal Church, 884 So.2d 747, 756 (Miss.2004)).The evidence must be viewed in the light most favorable to the non-moving party. In the instant case, genuine issues of facts which are outcome determinative remained. Accordingly, the summary judgment should not have been entered. Therefore, the order should be reversed and the case remanded for trial.

ARGUMENT

ISSUE 1: WHETHER THE COURT ERRED IN GRANTING SUMMARY JUDGMENT SINCE A GENUINE ISSUE OF MATERIAL FACTS EXISTED AS TO EXISTENCE OF A WRITTEN CONTACT OF EMPLOYMENT AND WHERE THERE ARE PROVISIONS WITHIN THE PERSONNEL MANUAL WHICH CONFLICTS WITH AND UNDER THE TERMS OF THE PERSONNEL MANUAL SUPERSEDE THE AT-WILL PROVISION.

We begin our inquiry by recognizing that Mississippi has followed the employment at-will doctrine since 1858. Coleman v. Mississippi Employment Sec. Comm'n, 662 So.2d 626, 628 (Miss.1995). Where there is either no employment contract or the contract fails to specify the length of the worker's employment, either party may terminate the employment at-will. Perry v. Sears, Roebuck & Co., 508 So.2d 1086, 1088 (Miss.1987). This means that the employee is entitled to quit or the employer is entitled to terminate the employee for a good reason, a wrong reason, or no reason at all. Solomon v. Walgreen, 975 F.2d 1086, 1089 (5th Cir.1992). The Mississippi Supreme Court created an exception to the at-will doctrine in Bobbitt v. Orchard, Ltd., 603 So.2d 356, 361 (Miss.1992). The court in that case held that when an employer furnishes its employees with a manual which sets forth specific procedures to be followed in reprimanding, suspending, or discharging its employees, then the employer is obligated to follow its own provisions.

However, in this instance our inquiry must focus on two documents. Either document standing along contradicts the findings of the court and would lead an impartial trier of facts to a different conclusion. The Court, in this instance, ruled Appellant's claim was based on an unwritten contract of employment. However, Appellant signed a Personnel Action Form sufficient to meet the definition of a contract. Absent illegality or public policy violations, contracts are to be enforced as written. The document while not entitled a contact meets the essence of a contract. Under the terms of the document, Appellant agreed to work as a teacher for COI at its Aaron Henry Center. The document changed Appellant from a lead teacher to teacher. It further provided the change was retroactive to January 3, 2003 and provided for compensation at the rate of $20,080.09 to be paid at a rate of $1085.41 bi-weekly. The document clearly meets

the definition of a written contract. In one instance something less that the document we have in this case was found sufficient to constitute a contract of employment. In Levens v Campbell , 733 So. 2d 753 (5th Cir. 1999) the employer filled in terms concerning the employees start date, start salary and initial job assignment on the application at the time the plaintiff was hired. The court ruled that was a written contract sufficient to sustain a claim under the 3-year statute of limitations for actions on written contracts under MCA Section 15-1-49 . Similarly in Robinson v Coastal Family Health Center Inc., 756 F. Supp 958 the Mississippi Supreme Court considered a similar case involving wrongful termination. The court found a contract of employment and stated the statute of limitation under those facts was neither 15-1- 29 nor 15-1-35 but instead 15-1-49 which prescribes a three year statute of limitation.

The second document impacting and contradicting the finding or creating issues of fact is is the Personnel Manual. Appellee COI is required as a condition of funding by HHS to "establish and implement" written personnel policies for hiring and terminating Head Start employees. The directive further provides that at a minimum such policies must include a description for procedure for recruitment, selection and termination of staff. HHS directives requires that any decision to terminate any Head Start employee be approved by the Policy Council. In adherence to these requirements, COI "established" a 180 page personnel manual which sets forth a five step due process procedure and limits the authority to terminate, fire and suspend Head Start employees. Specifically, the manual in accordance with Federal Regulations requires than any decision to terminate Head Start employees be approved by the Policy Council and further limits who can take adverse action in the nature of firing, suspending or terminating against an employee to the Executive Director, Board of Directors and Policy Council.

The manual creates a genuine issue of fact that is outcome determinative and highlights a contested issue regarding the due process rights versus the at-will provision. The manual states it should not be construed to grant to an employee the expectation of employment for a definite period of time, or any employment other than strict at will employment. (TR68). However, it further states the policies contained herein **shall** in no way **supersede or conflict** with directive of funding agencies. Should a conflict occur in the future, directives of the funding agencies will take precedence.(TR 68).The provisions are contradictory. In accordance with the plain wording of the manual, the federal directive requiring establishment and implementation of a written personnel manual with the policy council approving or disapproving of termination of head start employee is binding on COI. Implementation of COI's Manual requires that if the Executive Director or the Board/Policy Council (as appropriate) decides to take **any** adverse actions(fire, suspend or terminate) against **any employee for any reasons**, the following **due process procedures safeguards will be followed**:

1. Provide an explanation of the established procedure for removal of employees;

2. Give reasons for the action;

3. Inform the individual of his right to a hearing and to be represented by counsel at all stages of the proceedings at his expense;

4. Inform the individual of his rights to present witnesses on his behalf and to cross examine witnesses presented in support of the board or policy council; and

5. The right to receive and examine copy of any documents which will be relied upon by the Board or policy council to support the adverse action. (TR 71).

The manual further placed limitation on the authority staff has . It states when an employee proves unsatisfactory according to established procedures and/or performance, the supervisor will present to the Project Director proof of cause for a recommendation of termination. The project Director will recommend to the Executive Director when a decision to terminate is made, the decision is then forwarded to the Policy Council for approval. (TR82). The manual provides a very ordered procedure for termination of employees.

The Manual is accorded great significance in the relationship between employee and employer. According to Wilson each employee is provided copy of the manual. Appellant understood the manual to grant due process procedures to her. Within the manual COI established a very extensive list of offenses. (TR 167). Additionally, COI established a series of disciplinary actions with specific designations as to who can hand out which discipline. Under terms of the manual any provision of the manual which contradicts directives of funders is superseded by the funders' directive. Application of the at-will doctrine is in direct contravention of COI's duty to establish and implement written personnel policies regarding hiring and terminating Head Start employees.

The HHS directives further required COI to establish a Policy Council as governing body. The policy Council is entrusted with the responsibility of approving or disapproving of any termination of Head Start employees. Appellee Wilson described the Policy Council as the body that makes all decisions dealing with Head Start. Failure of Grantees, such as COI, to comply with grant conditions such as this will result in the grantee losing federal funding.

The Mississippi Supreme Court for some time now has expressed its discomfort with the harsh results of the at will employment rule. In this connection, the Court has stated that it "...warns employers that this Court will be looking for a wiser and more humane alternate to the terminable at will rule in an employment contract." Bobbitt v. Orchard Ltd., 603 So.2d 356 at 361 (Miss. 1992). In furtherance of this policy the Court has recognized that "a personnel manual can create contractual obligations, even in the absence of a written agreement." Bobbitt v. Orchard Ltd., 603 So. 2d 356, 361 (Miss. 1992) quoting Perry v. Sears Roebuck & Co., 508 So. 2d 1086 at 1088 (Miss. 1987). In recognizing this possibility, the Supreme Court, with reluctance, conditioned the effect of a personnel manual in those circumstances where the employer has made clear that the policy is not intended to create enforceable obligations and that it does not impinge upon the right to at will termination. In doing so the Court observed with "chagrin that the attendant rights and burdens are imposed by law, not by sympathy or outrage. "Bobbitt, supra, quoting Perry, supra

(emphasis supplied).

Thus, regardless of our sympathy for Defendants, or outrage at the employer's intentional, continued and flagrant disregard for its personnel handbook policies, it is to the law, which imposed the rights and burden herein at issue, to which we must look in determining whether the handbook in issue created an enforceable contract. Bobbit, supra. In this connection, the law as expressed in federal regulation states that the employer "must establish and implement written personnel policies for staff...at a minimum such policies must include.....[a] description of the procedures...for termination 45 C.F.R. 1301. (Emphasis supplied). Moreover, Appellants' specific termination policy in issue, which required that the

Policy Council approve the termination of plaintiffs, is not optional. Federal Regulation specifically requires policy council approval of any decisions to hire or terminate any person who works primarily for the Early Head Start or Head Start program of the grantee or delegate agency. 45 C.F.R. 1304.50(d)(1)(xi). Implementation of these policies, as required by regulations, is thus mandatory.

In consequence, the employer's purported disclaimer, which attempts to make implementation discretionary, is prohibited as a matter of law, whether one chooses to characterize it as illegal, ultra vires and/or unconscionable. Regardless of whichever characterization we choose it may not be given legal effect, and should be stricken. See e.g. Entergy Miss. Inc. v. Burdette Gin Co. , 726 So. 2d 1202 (Miss. 1998) (Utility's indemnity clause, even though approved by PSC, declared ultra vires as to PSC, and void as against public policy); Trinity Mission of Clinton, LLC v. Barber, 988 So. 2d 910, (Miss. 2007)(Court "adheres to practice of striking unconscionable terms and leaving the remainder of the agreement intact"). Striking the prohibited discretionary clause does not void the rest of the contract, See e.g. Covenant Health Rehab of Picayune, L.P. v. Brown, 494 So. 2d 732, 741 (Miss. 2007) (If a court strikes a portion of agreement as void, the rest of the agreement is binding); Plaza Amusement Co. v. Rothenberg, 159 Miss. 800, 131 So. 350, 351, 357 (Miss. 1930)(If an illegal condition is annexed to a contract, it will not void the whole contract, but the illegal part will be treated as void). Once the discretionary clause is stricken as void, this case is controlled by Bobbitt, supra. and the personnel policy at issue herein stands as an enforceable contract of employment.

A different argument, which produces the same effect, is that the Plaintiff is a third party beneficiary of Defendants' contract with Head Start, pursuant to which it promised to establish

and implement the personnel policy upon which Plaintiff here relies. See, e.g., Roddy v. Urban League of Madison County, 2002 U.S. Dist. Lexis 11618 (S.D. Ind, Indianapolis Div. June 25, 2002) (Holding remand proper as Plaintiff employees third party beneficiary claim with regard to Headstart Agency's grantee contract with DHS did not state a federal cause of action but a state claim).In Mcglohn v. Gulf and S.I.R.R. Co., 179 Miss. 396, 174 So. 250 (1937), the Court considered whether an agreement between a railway labor union and railroad concerning conditions of employment applied to a union member employment with the railroad. The court held the union agreement was a part of the contract of employment. The court further states "In other words, while the railroad company may have the right to terminate the contract at its will, a solemn stipulation was made by it by which it is bound not to exercise such will in a summary manner, but in a certain well-defined manner and by stipulated course of procedure. We conclude that this was a material part of this contract and a part of the promised consideration.

Stripped to its essence, Defendant's argument is that although it violated its own personnel policy, the violation does not matter because it inserted a disclaimer purporting to allow it to ignore the policy even though ignoring the policy is in violation of both federal regulation and its contractual promise to implement and follow those federal regulations. Such duplicity cannot stand particularly where -as here- it is mustered in aid of the disfavored at-will employment doctrine. Rather, as in Bobbitt, supra, the handbook must be enforced. As stated by the Court in Bobbitt: "We hold in this case that because the manual was given to all Employees, it became a part of the contract. It did not give the employees "tenure," or create a right to employment for any definite length of time, but it did create an obligation on the Part of The

Orchard to follow its provisions in reprimanding. Suspending or discharging an employee for infractions specifically covered therein.

This case is further distinguishable from other reported cases because adopting and complying (establishing and implementing) is not optional. For instance in Sensey v Mississippi Power, 2004-CA-00401-COA 2005, the guidelines concerning discharge and other forms of employee discipline speak in permissive terms of what a manager "should" do and suggest factors that should be taken into consideration. The manual in this instant case uses the term "will" denoting it is not permissive but mandatory.

This case is more analogous to Hodgins v Philadelphia Public School District, 2007-MS A1024.009 . Hodgins was employed by a school district. Her contract referenced the personnel manual and state law and stated her employment was subject not only to the personnel manual but to the laws of the State of Mississippi. The Court found that the personnel policy by referencing state law manifested an intention to follow statutory law. Similarly, the employer in this instant manifested an intention to follow federal directives by providing that contradictory provisions in the manual are superseded by funders' directives.

Appellant has yet to be terminated in accordance with Appellee COIs' written policies, adopted in compliance with federal regulations. Unless, and until Appellee seeks and obtains Policy Council approval to terminate Appellant, its continued improper denial of employment is in violation of contract, and it is subject to the appropriate sanctions. Furthermore, Appellees' action is in the nature of a continuing tort.

Finally, Under COI's Bylaws and 45 CFR 1304.50 termination of Head Start employees must be approved by the Policy Council. The letter from McDougal did not terminate McCool.

McDougal, Wilson, Sellers, McCool, Tenner, and Gilbert all testified McDougal did not have the authority to terminate McCool. In explaining the importance of the approve and disapproved provision, 45 C.F.R. 1304.50 states in the absence of approval there is no action. In other words, there has not been a termination and will not be until the Policy Council puts its stamp of approval on the proper recommendation and the notice is provided.

McDougal as Head Start Project Director was not given the authority to terminate any Head Start employee. McDougal, Wilson and Sellers all admit McDougal did not have the authority to terminate McCool. Yet, COI relies on the letter sent by McDougal as the termination letter. COI does not dispute the matter was not submitted to the Policy Council. COI does not dispute the Policy Council did not approve the termination of McCool.

ISSUE 2: WHETHER THE COURT ERRED IN FINDING APPELLANT SUFFERED NO DAMAGES FROM APPELLEE COI'S FAILURE TO REMIT AND /OR TIMELY REMIT FUNDS WITHHELD FROM HER EARNINGS?

In the summer of 2003, COI s devised a plan to use funds deducted from the paycheck of the Head Start employees to pay agency bills. In carrying out this plan, COI provided Appellant McCool and the other employees check stubs showing certain sums were deducted. Included in Appellant's deduction were FICA taxes, state taxes, federal taxes, insurances and a Chapter 13 bankruptcy payments. Appellee states it simply prioritized it's debts and nothing more. Under the terms of Appellant's contract with COI, she was to receive $1085.41 bi-weekly. Instead she

received approximately $385.00 bi-weekly. The action of COI establishes conversion as set forth in County Bank of Ellisville v Courtney, 884 So. 2d 767 (Miss. 2004). The court stated the elements of conversion are well established in Mississippi. To make out a conversion there must be proof of a wrongful possession, or an exercise of a dominion in exclusion or defiance of the owner's rights, or of an unauthorized and injurious use, or a wrongful detention after demand. In First Investors Corp v. Rayner, 738 So. 2d 228, 234-5 (Miss. 199) the court stated while intent is necessary, it is need not be the intent to be a wrongdoer. Appellee COI claims it did nothing more than prioritize payment of its debts and had eventually forwarded payment where they belonged. This is contradicted by the facts. In the February 2004 Board minutes COI reports to its Board of Directors that unpaid bills for 2003 included deductions from employees checks for bankruptcy, child support, state taxes, returned checks, loan payments, insurance payments, state taxes and unemployment taxes. The Executive Director Mayo Wilson testified as of July 2008 COI still owed FICA and other taxes withheld from employee wages for 2000, 2001, 2003 and 2004. COI's conduct meets the definition of conversion. By using funds of Appellant, COI continued to exercise dominion and control of those fund in exclusion of Appellant's rights. The actions of COI squarely fit within the definition of conversion. Regardless of the sum involved, COI has no entitlement to any funds from Appellant's earnings. Question of fact remains sufficient to present the matter to the triers of fact for resolution.

ISSUE 3 WHETHER THE COURT ERRED IN GRANTING SUMMARY JUDGMENT SINCE A GENUINE ISSUE OF MATERIAL FACTS EXISTED WHETHER THE EXCLUSIVE REMEDY FOR NEGLIGENCE WAS THE MISSISSIPPI WORKMEN COMPENSATION ACT?

The complaint for negligence alleges COI's refusal to investigate the facts and circumstances surrounding her case, not effectuating proper procedures and/or fully investigating the circumstances surrounding the improper, irresponsible, and illegal accounting and financial practices and omissions. As an employee of COI, Mccool had every right to expect to be compensated for her services. She had every right to expect her wages to be paid directly to her or for her. COI has a history of financial problems regarding financial matters. HHS cited COI for failure to pay child support payment, bankruptcy, FICA, state taxes, and insurance. The failures were for years 2000, 2001, 2002, and 2003. As of July 2008 COI still owed taxes for 2003. COI has a history of noncompliance as evidenced in a letter to COI from HHS in February 2005 citing COI's chronic long term financial difficulties in 2000, 2001,2002 and 2003. The proof in this case shows Defendants McDougal and COI withheld certain sums from Plaintiff's checks. Between the summer 2003 and April 2004 Defendant devised a scheme. The proof shows the plan was deliberate. This was not accidental. The statutory provision of the Workmen Compensation Act required the injury to be accidental to be compensable. See Mississippi Code Section 71-3-3(d), 71-3-7. The Supreme Court has held the Workmen Compensation Act does not bar an employee from pursuing a common law remedy against his employer for an injury caused by his employers willful and malicious act. Royal Oil Co. v. Wells, 500 So. 2d 439 (Miss. 1986).

4. WHETHER THE COURT ERRED IN RULING THE CLAIM FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS WAS BARRED BY THE ONE YEAR STATUTE OF LIMITATION OR ALTERNATIVELY DID NOT RISE TO

THE LEVEL OF EXTREME AND OUTRAGEOUS TO SUPPORT A CAUSE OF ACTION?

The nature of the act meets the standard for intentional infliction of emotional distress. Appellee McDougal was allowed to do with impunity what federal regulations and the personnel manual adopted by the governing bodies specifically did not authorize her to do. She has been allowed unfettered discretion to exact punishment on a 20 year employee without any checks and balances from the governing bodies. This is not an instance where anyone thinks McDougal was authorized to do what she did. It is an instance where absolutely no body will call McDougal to task for her actions. The nature of the action is such that with pure malice and forethought McDougal was able to terminate a 20 year employee without answering to anyone.

The basis for Appellant's claim for intentional infliction of emotional distress is COI's wrongful and malicious termination of her. The termination was in retaliation for what McDougal perceived as Appellant's failure to follow the chain of command and suspicions that Appellant and 2 other teachers had contacted the Attorney General' Office, HHS Regional Office in Atlanta, HHS Office in Washington, the newspaper, and Board members regarding failure of COI to remit payments.

In the present case, McDougal testified as follows. McCool, Gilbert and Tenner were working against her. If an employee wants to be an employee they will work in cooperation with the program. The information that HHS received was causing the agency to have to be scrutinize by the funding source over an over again. When asked the name, date, details of any inquiries caused by McCool Tenner, McDougal could not provide any. When asked who called about McCool reporting the use of her funds by COI, McDougal did not know who called or when. She

testified she made no attempt to verify if McCool, Gilbert or Tenner made the call causing COI such concerns. The fact that the agency was diverting funds withheld from employees checks was irrelevant. Because of her illogical conclusions, McDougal sent a letter to Appellant purporting to terminate her. McDougal lacked the legal authority to terminate Appellant. All parties were aware McDougal lacked that authority. Despite this fact, with the exception of the Policy Chair Trudy Wesley, none of the administrative staff nor governing bodies took any step to correct this situation.

When pressed on the basis for her action, McDougal stated it was because of the false claims made by Appellant to funders. This statement ignores the fact HHS began their visits in 2003. The record indicates a visit in November 2003. This was long before Appellant knew her bills were not being paid. In turn, Appellees argued their funding was jeopardized by these visits and McCool was working against the agency. The proof shows COI continuing problems with HHS had to do with their own shoddiness in operating the program. This action was not something she was authorized to do. She knew she lacked the power but she did it anyway. Wilson knew she lacked the authority but he did nothing. COI knows the Policy Council did not approved this action but did nothing.

The course of conduct by McDougal and COI is clearly meets the standard "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Pegues v. Emerson Elec. Co., 913 F.Supp. 976, 982 (N.D.Miss.1996) (quoting Restatement (Second) of Torts § 46 cmt. d. (1965)). It is. "The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppression, or other trivialities." Lawson v.

Heidelberg Eastern, 872 F.Supp. 335, 338 (N.D.Miss.1995) (quoting Restatement (Second) of Torts § 46 cmt. d. (1965)). This is more than mere insult or petty differences. "[I]t is the nature of the act itself-as opposed to the seriousness of the consequences-which gives impetus to legal redress." Pegues, 913 F.Supp. at 982 (quoting 405 Sears, Roebuck & Co. v. Devers, So.2d 898, 902 (Miss.1981)). Furthermore, damages for intentional infliction of emotional distress are usually not recoverable in mere employment disputes. Pegues, 913 F.Supp. at 982. "Only in the most unusual cases does the conduct move out of the 'realm of an ordinary employment dispute' into the classification of 'extreme and outrageous,' as required for the tort of intentional infliction of emotional distress." Prunty v. Arkansas Freightways, Inc., 16 F.3d 649, 654 (5th Cir.1994) (citations omitted).

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overwhelming evidence shows a course of action that established issues of material fact that, as a matter of law, should defeat summary judgment.

The basis for McCool's claim for intentional infliction of emotional distress is COI wrongful and malicious termination of McCoolr. The termination was in retaliation because COI thought McCool had contacted the Attorney General' Office, HHS Regional Office in Atlanta, HHS Office in Washington, the newspaper, and Board members regarding failure of COI to remit payments. In the present case, McDougal testified as follows. "McCool, Gilbert and Tenner were working against her. If an employee wants to be an employee they will work in cooperation with the program. The information that HHS received was causing the agency to have to be scrutinize by the funding source over an over again. She further testified COI was closely scrutinized because of McCool, Tenner and Gilbert . When asked the name, date, details of any inquiries caused by McCool, McDougal could not provide any. When asked who called about McCool reporting the use of her funds by COI, McDougal did not know who called or when. She testified she made no attempt to verify if McCool, Gilbert or Tenner made the call causing COI such concerns. The fact that the agency was converting sums from its employees seemed less relevant than McDougals belief McCool, Gilbert and Tenner were not team players. The above shows McDougal was angered by what she perceived as McCool's failure to follow the chain of command. COI had a history of noncompliance as evidenced in a letter to COI from HHS in February 2005 citing COI's chronic long term financial difficulties in 2000, 2001,2002 and 2003. Yet, this history was ignored in order to justify and affuscate MCDougal's retaliation against Appellant.

the due process procedure set forth in the manual. As the employer failed to follow this procedure, the case should be reversed and remanded for trial.

Additionally, the trial court ignored the Personnel Action Form signed by Appellant and COI. The document is sufficient to constitute a contract of employment. The document contains an agreement signed by Appellant to work for COI as a teacher at the Aaron Henry Center effective January 2003. In exchange COI agreed to pay Appellant a salary of $20080.00 at a rate of $1048.00 bi-weekly. The document is sufficient to constitute a written contract of employment. The uncontradicted evidence in this case shows COI continued to exercise dominion and control of funds withheld from Appellant's earnings for months after the withholding. The money was then used to pay COI expenses. Appellant had not agreed to the use of her funds in this manner. The continued exercise and dominion constitute conversion. While some of the funds had ultimately been forwarded to the intended source, COI admits that funds withheld for FICA and Federal taxes had not been forwarded as of July 2008. The use of these withholding and the history of such use created an issue that should have been submitted to a trier of fact. COI did not have the right to do this as a matter of law.

In regards to the negligence of COI in regards to its financial matters the proof is that these financial irregularities were systemic and had existed since 1999. The weakness and lack of control were brought to COI's attention by HHS and its auditor. Despite this COI continued to operate without proper safeguards for its financial matters. As a result Appellant was injured and should be allowed to seek redress.

Finally, Appellant who was a 20-year employee was sent a letter in July 2004 notifying her that her services were no longer needed. The person sending the letter lacked the authority or

right to send the letter. No one contends McDougal had the authority to terminate Appellant. Despite this fact no one at COI has taken steps to rectify the matter. This is not an instance where the employer is alleging Appellant failed to do her job. Instead, McDougal alleged McCool caused the funding source to constantly scrutinize COI's operations. The statement is without merits. The records reveal that in November 2003, HHS visited COI and discovered COI's financial situation. This visit was before Appellant became aware her deductions were not being forward to the correct payee. McDougal further based her action on claims that Appellant was making false statements regarding COI failure to pay according to her authorized deductions. The statements happen to be true. COI does not even dispute this matter but simply states it prioritized its debts. It cannot in good conscience argue Appellant had no interest in questioning what was happening to her money. Despite not having the authority or power to terminate a head start employee, Appellees have been allowed to do so with impunity. COI has now adopted the action of McDougal as theirs despite the fact is in contravention of COI bylaws and the Personnel Manual. In essence COI now says so what. This action does in fact meets the standards of extreme and outrageous and should not continue to be sanctioned.

Accordingly, the decision of the Trial Judge should be reversed and remanded for trial.

CERTIFICATE OF SERVICE

I, Ruby White, Counsel for Appellant do hereby certify that I have this day mailed via U.S. mail, postage prepaid, a true and correct copy of the above and foregoing Appellant's Brief to the following individuals:

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