IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOHN MOLLAGHAN and
JOHN VINCENT — APPELLANTS

V. — NO. 2010-TS-02005

SONYA VARNELL, INDIVIDUALLY and OFFICIALLY; ESTATE OF DR. HORACE FLEMING; RICHARD GIANNINI, INDIVIDUALLY and OFFICIALLY; and UNIVERSITY OF SOUTHERN MISSISSIPPI — APPELLEES

BRIEF OF THE APPELLEE, RICHARD GIANNINI

ON APPEAL FROM THE CIRCUIT COURT OF FORREST COUNTY
Consolidated Cause No. CI01-0024

OF COUNSEL:

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CERTIFICATE OF INTERESTED PERSONS

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

(1) John Vincent - Appellant

(2) John Mollaghan - Appellant

(3) Kim T. Chaze and Alexander Ignatiev - Counsel for Appellants

(4) Sonya Varnell - Appellee

(5) William E. Whitfield, III, Matthew D. Miller and Nicholas K. Thompson - Counsel for Appellee-Varnell

(6) Estate of Dr. Horace Fleming - Appellee

(7) Herman M. Hollensed, Jr. - Counsel of Appellee-Estate of Fleming

(8) Richard Giannini - Appellee

(9) Mark D. Morrison - Counsel for Appellee-Giannini

(10) Hon. Robert B. Helfrich - Forrest County Circuit Judge

Mark D. Morrison (MSB [redacted])

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STATEMENT OF THE ISSUES

Whether the trial court erred in granting judgments notwithstanding the verdict ("JNOV") in favor of the Appellee, Richard Giannini, thereby reversing the jury verdicts obtained against him by the Appellants, John Mollaghan ("Mollaghan") and John Vincent ("Vincent").

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition Below

As noted by counsel for Mollaghan and Vincent, the instant appeals arrive in this Court from the Circuit Court of Forrest County where three separately filed employment-related suits were tried together to conclusion on June 22, 2008. Jury verdicts were rendered in Vincent and Mollaghan's favor on that date (R.E., pp. 11-14; C.P., pp. 1140-43), following which, Final Judgments where entered accordingly (R.E., pp. 15-16, 44-45; C.P., pp. 1146-47, 1332-33). From these verdicts and judgments, Giannini and his co-defendants filed post-trial motions (R.E., pp. 17-43; C.P., pp. 1152-78), eventually resulting in an April 12, 2010 Opinion and Order by the trial court granting JNOV in favor of, amongst others, Giannini. (R.E., pp. 46-57; C.P., pp. 1346-57). It is from this grant of JNOV that Mollaghan and Vincent have perfected their appeals. (R.E., pp. 58-63; C.P., pp. 1441-46).

B. Statement of the Facts

Both Mollaghan and Vincent, as well as their graduate assistant, Mr. Ged O'Connor ("O'Connor"), are former members of the USM women's soccer team coaching staff, having begun their relationship with the university between 1995-97. (T.T., pp. 214, 341). In the Summer of 1999, Giannini was hired as USM's Athletic Director, which included Ms. Sonya Varnell ("Varnell") as part of his staff. (T.T., pp. 145). Following the conclusion of the Fall 1999 soccer season, a decision was made to relieve Vincent of his duties as head coach, thereby transferring him to a teaching position for the remainder of his 1999-2000 contract. (T.T., pp. 187-92). To fill the vacancy left by Vincent, Mollaghan was named the interim head coach of the team, and was further informed that he could apply for the full-time position along with other duly qualified candidates. (T.T., pp. 193-95). Mollaghan was not selected as the permanent

replacement for Vincent; rather, USM eventually hired Mr. Matt Clark as the new women's soccer coach. (T.T., pp. 194).

Feeling aggrieved, both Mollaghan and Vincent eventually filed suit against the Appellees, including Giannini. After years of formal litigation and discovery, Giannini and others filed their joint dispositive motions (R.E., pp. 64-100; C.P., pp. 1505-41)[1], eventually resulting in the trial court entering an Opinion and Order on June 12, 2008 (R.E, pp. 46-57; C.P., pp. 1088-97) granting said motions in part and denying them in part, thereby leaving certain claims and causes of action against Giannini for trial. Thus, on June 16, 2008, Mollaghan and Vincent proceeded to trial on their claims of a denial of procedural due process, gender discrimination and retaliation. The results of the trial have been stated previously above, resulting in the instant appeals.

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[1] Due to the voluminous nature (i.e., nearly 750 pages) of the aforementioned Motion for Summary Judgment, the attending exhibits have not been included in Giannini's Record Excerpts.

SUMMARY OF THE ARGUMENT

The trial court was imminently correct in granting JNOV in Giannini's favor as no reasonable juror could have found as did the jury with regard to the claims of Mollaghan and Vincent. More specifically, and as it concerns these individual's due process claims, it was undisputed at trial that they received all monetary compensation to which they were entitled under their contracts with USM. Thus, neither was deprived of any due process with respect to any property interest they may have possessed relative to their then-existing employment contracts.

The jury's verdicts with regard to these individuals' gender discrimination claims were likewise against the overwhelming and undisputed evidence to the contrary. Neither of these former employees proved the essential element of discharge necessary to support their claims. Vincent was re-assigned to a teaching position within the university, and Mollaghan was actually made the interim head coach, succeeding Vincent, all of which remained effective through the end of their then-existing employment contracts. Further, both were succeeded in their final respective coaching positions by males.

Finally, the jury's verdicts on the retaliation claims were ripe for reversal by the trial court as neither Mollaghan nor Vincent presented evidence of any causal connection between the allegedly adverse employment actions taken against them and the purportedly protected activity of reporting Varnell's supposed sexual harassment of O'Connor. Specifically as to Vincent, it is undisputed that his removal as head coach occurred months before O'Connor filed his formal grievance with USM and after Vincent's failure to follow Giannini's advice and admonishments with regard to the proper manner in which to address the numerous continuing complaints against him by the team members and their parents. Mollaghan's claim for retaliation fails as a

matter of law and undisputed fact because he actually received a promotion from assistant to interim head coach during the relevant time period, was allowed to interview twice for the head coaching position, and was succeeded by someone who he failed to prove was clearly less qualified than himself.[2]

[2] Giannini expressly adopts and incorporates by reference those factual matters and legal authorities set forth in his co-Appellees' briefs to the extent consistent with the arguments contained herein.

ARGUMENT

A. Standard of Review

Because these cases arrive in this Court on appeal from the trial court's granting of JNOV, the appropriate appellate standard of review is *de novo*. Pierce v. Cook, 992 So.2d 612, 620 (Miss. 2008)(citing White v. Stewman, 932 So.2d 27, 32 (Miss. 2006)). More specifically, the standard has been explained as follows:

> A motion for a JNOV tests the legal sufficiency of the evidence supporting the verdict, not the weight of the evidence. It asks the court to hold, as a matter of law, that the verdict may not stand. When a motion for JNOV is made, the trial court must consider all of the evidence - not just evidence which supports the non-movant's case - in the light most favorable to the party opposed to the motion. If the facts and inferences so considered point so overwhelmingly in favor of the movant that reasonable jurors could not have arrived at a contrary verdict, granting the motion is required.

McFarland v. Entergy Mississippi, Inc., 919 So.2d 894, 899-900 (Miss. 2005)(citations omitted). Thus, "[w]hen it is clear that the jury decided issues in a case with total disregard for the conclusions that were mandated by the overwhelming evidence, a trial judge has the authority to set aside an unjust verdict." Alfa Janitorial & Paper Co. v. Crawford, 925 So.2d 547, 549 (Ms.Ct.App. 2005)(citing Booker v. Pettey, 770 So.2d 39 (Miss. 2000)). It is against this backdrop that Giannini respectfully requests that this Court affirm the trial court's grant of JNOV as to both the Vincent and Mollaghan jury verdicts.

B. Procedural Due Process Claims

(1) Applicable Law

Typically, when a former employee raises a procedural due process claim, it should be evaluated utilizing a two step process: (1) The court must decide whether a protected property

interest exists, and (2) Thereafter, what "process" was due the employee in order to protect his substantive rights. Bowie v. City of Jackson Police Department, 816 So.2d 1012, 1015 (Ms.Ct.App. 2002). In order to present a viable denial of due process claim, the aggrieved party must, at the very outset, provide competent evidence of a property interest in his employment. See, Whiting v. USM, 451 F.3d 339, 344 (5th Cir. 2006); see also, Nichols v. USM, 669 F.Supp.2d 684, 694 (S.D. Miss. 2009) and Staheli v. Univ. of Miss., 621 F.2d 449, 453 (5th Cir. 1985). In another dispute involving USM and one of its former employees, the Court of Appeals provided the following instruction as to what constitutes an actionable property interest in continued public employment:

> 'The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests that a person has already acquired in specific benefits.' These property interests take several forms, containing certain attributes. 'To have a property interest in a benefit, a person clearly must have more than an abstract need...for it...[but instead must] have a legitimate claim of entitlement to it.' These property interests are not created by the Constitution, but by 'existing rules or understandings that stem from an independent source such as state law....' The property interests 'secure certain benefits and support claims of entitlement to those benefits.' Thus courts must look to state law to determine if a state employee has a property right in continued employment.

Suddith v. USM, 977 So.2d 1158, 1170 (Ms.Ct.App. 2007)(citations omitted). Further, the mere existence of an "employee handbook or manual" does not, in and of itself, create a protected property interest for which procedural due process is required. Suddith, 977 So.2d @1171-72; see also, Nichols, 669 F.Supp.2d @ 694. This is especially true when the handbook or manual expressly rejects any such notion and clearly advises the employee of his "at-will" status. Nichols, 669 F.Supp. 2d @ 694; see also, Hartle v. Packard Elec., 626 So.2d 106, 109 (Miss. 1993). Finally, and to the extent that an employee receives all benefits due and owing under the

terms and conditions of his employment, any property interest he may have possessed in the same has undeniably been protected and not infringed upon. Robinson v. Boyer, 825 F.2d 64, 67 (5th Cir. 1987); see also, Nichols, 669 F.Supp.2d @ 694.

(2) John Vincent

It is undisputed that Vincent, at the time he was relieved of this head coaching duties, had a one-year contract of employment with USM for 1999-2000. (Exh. "E-5"). It is likewise true that he was, in fact, paid all monies due and owing to him under that contract, even though he spent the balance of his employment in a teaching position. (T.T., pp. 187, 398). Therefore, it is inconceivable how, when faced with such plain and uncontradicted proof, the jury could've found that Vincent had a property interest in employment and/or compensation beyond the term of his final 1999-2000 year contract. Because no property interest existed, none of the defendants below, including Giannini, owed him any procedural due process as a matter of law. See, Whiting, 451 F.3d @ 344 (5th Cir. 2006); see also, Nichols, 669 F.Supp.2d @ 694 (S.D. Miss. 2009) and Staheli, 621 F.2d @ 453 (5th Cir. 1985).

(3) John Mollaghan

As was true with respect to Vincent immediately above, so too did the jury commit gross error in finding that Mollaghan was denied procedural due process. In fact, because Mollaghan was allowed to stay one month ***beyond*** the contractual term of his 1999-2000 employment (Exhs. "E-6,11"), he actually received more than he was due. (T.T., pp. 298-300). Thus, it can hardly be said that he was denied any property interest which would have triggered any procedural protections. His brief tenure as "interim" head coach following Vincent's removal likewise did not create any property interest in future employment as he was allowed to interview twice for the full-time position with the clear understanding that he was not guaranteed the same; rather,

only that he would receive the same consideration as all other candidates. (T.T., pp. 281-82, 292-94).

C. Gender Discrimination Claims

(1) Applicable Law

As the Court is aware, it is unlawful under Title VII for any employer to discriminate against any individual on account of their gender. See, 42 U.S.C. §2000e-2(a)(1). Of course, one of the essential elements of such a claim is proof that the plaintiff was replaced in his position by someone outside his protected class of persons. Brown v. Bunge Corp., 207 F.3d 776, 781 (5th Cir. 2000). In any event, proof of such a claim, as asserted by both Vincent and Mollaghan herein, requires evidence of intentional discrimination, which may be either direct or circumstantial in nature. See, Alvarado v. Tex. Rangers, 492 F.3d 605, 611 (5th Cir. 2007). Should an employee elect to proceed upon proof of direct discrimination, such evidence must not rest upon inference, but rather, it shall be "directly related to sex-based animus; proximate in time to the termination; made by an individual with authority over the employment decision; and related to the employment decision." Krystek v. USM, 164 F.3d 251, 254-56 (5th Cir. 1999). Mere "stray remarks" are insufficient to constitute competent "direct evidence" of discriminatory animus. Jackson v. Cal-Western Packaging Corp., 602 F.3d 374, 380 (5th Cir. 2010); see also, Reilly v. TXU Corp., 271 Fed. Appx. 375, 379-380 (5th Cir. 2008).

If a given former employee elects to proceed with circumstantial evidence, then his claim for gender discrimination must be analyzed under the "burden-shifting" regimen of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). This analysis has been adopted and utilized repeatedly by the Fifth Circuit. See, e.g., Alvarado, 492 F.3d @ 611 and Reilly, 271 Fed. Appx. @ 380. However, if the aggrieved employee fails to make a *prima facie* case in the first instance,

then there is clearly no need for any further analysis under the McDonnell Douglas burden-shifting frame work. See, e.g., Bailey v. Dolgencorp, LLC, 2011WL3759629 (5th Cir. 2011). Again, an essential element of a *prima facie* case of gender discrimination naturally includes proof that the employee was either replaced by someone outside of his protected classification, or that similarly situated persons were treated more favorably under circumstances substantially identical to his own. See, Stover v. Hattiesburg Pub. Sch. Dist., 549 F.3d 985, 992-93 (5th Cir. 2008); see also, Okoye v. Univ. of Tex. Houston Health Sci. Ctr., 245 F.3d 507, 513 (5th Cir. 2001).

(2) John Vincent

The jury's verdict in favor of Vincent under this theory of liability cannot stand for two fundamental reasons: (a) He was not "discharged"; and (b) He was replaced by another male. It is undisputed that in December 1999, Giannini made the decision to relieve Vincent of his head coaching duties with respect to the USM women's soccer team, thereby exercising the university's right under his existing contract (Exh. "E-5"), to transfer him to a teaching position within the Human Performance Department for the balance of his one year employment term at the same rate of pay. (T.T., p. 187-88). It is likewise uncontradicted that the vacancy in the head coaching position created by Vincent's reassignment was filled first, on an interim basis, by Mollaghan, the assistant coach. (T.T., pp. 193, 281-82). Ultimately, when Mollaghan was not selected to the position on a permanent basis, it was filled by another male, Matt Clark, who occupied the position for a period of years. (T.T., pp. 194).

(3) John Mollaghan

As was true with regard to Vincent's gender discrimination claims discussed immediately above, the same shortcomings concerning Mollaghan's claims were patently obvious at trial

based upon the overwhelming evidence. Mollaghan suffered no adverse employment decision, much less a termination, when he was in fact promoted to the position of interim head coach of the team in the wake of Vincent's removal and transfer. (T.T., pp. 193, 281-82). And, as previously established, USM hired a male, Matt Clark, to ultimately fill the head coaching spot previously occupied on an interim basis by Mollaghan. (T.T., pp. 194). Therefore, it is inconceivable under the applicable law and undisputed facts as to how the jury could've rendered a verdict in his favor on this count.

D. Retaliation Claims

(1) Applicable Law

Section 2000e-3(a) of Title VII makes it unlawful for an employer to retaliate against an employee where the latter either opposes unlawful employment practices, or participates in proceedings attending a claim of discriminatory conduct. In order to establish a viable claim of retaliation, it is incumbent upon the aggrieved employee to come forward with competent evidence that (1) he engaged in protected activity, (2) suffered an adverse employment decision, and (3) that there was a causal connection between the protected activity and the adverse employment decision suffered. See, e.g., Russell v. Univ. of Tex. of Permian Basin, 234 Fed. Appx. 195, 205 (5th Cir. 2007) and Raggs v. MP&L Co., 278 F.3d 463, 471 (5th Cir. 2002). Such elements may be proven by circumstantial evidence, but in such instances, the same "burden-shifting" McDonnell Douglas analysis discussed previously applies, and the plaintiff must establish that he would not have suffered any adverse employment action "but for" the protected conduct. Septimus v. Univ. of Houston, 399 F.3d 601, 608 (5th Cir. 2005). Obviously, and as was true with respect to the gender discrimination claims addressed herein above, a failure of proof as to any of the three (3) essential elements of a *prima facie* case of retaliation obviate the

need to engage in an analysis of the employer's reasons, as well as any rebuttal evidence by the employee. See, e.g., Lopez v. Martinez, 240 Fed. Appx. 648, 650 (5th Cir. 2007) and Wilson v. DSU, 143 Fed. Appx. 611, 613 (5th Cir. 2005).

(2) John Vincent

As noted by the trial court in reaching its decision to set aside the jury's verdict on Vincent's retaliation claim (R.E., pp. 11-12; C.P., pp. 1252-53), the latter failed to come forward with the requisite proof of causation necessary to make a viable claim. Simply put, he failed to show that "but for" his having engaged in protected activity (i.e., reporting the alleged sexual harassment of O'Connor by Varnell), he would not have suffered any adverse employment action (i.e., removal as head coach and reassigned to a teaching position)(T.T., pp. 189-92). This is especially true when consideration is given to the fact that O'Connor did not formally file his own grievance until months after Vincent's removal. (Exh. "E-3"). Although Vincent's complaint to Giannini regarding Varnell and O'Connor occurred approximately a month before his removal as head coach, mere temporal proximity alone does not constitute sufficient proof of "but for" causation. See, e.g., Strong v. University Healthcare System, 482 F.3d 802, 808 (5th Cir. 2007); see also, Septimus, 399 F.3d @ 608 (5th Cir. 2005). There was simply too much credible evidence to the effect that Giannini received numerous complaints from parents (Exh. "E-34") and team members in the interim (Exhs. "E-26 & 27"), as well as Vincent's own failure to work towards a reasonable solution in the manner suggested by Giannini, such as meeting with the team in mid-December, to support a finding by the jury that a complaint of sexual harassment bore any causal relation to Vincent's removal and reassignment.

(3) John Mollaghan

The jury's verdict as to Mollaghan's retaliation claim could not stand as the

uncontradicted evidence clearly established that he did not suffer any adverse employment action following his involvement in complaining of the alleged sexual harassment of O'Connor by Varnell. Simply put, between the time he reported such allegedly inappropriate behavior and his departure from the USM women's soccer team, two significant events occurred, each of which is fatal to his claim: (a) He was promoted to interim head coach (T.T., pp. 193, 281-82); and (b) He was allowed to interview, on 2 occasions, for the permanent position (T.T., p. 294). With regard to the latter, and to the extent that Mollaghan argues that USM's failure to hire him as the new permanent head coach constituted an "adverse employment action," his proof in such regard did not meet the "but for" causation requirement. He failed to provide evidence to the effect that he was clearly better qualified than the candidate actually selected (i.e., Matt Clark), offering only his brief 5 month period as interim head coach on this critical element and nothing more. (T.T., pp. 311-12). On this point, the trial court's reliance upon the 5th Circuit's opinions in Sabzevari v. Reliable Life Ins. Co., 264 Fed. Appx. 392, 395 (5th Cir. 2008); Gillaspy v. Dallas Indep. Sch. Dist., 278 Fed. Appx. 307, 313 (5th Cir. 2008); and McNeill v. City of Canton, 291 Fed. Appx. 670, 672 (5th Cir. 2008), amongst others, was infinitely correct and thus unassailable.

CONCLUSION

For the reasons set forth herein above, Giannini respectfully submits that the trial court was eminently correct in granting a JNOV in his favor as to both the Vincent and Mollaghan jury verdicts. The jury clearly reached unjust verdicts, contrary to both the applicable law as given to them by the trial court and against the overwhelming and/or uncontradicted evidence. As such, Giannini requests that the trial court's rulings as to these claims be affirmed as to both Vincent and Mollaghan with respect to all claims or causes of action in the premises.

CERTIFICATE OF SERVICE

I, Mark D. Morrison, do hereby certify that I have this day caused a true and correct copy of the above and foregoing instrument, document or pleading to be served upon the following:

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THIS, the 9th day of March, 2012.

Mark D. Morrison