

**IN THE SUPREME COURT OF MISSISSIPPI**

**JOHN VINCENT**

**APPELLANT**

**VS.**

**CAUSE NO.: 2010-CA-2005**

**SONYA VARNELL, INDIVIDUALLY, THE ESTATE OF  
DR. HORACE FLEMING, RICHARD GIANNINI, INDIVIDUALLY,  
AND THE UNIVERSITY OF SOUTHERN MISSISSIPPI**

**APPELLEES**

**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 disqualification or recusal.

1. John Vincent – Appellant
2. John Mollaghan – Co-Plaintiff in trial court/Co-Appellant
3. Ged O'Connor – Co-Plaintiff in trial court
4. Kim T. Chaze, Esq., and Alexander Ignatiev, Esq. – Counsel for the Plaintiffs/Appellants
5. Richard Giannini – Co-Defendant in trial court
6. Mark D. Morrison, Esq. – Counsel for Richard Giannini
7. Estate of Dr. Horace Fleming – Appellee
8. The University of Southern Mississippi
9. Herman M. Hollenshed, Jr., Esq. – Counsel for Estate of Dr. Horace Fleming and the University of Southern Mississippi
10. Sonya Varnell – Appellee
11. William E. Whitfield, III, Esq., and Matthew D. Miller, Esq. – Counsel for Sonya Varnell

  
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## **STATEMENT OF THE ISSUES**

A. Whether the trial court was correct in granting a judgment notwithstanding the verdict (“JNOV”) in favor of the separate Defendant/Appellee, Sonya Varnell (“Varnell”), on the procedural due process claim of the separate Plaintiff/Appellant, John Vincent (“Vincent”), when Vincent failed to provide any evidence of any property right of which he was deprived by Varnell, nor that he had any property right to the grievance and hearing procedures in USM’s employee handbook.

B. Whether the trial court was correct in granting a JNOV in favor of Varnell on Vincent’s gender discrimination claim, when Vincent was replaced by a male, the comments made by Varnell on which Vincent based his gender discrimination claim were nothing more than inactionable stray remarks, Vincent provided no evidence of causation and Varnell did not make the decision to reassign Vincent.

C. Whether the trial court was correct in granting a JNOV in favor of Varnell on Vincent’s retaliation claim, when the only causation evidence Vincent presented on that claim was the temporal proximity between his reporting of O’Connor’s allegations of sexual harassment against Varnell and his reassignment, and since the legitimate, non-discriminatory and true reason for his reassignment was his conduct toward the female players and the complaints raised by the players and their parents.

## **STATEMENT OF THE CASE**

### **A. Nature of the Case and Course of Proceedings and Disposition in the Court Below**

John Vincent (“Vincent”) brought suit in the Circuit Court of Forrest County against the University of Southern Mississippi (“USM”), Sonya Varnell (“Varnell”), Richard Giannini (“Giannini”), and Dr. Horace Fleming (“Dr. Fleming”), alleging federal-law claims under 42 U.S.C. § 1983 for gender discrimination, retaliation, and denial of substantive and procedural Due Process rights. He also asserted state-law claims for wrongful termination, tortious interference with his employment contract, negligent and intentional infliction of emotional distress and defamation. (*See* “Complaint,” Clerk’s Papers (“CP”) at pp. 35-43).

Vincent’s case was consolidated for discovery and ultimately for trial with similar suits brought by the separate plaintiffs, John Mollaghan (“Mollaghan”) and Ged O’Connor (“O’Connor”). (CP at pp. 950-952). On April 18, 2008, a consolidated Motion for Summary Judgment was filed by all Defendants concerning all claims of all three Plaintiffs. On June 12, 2008, the Trial Court entered an Opinion and Order granting summary judgment in favor of Varnell, dismissing all of Vincent’s § 1983 claims against her in her official capacity, his claims arising out of the non-renewal of his employment contract,<sup>1</sup> his equal protection claims,<sup>2</sup> and all of his state law claims.<sup>3</sup> (CP at pp. 1243-52). Thus, the claims remaining for trial were Vincent’s claims for procedural due process, gender discrimination and retaliation. These claims were submitted to the jury at the trial, which

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<sup>1</sup> The trial court found summary judgment appropriate on Vincent’s due process claim arising out of the non-renewal of his employment contract since he had no reasonable expectation of continued employment, and thus, no constitutionally-protected property interest in his job.

<sup>2</sup> The trial court found that Vincent failed to allege membership in a protected class or that he was intentionally treated differently from others similarly situated, and thus, he failed to provide any proof of how he was treated differently from any other similarly situated individual.

<sup>3</sup> The trial court found Vincent’s state-law claims against Varnell were barred by a myriad of immunities under the Mississippi Tort Claims Act, including, *inter alia*, her immunity from individual liability (MISS. CODE ANN. § 11-46-7(2)), and discretionary function immunity (MISS. CODE ANN. § 11-46-9(1)(d)), among other reasons.



commenced on June 16, 2008. (See Jury Instructions, CP at pp. 1105-1112, 1119-1130, and 1134-1136).

The jury returned a verdict in favor of Vincent and against Varnell and Giannini on all three of his claims, awarding him \$500,000.00 in damages. (CP at pp. 1140-1141, 1146-1147). Subsequently, Varnell and the other Defendants filed Motions for JNOV as to the jury's verdict in favor of Vincent, and the trial court granted these Motions on April 12, 2010. (See Opinion and Order, CP at pp. 1346-1357). The trial court subsequently denied Vincent's Motion for Reconsideration on November 8, 2010. (See Order, CP at pp. 1436-1440). Vincent filed his Notice of Appeal on December 2, 2010, appealing the trial court's Orders of April 12, 2010, and November 8, 2010. (See CP at pp. 1441-1442).<sup>4</sup>

#### **B. Statement of the Facts**

Vincent became the head coach of the women's soccer team at USM in January 1997. (Trial Transcript ("Tr.") at p. 341, L 10-14; p. 342, L 14-29). He signed a one-year contract each year he coached at USM, and his final contract was for the 1999-2000 school year. (Tr. at p. 347, L 5 to p. 348, L 3) (See also Trial Exhibit "5"). The contract provides that USM has the authority "to transfer, reassign, or otherwise change the duties of [Vincent] during the term of this Contract." (Tr. at p. 186, L 19 to p. 187, L 9) (Employee Contracts, Trial Exhibit "5" at p. 9) (Record Excerpt ("RE") 1).

Vincent also received a USM Employee Handbook when he was hired. Chapter 5 of the Handbook includes a grievance procedure, which provides that employee complaints may be resolved in several ways, including informal resolution and hearings before a grievance committee or the university president. (See Excerpts of Employee Handbook, Trial Exhibit "7") (RE 2). However,

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<sup>4</sup> The final Motions concerning the jury verdict as to Vincent were disposed of by the trial court in its Order denying the Plaintiffs' Motion for Reconsideration, which Order was entered November 8, 2010. (See CP at p. 1436-40).

the USM Employee Handbook also includes a "Disclaimer," which explicitly provides that the Handbook "does not give rise to any contractual rights." (*See* Excerpts of Employee Handbook, Trial Exhibit "41" at p. 2) (RE 2).

Giannini came to USM in 1999 as the new USM Athletic Director. (Tr. at p. 178, L 29 to p. 179, L 1). Varnell also came to USM in 1999 as an Associate Athletic Director and Senior Women's Administrator for women's sports. (Tr. at p. 503, L 29 to p. 504, L 27).

In late October 1999, the women's soccer team traveled to Chicago, Illinois, and Milwaukee, Wisconsin, for games with DePaul University and Marquette University. In early November, the team traveled to Dallas, Texas, for the Conference-USA Soccer Tournament. (Tr. at p. 59, L 28 to p. 60, L 16). Varnell accompanied the team on these trips. Ged O'Connor ("O'Connor"), a graduate assistant with the team, alleged that he suffered sexual harassment by Varnell on both those trips ("the Subway sandwich incident" and "the hotel room incident"). (Tr. at p. 60, L 17 to p. 61, L 22; p. 65, L 15-19; Tr. at p. 62, L 7 to p. 63, L 7; p. 107, L 14 to p. 111, L 3; p. 133, L 11-25).

During the team's final game in Dallas, several players raised complaints to Varnell concerning the coaches. (Tr. at p. 516, L 11 to p. 518, L 5). Varnell, Vincent and Mollaghan agreed that, when the team returned to Hattiesburg, Varnell would interview the players to try to find out what problems the team had. (Tr. p. 518, L 6 to p. 520, L 7). Varnell interviewed the players the following week and took notes of all their complaints. (Tr. at p. 520, L 8 to p. 522, L 6). Later, the team presented Varnell with a letter, signed by twenty-two (22) players, outlining their complaints with the coaching staff. (Tr. at p. 530, L 9 to p. 531, L 1) (*See also* Trial Exhibit "26") (RE 3). Parents of several players also sent letters to Varnell regarding Coach Vincent's conduct. (Tr. at p. 532, L 1 to p. 533, L 5) (*See also* Trial Exhibit "34") (RE 3). Upon completion of her interviews of the players, and her review of the players' letter and the parents' letters, Varnell wrote a letter and

summary memorandum to Giannini regarding the problems the team was having with the coaches. (Tr. at p. 531, L 6-29) (*See also* Trial Exhibit “35”) (RE 3).

Varnell and Giannini were shocked at the problems the players and their parents had with the coaches. (Tr. at p. 533, L 11 to p. 534, L 6). Based on Vincent’s inappropriate conduct, the players’ and parents’ concerns, and Vincent’s failure to rectify his conduct, Varnell believed the women’s soccer program had been compromised. Multiple players were threatening to leave if Vincent remained the coach, and if all those players left, Varnell believed the soccer program would cease to exist. (Tr. at p. 537, L 19-21; p. 537, L 27 to p. 538, L 14). Because of all of this, Giannini decided to remove Vincent as the head soccer coach and reassign him to another position within the university. (Tr. at p. 187, L 10-16; p. 188, L 22 to p. 192, L 3). Vincent had a meeting with Giannini on December 15, 1999, in which he was informed that he was reassigned to a teaching position in the university and that his coaching contract would not be renewed beyond the 1999-2000 year. (Tr. at p. 372, L 18 to p. 373, L 10) (*See also* Trial Exhibit “8”). Vincent was paid the full salary he was due under his 1999-2000 employment contract and received all benefits he was due under this contract. (Tr. at p. 187, L 25-29; Tr. at p. 398, L 18-27).

Mollaghan was promoted, on an interim basis, to succeed Vincent as the head coach of the women’s soccer team. (Tr. at p. 193, L 20-25; p. 245, L 7-12; p. 281, L 27-29; p. 292, L 18 to p. 293, L 2; p. 323, L 25) (RE 4). Matt Clark, another male, was hired as the permanent head coach of the women’s soccer team in the Spring of 2000. (Tr. at p. 193, L 26 to p. 194, L 27; p. 543, L 18 to p. 544, L 2) (RE 4). Clark was the head coach of the women’s soccer team from 2000 until 2004.<sup>5</sup>

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<sup>5</sup> Gail Macklin, a female, succeeded Clark as the head coach of the women’s soccer team. (Tr. at p. 94, L 14-16). At the trial in June of 2008, Macklin testified she resigned as the head coach a few months prior, and that she had been the head coach for about four (4) years. (Tr. at p. 149, L 2-12, p. 150, L 7-10, p. 492, L 10-16).

## **SUMMARY OF THE ARGUMENT**

Vincent presented three claims against Varnell to the jury: violation of procedural due process rights, gender discrimination and retaliation. The trial court correctly held that Vincent failed to put forth sufficient evidence to support the jury's verdict against Varnell on each of these claims. Thus, the trial court was correct when it granted Varnell's Motion for JNOV as to all three of Vincent's claims.

Vincent's due process claim failed since he failed to establish any protected property right of which he was deprived by Varnell or any of the other Defendants. His employment contract was for a period of one year, and it gave USM the right to reassign or transfer him during that period. Since Vincent received all benefits to which he was entitled under his contract, he was not deprived of any property right due him under this contract. Further, the USM Employee Handbook explicitly states that it did not give rise to any contractual rights, nor could any comments or statements made by any USM employee alter the terms and conditions of Vincent's employment at USM. Thus, Vincent had no protected property right in anything contained in this Handbook, including but not limited to the grievance procedures. Therefore, the trial court correctly granted a JNOV in Varnell's favor on Vincent's procedural due process claim.

Vincent's gender discrimination claim failed for several reasons. First, his *prima facie* case failed, as he did not show he was replaced by a female. The undisputed evidence showed Vincent was replaced by Mollaghan, a male, and Mollaghan was succeeded by Matt Clark, another male.<sup>6</sup> Next, Vincent failed to provide any direct evidence of discrimination by Varnell, nor any evidence of

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Thus, Clark was the head coach from 2000 to 2004.

<sup>6</sup> Varnell had no authority to and did not make any decision regarding Vincent's employment, thus providing yet another reason his gender discrimination and retaliation claims against her correctly failed as a matter of law.

a causal connection between the comments he contends Varnell made<sup>7</sup> and his reassignment. At best, Varnell's comments were nothing more than "stray remarks," which are insufficient to establish causation. Finally, the evidence presented at trial demonstrated a legitimate, non-discriminatory reason for Vincent's reassignment – his inappropriate conduct toward the female soccer players and the complaints raised by the players and their parents. Accordingly, the trial court was correct in granting Varnell a JNOV on Vincent's gender discrimination claim.

The trial court was also correct in granting the JNOV in favor of Varnell on Vincent's retaliation claim. Vincent failed to produce any evidence whatsoever that his alleged reporting of O'Connor's sexual harassment was causally connected to any adverse employment action he allegedly suffered. The only evidence Vincent presented on his retaliation claim was the temporal proximity between his alleged reporting of O'Connor's claims and his reassignment, which, as a matter of law, is insufficient to establish causation. Vincent also failed to provide any evidence to establish that the stated reason for his reassignment – his actions toward the players and the complaints of the players and their parents – was pretextual or that his alleged reporting of O'Connor's claim was a "motivating factor" for the actions. The evidence at trial showed that Vincent would have been reassigned and his contract not renewed, regardless of whether he reported O'Connor's claim to anyone. Accordingly, the trial court was correct in granting the JNOV in favor of Varnell and the other Defendants on Vincent's retaliation claim.

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<sup>7</sup> Varnell's comments with which Vincent took issue stemmed from her opinion that women should be coaching female athletes.

## ARGUMENT<sup>8</sup>

### I. STANDARD OF REVIEW

This Court's standard of review for a trial court's grant of a motion for judgment notwithstanding the verdict is *de novo*. *White v. Stewman*, 932 So. 2d 27, 32 (Miss. 2006). "The motion for [JNOV] tests the legal sufficiency of the evidence supporting the verdict. It asks the Court to hold, as a matter of law, that the verdict may not stand." *Watts v. Radiator Specialty Co.*, 990 So. 2d 143, 150-151 (Miss. 2008) (quoting *Jesco, Inc. v. Whitehead*, 451 So. 2d 706, 713 (Miss. 1984) (Robertson, J., specially concurring)).

In essence, judgments as a matter of law present both the trial court and the appellate court with the same question - whether the evidence, as applied to the elements of a party's case, is either so indisputable, or so deficient, that the necessity of a trier of fact has been obviated. Stated differently, judgments as a matter of law go to the very heart of a litigant's case and test the legal sufficiency of that litigant's case. In this way, judgments as a matter of law put a party to its proof and are available through a motion at varying junctures of the judicial process before, during, and after trial.

[T]he grant of a J.N.O.V. results in a wholesale reversal of the verdict. Thus, Rule 50(b) allows the court to reserve the decision on this critical question of law until after the case has been submitted to the jury and the jury has reached a verdict or has informed the judge of its inability to agree on a verdict. Wright & Miller, *Federal Practice and Procedure: Civil 2d* § 2521, p. 241. "If the court decides that the initial motion for judgment as a matter of law should have been granted, it may set aside the verdict of the jury and enter a judgment as a matter of law. . . . Thus the rule gives the trial court a last chance to order the judgment that the law requires." *Id.*, pp. 241-42.

*White v. Stewman*, 932 So. 2d 27, 32 (Miss. 2006). When a JNOV has been entered by the trial court, this Court is required to review the evidence in the light most favorable to the appellant. *Stewart v. Gulf Guar. Life Ins. Co.*, 846 So. 2d 192, 200 (Miss. 2002).

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<sup>8</sup> Varnell incorporates herein by reference all applicable facts and legal arguments set forth in her brief in response to Mollaghan's appeal, as well as the briefs submitted by the other Appellees.

In other words, the Motion for JNOV asks the Court to decide whether the Plaintiff presented sufficient evidence at trial to prove each and every element of his asserted claims. “Substantial evidence” has been defined as “information of such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions.” *U.S. Fid. and Guar. Co. of Miss. v. Martin*, 998 So.2d 956, 964 (Miss. 2008) (citing *Adcock v. Miss. Transp. Comm’n*, 981 So.2d 942, 948-49 (Miss. 2008)). As is set out in more detail below, under this standard, the trial court correctly granted Varnell’s JNOV Motion setting aside the jury’s verdict in Vincent’s favor.<sup>9</sup>

**II. THE TRIAL COURT CORRECTLY GRANTED VARNELL’S JNOV MOTION ON VINCENT’S PROCEDURAL DUE PROCESS CLAIM, AS HE HAD NO CONSTITUTIONALLY PROTECTED PROPERTY RIGHT TO ANYTHING CONTAINED IN USM’S EMPLOYEE HANDBOOK, INCLUDING THE GRIEVANCE AND HEARING PROCEDURES.**

Vincent’s procedural due process claim<sup>10</sup> stems from his allegation that he has a protected property right in the procedures set forth in the USM Employee Handbook regarding the grievance he filed, and he specifically contends his alleged rights were violated when he was not provided a hearing before he was reassigned and his coaching contract was not renewed.

Procedural due process questions are addressed in two steps: the first asks whether there exists a liberty or property interest which has been interfered with by the State; the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient. *Esco v.*

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<sup>9</sup> Vincent devotes a sufficient portion of his brief arguing that the trial court had no authority to grant Varnell’s JNOV Motion since it previously denied her Motion for Summary Judgment on the claims that were tried. This argument is a non-starter. The trial court’s denial of Varnell’s summary judgment motion on the three issues that were tried was a finding that genuine issues of material fact existed at the time of the summary judgment ruling. It was not, as the trial court pointed out, an affirmation that there was sufficient evidence to support Vincent’s claims. (See the trial court’s Order on Motion for Reconsideration, CP. at p. 1437, n. 1, and Tr. at p. 620, L 13-19).

<sup>10</sup> The trial court dismissed Vincent’s substantive due process claim on summary judgment, holding that Vincent “had no reasonable expectation of continued employment,” and thus, he had no “constitutionally-protected interest” in maintaining his job. (CP. at pp. 1246-1247). Vincent is not raising this issue in his

*Blackmon*, 692 So. 2d 74, 78 (Miss. 1997) (citing *Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 459-460, 104 L. Ed. 2d 506, 109 S. Ct. 1904 (1989)). In the context of a protected property right in continued employment, “[a] threshold requirement is that the plaintiff demonstrate either a liberty or property interest in [his] public employment. Without such an interest to public employment, no right to due process accrues.” *Whitehurst v. Abel*, 1995 U.S. Dist. LEXIS 21664 (N.D. Miss. Jan. 12, 1995) (quoting *Moore v. Mississippi Valley State Univ.*, 871 F.2d 545, 548 (5th Cir. 1989)). An employee has a property interest in his employment only when a legitimate right to continued employment exists. *McDonald v. City of Corinth*, 102 F.3d 152, 155 (5th Cir. 1996) (citing *Perry v. Sindermann*, 408 U.S. 593, 601-602, 92 S. Ct. 2694, 2699-2700, 33 L. Ed. 2d 570 (1972)).

Against this backdrop, Vincent’s procedural due process claim failed as a matter of law, as he provided no evidence of any property right of which he was deprived. There is no dispute that Vincent had an employment contract with USM from July 1, 1999, to June 30, 2000. (See Trial Exhibit “5” at p. 7) (RE 1). It is undisputed that Vincent received all salary and other benefits to which he was entitled under his contract. (Tr. at p. 187, L 25-29; Tr. at p. 398, L 18-27). Furthermore, under this contract, Vincent could be reassigned to another position. Thus, he had no protected property right in maintaining the position of head women’s soccer coach for the duration of his contract.<sup>11</sup> See *Lollar v. Baker*, 196 F.3d 603, 608 (5th Cir. 1999). Since Vincent received all salary and other benefits to which he was entitled under his contract, and had no protected property right in maintaining the position of head women’s soccer coach, he was not deprived of any property right, and his procedural due process claim correctly failed as a matter of law. See *Robinson v.*

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appeal. (See Vincent’s Brief, p. 28).

<sup>11</sup> Vincent’s contract provided that USM had the right “to transfer, reassign, or otherwise change the duties of [Vincent] during the term of this Contract.” (Trial Exhibit “5” at p. 9) (RE 1).



*Boyer*, 825 F.2d 64, 67 (5th Cir. 1987); *Gorden v. Jackson State Univ.*, 85 F.3d 622 (5th Cir. 1996) (affirming summary judgment on due process claim in part because athletic director “continued to receive the contracted for salary . . . and ha[d] therefore suffered no compensable damage as a result of his reassignment.”).

Vincent’s procedural due process claim also fails since he cannot establish that he had a protected property right to the grievance and hearing procedures set forth in USM’s Employee Handbook. “The mere existence of a faculty handbook does not create an expectation of continued employment. It matters what the handbook actually says.” *Suddith v. Univ. of S. Miss.*, 977 So. 2d 1158, 1171-72 (Miss. Ct. App. 2007). The law in Mississippi is clear that “express statements contained in employee handbooks that nothing in the contents creates a legal contract or alters an at-will status bar any suggestion that the employee is anything other than at-will.” *Whitehurst v. Abel*, 1995 U.S. Dist. LEXIS 21664 (N.D. Miss. Jan. 12, 1995) (citing *Hartle v. Packard Electric*, 626 So. 2d 106, 109 (Miss. 1993)).

Here, the Handbook expressly states that “[t]hese policies are intended only to be guidelines for employment at USM, and they do not give rise to any contractual rights.” (Employee Handbook, Trial Exhibit “41” at p. 2) (RE 2). The Handbook also provided that employment was “at will” and that nothing in the Handbook or any statements by any administrator or other employee of USM could change that.<sup>12</sup> (Trial Exhibit “41” at p. 2) (RE 2). Since USM’s Employee Handbook specifically states that its policies do not give rise to any contractual rights, Vincent had no protected property interest in the grievance or hearing procedures contained therein. This provides yet another

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<sup>12</sup> This language in USM’s Employee Handbook makes it clear that the statements or opinions of anyone, including the testimony of Russ Willis and Dr. Fleming cited by Vincent in his Brief (see pp. 11-12 and 16 of Vincent’s Brief), cannot convey rights to Vincent through the Employee Handbook or otherwise alter the terms and conditions of his employment with USM.

reason the trial court was correct in granting Varnell's JNOV Motion on Vincent's procedural due process claim.

### **III. THE TRIAL COURT CORRECTLY HELD THAT VINCENT'S GENDER DISCRIMINATION CLAIM FAILED AS A MATTER OF LAW.**

Title VII of the Civil Rights Act of 1964 makes it unlawful "for an employer to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's...sex." See 42 U.S.C. §2000e-2(a)(1). In deciding cases regarding Title VII violations, the court's inquiry is "whether the defendant intentionally discriminated against the plaintiff." See *Alvarado v. Tex. Rangers*, 492 F.3d 605, 611 (5th Cir. 2007) (citing *Roberson v. Alltel Info. Servs.*, 373 F.3d 647, 651 (5th Cir. 2004)). In order to set forth a *prima facie* case of discrimination, a plaintiff must demonstrate (1) that he belongs to a protected class; (2) that he was qualified for the position; (3) that he suffered an adverse employment decision; and (4) that he was replaced by someone outside the protected class. *Swanier v. Home Depot U.S.A. Inc.*, 2007 U.S. Dist. LEXIS 89843, \*8-9 (S.D. Miss. Dec. 5, 2007) (citing *Okoye v. Univ. of Tex. Houston Health Sci. Ctr.*, 245 F.3d 507, 513 (5th Cir. 2001)).

To prove his gender discrimination claim by direct evidence, Vincent must submit evidence that, if believed, proves the fact in question without inference or presumption. *Jones v. Robinson Prop. Group*, 427 F.3d 987, 992 (5th Cir. 2005). "To qualify as direct evidence, a comment must 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. Univ. of S. Miss.*, 164 F.3d 251, 254-256 (5th Cir. 1999); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235, 109 S. Ct. 1775, 104 L. Ed. 2d 268 (1989); *Brockie v. AmeriPath, Inc.*, 273 Fed.Appx. 375,

378 (5th Cir. 2008). “Stray remarks” are insufficient to amount to competent direct evidence of discrimination. *See Jackson v. Cal-Western Packaging Corp.*, 602 F.3d 374, 380 (5th Cir. 2010).

In the absence of direct evidence of discrimination, Vincent’s gender discrimination claim is analyzed under the burden-shifting framework set forth in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). *See Alvarado v. Texas Rangers*, 492 F.3d 605, 611 (5th Cir. 2007); *Harris v. First Am. Nat’l Bancshares, Inc.*, 2011 U.S. Dist. LEXIS 117882 (N.D. Miss. Oct. 13, 2011). Under that framework, if the plaintiff establishes a *prima facie* case of gender discrimination, “an inference of intentional discrimination is raised, and the burden of production shifts to the employer, who must offer an alternative nondiscriminatory explanation for the adverse employment action.” *Lee v. Kansas City Southern Ry. Co.*, 574 F.3d 253, 259 (5th Cir. 2009). If the defendant can set forth a legitimate nondiscriminatory reason for its action, the burden then shifts back to the plaintiff who must show at “a new level of specificity” that the explanation is merely a pretext for discrimination. *Thornbrough v. Columbus and Greenville R.R. Co.*, 760 F.2d 633, 639 (5th Cir. 1985), abrogated on other grounds by *St. Mary’s Honor Center v. Hicks*, 509 U.S. 502, 513, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993).

In the alternative, Vincent may show “that the employer’s reason, while true, is not the only reason for its conduct, and another ‘motivating factor’ is the plaintiff’s [gender].” *Alvarado*, 492 F.3d at 611 (quoting *Rachid v. Jack In The Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004)). *See also* 42 U.S.C. § 2000e-2(m). If Vincent proceeds under this option and successfully proves that his gender played a motivating part in the employment action, the Defendants still have no liability if they “would have made the same decision even if it had not taken the plaintiff’s gender into account.”

*Desert Palace, Inc. v. Costa*, 539 U.S. 90, 93, 123 S. Ct. 2148, 156 L. Ed. 2d 84 (2003) (applying Title VII “mixed-motive” analysis in a gender discrimination case).<sup>13</sup>

**A. Vincent was not replaced by a female.**

Vincent’s gender discrimination claim fails at the outset, since he did not and could not prove an essential element of his *prima facie* case – that he was replaced by a member of the opposite sex. It is undisputed that Vincent was initially replaced as head coach of the USM women’s soccer team by Mollaghan, a male. After Mollaghan, another male, Matt Clark, was hired as the head coach of the USM women’s soccer team, and coached the team for four (4) years. Thus, Vincent was not replaced by “someone outside his protected class,” i.e., a female.

Vincent argues that he satisfies this element of his *prima facie* case since he was “ultimately” replaced by a female. This argument is specious, at best. USM indeed hired Gail Macklin, a female, some four (4) years *after* Vincent was reassigned. However, Vincent conveniently ignores that he was replaced by two (2) males – Mollaghan and Clark – prior to Macklin’s hiring. The common-sense meaning of an employee’s “replacement” in a gender discrimination claim is the “immediate successor.” See *Turner v. North Am. Rubber, Inc.*, 979 F.2d 55, 58 (5th Cir. Tex. 1992) (in age discrimination case involving a plant manager in his fifties, court explained that “[t]wo years after Wilson was fired, the person who was made plant manager was in his mid-thirties, but Wilson’s two immediate successors were in their forties.”) (emphasis added). It is easily seen this “ultimately replaced by a female” argument has no merit and was correctly disregarded by the trial court.

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<sup>13</sup> Notwithstanding the shifting of “intermediate evidentiary burdens” under *McDonnell Douglas*, “[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.” *Texas Dep’t of Community Affairs v. Burdine*, 450 U.S. 248, 253, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981).

**B. Vincent provided no direct evidence of gender discrimination by Varnell nor any evidence of a causal connection between the stray remarks Varnell made and his reassignment.**

Notwithstanding the fact that Vincent failed to make his *prima facie* case for gender discrimination, his “direct evidence” argument also fails as a matter of law. Vincent contends that Varnell’s comments about her preference for women coaching women’s sports at USM are direct evidence that he was discriminated against because he is a male. This contention fails for several reasons.

First, it is undisputed that Varnell did not have the authority to reassign Vincent or non-renew his coaching contract. Those decisions were and could only be made by Giannini, the USM Athletic Director. (Tr. at p. 188, L 1-6). Since Varnell had no authority to make, and did not make, any decision regarding Vincent’s position, she cannot have any liability to Vincent for gender discrimination.<sup>14</sup> *See Krystek*, 164 F.3d at 256 (holding that stray remarks from a female regarding a male, who had no role in the employment decision, were not evidence of discrimination).

Even if Varnell did express a preference for females coaching females, that statement does not constitute direct evidence of sex-based animus because it requires the court to draw an inference or make a presumption. *See Read v. BT Alex Brown, Inc.*, 72 Fed. Appx. 112, 119 (5th Cir. 2003); *Mooney v. Aramco Svcs. Co.*, 54 F.3d 1207, 1212 (5th Cir. 1995) (“Even if we accept the statements at face value, they do not provide discriminatory animus “without inference or presumption.”) (abrogation on other grounds recognized in *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 311 n.10 (5th Cir. 2004)); *Dickerson v. Jones County, Miss.*, No. 2:06CV88, 2007 WL 763925, at \*4 (S.D. Miss. March 9, 2007) (“None of the comments are directly related to the employment decision at issue and they require the factfinder to draw additional inferences.”); *Stover v. Hattiesburg Publ.*

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<sup>14</sup> The fact that Varnell did not reassign Vincent or had the authority to do so also demonstrates there is no

*Sch. Dist.*, No. 2:05CV388, 2007 WL 465664, at \*7 (S.D. Miss. Feb. 8, 2007), rev'd on other grounds, 549 F.3d 985 (5th Cir. 2008) ("These are not direct evidence of discrimination because they require this court to draw an inference between the statements and the challenged actions."). At best, Varnell's alleged comments are nothing more than "stray remarks", which are ineffective as direct evidence of discrimination. *See Jackson v. Cal-Western Packaging Corp.*, 602 F.3d 374, 380 (5th Cir. 2010).

The case of *Comer v. Jesco, Inc.*, 1997 U.S. Dist. LEXIS 16749 (N.D. Miss. Sept. 25, 1997), is instructive here. In that case, Jesco hired Paula Comer, a female, in December of 1994 as an electrician. During the summer of 1995, Jesco hired Michael Williams, a male, as a foreman at Jesco's Cooper Tire project, and declined to promote Comer to that position. *Id.* at \*1-2. Comer sued Jesco, alleging that it discriminated against her on the basis of her sex. Comer alleged that her superintendent, Ralph Wiggington, stated that he "would never have a woman over his men." *Comer*, 1997 U.S. Dist. LEXIS 16749 at \*17.

In ruling upon Jesco's Motion for Summary Judgment, the district court explained that such a statement does not constitute direct evidence of discrimination:

As the Defendant properly notes, a single stray remark does not support a finding of discrimination. *See, e.g., Price v. Marathon Cheese Corp.*, 119 F.3d 330, 337 (5th Cir. 1997) (noting "stray remarks" insufficient to establish discrimination); *E.E.O.C. v. Texas Instruments Inc.*, 100 F.3d 1173, 1181 (5th Cir. 1996) ("This court has repeatedly held that 'stray remarks' do not demonstrate . . . discrimination."); *Ray v. Tandem Computers, Inc.*, 63 F.3d 429, 434 (5th Cir. 1995) ("[A] single comment, made several years prior to the challenged conduct, is a stray remark too remote in time to support an inference of sex discrimination in later employment actions."). Rather, in order for a comment to be probative of discriminatory intent, the comment itself must be direct and unambiguous, allowing a reasonable jury to conclude without any inferences or presumptions that the protected status was an impermissible factor in the employer's choice to make an adverse employment decision against the plaintiff. *Texas Instruments*, 100 F.3d at 1181; *Bodenheimer v. PPG Industries Inc.*, 5 F.3d 955, 958 (5th Cir. 1993).

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causal connection between her stray remarks and Vincent's reassignment.

The undersigned is of the opinion that Mr. Wiggington's alleged statement, while potentially having relevance as circumstantial evidence of discrimination, does not possess any probative worth as *direct evidence* of discrimination.

*Comer*, 1997 U.S. Dist. LEXIS 16749 at \*17-18 (*emphasis* in original).

In the present case, the alleged statement of Varnell is very similar to that of Comer's superintendent, Mr. Wiggington. However, as in *Comer*, this statement by Varnell, even if made, does not constitute direct evidence of discrimination because it requires the fact-finder to infer or presume that Varnell somehow acted on her desire to have women coaching women's sports at USM by reassigning Vincent or not renewing his contract. Thus, at best, the statement qualifies as a "stray remark," which is not direct evidence of discrimination.

**C. The true reasons for Vincent's reassignment were his conduct toward the female soccer players and the complaints of the players and their parents regarding his conduct.**

Finally, and out of an abundance of caution,<sup>15</sup> the evidence presented at trial by the Defendants provided a valid, legitimate and non-discriminatory reason for Vincent's reassignment. A substantial majority of the players on the soccer team, and even many of the players' parents, brought allegations of Vincent's inappropriate conduct to the attention of USM. (Trial Exhibit "26" and Trial Exhibit "34") (RE 3). Giannini discussed with Vincent the allegations of his conduct and asked him to apologize to the students, but Vincent did not do so. Varnell also believed that Vincent's conduct had compromised the future existence of the soccer program. Vincent's inappropriate conduct and his failure to rectify it are the true reasons for Vincent's reassignment and non-renewal. (Tr. at p. 187, L 10-16; p. 188, L 22 to p. 192, L 3; p. 537, L 19-21; p. 537, L 27 to p.

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<sup>15</sup> Vincent's failure to establish his *prima facie* case of gender discrimination and lack of direct evidence should dispel the need for further analysis of this claim. However, should further analysis be required, the legitimate, non-discriminatory reasons for Vincent's reassignment and non-renewal should finally affirm the trial court's decision to grant a JNOV in favor of Varnell on Vincent's gender discrimination claim.

538, L 14). Vincent provided no evidence to rebut these reasons or to show they were pretextual, nor did he provide any evidence to rebut the testimony of the Defendants that he would have been reassigned and his contract not renewed regardless of whether Varnell or any other Defendant desired to have women coaching women's sports.

In sum, Vincent failed to make out his *prima facie* case for gender discrimination since he did not prove he was replaced by a female. Varnell's opinions regarding women coaching women's sports are not direct evidence of discrimination. At best, these were stray remarks that ultimately had no relevance to Vincent's claims, since Varnell had no authority to and did not make the decision to reassign and non-renew Vincent. Finally, the evidence presented provided legitimate, non-discriminatory reasons for Vincent's reassignment and non-renewal. For all of these reasons, the trial court was correct in granting the JNOV in favor of Varnell on Vincent's gender discrimination claim, and this decision should not be disturbed.

#### **IV. THE TRIAL COURT CORRECTLY GRANTED VARNELL'S JNOV MOTION ON VINCENT'S RETALIATION CLAIM.**

Vincent's retaliation claim is based upon his allegation that he was reassigned and his contract was not renewed because he reported O'Connor's sexual harassment allegations against Varnell to Giannini. A retaliation case based on circumstantial evidence,<sup>16</sup> as in a discrimination case, is analyzed under the *McDonnell-Douglas* burden-shifting framework. *Septimus v. Univ. of Houston*, 399 F.3d 601, 608 (5th Cir. 2005). Vincent must first establish a *prima facie* case by showing: (1) that he engaged in a protected activity, (2) that an adverse employment action occurred, and (3) that a causal link existed between the protected activity and the adverse action. *Gee v. Principi*, 289 F.3d 342, 345 (5th Cir. 2002) (quoting *Raggs v. Miss. Power & Light Co.*, 278 F.3d 463, 471 (5th Cir. 2002)) (internal quotation marks omitted). If the plaintiff establishes a *prima facie*



case, the burden “shifts to the defendant to demonstrate a legitimate nondiscriminatory purpose for the employment action.” *Id.* (quoting *Aldrup v. Caldera*, 274 F.3d 282, 286 (5th Cir. 2001)) (internal quotation marks omitted). The employer’s burden is one of production, not persuasion, and does not involve a credibility assessment. *McCoy v. City of Shreveport*, 492 F.3d 551, 556 (5th Cir. 2007).

Once the defendants provided a legitimate, non-discriminatory reason for the employment action, the burden then shifts back to the plaintiff to prove either (1) that the defendant’s reason is not true, but is instead a pretext for retaliation (pretext alternative); or (2) that the defendant’s reason, while true, is only one of the reasons for its conduct, and another motivating factor is the plaintiff’s protected activity (mixed-motive alternative). *Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 341 (5th Cir. 2005) (quoting *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004)). *See also Smith v. Xerox Corp.*, 602 F.3d 320, 326 (5th Cir. 2010); *Cothran v. Potter*, 398 F. Appx. 71, 73 (5th Cir. 2010); *Everett v. Cent. Miss.*, 2011 U.S. App. LEXIS 20408, \*11-13 (5th Cir. Miss. Oct. 5, 2011).

Under the pretext alternative, the plaintiff “bears the ultimate burden of proving that the employer’s proffered reason is not true but instead is a pretext for the real . . . retaliatory purpose. To carry this burden, the plaintiff must rebut each . . . nonretaliatory reason articulated by the employer.” *McCoy*, 492 F.3d at 556. To do this, the plaintiff must show that “the adverse employment action taken against the plaintiff would not have occurred ‘but for’ [his] protected conduct.” *Septimus*, 399 F.3d at 608. Under the mixed-motive theory, if the plaintiff sufficiently shows that the plaintiff’s protected activity was a motivating factor, then the burden shifts to the employer to show that the adverse employment action would have been made regardless of the retaliatory animus. *See Rachid*, 376 F.3d at 312; *Cothran*, 398 Fed. Appx. at 73.

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<sup>16</sup> Vincent has absolutely no “direct evidence” of retaliatory animus on the part of Varnell.

**A. Vincent's evidence of the temporal proximity between his alleged reporting of O'Connor's claims against Varnell and his reassignment is insufficient as a matter of law to support the causation element of his retaliation claim.**

Vincent's *prima facie* case of retaliation fails the causal link element. The only evidence Vincent provided concerning the connection between his alleged reporting of O'Connor's sexual harassment allegation and his reassignment and non-renewal was the temporal proximity between the two. However, temporal proximity alone is insufficient to establish the causal link. *Strong v. University Healthcare System*, 482 F.3d 802, 808 (5th Cir. 2007). Furthermore, Vincent's subjective belief that his reassignment and non-renewal were retaliatory is also not sufficient to show causation. *See Grice v. FMC Techs. Inc.*, 216 Fed. Appx. 401, 407 (5th Cir. Tex. 2007) (citing *Haley v. Alliance Compressor LLC*, 391 F.3d 644, 651 (5th Cir. 2004)). Since Vincent failed to put forth any evidence on the causal link element of his *prima facie* case for retaliation, the trial court correctly granted Varnell's JNOV motion on Vincent's retaliation claim.

**B. Vincent's reassignment was a result of his conduct and the complaints of the players and parents regarding his conduct.**

As discussed above, USM and Varnell proffered a legitimate, non-discriminatory reason for Vincent's reassignment and non-renewal, namely Vincent's inappropriate conduct, his failure to rectify it, and the complaints about it brought by the soccer players and their parents, all of which had compromised the survival of USM's soccer program. Vincent put forth no evidence to rebut that non-retaliatory reason, to show that it was pretextual, or to show that his reassignment and non-renewal would not have occurred "but for" his reporting of O'Connor's sexual harassment allegations concerning Varnell. The trial court correctly noted this in its Order granting Varnell's JNOV: "[Vincent] has not presented sufficient evidence to establish he would not have been reassigned but for having reported O'Connor's complaint." (CP at p. 1353 (second ¶)) (*See also* CP

at p. 1354). This provides yet another reason the trial court was correct in granting Varnell's JNOV motion on Vincent's retaliation claim.

### **CONCLUSION**

The trial court was absolutely correct in granting Varnell's Motion for JNOV on all three of Vincent's claims. The USM Handbook provided Vincent no protected property right in any of its contents, including the grievance and hearing procedures. Thus, his procedural due process claim properly failed.

The undisputed evidence established Vincent was replaced by two (2) males and was not discharged from his position. Thus he did not make his *prima facie* case for his gender discrimination claim. Varnell's comments regarding "women coaching women," at best, were stray remarks, and Vincent provided no evidence of any causal connection between these remarks and his reassignment and non-renewal, providing more reasons the trial court was correct in granting Varnell's JNOV on Vincent's gender discrimination claim.

Finally, Vincent's retaliation claim failed because Vincent's only evidence was the temporal proximity between his reporting of O'Connor's sexual harassment allegations and his reassignment, which is clearly insufficient, standing alone, to support his retaliation claim.

The death knell for Vincent's discrimination and retaliation claims was his failure to overcome the Defendants' evidence of the legitimate, non-discriminatory and non-retaliatory reason he was fired – his conduct toward his players which compromised the soccer program. The bottom line is that no act or omission of Varnell led to Vincent's reassignment and non-renewal. It was Vincent's own conduct that led to the end of his coaching job at USM.



The trial court appropriately granted Varnell's JNOV Motion setting aside the jury's verdict in favor of Vincent, and this Court should not disturb the trial court's findings. Accordingly, Varnell

requests that this Court issue an Opinion affirming the trial court's JNOV ruling in her favor on all of Vincent's claims.

RESPECTFULLY SUBMITTED, this the 12<sup>th</sup> day of March, 2012.

SONYA VARNELL, INDIVIDUALLY

By:   
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**CERTIFICATE OF SERVICE**

I, the undersigned, being the attorney of record for the separate Appellee, Sonya Varnell, in Docket No. 2010-CA-2005 in the Supreme Court of Mississippi, do hereby certify that I have, pursuant to Mississippi Rules of Appellate Procedure 25 and 31, this day delivered a copy of the foregoing brief of Appellant Sonya Varnell to: Kim T. Chaze, Esq., 7 Surrey Lane, Durham, NH 03824, Alexander Ignatiev, Esq., 206 Thompson St., Hattiesburg, MS 39401, Mark D. Morrison, Esq., Adcock & Morrison, P.O. Box 3308, Ridgeland, MS 39158-3308, Herman M. Hollensed, Jr., Esq., Byran Nelson, P.O. Drawer 18109, Hattiesburg, MS 39404-8109, Honorable Robert B. Helfrich, Forrest County Circuit Court Judge, P. O. Box 309, Hattiesburg, MS 39403, via Regular United States Mail, postage prepaid.

THIS, the 12<sup>th</sup> day of March, 2012.

  
\_\_\_\_\_  
MATTHEW D. MILLER

**CERTIFICATE OF SERVICE AS TO FILING**

I, the undersigned, being the attorney of record for the Appellee Sonya Varnell in Docket No. 2010-CA-2005 in the Supreme Court of Mississippi, do hereby certify that I have, pursuant to Mississippi Rules of Appellate Procedure 25 and 31, this day delivered for filing, the original and three (3) copies of the foregoing brief of Appellant to Kathy Gillis, Supreme Court Clerk, Third Floor of the Gartin Building, 450 High Street, Post Office Box 249, Jackson, Mississippi, 39205, via Regular United States Mail, postage prepaid.

THIS, the 12<sup>th</sup> day of March, 2012.

A handwritten signature in black ink, appearing to read "Matthew D. Miller", written over a horizontal line.

MATTHEW D. MILLER