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RE-STATEMENT OF THE FACTS[1]

The "Facts" section of O'Connor's Brief of Appellee is replete with misstatements of the testimony of Varnell and the other Defendants, inaccurate and out-of-context recitations of O'Connor's testimony, and facts which have no bearing whatsoever on the sole issue presented in this appeal. In the interest of clarity, below are some of the "facts" O'Connor has cited that are actually germane to this appeal.

O'Connor avers that "Varnell became attracted to O'Connor." (O'Connor's Brief at p. 3). Simply put, there was no evidence presented at trial to support this allegation. In fact, Varnell affirmatively stated that she had no interest whatsoever in any romantic relationship with O'Connor. (Tr. at p. 513, L 20-27). O'Connor further admitted Varnell never asked him to stay in her bed nor did she ask him to sleep with her. (Tr. at p. 110, L 23-27).

Next, O'Connor contends that "[Varnell] threatened [him] by telling him that she had to 'get him out of here as soon as possible.'" (O'Connor's Brief at pp. 4, 11, 21, 31). What O'Connor fails to mention is that this statement was made in late April 2000, and was regarding his required attendance for a full summer of graduate school. (Tr. at p. 77, L 13-24). Furthermore, there was no evidence presented at trial to establish any connection whatsoever between this alleged statement by Varnell, in April 2000, and the two alleged instances of sexual harassment in December 1999.

O'Connor next describes a meeting he had with Varnell, during which he alleges that Varnell attempted to "bribe" him to keep quiet about her alleged "sexual misconduct." (O'Connor's Brief at p. 5). He further implies that the laundry list of alleged actions taken by Varnell and others, after the

[1] Varnell hereby incorporates herein the Statement of the Case and Statement of the Facts included in her principal Brief of Appellant.

two instances of Varnell's alleged sexual harassment occurred, "continued" this sexual harassment and made the remainder of his tenure at USM untenable. The fallacy of this implication is exposed by O'Connor himself, as he testified at trial and asserts in his Brief that he believes he actually was promoted and became the Assistant Coach of the soccer team during this same period. (Tr. at p. 116, L 25 to p. 117, L 10) (O'Connor's Brief at p. 8).

O'Connor further alleges in his Brief that he became a contractual employee of USM, in the position of Assistant Coach, when Mollaghan became the interim Head Coach. (O'Connor's Brief at p. 8). O'Connor goes so far as to state that, "[a]s one aspect of the sexual harassment that Ged O'Connor endured, Coach O'Connor was never paid for performing duties as an Assistant Coach." (O'Connor's Brief at p. 8). These allegations, however, conflict with his testimony at trial, where he admitted that he never had any written contract to be the assistant coach with the women's soccer team and that he received all the benefits to which he was entitled as a graduate assistant. (Tr. at p. 114, L 28 to p. 116, L 1; p. 117, L 1-28; p. 135, L 4-25).

O'Connor also asserts that Varnell's conduct was supported by Giannini, who allegedly instructed Varnell to "let [O'Connor] fend for himself." O'Connor states that Giannini wanted Varnell to ignore the rules and her own conduct and let O'Connor "twist in the wind." (O'Connor's Brief at p. 14). A closer examination of Varnell's testimony reveals that Giannini instructed her that, in the event she again witnessed Vincent and Mollaghan teasing O'Connor with homosexual comments and innuendos, she should not offer him the extra bed in her room and let him "fend for himself." (Tr. at p. 596, L 27 to p. 597, L 17).

Finally, the "Facts" section of O'Connor's Brief discusses the various "negative occurrences" O'Connor allegedly endured after he refused Varnell's alleged sexual advances. (O'Connor's Brief

at pp. 5-12, 20-21). O'Connor opines that Varnell was responsible for *all* of these problems and that she was doing so to "cover her tracks" regarding the two alleged incidents of sexual harassment. (O'Connor's Brief at p. 9).[2] As discussed *infra*, however, none of these alleged actions by Varnell, if they did occur (which is denied), were based upon sex or sexual in nature, nor do they have anything to do with O'Connor's sexual harassment claim against Varnell based upon a hostile work environment. These alleged events occurred well after the two alleged instances involving Varnell that O'Connor claims were sexual harassment, and thus, the causal connection element of his claim is lacking.

In sum, O'Connor's entire "Facts" section is a combination of irrelevant factual allegagtions dealing with the claims of Vincent and Mollaghan or with his own claims for gender discrimination, due process and retaliation, none of which are relevant to this appeal, but which are advanced for no other reason but to confuse the issues and mislead this Court into believing there was sufficient evidence presented at trial to support the jury's verdict in O'Connor's favor. When the mask of O'Connor's factual ruse is removed, the legal insufficiency of his sexual harassment claim is exposed, and it is clear that the jury's verdict cannot stand.

[2] O'Connor also asserts that Varnell sexually harassed and retaliated against Mollaghan and that Vincent was terminated for reporting her harassment of O'Connor. (O'Connor's Brief at p. 7-8). These assertions are simply irrelevant to this appeal, which involves only *O'Connor's* sexual harassment claim against Varnell.

ARGUMENT IN REPLY TO BRIEF OF APPELLEE

I. The majority of O'Connor's brief is irrelevant, as it addresses facts and issues outside the single issue presented in this appeal – that O'Connor failed to establish his sexual harassment claim against Varnell as a matter of law.

In his Brief, O'Connor attempts to confuse this Court by conflating *all* of his claims and *all* his co-Plaintiffs' claims against *all* of the Defendants. His Brief is replete with factual allegations regarding the actions of his co-Plaintiffs, John Vincent ("Vincent") and John Mollaghan ("Mollaghan"), and the conduct of multiple defendants other than Varnell. O'Connor's Brief also includes innumerable factual allegations and legal arguments relating to his claims against *all* the Defendants for alleged due process violations, gender discrimination, and retaliation. As is discussed in more detail below, the "facts" and arguments set forth in O'Connor's Brief concerning these tangential issues have no bearing whatsoever on whether O'Connor established, as a matter of law, his sexual harassment claim against Varnell.

a. O'Connor's "facts" and argument concerning his gender discrimination, due process and retaliation claims, as well as those regarding John Vincent and John Mollaghan, are not pertinent here, as these claims are not before this Court in this appeal.

The only claim before this Court in this appeal is O'Connor's claim against Varnell, individually, for sexual harassment based on a hostile work environment. O'Connor presented claims to the jury at trial for gender discrimination and retaliation, for which the jury found in his favor, but the trial court overturned the jury's verdict on these claims. (Record on Appeal/Clerk's Papers ("CP") at pp. 1346-57). O'Connor did not file any Notice of Appeal in this case. (*See* CP at

pp. 1441-1446, 1457-1462). Thus, his claims for gender discrimination, retaliation, or anything other than his hostile work environment sexual harassment claim, are not before this Court.[3]

Perhaps recognizing this, O'Connor attempts to prop-up the jury's verdict on his sexual harassment claim by bootstrapping in his due process and retaliation claims. He repeatedly alleges in his Brief that, *as part of the sexual harassment*, he was denied due process. (O'Connor's Brief at pp. 6, 11, 12). He also asserts that, after "[h]e complained both verbally and in writing [about the two incidents of sexual harassment], [Varnell] made his workplace untenable, miserable, and intolerable[,]" which is nothing more than a retaliation argument. (O'Connor's Brief at p. 21). However, the factual allegations and legal arguments concerning his due process, gender discrimination and retaliation claims, as well as the allegations and arguments regarding Vincent, Mollaghan, and the other Defendants, are irrelevant here.

b. O'Connor's allegations of Varnell's non-sexual, harassing conduct are irrelevant to O'Connor's sexual harassment claim.

O'Connor next attempts to bolster the paltry evidence in support of his sexual harassment claim by extensively alleging conduct attributable to Varnell and others, which occurred long after the two incidents at issue.[4] However, all of this alleged conduct by Varnell was not "based on sex" or "sexual in nature." As O'Connor himself points out in his Brief, under the "hostile work environment" paradigm, it is "sexually based" conduct that must render the work environment hostile in order to be actionable as sexual harassment. (O'Connor's Brief at pp. 21-22) (citing

[3] Likewise, the trial court completely overturned the jury's verdicts in favor of Vincent and Mollaghan and against Varnell and the other Defendants in their entirety. These are the subject of appeals filed by Vincent and Mollaghan pending before this Court, but have no bearing whatsoever on O'Connor's sexual harassment claim.

[4] O'Connor devotes nearly seven (7) pages of his Brief to this itemization of alleged "wrongs" he contends he experienced at the hands of Varnell and others. (*See* O'Connor's Brief at pp. 5-12).

Meritor). Thus, none of Varnell's alleged, later-occurring "non-sexual" conduct is relevant to O'Connor's "hostile work environment" claim, even if the non-sexual conduct was "harassing," aggravating and/or antagonistic.

Title VII does not prohibit *all* harassment in the workplace; it is directed only at discrimination because of race, gender, religion, or national origin. *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81, 118 S. Ct. 998, 1002, 140 L. Ed. 2d 201 (1998). Again, the test for hostile work environment claims requires a showing of "verbal or physical conduct **of a sexual nature**." *Stewart v. Miss. Transp. Comm'n*, 586 F.3d 321, 334 (5th Cir. Miss. 2009) (quoting *Jones v. Flagship Int'l*, 793 F.2d 714, 720 (5th Cir. 1986)) (**emphasis** added). Hence, it is the *sexual harassment* itself that must create the hostile work environment, not non-sexual conduct. *See Hockman*, 407 F.3d at 325 (plaintiff must prove that "the harassment *affected* a term, condition or privilege of employment"); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 768 (U.S. 1998) (citing *Harris*, 510 U.S. at 21) (the question is "whether sexual harassment *renders* a work environment hostile") (*emphasis* added). Also, the regulations covering hostile workplace claims forbid "verbal or physical conduct of a sexual nature" that creates "an intimidating, hostile, or offensive working environment[.]'" 29 CFR § 1604.11(a) (1991)) (emphasis added). "The regulation does not prohibit workplace harassment generally." *R. A. V. v. St. Paul*, 505 U.S. 377, 409 (U.S. 1992) (White, J., concurring in judgment, joined by Blackmun, O'Connor, and Stevens, JJ.).[5]

[5] O'Connor asserts in his Brief that sexual harassment is rarely about sex, but about power. (O'Connor's Brief at p. 19). Notably, however, O'Connor cites no authority for this assertion, nor did any expert testify at trial thereto. And regardless, the law on sexual harassment still requires harassing conduct "*of a sexual nature*" that interferes with the job. *Stewart*, 586 F.3d at 334 (quoting *Jones*, 793 F.2d at 720).

In other words, ***it is not illegal or actionable for an employer or supervisor to create a hostile working environment by engaging in conduct of a non-sexual and non-discriminatory nature***. Here, O'Connor affirmatively testified that the only "sexually offensive" conduct by Varnell was the "Subway sandwich comment" and the "hotel room incident." (Tr. at p. 111, L 4-14). O'Connor's allegations that Varnell harassed him and created a hostile working environment by engaging in *non-sexually-based* conduct are irrelevant to O'Connor's sexual harassment claim and absolutely ineffective to prove it. *See Roberts v. Management & Training Corp.*, 1999 U.S. App. LEXIS 9125 (9th Cir. May 12, 1999) (affirming summary judgment for employer in part because of finding that "[m]uch of [the employer]'s conduct towards [the employee], although aggravating and antagonistic, was neither sexual in nature nor directed at [the employee] because of her gender").

All of Varnell's alleged conduct toward O'Connor following "the Subway sandwich comment" and "the hotel room incident" was neither sexual in nature nor directed toward O'Connor because of his gender. Thus, the allegations regarding this negative, *non-sexual* conduct and other occurrences O'Connor contends he suffered at the hands of Varnell and others after the two alleged *sexually* harassing incidents, are irrelevant to his *sexual* harassment claim.

c. O'Connor's "facts" and arguments concerning *quid pro quo* sexual harassment are not before this Court, as this claim was not considered by the trial court nor presented to the jury.

O'Connor's attempt to improperly comingle facts and issues reaches its peak when he conflates the "*quid pro quo*" and "hostile work environment" theories of sexual harassment in his Brief. (O'Connor's Brief at pp. 4-5, 6, 13, 14, 21-22, 25). He even asserts here, for the first time on appeal, that he proved a "*quid pro quo*" claim at trial. (O'Connor's Brief at p. 6) ("Clearly, all of the

foregoing, in and of itself, evidences *quid pro quo* sexual harassment and hostile work environment.").

This simply is not the case. The only jury instructions which the trial court granted and presented to the jury on the issue of sexual harassment were Instructions P-13, D-6, D-7, and D-8. (*See* CP at pp. 1119, 1124-1127). These instructions clearly establish that O'Connor's sexual harassment claim against Varnell was submitted to the jury only on the "hostile work environment" theory. (CP at pp. 1119, 1124-1127). There simply were no *quid pro quo* instructions given to the jury, so there was no *quid pro quo* claim presented to the jury.

Furthermore, none of the sexual harassment jury instructions given included all the elements of a *quid pro quo* claim.[6] In fact, none of the instructions even mentioned the *sine qua non* of *quid pro quo* sexual harassment: namely, the "tangible employment action."[7] Without finding a tangible employment action, the jury could not have found *quid pro quo* sexual harassment.

If O'Connor had intended to submit a *quid pro quo* sexual harassment claim to the jury, he should have presented an instruction that included the elements of that claim and the specific facts related to those elements. *See McCarty v. Kellum*, 667 So. 2d 1277, 1287-88 (Miss. 1995); *Young v. Guild*, 7 So. 3d 251, 260-61 (Miss. 2009). But he simply failed to do so. More importantly, the jury could not possibly have found Varnell liable for *quid pro quo* sexual harassment if the jury was not instructed that it could do so. *See Jones v. Westinghouse Elec. Corp.*, 694 So. 2d 1249, 1252 (Miss.

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[6] A *prima facie* case for *quid pro quo* sexual harassment requires a showing that: (1) the employee belongs to a protected group; (2) the employee is subjected to unwelcome harassment; (3) the harassment is based on sex; (4) the employee's refusal of the unwelcome harassment causes a tangible job detriment [(i.e., tangible employment action)]; and (5) there exists some ground to hold the employer liable. *Collins v. Baptist Mem'l Geriatric Ctr.*, 937 F.2d 190, 195-96 (5th Cir. 1991).

[7] Whether a sexual harassment claim is either *quid pro quo* or hostile work environment depends on if the employee suffered a "tangible employment action"; if a tangible employment action occurs, it is a *quid pro quo*

1997) (omission of plaintiffs' "failure to warn" theory from special verdict jury instruction precluded jury from finding in favor of plaintiffs on that theory). O'Connor cannot now ask this Court to consider the sufficiency of the evidence on a purported *quid pro quo* claim when it was not even considered by the jury.

Notwithstanding this, O'Connor also failed to prove any *quid pro quo* sexual harassment by Varnell. Peeling away the conflated veil of his newly asserted "*quid pro quo*" claim, the gravamen of O'Connor's argument is that, because he refused Varnell's alleged sexual advances, he endured all the negative occurrences which he listed in his Brief. (O'Connor's Brief at pp. 5-12, 20-21). This argument has several fatal flaws.

First, O'Connor admitted in his Brief that Giannini, not Varnell, had all the power and control regarding athletics at USM, including the soccer team. (O'Connor's Brief at p. 6). In fact, most of the negative things O'Connor says happened to him in the Spring of 2000 were not done by Varnell and/or were things which Varnell had no power to do. (*See* O'Connor's Brief at pp. 5-12, 20-21). Thus, even if all these "negative occurrences" did occur to O'Connor as he alleged, he admits he cannot show these were the fault of Varnell.

Furthermore, even if Varnell did engage in some of the "negative" conduct, O'Connor put on absolutely no evidence at trial that any of it was caused by his refusing her alleged sexual advances. In fact, the reason O'Connor presented all these allegations at trial was to attempt to support his retaliation claim. He asserted that Varnell was retaliating against him for reporting the alleged sexual harassment, and the jury was instructed as to the law on his retaliation claim. As previously noted, the trial court granted a JNOV in favor of Varnell and Giannini on O'Connor's retaliation

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case. *Casiano v. AT&T Corp.*, 213 F.3d 278, 283 (5th Cir. 2000).

claim, and he did not appeal this ruling.

Finally, and most importantly, as discussed in Varnell's principal Brief, none of the alleged negative occurrences that O'Connor supposedly suffered after the two alleged *sexually* harassing incidents constitutes a "tangible employment action," as defined by the Fifth Circuit. *See La Day v. Catalyst Tech., Inc.*, 302 F.3d 474, 481-82 (5th Cir. 2002) (quoting *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998)).[8] O'Connor was not fired, reassigned with different duties, or denied any benefits. He admitted that he received all the benefits he was due as a Graduate Assistant coach, including tuition, room, board, and books. (Tr. at p. 114, L 28 to p. 116, L 1). O'Connor does contend that he was *promoted* to Assistant Coach after the alleged sexual harassment by Varnell, but was not paid as Assistant Coach and that he was not chosen as the permanent Assistant Coach. The undisputed proof at trial showed O'Connor never had a written contract of employment with USM to serve as Assistant Coach, and the decision to hire someone other than O'Connor as the permanent Assistant Coach was made by the new head coach, Matt Clark, not Varnell. In fact, O'Connor admits in his Brief that "the Head Coach hires his Assistant Coaches." (O'Connor's Brief at p. 8). Therefore, O'Connor failed to prove any "*quid pro quo*" claim at trial, assuming *arguendo* he even presented any such claim to the jury.

II. O'Connor failed to provide sufficient evidence of actionable sexual harassment to support the jury's verdict against Varnell on his hostile work environment sexual harassment claim as a matter of law.

When O'Connor finally reaches the sole issue in this appeal, the sexual harassment claim, he argues repeatedly that Varnell has not asserted any error with the jury's verdict or the trial court's

[8] "A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *La Day*, 302 F.3d at 481-82 (quoting *Ellerth*, 524 U.S. at 761).

instructions as to the law given to the jury. (O'Connor's Brief at pp. 2, 16, 17, 19, 28). He quite bluntly misstates that "not one error is referred [to by Varnell]." (O'Connor's Brief at p. 28). Varnell takes no issue with the instructions the trial court provided the jury on O'Connor's sexual harassment claim.[9] However, it is the lack of evidence to support this claim, coupled with the jury's failure to follow the trial court's instructions as to the law, which are at issue here.[10]

Taking O'Connor's trial testimony in the light most favorable to him, the only conduct he alleges of Varnell that even comes close to being "based on sex" or "sexual in nature" was "the Subway sandwich comment" and "the hotel room incident." (Tr. at p. 60, L 17 to p. 63, L 1). In fact, O'Connor himself testified that, other than these two incidents, Varnell took no other *sexually* harassing or offensive actions toward him at any time. (Tr. at p. 111, L 4-14).

In order for O'Connor to make out a *prima facie* case for sexual harassment against Varnell, he was required to establish that (1) he belonged to a protected class; (2) he was subject to unwelcome sexual harassment; (3) the harassment was based upon sex; (4) the harassment affected a term, condition or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take prompt remedial action. *Hockman v. Westward Communications, LLC*, 407 F.3d 317, 325 (5th Cir. 2004). At issue here are the third and fourth elements of O'Connor's *prima facie* case.

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[9] Varnell agrees that the jury was properly instructed on the law of sexual harassment. Indeed, as O'Connor correctly points out, Varnell herself submitted the relevant jury instructions. (*See* CP at pp. 1124-1127).

[10] This is clearly shown by the fact that the jury failed to follow the jury instructions as to Vincent's and Mollaghan's claims, as well. The jury found in favor of the co-plaintiffs, Vincent and Mollaghan, on their gender discrimination claims even though it was undisputed that neither of them was replaced by a female. (Jury Verdicts, CP at pp. 1140, 1142). Had the jury followed the instructions, there was absolutely no basis for it to find in favor of Vincent or Mollaghan on that claim. (*See* Instruction D-4, CP at pp. 1121-22)

The test for hostile work environment claims requires a showing of "verbal or physical conduct **of a sexual nature**." *Stewart v. Miss. Transp. Comm'n*, 586 F.3d 321, 334 (5th Cir. Miss. 2009) (quoting *Jones v. Flagship Int'l*, 793 F.2d 714, 720 (5th Cir. 1986)) (**emphasis** added). Further, the alleged harassment must be "**so severe and pervasive** that it destroys a protected class member's opportunity to succeed in the workplace." *Shepherd v. Comptroller of Pub. Accounts*, 168 F.3d 871, 874 (5th Cir. 1999) (**emphasis** added). "In determining whether a workplace constitutes a hostile work environment, courts must consider the following circumstances: **the frequency of the discriminatory conduct**; **its severity**; whether it is physically threatening or humiliating, **or a mere offensive utterance**; and whether it unreasonably interferes with an employee's work performance." *Keibro v. Walmart*, 193 Fed.Appx. 365, 369 (5th Cir. 2006) (*quoting Ramsey v. Henderson*, 286 F.3d 264, 268 (5th Cir. 2002)) (**emphasis** added).

However, "**[o]ccasional comments**, discourtesy, rudeness, or **isolated incidents**, unless extremely serious, are insufficient to establish severe or pervasive harassment." *Hancock v. Barron Builders and Management Co., Inc*, 523 F.Supp.2d 571, 575 (S.D. Tex. 2007) (*citing Shepherd v. Comptroller of Pub. Accounts*, 168 F.3d 871, 874 (5th Cir. 1999)) (**emphasis** added). Actionable sexual harassment only occurs when the workplace is "**permeated** with discriminatory intimidation, ridicule, and insult." *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993) (**emphasis** added). Furthermore, the alleged harassment must be both **objectively offensive**, meaning that a reasonable person would find it hostile and abusive, and subjectively offensive, meaning that the victim perceived it to be so. *Shepherd*, 168 F.3d at 874 (*citing Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 21 (1993)) (**emphasis** added).

Assuming *arguendo* that O'Connor found the "Subway sandwich comment" and the "hotel room incident" subjectively offensive,[11] he failed to prove that they were *objectively* offensive, much less that they were sufficiently "severe and pervasive" to constitute actionable sexual harassment. Noticeably absent from O'Connor's Brief is any argument demonstrating how these two isolated incidents were objectively offensive. In fact, the objective offensive issue is addressed in a mere two (2) paragraphs of O'Connor's brief, and for good reason. (*See* O'Connor's Brief at p. 18, last two ¶s).

First, none of the *comments* allegedly made by Varnell during these two incidents were objectively offensive. O'Connor testified that, during the "Subway sandwich comment," he offered to give Varnell "six inches of [his] [Subway sandwich]," and Varnell simply responded, "You're so nasty; you're so nasty." (Tr. at p. 60, L 17 to p. 61, L 27). At best, while this alleged comment may imply some sexual *innuendo*, it hardly can be said to have been offensive.

Varnell's alleged comments during the "hotel room incident" were not objectively offensive, either. O'Connor testified that she "invited [him] to stay in her hotel room" because she "[had] an extra bed" and then she supposedly said "stay in my room" two more times. (Tr. at p. 61, L 28 to p. 63, L 1). O'Connor clearly testified that Varnell never said "stay in my *bed*," but only "stay in my *room*," and that Varnell said she had "an *extra* bed." (*Id.*) More importantly, Varnell's offering of her extra bed was made after Vincent and Mollaghan had unmercifully teased O'Connor about the homosexual activity to which he would be subjected if he remained with his assigned roommate. Looking at Varnell's comments in this context, one could hardly say they were offensive.

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[11] It is highly questionable and likely improbable that O'Connor subjectively felt Varnell's comments, at the time they were made, were offensive, especially in light of the conduct and comments of his immediate supervisors, Vincent and Mollaghan, explicit with graphic homosexual innuendo, which he found were not

Furthermore, even if these comments could be considered "sexual in nature" when considered in context (which is denied), they are not recoverable sexual harassment. First, Varnell's conduct during "the Subway sandwich comment" was only a *comment*. O'Connor provided no evidence that Varnell touched him or made any physical contact with him in any way during this incident. (Tr. at p. 60, L 17 to p. 61, L 27). This comment, even if considered offensive (which is denied), was nothing more than "a mere offensive utterance." *Keibro*, 193 Fed.Appx. at 369.

As for Varnell's conduct during "the hotel room incident," O'Connor testified that Varnell first "invited" him and then "said" to him that he could "stay in [her] room" in the "extra bed," and that she "grabbed ahold of [his] arm." (Tr. at p. 62, L 7 to p. 63, L 7).[12] Although this alleged incident involves physical contact, it still cannot be said to be objectively offensive. Even if Varnell did grab O'Connor's arm (which is denied) and ask him to "stay in her room," she did not touch any sexually relevant body part, nor was there any mention of sexual intercourse. More importantly, and contrary to the allegations in his Brief, O'Connor admitted at trial that Varnell never asked him to stay in her bed, nor did she ask him to sleep with her. (Tr. at p. 110, L 23-27).

Additionally, O'Connor put on no evidence that Varnell's conduct was "physically threatening or humiliating." *Keibro*, 193 Fed.Appx. at 369. In fact, O'Connor testified that his reaction was that he simply "pulled [his] arm away. [He] just ignored it and just kept on walking as if [he] hadn't heard it. It hadn't happened. [He] Just shunned it away from [him]." (Tr. at p. 62, L 25 to p. 63, L 1).

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offensive. (Tr. p. 111, L 15 to p. 112, L 12).

[12] Only when "the Subway sandwich comment" is combined with the alleged comments during "the hotel room incident" does Varnell's alleged conduct even rise to the level of "*occasional* comments." *See Hancock*, 523

Finally, there was absolutely no evidence presented at trial that the "Subway sandwich comment" or the "hotel room incident" or the combination of both "unreasonably interfere[d] with [O'Connor's] work performance." *Keibro*, 193 Fed.Appx. at 369. There was also no evidence that these two incidents "destroy[ed] [his] opportunity to succeed in the workplace." *Shepherd*, 168 F.3d at 874. With only two incidents, it cannot be said that the sexual harassment was pervasive or that O'Connor's workplace was "permeated" with sexual harassment. *Harris*, 510 U.S. at 21.

At best, O'Connor proved only two isolated instances of alleged *sexually* harassing comments/conduct by Varnell. O'Connor affirmatively testified that these were the only two instances in which Varnell allegedly made any *sexually* offensive remarks or engaged in any *sexually* offensive conduct toward him at any time. (Tr. at p. p. 111, L 4-14). However, the two instances of comments/conduct by Varnell that O'Connor presented do not amount to actionable sexual harassment **as a matter of law**. *Keibro*, 193 Fed.Appx. at 369; *Ramsey*, 286 F.3d at 268; *Hancock*, 523 F.Supp.2d at 575; *Shepherd*, 168 F.3d at 874.

O'Connor failed to present sufficient, much less substantial, evidence to allow the jury to find sexual harassment. No reasonable juror, following the jury instructions, could have determined that these two isolated incidents were objectively offensive and severe and pervasive enough that they rendered O'Connor's workplace hostile or abusive. Therefore, it is respectfully submitted that the trial court erred when it denied Varnell's Motion for JNOV on O'Connor's sexual harassment claim, as the proof O'Connor submitted was legally insufficient to support that claim.

F.Supp.2d at 575 (*emphasis* added). But "occasional comments" are not recoverable as sexual harassment. *Id.*

III. The evidence O'Connor put forth at trial of his alleged damages was inadequate to support the damages awarded by the jury.

Finally, the evidence presented to the jury on O'Connor's purported "damages" was insufficient to support the jury's $300,000.00 award. To support his purported economic damages, O'Connor alleges that he "was not paid as the Assistant Coach", and points to his tax returns and events which occurred well after the two alleged isolated incidents upon which he bases his sexual harassment claim. The flaws in these arguments are innumerable.

First, O'Connor put forth no evidence whatsoever that he was ever hired by USM as an assistant soccer coach. He had no employment contract with USM, never received any compensation for any duties as an assistant soccer coach, and was never recognized by USM as a full-time, contracted assistant soccer coach. He was a graduate assistant, and the undisputed evidence showed that he received all benefits to which he was entitled as a graduate assistant. The only compensated position he ever held while at USM was as a counselor at soccer camps, for which he was paid over $13,000.00 for one month's work, some eight months after Varnell allegedly made the offending comments.

Next, O'Connor put forth no evidence whatsoever that he suffered any economic damages as a result of the two isolated comments allegedly made by Varnell. He points to his tax returns, claiming these are "evidence" to support the jury's verdict. These tax returns are not evidence of any economic damages he suffered, as they show an increase in his income after he resigned his GA position at USM. He identifies no other evidence presented to the jury to support any economic damage claim, and for good reason – there simply was not any such evidence presented at trial. Thus, there is not and cannot be any economic damages included in the jury's verdict.

The only basis upon which the jury could have awarded O'Connor $300,000.00 was his claims of emotional distress. According to O'Connor, however, the majority of his purported "emotional distress" stemmed from the alleged *non-sexual* actions of Varnell and others, occurring well after the two isolated incidents he contends were sexual harassment. There is no causal connection between these alleged actions and the two isolated incidents which O'Connor alleges were *sexual* harassment, thus this evidence cannot support the jury's verdict of $300,000.00 in favor of O'Connor on his sexual harassment claim.

Finally, the jury's $300,000.00 award in O'Connor's favor was awarded against Varnell *and* Giannini, and it included compensation for the jury's verdict on his sexual harassment, gender discrimination, *and* retaliation claims. The trial court properly granted a JNOV to Giannini on *all* of O'Connor's claims, and to Varnell on his gender discrimination and retaliation claims. Logic dictates that, if the jury's $300,000.00 award was against *both* Giannini and Varnell, based on three claims O'Connor raised against *each*, and the trial court held that there was no legal basis for any of the claims against Giannini nor the gender discrimination and retaliation claims against Varnell, this amount cannot stand as a singular verdict against Varnell based solely on the sexual harassment claim.

CONCLUSION

O'Connor spends the majority of his Brief reciting and manipulating facts and advancing arguments which simply have no bearing here. His gender discrimination, due process and retaliation claims are not before this Court, as he did not appeal these claims, despite his efforts to bootstrap these along with the sexual harassment claim at issue on appeal. His *quid pro quo* sexual harassment claim is nonexistent, as this was not before the trial court nor presented to the jury.

The single claim on appeal is his sexual harassment claim based on an alleged hostile work environment. This claim fails as a matter of law, as he did not present sufficient evidence at trial to make out his *prima facie* case. The only evidence O'Connor presented at trial to support his sexual harassment claim were two isolated incidents: "the Subway sandwich comment" and "the hotel room incident." These were nothing more than "isolated incidents" or "occasional comments" amounting to "mere offensive utterances," at best. They cannot be said to have been severe or pervasive or objectively offensive, and they were not hostile or abusive. Furthermore, all of the other allegedly harassing actions by Varnell were not "based on sex" or "sexual in nature" and did not qualify as "tangible employment actions."

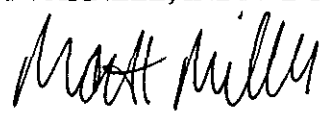
Finally, the jury's $300,000.00 award in O'Connor's favor against Varnell cannot stand. O'Connor put forth no evidence whatsoever that he suffered any economic loss as a result of Varnell's actions, and his emotional distress "evidence" was predominantly the alleged *non-sexual* actions of Varnell and others which occurred months after the two isolated incidents he contends were sexual harassment. More importantly, the jury's $300,000.00 verdict for O'Connor was based on their findings in favor of O'Connor against *both* Varnell and Gianinni on *all three* of his claims, gender discrimination, retaliation, and sexual harassment. Since the trial court correctly overturned all the claims against Giannini and two of O'Connor's three claims against Varnell, logic dictates that the jury's $300,000.00 verdict cannot stand as the damages for only O'Connor's sexual harassment claim against Varnell.

For these reasons, this Court should reverse the trial court's denial of Varnell's Motion for JNOV on O'Connor's sexual harassment claim, render judgment on that claim in favor of Varnell,

and dismiss O'Connor's sexual harassment claim with prejudice. Alternatively, this Court should reverse the trial court's denial of Varnell's Motion for New Trial, and remand this case back to the trial court for a new trial solely on O'Connor's sexual harassment claim, as his other claims have been finally disposed of. Varnell further prays for all additional relief she is entitled to at law or in equity.

RESPECTFULLY SUBMITTED, this the 30th day of April, 2012.

SONYA VARNELL, INDIVIDUALLY

By: 
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CERTIFICATE OF SERVICE

I, the undersigned, being the attorney of record for the Appellant, Sonya Varnell, in Docket No. 2010-TS-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 reply 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.

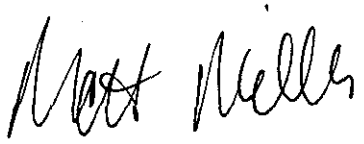
THIS, the 30th day of April, 2012.

MATTHEW D. MILLER

CERTIFICATE OF SERVICE AS TO FILING

I, the undersigned, being the attorney of record for the Appellant, 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 Reply 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 30th day of April, 2012.



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