2010-CA-02005 RT2

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

No. 2010-TS-02005

John Mollaghan and John Vincent v. University of Southern Mississippi, et al

REPLY BRIEF FOR THE APPELLANTS

INTRODUCTION:

The Defendants have overlooked much. Then, they have ignored much. On top of that they have relied upon overruled cases. Then, they have essentially refused to analyze the actual facts, law, and issues presented by Coach Vincent and Coach Mollaghan in their original Brief filed herein.

For example, with regard to the issue of Retaliation, they have not referred to the current, actual status of the law in that regard. As to Due Process they have essentially ignored the judicial admissions that testified from the witness stand where they agreed that the two coaches were entitled to Due Process. As to gender discrimination they also have made judicial admissions flatly admitting their preference towards females coaching females to include the female soccer team.

Even with this opportunity before this High Court the Defendants never provide any evidence of jury bias or prejudice. Even now, they do not offer any case or legal precedent or explanation as to how the Circuit Judge could have: (a.) denied their Motion for Summary Judgment regarding the issues that were presented to the Jury that unanimously rendered a verdict in favor of the Coaches; (b). denied all of Defendants' motions for Directed Verdict, and, then, (c.) two years later, grant JNOV. The Defendants do not refer the Court to any instance where the foregoing has occurred. All of this was specifically addressed in the Coaches' principal Brief; yet the Defendants offer no explanation regarding it.

Consequently, we respectfully submit that it is even clearer now that the Jury Verdicts rendered herein should be reinstated for the reasons expressed in the principal Brief provided this Court by these Plaintiffs.

I. RETALIATION:

The Retaliation issue is just one example of the Defendants' avoiding the actual facts and the actual law:

The Defendants say nary a word about the United States Supreme Court case, *Thompson v. North American Stainless*, 131 S. Ct. 863,866-67 (2011). That case contradicts the Defendants' entire case. In *Thompson*, the Supreme Court accentuated how broad the retaliation statutes are and held that **"Title VII's anti-retaliation provision must be construed to cover a broad range of employer conduct**." citing *Burlington N. & S.F.R. Co. v. White*, 548 U.S. 53. The Court held that the anti-retaliation provision, "prohibits any employer action that 'well might have dissuaded a reasonable worker from making **or supporting** a [discrimination] charge'". *Thompson, supra*, at p. 867.

For some peculiar reason the Defendants apparently believe, even though the Plaintiffs had written, express contracts that were issued for a definite period of time, that Plaintiffs were "at will" employees. This is not the case. It is undisputed that their contracts were expressly definitive and were expressly, "for cause" written, definitive contracts. [Exhibits 5 and 6] *Shaw v. Burchfield,* 481 So. 2d 247,254 (Miss. 1985).

Furthermore, as held by this Court in *Robinson v. Board of Trustees,* 477 So. 2d 1352-53 (Miss. 1985), *Bobbitt v. The Orchard Dev. Co.*, 603 So.2d 356, 361 (Miss. 1992), in numerous other cases, and by the Fifth Circuit in *Whiting v. USM,* 451 F. 3d 339 (5th Cir. 2006) their Employee Handbook melded with their written contract and

was part of their contractual and property rights. The undisputed fact that they were not provided the entitlements contained in their Handbook was part of the Retaliation levied against them by the Defendants.

However, of course, with regard to the Title VII violations of Discrimination and Retaliation, the Coaches' employment status is not pertinent. The law, indeed federal statutory law, protects them no matter whether "at will" or not. The fact that the Coaches were not "at will" is even more compelling in their behalf.

One can only be terminated in Mississippi for "legally permissible" reasons. *McArn v. Allied Bruce Terminix,* 626 So. 2d 603,606 (Miss. 1993). *Shaw v. Burchfield,* 481 So. 2d 247,254 (Miss. 1985). Obviously, one cannot be discriminated against and/or retaliated against with impunity. That conduct is not "legally permissible" by our Courts or any Courts in this great Nation.

The argument of the Defendants is skewered by the plain fact that they have overlooked *Thompson, supra* and the other cases referred in our Original Brief. The Defendants' argument overlooks numerous cases that eliminates the "but for" approach they ask this Court to embrace. In *Smith v. Xerox Corp.,* 602 F. 3d 320 [5th Cir. 2010] the Court made it even clearer that the U.S. Supreme Court does not countenance the "but for" standard as we showed in our original, principal Brief.

In *Xerox Corp.*, **the Court was asked to uphold the "but for" approach, and it declined to do it**. Xerox wanted the "but for" test used. The Court declined and began by establishing the issue before it:

> **"Xerox argues** that the district court erroneously instructed the jury on the burden of proof by allowing it to find for Smith on her retaliation claim **with *only* *'motivating factor'* *rather than 'but-for' causation***, thereby improperly shifting the ultimate burden of persuasion to Xerox." *Id. At p. 329.*

A lengthy discussion by the Court follows. Then, the Court held, while **eliminating the "but for" approach** and, relying upon *Desert Palace, Inc. v. Costa,* 539 U.S. 90 (2003), recognized that its previous cases regarding "but for" **had "been necessarily overruled" and that both *circumstantial* and direct evidence trigger the mixed-motive [motivating factor] approach - - not "but for":**

> "We therefore hold that to the extent we have previously required direct evidence of retaliation in order to obtain a mixed-motive jury instruction in a Title VII case, **our decisions have been necessarily overruled** by *Desert Palace*. Smith therefore was not required to present direct evidence of retaliation in order to receive a **mixed-motive jury instruction" *Id.* At p. 332.**

The Court specifically noted, **"That is why we have juries"**. *Id.* At p.333.

There is no "but for" test. It is a dead concept. The Supreme Court of the United States, the Fifth Circuit, and Congress have eliminated it.

Consequently, the Defendants' argument is as fatally dead as is their dead concept. This also applies to their causal connection argument. All of the foregoing skewers that argument. The Plaintiffs/Coaches only need to show the Jury that discrimination and/or retaliation were "motivating factor(s)" for the jury to consider regarding their mistreatment. The Court in *Xerox* makes this perfectly evident and is quite explicit. Yet, the Defendants do not refer to so much as one word of that dominating case. With due respect to the Circuit Judge and the Defendants, they cannot expect to be sustained when they have used a completely inaccurate test regarding the issue of Retaliation. The Jury Verdict should have been left unfettered. This is especially true since the Defendants do not address in any detail the tidal wave of case law that prohibits the overturning of a jury verdict unless extremely stringent and forbidding legal standards are attained.

Indeed, the Defendants do not analyze any of the cases provided this Court by the Coaches in their Original/Principal Brief. Even though it is evident that the dominant theme of this case is the "pattern or practice" of retaliatory, harassing, and discriminatory mistreatment of all three coaches, the Defendants do not analyze the pattern or practice from either a factual or legal perspective.

Please recall that the unanimous Jury Verdict regarding Ged O'Connor was not contradicted by the Circuit Judge. There is no legitimate question that he was in fact sexually harassed by Ms. Varnell. It is equally undisputed that Coaches Vincent and Mollaghan complained on behalf of and **"supported" Ged O'Connor** all the way to the President. Nowhere in the Briefs filed by the Defendants do they dispute the long list of retaliatory facts provided this Court by the two Coaches. They also do not dispute the vigorous action the Coaches undertook in support of Ged O'Connor.

These facts include, but are not limited to the following: [please recall the Coaches' Original Brief consists of numerous pages delineating the applicable facts in considerable detail]:

Firing or removing Coach Vincent as Head Coach; upon removing him not providing any duties or actual position; depriving Vincent of Summer Soccer Camp money he was contractually entitled; not paying Coach Mollaghan the Head Coaches' salary he warranted; disrupting and undermining the team and turning the team against the Coaches; limiting and changing scholarships and causing turmoil on the team; not providing adequate equipment for the student athletes; Ms. Varnell taking over the team even though she had no experience and no precedent or office for doing so; causing dissension on the team, meeting and socializing with the student athletes; insulting the Coaches in the presence of the players to include calling the Coaches "liars"; cutting the

equipment budget; allowing the playing field to deteriorate; cutting scholarships; excluding the Coaches from meetings where only Varnell and the student athletes met; allowing the student athletes to be disrespectful to the Coaches; not admonishing or punishing Varnell for her conduct; reducing or eliminating duties of the Coaches; interfering with recruiting; Varnell telling the student athletes not to listen to the Coaches; threatening the Coaches with deportation; ignoring the Coaches' grievances and complaints; not providing a prompt remedial investigation of their complaints; admonishing them in the presence of the student-athletes; not providing due process, not adhering to the Handbook/contractual procedures that the President admitted the coaches were entitled, Varnell started giving Mollaghan bad marks and a bad evaluation that was highly inaccurate. [T264]. Mollaghan filed grievances that were not investigated. No hearing was ever provided him. [T266]. The bad evaluation hurt him because it contaminated his record and prevented his promotion to permanent Head Coach and clearly kept him from becoming permanent Head Coach. [T267]. All the while President Fleming did nothing to alleviate the retaliation and discrimination [T 269]. Giannini did nothing to alleviate the retaliation and discrimination. [T269]. Numerous retaliatory acts were summarized in a pleading regarding a summary of the testimony provided at trial. Please see RE 10 in this regard.

It is accentuated that both Mr. Giannini and Ms. Varnell admitted they had a bias and prejudice against men coaching the female soccer team. [T220]; [T147-48]. This is direct evidence of discriminatory and retaliatory intent.

Varnell admitted her harassing misconduct. [T76-77]. She also admitted she had a bias and prejudice towards females coaching the female soccer team. [T220]. Giannini also wanted females coaching females. [T224]. The combination of the

prejudice against the coaches based upon their gender and the sexual advances and harassment by Varnell created a hostile, toxic work environment that was and is unconstitutional - - particularly in a public, State institution.

Both Vincent and Mollaghan reported the sexual harassment of Ged O'Connor to Giannini who did nothing to address, investigate, comply with the grievance procedure, or rectify the situation. [T240]. Indeed, Varnell also approached Mollaghan. [T241]. He felt degraded and powerless regarding her. [T242]. In the wake of Varnell's misconduct, retaliation was persistent and pervasive. [T242]. Varnell "took control". [T246]. Every day was worse than the one before. [T246]. Mollaghan described the unrelenting pattern or practice of retaliation in minute detail. [T246-259].

The termination aspect was only part of the Retaliatory and Discriminatory treatment. It was a persistent pattern or practice and long chain of events levied against them by the Defendants. This was accentuated in the original Brief. It is respectfully accentuated now.

Fleming accentuated to both coaches that both "should have a hearing." [T273]. While all of the retaliation was occurring, as described *supra*, the grievances of Mollaghan and Vincent were ignored. [T296-297]. Ultimately, Mollaghan was not retained. [T298]. The retaliation even extended after he left as the Defendants held up his pay for six months. [T299].

President Fleming admitted the three coaches were entitled to all benefits and rights contained in the Staff Handbook. He admitted the Grievance Process was provided to insure that their rights were not violated. [T325]. **He admitted that, if Due Process had been provided, all three coaches could have retained their positions and had their rights vindicated. [T326].** He accentuated and admitted that the

Handbook provides rights to the three coaches. [T330]. It "provides entitlements". [T330].

Dr. Fleming and Dr. Willis, [Head of Human Resources] the USM representative at trial, confirmed that the Handbook was part of his contract and melded into it. [T348]. Dr. Fleming was asked if he disagreed with any of the testimony provided by any of the Plaintiffs. He responded that he did not. [T329; T651].

Coach Vincent confirmed that Varnell stated flatly that she wanted females coaching females. [T354]. All the while Varnell kept accentuating how she preferred females and wanted only females coaching females [T362]. The Assistant Coach, according to Varnell, had to be a female. [T362]. Giannini agreed with Varnell. [T363]. Giannini threatened Vincent with a specific female replacement. She would be, according to Giannini, Giannini's female soccer coach at ULM, Rena Richardson. [T364]. It is undisputed that Vincent was removed as Head Coach.

When Vincent complained to Giannini about what Varnell was doing to the team, Giannini "ushered him out of his office". [T364].

Ultimately, Giannini and Varnell achieved their goal. Eventually all three coaches were replaced by women.

Giannini told Vincent, after he fired him, "I'm not reassigning you to anywhere." [T372]. He never was, in fact, reassigned. [T401]. He presented his Grievance to Human Resources, to Giannini, and to Fleming, but nothing was done. [T401]. Exhibit 4.

As Dr. Fleming and Dr. Willis testified the Handbook entitled both Coaches to specific procedures, hearings, investigations, and a vindication of rights. If this had occurred, the mistreatment of them, to include their removal from their coaching

positions very likely would have been avoided. Furthermore, the written contracts provided much needed soccer camp funds. [Exhibits 5 and 6]. **Vincent desperately needed Summer Camp money that was denied him. [T374]. Vincent's contract outlined his entitlement to such monies, and in past years exceeded $20,000.** His income tax returns verified that, indeed, as the Coaches testified without refutation, the summer camp money was a substantial segment of their annual income. All of this occurred while his infant son and wife were very ill. [T375]. Then, the word was put out that Mollaghan and he had sexually harassed the players which is an absolute untruth. [T375-377].

Giannini and Varnell used a classic hearsay document at the trial. It was objected because of its hearsay and its lack of authenticity. [T524-527]. For example, the alleged players referred in the alleged document referred to matters that *predated* any knowledge they had or could have had. The references were to matters that predated their appearance on campus. The document was a total fabrication. The only player who actually testified was Gail Macklin, and she had nothing but complimentary statements to testify about the coaches. [T493;T496]. "I had a really good relationship with Coach Vincent." [T500-01]. She testified she told Varnell she had no problem with Coach Vincent. [T498]. She had "high regard" for him. [T499]. She had a good relationship with all three coaches. [T500-01] Other players verified to Coach Vincent they thought he was doing a fine job. [T477]. Not one student-athlete testified against any of the three coaches.

Of course, it was Varnell who concocted the document. The Jury was not impressed with it. If anything this issue, because of the compelling testimony by Ms. Macklin in favor of the Coaches, inured to the benefit of the Coaches.

Interestingly Macklin ultimately assumed the duties of Coach Vincent. [T501]. Her contractual situation was identical to his. She had a "rolling contract" for four years just as he did. [T 501].

The Defendants refer to *Haley v. Alliance Comp.*, 391 F.3d 644 (5th Cir. 2004). That case never even mentions retaliation. Then, the Defendants mention *Grice v. FMC Techs. Inc.* 216 Fed. Appx. 401 (5th Cir. Tex. 2007). That unreported case is no help either. First, no holding applies and no holding is even referred by Defendants. It *predates* Xerox and Thompson *supra*, and it does not even mention mixed motives and motivating factors.

- **ADVERSE TREATMENT:**

We have already shown the adverse treatment these coaches suffered. We have referred the Court to the correct legal standards as opposed to what the Defendants wish the law was. *Thompson v. North American Stainless*, 131 S.Ct. 863,866-67 (2011), informs how broad the retaliation statutes are and held that "Title VII's anti-retaliation provision must be construed ***to cover a broad range*** of employer conduct." *citing Burlington N. & S.F.R. Co. v. White*, 548 U.S. 53. The anti-retaliation provision of Title VII, "prohibits any employer action that 'well might have dissuaded a reasonable worker from making or supporting a [discrimination] charge'". *Thompson, supra*, at p. 867.

Here, the evidence was overwhelming that the three coaches either "made or supported" a claim of discrimination. The Circuit Judge agreed that both Vincent and Mollaghan provided sufficient proof of "protected activity". [CP 1352]. He agreed they suffered "adverse employment action." [CP 1352].

In *Burlington Northern & Santa Fe Railway Co., v. White,* 548 U.S. 53,126 S.Ct. 2405 (2006), the U.S. Supreme Court abrogated the more narrow view of the Fifth Circuit in regards to what constitutes retaliation. In essence the court ruled **that "the anti-retaliation provision [Title VII's]** ***is not limited to actions affecting employment terms and conditions." Id.*** **at 126 S. Ct. 2407. The Supreme Court broadened considerably what is retaliation** and made clear that retaliation can and often does occur in a broad context. Furthermore, the anti-retaliation provision of Title VII was specifically designed by Congress to protect complainants in the broadest of contexts. *Id.*

Retaliation comes in many forms, but it is broadly interpreted as established in *Burlington Northern, supra.* Even "post employment blacklisting is sometimes more damaging than on the job discrimination." *Charleton v. Paramus Bd of Educ.*, 25 F. 3d 194, 200 (3d Cir. Cert. Den., 513 U.S. 1022 (1994). [There was evidence of that conduct here.] The same applies to even a false reference or no reference whatsoever. *Hashimoto v. Dalton*, 118 F. 3d 671 (9th Cir. 1997). [There was evidence of that conduct here]; *EEOC v. L.B. Foster Co.*, 123 F. 3d 746 (3d Cir. 1997). Even being placed on a performance improvement plan can be retaliation. *Ray v. Tandem Computers, Inc.*, 63 Fs. 3d 429, 435 (5th Cir. 1995). Failure to rehire may be retaliation. *Fries v. Northside Distributors, 70 FEP 1293 (W.D. Mo. 1996).* [There was evidence of that conduct here.] Downgrading job duties is retaliation and excluding from departmental meetings is retaliation even if the change has no pecuniary consequences. *Preda v. Nissho Iwai Am. Corp., 128 F. 3d 789(2d Cir. 1997).* [There was evidence of that conduct here.] Depriving procedural protections is retaliation.

Cosgrove v. Sears, Roebuck & Co., 9 F. 3d 1033 (2d Cir. 1993). [There was evidence of that conduct here.]

In light of the foregoing facts and foregoing law the Defendants are mistaken in their view as to what is adverse treatment and retaliation and what is not.

- **CAUSAL CONNECTION:**

There is no need to repeat all of the foregoing facts regarding causal connection. Moreover, the actual, applicable law provides that the Plaintiffs must only show that discrimination and/or retaliation was a **motivating factor** regarding their mistreatment. The "but for" test is no more.

The Defendants tell this Court that, when Varnell wrote a memo on December 15,1999 to Giannini wanting the terminations of the Coaches and within hours Vincent is removed as Head Coach, that is insufficient causal connection. [T569-570] [Exhibit 8]. The Jury found otherwise. The long chain of events described *supra* and the long pattern or practice of retaliatory acts by Defendants, described *supra,* began immediately after the Coaches complained about the sexual advances and sexual harassment of Coach Ged O'Connor by Ms. Varnell. Clearly the Jury disagreed with the Defendants' argument. Clearly, on at least three occasions, the Circuit Judge disagreed with the Defendants' argument.

These Coaches grieved, complained, and filed written actions regarding the sexual harassment and hostile work environment created by Ms. Varnell. Even the Defendants agree with this. The Jury heard all of the evidence. The Trial Judge agreed the Jury should make the decision. He denied the Defendants' motions. The Jury's verdict favored the Coaches. It is clearly a fact question as to retaliation including causal connection. *Shackleford v. Deloitte & Touche*, 190 F. 3d 398, 408 (5th Cir. 1999);

Kim v. Nash Finch Co., 123 F. 3d 1046, 1060-61 (8th Cir. 1997)'; *Johnson v. City of Fort Wayne*, 91 F. 3d 922,939 (7th Cir. 1996). As we have shown herein and in our Original Brief, case after case stands for this obvious legal tenet. It is particularly true when, as here, the chain of events regarding the retaliatory acts began immediately after the sexual advances and hostile work environment was instigated by Ms. Varnell and ratified by Mr. Giannini.

Lastly, please recall that, before the Coaches complained about the sexual harassment and hostile work environment, they had "clean slates" as described in their original Brief. Then, upon their complaining and supporting Ged O'Connor, the Defendants began their retaliatory conduct or ratification of same. Just as in *Shackleford, supra*, this is additional proof of causation for the Jury to have considered.

The Jury verdict was absolutely appropriate. It should be reinstated.

II. GENDER DISCRIMINATION:

Once again the Defendants misapprehend the actual status of the law. This is a motivating factor discrimination case. The basic question is, "was gender a motivating factor regarding the treatment of the two coaches?"

When "Race, color, religion, sex, or national origin is a motivating factor for any employment practice", the Plaintiffs are entitled to relief. *Desert Palace, Inc. v. Costa*, 539 U.S. 90 (2003); 42 U.S.C. § 2000e-2(m). The Defendants never respond to the explicit wording of the foregoing federal statute or the explicit wording of *Desert Palace* or the explicit wording of *Thompson, supra,* or the explicit wording of *Xerox Corp., supra*.

Stated even more flatly, Congress has prohibited what the Defendants did here. The federal statute at 42 U.S.C. §2000e-2(m) states in part: "an unlawful employment

practice **is established** when the complaining party demonstrates that race, color, religion, sex, or national origin **was a motivating factor** for *any employment practice*, even though other factors also motivated the practice."

The Coaches' case is reinforced by direct evidence. Varnell and Giannini repeatedly and even on the witness stand admitted they wanted females coaching the female soccer team. These are blatant admissions and direct evidence of discriminatory mind set. Giannini made judicial admissions against interest on the witness stand at the trial of this matter. MRE 801 (d)(2). Any reasonable juror or person, upon hearing the foregoing, would immediately know the thought process of Varnell and Giannini. Consequently, there is no need for the circumstantial evidence approach as was explained in the Principal Brief of the coaches. Even if that approach is utilized, the Jury would be, as the Circuit Judge ordered, the determiner of the outcome.

Here, both Varnell and Giannini admitted they wanted females, preferred females, and did all they could to obtain females to coach the female soccer team. They told the Plaintiffs this repeatedly. [T62]; [T354]. They admitted to this at their depositions. **Then, Mr. Giannini, the decision maker herein, admitted from the witness stand at trial this desire and preference for females coaching females. [T147-48].** The first person called and attempted to be hired, upon Coach Vincent being removed as Head Coach by Mr. Giannini, was the female coach at ULM, Ms. Rena Richardson. [T148]. The Defendants never addressed these admissions and never denied what the jury undeniably was informed by the Defendants themselves.

At trial the Defendants never argued the admissions were "stray". Please note in this regard that the Defendants do not point the Court to any part of the Record where this characterization of a stray remark was even attempted or made. Judicial

admissions are never "stray". They are powerful evidence - - particularly when no objection was made regarding them.

Here, the motive of Defendants was testified and admitted: they wanted females coaching females. Furthermore, it was conceded also that the next Assistant Coach, after Coach Mollaghan, had to be a woman according to Ms. Varnell. According to the Defendants the next "Assistant Coach" after Coach Mollaghan was Ms. Beth Leaver. This is not disputed. The male coaches were banished. All of the evidence is to be viewed in the light most favorable to Plaintiffs - - particularly when that evidence includes judicial admissions. Consequently, there is no legal basis for overturning these Jury Verdicts.

Please note that both Mollaghan, and O'Connor were replaced by clearly less qualified females. For example, Beth Leaver had no NCAA Division One experience. When Ms. Macklin became Head Coach she had no collegiate coaching experience whatsoever.

As to the "same actor" argument the Defendants do not refute the extensive cases or facts the Coaches provided in their original Brief [p.36 of Original Brief]. *Brown v. CSI Logic, Inc., 82 F.3d 651, 658 (5th Cir. 1996)* and *Haun v. Ideal Industries, Inc., 81 F. 3d 541, 546 (5th Cir. 1996)* establish that this alleged defense [that is not applicable here since the "same actor" is not involved] is not a defense but a potential inference and only that. It is not outcome determinative. Again, please note the Defendants do not refer to any evidence even supporting this non applicable "inference".

At any rate, the Jury, without objection, was instructed as to whether discrimination was a motivating factor regarding discrimination. They had ample

evidence to consider. They considered the evidence and rendered a verdict in favor of the Coaches.

The one line that Defendants attribute to *Desert Palace, supra*, absolutely misstates the law. The "making the same decision" approach is actually a "partial affirmative defense". *Desert Palace at p. 100.* **It must be pleaded and proved by the Defendants.** The Defendants, not the Plaintiffs, have the burden of proof. The Defendants do not refer the Court to any proof whatsoever in this regard in their brief. They also do not refer the Court to any transcript page even mentioning this affirmative defense or proof in support of it. They also do not refer the Court to any Jury Instruction regarding it. If it had been pursued by Defendants, which it was not, the Jury could accept it or reject it. Here, there was no attempt at trial for it to be accepted.

Apparently, the Defendants, and perhaps the Circuit Judge, erroneously believe(d) that who replaced whom is a factor **when there is a motivating factor case or a direct evidence case or a pattern or practice case**. This case has all three approaches. Consequently, who replaced whom is not a necessary factor. As we have shown, repeatedly, this is not the law. The four step *McDonell-Douglas circumstantial evidence* minuet is not necessary. We accentuated this in our original Brief, and the Defendants do not refer to any case or any fact or any proof that refutes this point.

Furthermore, if that were the law, any employer could engage in every conceivable, despicable, racist act and walk away with impunity if he merely replaced the aggrieved employee with a member of the same race or sex for a short period of time. This point was made in our original Brief and, once again, the Defendants do not express any disagreement.

III. DUE PROCESS:

With regard to Due Process the Defendants have overlooked salient facts, additional judicial admissions, and legal precedent. The Defendants desperately desire to avoid the fact that the *Defendants themselves admitted to the Jury* that Coach Vincent and Coach Mollaghan were entitled to Due Process.

The actual facts have been summarized, *supra*, and definitively provided in the original Brief. Some of the relevant facts bear repeating:

President Fleming **admitted** the three coaches had been wronged. He **admitted** the three coaches were entitled to all benefits and rights contained in the Staff Handbook. He **admitted** the Grievance Process was provided to insure that their rights were not violated. [T325]. **He admitted that, if Due Process had been provided, all three coaches could have retained their positions and had their rights vindicated. [T326].** He **admitted** that the three coaches were entitled to a hearing. [T329]. He **admitted** that the written contract and incorporated Handbook provides rights to the three coaches. [T330]. It "provides entitlements". [T330]. He did not disagree with the testimony of the three coaches. [T329].

The University representative at trial, the Director of Human Resources [HR], Dr. Willis, who is also an attorney, agreed with everything that Dr. Fleming testified. [T634]. **He admitted that all three Coaches were entitled to hearings and Due Process**. [T634-635]. He agreed that speed and promptness were an essential aspect of the Due Process that was due. [T639-640]. Exhibit 7. The Handbook and its Due Process provisions accentuated the need for speed and prompt action. [T640]. Exhibit 7.

Giannini told Vincent, after he fired him, *"I'm not reassigning you to anywhere."* [T372]. He did not, in fact, assign Vincent anywhere. Vincent desperately needed

Summer Camp money that was denied him. [T374]. Coach Vincent was permanently ruined in the coaching community. [T406].

Mollaghan met with Dr. Fleming who told him he was deserving of a hearing and Due Process. [T270]. The Provost would not help him either. [T270]. Just as was the case with Vincent, no investigation occurred regarding Mollaghan. He was victimized by the same pattern and practice of mistreatment and retaliation that Coaches Vincent and O'Connor were subjected. No hearing was provided Mollaghan either. [T272].

The grievances of O'Connor and Mollaghan and Vincent were ignored. [T296-297]. Ultimately, Mollaghan was not retained. [T298]. The retaliation and denial of Due Process even extended after he left as the Defendants held up his pay for six months. [T299].

Coach Vincent and the other two coaches had the same kind of rolling contract that had been renewed every year except the year where all of the foregoing occurred. They had the same kind of rolling contract that the female coach, Macklin, had testified about as described *supra.*

The Defendants do not deny the foregoing facts. Clearly it was "reasonable" for the jurors to consider all of the foregoing to include the numerous admissions by the Defendants.

Even though it is not necessary, in light of the foregoing admissions, we respectfully accentuate the following:

a. **Judicial Admissions** are the finest, most pristine kind of evidence that can be adduced. It is important and necessary to accentuate that judicial admissions are rare. Here, however, they are evident and numerous. They are undenied. They were not objected. They were not sought to be withdrawn. The

effect is, of course, that nothing can be done by the Defendants to unring the bell. They are admitted for all purposes. *See e.g., Byrd v. Bowie*, 992 So. 2d 1202,1205 (Miss. 2008). Here, we have even more superior evidence than admissions established pursuant to MRCP Rule 36. We have open court, from the witness stand admissions – repeated admissions. These are classic admissions made "against interest" from the witness stand. *MRE 801 (d)(2);MRE 804 (b) (3).*

As this Court knows, MRCP Rule 36 (b) states that the "effect of admission" is that what was requested to be admitted is "conclusively established unless the Court on motion permits withdrawal or amendment of the admission."

This Court has stated that "[a] matter that is deemed admitted does not require further proof. Any admission that is not amended or withdrawn cannot be rebutted by contrary testimony or ignored by the court even if the party against whom it is directed offers more credible evidence." *DeBlanc v. Stancil*, 814 So.2d 796, 801(Miss. 2002).

What could have been a more pure form of proof? Surely the Jury was not unreasonable in considering it. What reasonable Juror would be expected to ignore the overwhelming impact of these judicial admissions? Twelve out of twelve did not - and should not have.

b. **The Coaches were not "at will" employees**. Each of the Coaches had a written, express contract for a definite period of time. [Exhibits 5 and 6].

There is not one case where an employee had a written contract for a definite period of time, and he was deemed to be an "at will" employee. Certainly the Defendants do not point to any such case. Indeed, when there is a definite

term of employment, one is not "at will". *Shaw v. Burchfield*, 481 So. 2d 247,254 (Miss. 1985).

It is quite inaccurate for the Defendants to tell this Court that the Coaches, during an official NCAA soccer game, could just have walked off with impunity - - leaving the student athletes to fend for themselves. "At will" means either side of an employee/employer relationship could walk away whenever they wished. Again, the written, "for cause", express contracts herein did not allow for this to occur. [Exhibits 5 and 6].

Furthermore, there cannot be a "legally impermissible" reason for the mistreatment [affecting any "term or condition of employment"] or termination or removal from a position of an employee. *Id.* In other words, of course, one cannot be discriminated against or retaliated against in violation of federal statutes as here. *Id.* [Federal statutes referred *supra, Costa, supra, Xerox Corp., supra, Thompson, supra].* This Court reiterated this position in *McArn v. Allied Bruce Terminix,* 626 So. 2d 603,606 (Miss. 1993) and in numerous other cases. Here, there are indeed legally impermissible factors as well as the fact that there were written contracts with definite periods of employment.

Additionally, when illegal acts are reported, as they were by Vincent and Mollaghan, they are not at will. *McArn* at p. 607.

c. **Even though all of the foregoing favors the coaches and even though the Defendants apparently have overlooked the foregoing, the Employment Contract and the Employee Handbook enhance their cases even more substantially:**

This Court has made it clear that when a Handbook, prepared, published, and distributed to the employee by the employer, such as here, both the Contract and the incorporated Handbook are contractually enforceable property rights. The employee has a Due Process right to have the provisions enforced. This is exactly what President Fleming and Dr. Willis testified. They are correct.

As this Court has held, **"The first issue presented in this appeal is whether the provisions in the handbook and manual are part of the contract of employment. *We are of the opinion they are*." *Robinson v. Board of Trustees*, 477 So. 2d 1352-53 (Miss. 1985).** Then, this Court held, **"The reference to the policies and procedures** of the Board in the contract adds strength to the argument in favor of enforcing the provisions." *Id.*

Here, virtually the same contracts in *Robinson* were used and placed, without objection, into evidence. [Exhibits 5 and 6].

Clearly, public institutions issue directives, internal procedures, and Handbooks with the intent that they are complied by all parties. Indeed, the U.S. Supreme Court has held that, a public entity's written procedures must be **"scrupulously observed."** *Vitarelli v. Seaton, 359 U.S. 535, 547 (1959)* (Frankfurter, J., concur and dissent).

Please note that, "[T]he right to procedural due process is 'absolute' in the sense that it does not depend upon the merits of a claimant's substantive assertions, and because of the importance to organized society that procedural due process be observed...". *Carey v. Piphus*, 435 U.S. 247, 266, 98 S.Ct. 1042, 1054, 55 L.Ed.2d 252 (1978). Here, these Coaches, according to their Written Contracts and Employee Handbook were entitled to the effecting of the grievance

procedure. There was and is considerable merit to their grievances but, even if there were not, they are still entitled to relief. *Id.*

Please note that the contracts here embrace and incorporate, "the policies and by laws of the Board." It is undisputed that the contracts and Handbook are issued and approved by the Board and are part of their "policies".

Please note the contracts are "for cause" contracts. Not at will.

Please note that the Fifth Circuit in *Whiting v. USM*, 451 F. 3d 339 (5th Cir. 2006) reinforced this Court's rulings in *Bobbitt v.The Orchard Dev. Co.*, 603 So. 2d 356, 361 (Miss. 1992); *Robinson v. Board of Trustees*, 477 So. 2d 1352-53 (Miss. 1985).

In *Whiting* the Fifth Circuit held that contracts and their incorporated Handbooks create property interests since they meld with the contractual rights already existent. Specifically, the Court in *Whiting* stated, **"Mississippi courts have held that employee manuals become part of the employment contract, creating contract rights to which employers may be held, such as Dr. Whiting's right to the procedures outlined in the handbooks". *Id.* At p. 345** citing *Robinson v. Bd. of Trustees of E. Cent. Junior Coll.*, 477 So.2d 1352, 1353 (Miss.1985); see also, *Bobbitt v. The Orchard Dev. Co.*, 603 So.2d 356, 361 (Miss. 1992).

That is exactly what Dr. Fleming and Dr. Willis agreed under oath at trial from the witness stand. This, of course, is not a tenure case, or a case asking for continued employment. In this case, where all the parties agree, the Coaches are entitled to the benefits and provisions provided in the Employee Handbook. These rights include the right to definite, distinct procedures regarding complaints

and procedures so that an aggrieved employee will have a prompt Due Process hearing regarding his or her grievance. That did not occur here. Indeed, according to Dr. Fleming and Dr. Willis, if the implemented procedures were provided the Coaches, the Coaches would have had an opportunity to have retained their positions. Interestingly, the ultimate decision maker would have been Dr. Fleming - - the same person who agreed they were entitled to Due Process.

Please bear in mind that the Circuit Judge specifically ruled, in his Opinion and Order denying summary judgment, denying peremptory instructions, and denying directed verdicts, that the claim for Due Process was viable and the Jury should render a verdict regarding it. [RE 4].

The Defendants, yet again, avoid all of the foregoing. They refer the Court to a Handbook page that refers to "at will". However, they have overlooked the second page of that Handbook where it makes clear that, as an exception, **one is not "at will" if an employee has a written contract "issued by the Board of Trustees of Institutions of Higher Learning". [Exhibits 41, 5, and 6]; [Varnell R.E. 2,p.2]** Dr. Fleming and Dr. Willis recognized that the two Coaches were not at will and, indeed, *had contracts with the Board of Trustees.* They recognized that no alleged disclaimer applied in a situation, such as here, when the "exception" applied: **i.e. these Coaches did in fact have a contract with the Board of Trustees.** Those contracts specifically incorporate the "policies and by laws of the Board." [Exhibits 5 and 6]. The Handbook and written contracts herein were approved by the Board. That is why they truthfully testified that Coaches Mollaghan and Vincent were entitled to the benefits and entitlements of

the Handbook. The Handbook, as accentuated herein and in the Original Brief, included full, prompt investigations of their complaints, notice of hearings, actual due process hearings, relief for their grievances to include compensation for pay deprived, summer camp money deprived, and even reinstatement. [Exhibit 7], [Varnell RE 2, pp. 3 through 18]. There are no specific limits on the relief that may be allowed. [Exhibit 7].

Termination, in and of itself, is not the point. We have delineated in the original Brief the damages both of these men suffered. Amongst other elements of damage Vincent was removed as Head Coach. He was denied funds for summer camp money he was contractually entitled and needed badly. This scuttled his career. Mollaghan was blackballed and deprived of being paid one dime as Head Coach. There is not room here to list all of their damages again. Suffice it to say, once again, even if termination is ignored, the Defendants do not express any disagreement with what was listed in the original Brief regarding damages that resulted from the Due Process violations. These include emotional damages they were clearly entitled. The damages they suffered were delineated in specific terms. The harm they suffered was shown to the Jury to be palpable and clear cut. That was why the Jury unanimously rendered a verdict favoring the two Coaches.

d. **GOOD FAITH IS REQUIRED:**

This Court has consistently insisted that every contract contains an implied covenant of good faith and fair dealing in performance and enforcement. *Morris v. Macione,* 546 So.2d 969, 971 (Miss.1989). "Good faith is the faithfulness of an agreed purpose between two parties, a purpose which is

consistent with justified expectations of the other party." *Cenac v. Murry*, 609 So.2d 1257, 1272 (Miss.1992). It appears the Defendants wish to circumvent their own Contract and incorporated Employee Handbook. Are the Handbooks meaningless? Cannot Coaches and Professors at our Universities rely upon what they are provided? This State has always kept parties to their representations. *See e.g., Covington v. Page,* 456 So. 2d 739, 741 (Miss. 1984); *PMZ Oil Co.. v. Lucroy* 449 So. 2d 201 (Miss.1984). We respectfully ask that the Defendants' judicial admissions and written representations be enforced - - just as the Jury verdict required.

CONCLUSION

Consequently, it is respectfully requested that the Jury Verdicts rendered herein be reinstated and that the Circuit Judge's Judgment Notwithstanding the Verdict be reversed. Both the applicable law and the actual facts favor that action in favor of Coach John Vincent and Coach John Mollaghan.

RESPECTFULLY SUBMITTED this the 1st day of May, 2012.

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CERTIFICATE OF SERVICE

I, the undersigned counsel of record for the Appellants herein do certify that I have this day caused to be mailed by United States first class mail with postage prepaid the original and three copies of the Reply Brief for the Appellants Mollaghan and Vincent along with a CD-Rom containing a PDF of the Reply Brief for the Appellants Mollaghan and Vincent for filing to Kathy Gillis, Clerk, Supreme Court of the State of Mississippi, at P.O. Box 249, Jackson, Mississippi 39205-0249; and have also this day caused to be mailed by United States first class mail with postage prepaid a true and correct copy of the Reply Brief for the Appellants Mollaghan and Vincent to the following persons at their regular business addresses:

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This the 1st day of May, 2012.

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