IN THE SUPREME COURT OF MISSISSIPPI

SONYA VARNELL, individually **APPELLANT**

VS. **CAUSE NO.: 2010-TS-2005**

GED O'CONNOR **APPELLEE**

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. Sonya Varnell – Appellant
2. Ged O'Connor – Appellee
3. Richard Giannini – Co-defendant in trial court
4. University of Southern Mississippi – Co-defendant in trial court
5. Hon. Robert B. Helfrich – Forrest County Circuit Judge
6. Kim T. Chaze, Esq. – Attorney for Appellee
7. Alexander Ignatiev, Esq. – Attorney for Appellee
8. William E. Whitfield, III, Esq. – Attorney for Appellant
9. Matthew D. Miller, Esq. – Attorney for Appellant
10. Nicholas K. Thompson, Esq. -- Attorney for Appellant
11. Mark D. Morrison, Esq. – Attorney for Richard Giannini
12. Herman M. Hollensed, Esq. – Attorney for the University of Southern Mississippi

MATTHEW D. MILLER, ESQ. (MSB [redacted])
Attorney for Appellant Sonya Varnell

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF THE ISSUES

I. **THE TRIAL COURT ERRED WHEN IT DENIED VARNELL'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AS TO O'CONNOR'S SEXUAL HARASSMENT CLAIM.**

A. **The two isolated comments by Varnell are insufficient as a matter of law to constitute actionable sexual harassment.**

B. **The alleged comments of Varnell toward O'Connor were not based on sex or sexual in nature.**

C. **The comments attributable to Varnell did not affect any term, condition or privilege of O'Connor's position with USM.**

1. *O'Connor's position with USM was not at all affected by or after Varnell's alleged comments.*
2. *Varnell's alleged comments are not severe or pervasive.*
3. *Varnell's alleged comments are not objectively or subjectively hostile or abusive.*

II. **O'CONNOR FAILED TO PROVIDE SUFFICIENT EVIDENCE TO SUPPORT THE DAMAGE AWARD RENDERED BY THE JURY.**

STATEMENT OF THE CASE

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

On March 29, 2001, Ged O'Connor brought suit in the Circuit Court of Forrest County against the University of Southern Mississippi, Sonya Varnell, Richard Giannini, and Dr. Horace Fleming, alleging claims of sexual harassment, gender discrimination and retaliation, which he contended violated his Due Process and Equal Protection rights, and entitled him to relief under Title VII of the Civil Rights Act of 1964 and/or 42 U.S.C. § 1983. He also brought state-law claims for slander/defamation, wrongful termination, "Whistle Blower" liability, negligence, negligent and intentional infliction of emotional distress, and tortuous interference with business/employment relationship. (*See* "Complaint" in Record on Appeal ("R.") at pp. 474-478).

O'Connor's case was consolidated for discovery and ultimately for trial with similar suits brought by John Vincent and John Mollaghan.[1] 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 and the other Defendants on O'Connor's Title VII, due process and equal protection claims, as well as all but one of his state-law claims. (R. at 1243-52; Record Excerpt ("R.E.") No. 2). Those remaining were O'Connor's claims for gender discrimination, sexual harassment, retaliation and tortuous interference with business relations concerning his alleged employment at the University of Louisiana Monroe.

---

[1] Vincent and Mollaghan have filed appeals of the rulings of the trial court, which have essentially been consolidated with this appeal since all three cases were tried together and a single record from the trial court is being utilized for all three appeals.

Beginning June 16, 2008, these three cases were tried to a jury in Forrest County. At the conclusion of trial, the jury returned a verdict in favor of O'Connor and against Varnell and others on his gender discrimination, sexual harassment and retaliation claims, and awarded him damages in the amount of $300,000.00. (R. at 1144-45). Varnell filed a Motion for Judgment Notwithstanding the Verdict, or Alternatively, for a New Trial, on July 1, 2008. (R. at 1179-89).

On March 5, 2009, the Trial Court entered an Opinion and Order finding in favor of all Defendants and against O'Connor on his tortuous interference with business relations concerning his alleged employment with the University of Louisiana-Monroe. (R. at 1237). On April 12, 2010, the Trial Court entered an Opinion and Order on the Defendants Motion for Judgment Notwithstanding the Verdict or alternatively, for a new trial, granting Varnell's Motion as to O'Connor's gender discrimination and retaliation claims, but denying it as to his sexual harassment claim and as to the amount of the jury verdict. (R. at 1346-57; R.E. No. 3). O'Connor subsequently filed a Motion for Reconsideration on April 22, 2010, which was denied by Order of the Trial Court on November 8, 2010. (R. at 1358-83; R. at 1436-40).

No notice of appeal has been filed by O'Connor. (*See* R. at pp. 1441-1446, 1457-1462). Thus, the JNOV's granted by the trial court as to all of O'Connor's other claims are final, and the only claims remaining for adjudication by this Court is his sexual harassment claim and, additionally and alternatively, whether the award of damages is supported by the evidence.

B. Statement of the Facts

In the Fall of 1999, O'Connor became a Graduate Assistant ("GA") for the University of Southern Mississippi's ("USM") women's soccer program. As a GA, O'Connor received tuition, room, board, and books. O'Connor did not receive any salary or benefits from USM, nor did he ever have a written employment contract with USM. O'Connor worked under the head women's soccer coach, Vincent, and the assistant coach, Mollaghan. (Trial Transcript ("Tr.") at p. 48, L 1-7; p. 116, L 17 to p. 118, L 20; p. 134, L 25 to p. 135, L 25; R.E. No. 4). At that time, Varnell was an Associate Athletic Director and the Senior Women's Administrator for women's sports at USM. (Tr. at p. 503, L 29 to p. 504, L 2; R.E. No. 5).

In late October 1999, the women's soccer team traveled to Chicago, Illinois, and Milwaukee, Wisconsin, for games with DePaul University and Marquette University. And 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; R.E. No. 4). Varnell accompanied the team on these trips, as it was her practice to accompany the women's teams she supervised on one away trip per season, as well as on any post-season trips.

On the October trip, the team departed from Hattiesburg by bus to the airport in New Orleans for their flight to Chicago. As the team was boarding the bus, O'Connor was distributing sandwiches he had purchased at Subway to all the players and coaches on the bus. O'Connor did not purchase a sandwich for Varnell since he was unable to contact her prior to arriving at the bus to take her order. When Varnell entered the bus, O'Connor advised her he did not have a sandwich for her, but that he had a foot-long Subway sandwich for himself. He told Varnell "if you want, you can have six inches of mine." O'Connor contends Varnell responded, "You're so nasty, you're so nasty"

and touched his arm.[2] (Tr. at p. 60, L 17 to p. 61, L 22; p. 65, L 15-19; R.E. No. 4). Varnell disputes O'Connor's version of this exchange. (Tr. at p. 507, L 13 to p. 508, L 10; R.E. No. 5). According to Varnell, when O'Connor offered her six inches of his foot-long sandwich, Mollaghan said to O'Connor, "I didn't know you had six inches [to give her], mate." And Varnell told Mollaghan, "you know that's not he was talking about." (*Id.*; R.E. No. 5).

On the November trip, the soccer team, coaches and administrators, including O'Connor and Varnell, traveled by bus to Dallas. When the team arrived at their hotel in Dallas, and while unloading their luggage and equipment, Vincent and Mollaghan were making crude comments to O'Connor about having to share a hotel room with Casey Smith, the student manager. Vincent and Mollaghan were teasing O'Connor about homosexual acts they thought Smith would engage with O'Connor. (Tr. at p. 108, L 4 to p. 109, L 13; R.E. No. 4; Tr. at p. 289, L 72 to p. 291, L 8; R.E. No. 7; Tr. at p. 367, L 2-21; R.E. No. 6; Tr. at p. 511, L 19 to p. 512, L 23; R.E. No. 5; *see also* Trial Exhibit "3"). Vincent and Mollaghan continued making these comments to O'Connor as they proceeded into the hotel lobby.

Varnell came up to the coaches while Vincent and Mollaghan were making these comments to O'Connor, and noticed he was uncomfortable with their comments. (Tr. at p. 512, L 19-27; R.E. No. 5). Varnell told O'Connor that she had an extra bed in her hotel room and that he could use it if he felt too uncomfortable rooming with Smith.[3] (*Id.*; R.E. No. 5). O'Connor contends that, subsequently, on two other occasions within five minutes of this first exchange, Varnell asked him to "stay in my room," grabbing his arm on one of these occasions. (Tr. at p. 62, L 7-16; p. 110, L 28 to

[2] Hereinafter, this is referred to as the "Subway sandwich" comment.
[3] Hereinafter, this is referred to as the "hotel room" comment.

p. 111, L 3; R.E. No. 4). But Varnell never asked or ordered O'Connor to stay in her bed or sleep with her. (Tr. at p. 110, L 17-27; p. 113, L 16-25; R.E. No. 4; Tr. at p. 513, L 20-27; R.E. No. 5). And O'Connor did not stay in Varnell's room that evening. (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; R.E. No. 4).

Shortly after the soccer team returned from Dallas, an investigation was conducted by the Athletic Director's office into allegations and complaints about Vincent, raised by members of the soccer team, in which Varnell participated. Thereafter, Vincent was reassigned from his position as head women's soccer coach by Giannini. Giannini named Mollaghan the interim head coach, and O'Connor contends he was "promoted" to the assistant women's soccer coach by Mollaghan. (Tr. at p. 116, L 25 to p. 117, L 10; R.E. No. 4). O'Connor did not receive a contract or any other benefits from USM as a result of this purported promotion. (Tr. at p. 117, L 11 to p. 118, L 17; R.E. No. 4).

O'Connor continued with his duties with the women's soccer program through the Spring 2000 semester, and continued to receive all benefits as a GA that he received in the Fall 1999 semester – tuition, room, board, and books. (Tr. at p. 114, L 28 to p. 116, L 1; R.E. No. 4). He was also hired by USM to assist in running soccer camps at USM in June of 2000, for which he received a total of $13,456.96. (Tr. at p. 120, L 15 to p. 121, L 15; R.E. No. 4; *see also* Trial Exhibit "17").

O'Connor had no other personal issues with Varnell prior to her comments in October and November 1999. Other than the Subway sandwich comment and the hotel room comment, Varnell made no other sexually harassing or offensive remarks to O'Connor at any time. (Tr. at p. 106, L 3-14; p. 107, L 10-13; p. 111, L 4-14; R.E. No. 4). On April 20, 2000, more than five months later, O'Connor filed a written sexual harassment grievance with USM, regarding the Subway sandwich comment and the hotel room comment. (Tr. at p. 63, L 22 to p. 64, L 27; p. 113, L 5-18; R.E. No. 4).

He did not report the alleged incidents to anyone else at USM other than Vincent before filing this written grievance. (Tr. at p. 114, L 15-27; R.E. No. 4).

O'Connor remained the GA (and supposed assistant coach) with the USM women's soccer team until he resigned in late July of 2000 to take another position at the University of Louisiana-Monroe. (Tr. at p. 114, L 28 to p. 116, L 16; R.E. No. 4). His resignation letter mentioned nothing about sexual harassment, a hostile work environment, or retaliation. (Tr. at p. 116, L 2-16; R.E. No. 4; *see also* Trial Exhibit "9").

SUMMARY OF THE ARGUMENT

Two of the elements O'Connor must prove to succeed on his sexual harassment/hostile work environment claim are that (a) the harassment was based upon sex and (b) the harassment affected a term, condition or privilege of employment. O'Connor's sexual harassment claim against Varnell must fail because he cannot satisfy his burden to prove these elements.

The only evidence O'Connor offered at trial of anything Varnell did that he claimed was sexual harassment are two comments she made – the Subway sandwich comment and the hotel room comment. The law is clear, however, that one or two isolated comments or incidents are insufficient to constitute actionable sexual harassment. Thus, O'Connor's claim must fail as a matter of law.

Moreover, these two comments, even if made by Varnell, were not based on sex or "of a sexual nature." They occurred in the context of and were in response to comments made by O'Connor's superiors, Vincent and Mollaghan, that were sexual in nature. More importantly, O'Connor admitted that no sexual advances were made by Varnell toward him, and Varnell clearly testified she had no desire to have any relationship with O'Connor. Since O'Connor cannot show these alleged comments of Varnell were based on sex, his sexual harassment claim fails.

Thirdly, and most importantly, O'Connor provided no evidence that these comments affected a term, condition or privilege of his position with USM. O'Connor continued to receive all benefits he had previously received as a GA until he resigned his position in July of 2000. He was even hired to coach soccer camps some eight months after these alleged comments and paid over $13,000.00 for a single month's work.

Next, Varnell's alleged comments were also not "severe" or "pervasive." O'Connor admitted that the Subway sandwich exchange lasted all of thirty seconds to a minute, while the hotel room

exchange, at most, spanned four to five minutes. O'Connor further admitted these were the only two comments Varnell made that he thought were offensive or sexually harassing. He also admitted Varnell never propositioned him for sex or asked him to sleep in her bed, and there was no sexual physical contact between them. These two comments, isolated in nature and short in duration, fall woefully short of being "severe" or "pervasive" to be actionable sexual harassment.

Furthermore, Varnell's two alleged comments were not objectively hostile or abusive. Each comment was allegedly made after Vincent and Mollaghan had made sexually-based comments to O'Connor, which Varnell heard. More importantly, these comments, given their isolated nature and the context in which they allegedly occurred, are nowhere near the level of hostility and abusiveness as the comments and conduct in numerous other cases in which the Federal courts found no actionable sexual harassment existed. All of those cases demonstrate that Varnell's comments, even if made, fail the objective standard to equate to actionable sexual harassment.

The two isolated comments also fail the subjective element of the severe and persuasive prong. Vincent, Mollaghan and O'Connor all admitted that Vincent and Mollaghan were making crude, homosexual remarks toward O'Connor immediately prior to Varnell's alleged hotel room comment. No reasonable person could determine O'Connor was subjectively offended by Varnell's comments when he admits he was not offended by Vincent's or Mollaghan's comments.

Finally, the jury's $300,000.00 damage award to O'Connor was unsupported by the evidence. O'Connor put on absolutely no evidence of economic loss as a result of the alleged harassment or his resignation from USM. While he provided limited testimony concerning alleged emotional distress he suffered, he stated the source of this emotional distress was his loss of control of and

inability to coach the soccer team, not Varnell's two alleged comments. Hence, there was no evidence whatsoever to support the jury's award of compensatory damages.

For these reasons, no reasonable jury could have found in favor of O'Connor on his sexual harassment claim, and the trial court erred when it denied Varnell's Motion for JNOV or for New Trial.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT DENIED VARNELL'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AS TO O'CONNOR'S SEXUAL HARASSMENT CLAIM.

This Court reviews a circuit court's decision to deny a JNOV motion *de novo*. That is, this Court does not defer to the circuit court's decision but rather reviews the matter anew. *Univ. of S. Miss. v. Williams*, 891 So.2d 160, 167-68 (Miss. 2004) (citing *Northern Elec. Co. v. Phillips*, 660 So.2d 1278, 1281 (Miss. 1995)). A circuit court should only deny a JNOV motion as to a particular theory of liability where the particular theory of liability is legally sufficient to support the verdict. *Id.* (citing Miss. R. Civ. P. 50).

"A motion for JNOV is a challenge to the legal sufficiency of the evidence, and this Court will affirm the denial of a JNOV if there is substantial evidence to support the verdict." *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 (Miss. 2008)). "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." *Martin*, 998 So.2d at 964 (citing *Adcock*, 981 So.2d at 948-49).

"If the facts are so overwhelmingly in favor of the appellant that reasonable and fair-minded jurors could not have arrived at a contrary verdict, then this Court must reverse and render." *Miss. Transp. Comm'n v. SCI, Inc.*, 717 So.2d 332, 338 (Miss. 1998) (citations omitted). "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." *White v. Stewman*, 932 So.2d 27, 32 (Miss. 2006).

Ged O'Connor brought multiple claims against USM and Varnell in this lawsuit. However, all of these claims were disposed of either by summary judgment or when the trial court granted Varnell's Motion for JNOV, with the exception of O'Connor's sexual harassment claim against Varnell. Since Varnell is an individual, this claim was brought pursuant to 42 U.S.C. § 1983.[4] One of the two issues before this Court on Varnell's appeal is whether there is sufficient evidence to support the jury's verdict in favor of O'Connor and against Varnell on O'Connor's sexual harassment claim.

There are two (2) types of sexual harassment claims: (1) *quid pro quo* and (2) hostile work environment. 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* case. *Casiano v. AT&T Corp.*, 213 F.3d 278, 283 (5th Cir. 2000). "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." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998).

There is no evidence whatsoever that O'Connor suffered any type of tangible **employment** action – he remained in the GA position after Vincent was reassigned and continued to receive all

[4] O'Connor's sexual harassment claim under Title VII was dismissed by the Trial Court on summary judgment as he did not file his EEOC charge within 180 days of the alleged harassment. R. at 1093-94; R.E. No. 2). Varnell has no liability in her individual capacity under Title VII. *See Ackel v. National Communications, Inc.*, 339 F.3d 376, 381 n. 1 (5th Cir. 2003). Sexual harassment in the public employment environment is actionable under § 1983. *Lauderdale v. Tex. Dept. of Criminal Justice, Inst. Div.*, 512 F.3d 157, 165-66 (5th

benefits of his GA position until he resigned on July 14, 2000. Further, O'Connor contends he was in fact "promoted" to assistant coach in early 2000. Thus, O'Connor does not have a *quid pro quo* claim. His sexual harassment claim, therefore, is based on an alleged hostile work environment.

In order for O'Connor to make out a *prima facie* case and recover on his hostile work environment claim, he must 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).

A. The two isolated comments by Varnell are insufficient as a matter of law to constitute actionable sexual harassment.

The law is clearly established that "**[o]ccasional comments**, discourtesy, rudeness, or **isolated incidents**, unless extremely serious, are insufficient to establish [actionable] 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).

Here, O'Connor's entire sexual harassment claim against Varnell is based on only two isolated comments she allegedly made -- the Subway sandwich comment and the hotel room comment. That is it. O'Connor stated he had no other problems with Varnell before the two alleged comments. He further admitted that these two comments were the only two comments ever made by Varnell that he thought were sexually harassing or offensive. (Tr. at p. 106, L 3-14; p. 107, L 10-13;

Cir. 2007). The inquiry into a § 1983 sexual harassment claim is the same as one brought under Title VII. *Id.*

p. 111, L 4-14; R.E. No. 4). These 2 isolated comments fall into the category of "occasional comments", which are not actionable sexual harassment. Therefore, O'Connor's claim must fail as a matter of law.

B. The alleged comments of Varnell toward O'Connor were not based on sex or sexual in nature.

In order for O'Connor to recover on his hostile work environment claim, he must establish, *inter alia*, that the harassment was based upon sex. *Hockman*, 407 F.3d at 325. The Fifth Circuit test for hostile work environment claims requires a plaintiff to show unwelcome sexual harassment in the form of "sexual advances, requests for sexual favors, and other 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).

"The 'critical issue' in determining whether workplace activities constitute harassment based on sex is 'whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.'" *Reine v. Honeywell International, Inc.*, 362 Fed.Appx. 395, 397 (5th Cir. 2010) (quoting *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998)).

O'Connor failed to provide evidence that the comments attributable to Varnell were based on his sex. The "proof" O'Connor put on at trial to support his sexual harassment claim against Varnell consisted of two separate, isolated comments attributable to Varnell. The first, the Subway sandwich comment, was nothing more than an isolated comment made by Varnell consisting of a single statement: "You're so nasty, you're so nasty." (Tr. at p. 61, L 5-10; R.E. No. 4; Tr. at p. 226, L 6-15; R.E. No. 7; Tr. at p. 366, L 16-23; R.E. No. 6). Varnell testified that after O'Connor offered her

six inches of his sandwich, Mollaghan stated, "I didn't know you had six inches [to give her], mate," to which Varnell replied "that was not what he was talking about." (Tr. at p. 507, L 13 to p. 508, L 10; R.E. No. 5). This indicates that if any sexual connotation, if any, came from this exchange, it was initiated by Mollaghan, not Varnell.

With regard to the hotel room comment, Varnell only offered O'Connor the extra bed in her hotel room after she learned of the continuous crude, homosexually-based comments Vincent and Mollaghan were making toward O'Connor involving him sharing a room with Smith. (Tr. at p. 511, L 14 to p. 513, L 19; R.E. No. 5). Vincent, Mollaghan and O'Connor all admit Vincent and Mollaghan were making these comments to O'Connor regarding Smith. (p. 108, L 4 to p. 109, L 13; R.E. No. 4; Tr. at p. 289, L 22 to p. 291, L 8; R.E. No. 7; Tr. at p. 367, L 2-21; R.E. No. 6). Incredibly, O'Connor testified that Vincent and Mollaghan's sexually-related comments were not offensive to him, but Varnell's comment was. (Tr. at p. 108, L 22 to p. 109, L 13; p. 111, L 18 to p. 112, L 12; R.E. No. 4). More importantly, O'Connor admitted that Varnell never asked him to stay in her bed, or made any comment whatsoever that she wanted to sleep with him. (Tr. at p. 110, L 21-27; p. 133, L 16-21; R.E. No. 4).

Taking into account the context in which Varnell's two alleged comments were made, coupled with the fact that O'Connor was not offended by Vincent and Mollaghan's sexually-related comments, O'Connor failed to provide any proof that Varnell's comments were based on sex. Thus, the jury could not have found this necessary element of O'Connor's case. Accordingly, the jury's verdict, as well as the Trial Court's ruling denying Varnell's Motion for JNOV or for new trial, were in error and should be overturned.

C. The comments attributable to Varnell did not affect any term, condition or privilege of O'Connor's position with USM.

O'Connor also failed to prove the fourth element of his *prima facie* case for sexual harassment – that the alleged harassment affected a term, condition or privilege of his position at USM. In order for harassment to affect a term, condition or privilege of his position, O'Connor must prove the alleged harassment was "**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**).

Additionally, the challenged conduct 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)). "**Occasional 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**).

1. O'Connor's position with USM was not at all affected by or after Varnell's alleged comments.

No actual term or condition of O'Connor's position as a GA was affected by the two comments Varnell allegedly made. O'Connor continued to receive all of the benefits he had had been receiving as a GA – tuition, room, board, and books – for the Spring 2000 semester. (Tr. at p. 114, L 28 to p. 116, L 1; R.E. No. 4). He also was paid $13,456.96 for working soccer camps in June of 2000. (Tr. at p. 120, L 15 to p. 121, L 5; R.E. No. 4; *see also* Trial Exhibit "17"). In fact, according to O'Connor and Mollaghan, he received a "promotion" to assistant coach after the comments were allegedly made by Varnell. (Tr. at p. 116, L 25 to p. 117, L 10; R.E. No. 4).

2. Varnell's alleged comments are not severe or pervasive.

Next, the two isolated comments made by Varnell cannot be considered "pervasive." These comments occurred several weeks apart. O'Connor admitted these were the only two occasions where Varnell made any comments which he felt were offensive or sexually harassing. (Tr. at p. 106, L 3 to p. 107, L 13; p. 111, L 4-14; R.E. No. 4). O'Connor presented no evidence that Varnell propositioned him for sex, or made any physical contact with him. Furthermore, O'Connor remained in his position as GA for approximately eight months after these alleged comments were made, until he resigned to take another position at the University of Louisiana-Monroe. Based on these undisputed facts, there is no question, under any reasonable or rationale interpretation of these two comments, that anyone can say they are pervasive.

These comments also fall woefully short of being "severe." Again, the evidence O'Connor put on at trial to support his sexual harassment claim consisted of two isolated comments made by Varnell: "You're so nasty. You're so nasty" and "Stay in my room." O'Connor admitted the

Subway sandwich exchange lasted thirty seconds to a minute. (Tr. at p. 105, p. 27 to p. 106, L 2; R.E. No. 4). Regarding the hotel room comment, O'Connor admitted Varnell never asked him to sleep with her or to share her bed. (Tr. at p. 110, L 23-27; R.E. No. 4). With no other evidence of any comments or actions of alleged sexual harassment attributable to Varnell, these statements are nowhere near severe.

3. Varnell's alleged comments are not objectively or subjectively hostile or abusive.

The U.S. Supreme Court has emphasized that the objective severity of harassment should be judged from the perspective of a reasonable person in the plaintiff's position, **considering all the circumstances**, and that, in all harassment cases, that inquiry requires careful consideration of **the social context** in which particular behavior occurs and is experienced by its target. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81-82 (1998) (**emphasis** added).

These two comments allegedly made by Varnell also fail both the objective and subjective tests for being hostile and abusive, especially when examined in the context in which they were made (if made at all). Varnell testified at trial that after O'Connor offered her six inches of his foot-long sandwich, Mollaghan stated, "I didn't know you had six inches [to give her], mate," to which Varnell replied "that was not what he was talking about." (Tr. at p. 507, L 13 to p. 508, L 10; R.E. No. 5).

Regarding the hotel room comment, Mollaghan and Vincent admitted that, immediately prior to Varnell's comment, they were teasing O'Connor about the homosexual tendencies of Smith, specifically what Smith was going to do to him sexually. (Tr. at p. 289, L 22 to p. 291, L 8; R.E. No. 7; Tr. at p. 367, L 2-21; R.E. No. 6; *see also* Trial Exhibit "3"). She testified that she perceived O'Connor was uncomfortable with these comments and with sharing a room with Smith; hence, the

reason she offered him the extra bed in her room. (Tr. at p. 512, L 19-27; R.E. No. 5).

More importantly, the fact that O'Connor testified the comments made by Vincent and Mollaghan, which were at least equal to if not worse than those made by Varnell, were not offensive to him demonstrates Varnell's comments were not objectively hostile and abusive. Viewing the comments attributable to Varnell, in a light most favorable to O'Connor but while considering the full context of each situation, there is no question that no reasonable person, objectively, would find these comments hostile and abusive to arise to the level of actionable sexual harassment.

The Fifth Circuit Court of Appeals and the District Courts within its jurisdiction have examined the alleged conduct and comments of plaintiffs in numerous sexual harassment cases to determine whether the comments and/or conduct meets the objective standard of being sufficiently severe or pervasive to be actionable sexual harassment. Numerous decisions from these Courts, which outline conduct and comments far more severe than those attributable to Varnell but which were not actionable sexual harassment as a matter of law, are outlined here:

> *Russell v. UTPB*, 234 Fed.Appx. 195, 205 (5th Cir. 2007) – The alleged harasser rubbed the hand and side of plaintiff, intimated she wanted the plaintiff to move to New York with her, stated she wanted to watch a movie in bed with plaintiff and called the plaintiff "honey" and "babe" on numerous occasions.
>
> *Hockman v. Westward Communications, LLC*, 407 F.3d 317, 328 (5th Cir. 2004) – The alleged harasser remarked about another employee's body, he grabbed or brushed plaintiff's breasts and behind, he slapped her on the behind with a newspaper, he held her cheeks and tried to kiss her, he asked plaintiff to arrive at work early to be alone with her, and he stood in the doorway of the bathroom while she was washing her hands.
>
> *Derouen v. Carquest Auto Parts*, 275 F.3d 42 (5th Cir. 2001) – The alleged harasser attempted to grab plaintiff's breast and later put his hand on plaintiff's thigh and rubbed it.

Shepherd v. Comptroller of Public Accounts of State of Texas, 168 F.3d 871, 872 (5th Cir. 1999) – The alleged harasser told plaintiff "your elbows are the same color as your nipples", and on another occasion told plaintiff "you have big thighs" while simulating looking under her dress, on several occasions stood at plaintiff's desk and attempted to look down her dress, on several occasions touched her arm, rubbing her shoulders down to her wrists and on two occasions, when plaintiff was looking for a seat after coming in late for a meeting, pointed to his lap and said "here's your seat".

Little v. K & B Mississippi Corp., 2007 WL 2417353, *1 (S.D. Miss. 2007) – The alleged harasser touched plaintiff's breast while giving bear hug, grabbed the back of her leg, rubbed her shoulders, kissed the back of her neck, and bought her chocolate-flavored lip gloss.

Hancock v. Barron Builders & Mgt. Co., 523 F.Supp.2d 571 (S.D. Tex. 2007) – The owner of company made numerous sexually graphic, vulgar comments on a weekly basis against one plaintiff; he made at least 100 sexually graphic and vulgar statements to another plaintiff; and with the third plaintiff, he described sex toys, discussed sexual relations, and videotaping his sexual encounters.[5]

Stewart v. Loftin, 2008 WL 3086760 (S.D. Miss. 2008) – the plaintiff alleged her supervisor sexually harassed her by stating he loved her on six different occasions and that they were going to be sweet to each other on six occasions. The Southern District Court situated in Hattiesburg found that these comments, while "boorish and offensive" did not equate to acts of sexual harassment and granted the defendants' motion for summary judgment on this issue. *Id.* at p. *5.

Arensdorf v. Geithner, 329 Fed.Appx. 514 (5th Cir. 2009) – the Fifth Circuit affirmed summary judgment in favor of the defendant on the plaintiff's claims she was teased, ridiculed and criticized at work, holding these were not severe enough to establish a *prima facie* case of sexual harassment or a hostile work environment. *Id.* at *2.

Delane v. J. Ivy Industries, 2009 WL 1505502 (N.D. Miss. 2009) – comments by a male co-worker to the female plaintiff – "Christmas not for free", "Never had a black girl", "Don't want no fat black girl" and sexual comments by the male co-worker to the female plaintiff about his penis were not sufficient to establish a *prima facie* case of a hostile work environment. *Id.* at *5.

---

[5] *See also, Ray v. Tandem Computers, Inc.*, 63 F.3d 429, 434-35 (5th Cir. 1995) (supervisor scheduling lunch meeting at Hooter's restaurant with employee, supervisor referring to employee saying he was going to get rid of "the c**t in the office," and supervisor referring to another employee as better man for job did not support finding of discriminatory animus); *Martin v. The Kroger Co.*, 65 F.Supp.2d 516, 548-51 (S.D. Tex. 1999) (citing numerous cases where court did not find discrimination although highly offensive terms were used).

Johnson v. TCB Construction Co., 2009 WL 1766519 (5th Cir. 2009) – the Court found that while numerous racially derogatory comments by the white supervisor to the black plaintiff and other instances of "boorish behavior" were offensive, they were isolated and there was no evidence these comments had any effect on the plaintiff's job performance, thus summary judgment was granted on the plaintiff's hostile work environment claim. *Id.* at *5.

Barnett v. The Boeing Co., 306 Fed.Appx. 875 (5th Cir. 1999) – repeated leering, sexually suggestive comments and unwanted touching over a 7 month period was not sufficiently severe or pervasive enough establish the plaintiff's *prima facie* case for sexual harassment, and the District Court's grant of summary judgment was affired by the Fifth Circuit.

Hinton v. Eagle One Logistics, et al., 2009 U.S. Dist. Lexis 62417 (S.D.Miss. 2009) – continued expressions of sexual interest in female plaintiff, making sexual overtures, comments about the female plaintiff's anatomy, conversations with plaintiff about oral sex and repeated physical contact with plaintiff by male supervisor was not sufficient to establish a *prima facie* case for sexual harassment, and summary judgment was granted in favor of the defendant employer and supervisor.

When juxtaposing the two isolated comments attributable to Varnell with the facts in the above cited cases, it is clear that Varnell's alleged comments are nowhere near as pervasive or severe as the comments alleged in those cases, under any standard of objectivity. Yet in each one of those cases, the Court found no basis for a sexual harassment claim because the alleged harassment did not violate the objective standard.

Finally, the evidence at trial also demonstrated these comments were not subjectively offensive to O'Connor. Mollaghan, Vincent and O'Connor all admitted Mollaghan and Vincent were teasing O'Connor about sleeping in the same room as Smith and what Smith might do to him sexually. O'Connor testified he did not find these comments by Mollaghan and Vincent offensive and, in fact, he found nothing wrong with these comments. (Tr. at p. 108, L 22 to p. 109, L 13; p. 111, L 18 to p. 112, L 2; R.E. No. 4). Vincent, the head coach, and Mollaghan, the assistant coach,

were O'Connor's immediate supervisors, and their comments to O'Connor regarding what Smith might do to him were made while they were on a trip with the women's soccer team. (Tr. at p. 111, L 18 to p. 112, L 2; R.E. No. 4).

To any reasonable person, the comments made by Vincent and Mollaghan, which they and O'Connor admitted were made, under the circumstances they were made – during a trip where they were in charge of the USM's women's soccer team – are far more offensive than those O'Connor alleges Varnell made. Thus, it is incredible for O'Connor to state he felt Varnell's comments were offensive to him but that these comments by Vincent and Mollaghan were not.

The jury was properly instructed on all the elements required to make a *prima facie* case of sexual harassment, including the "severe and pervasive" and "objectivity" elements. (*See* R. at pp. 1119, 1124-25, and 1127). Thus, had the jury followed the instructions, no reasonable juror could have determined that these two isolated comments by Varnell, even if true, were so objectively severe and pervasive that they made O'Connor's workplace intolerable. From the cases cited above, it is clear that these two comments by Varnell do not amount to sexual harassment as a matter of law. Therefore, the trial court erred when it denied Varnell's Motion for JNOV on O'Connor's sexual harassment claim.

II. O'CONNOR FAILED TO PROVIDE SUFFICIENT EVIDENCE TO SUPPORT THE DAMAGE AWARD RENDERED BY THE JURY.

Evidence on damages is unsatisfactory if it does not prove the damages with reasonable certainty. *Stewart v. Prudential Life Ins. Co. of America*, 44 So.3d 953, 959 (Miss. 2010); *Chevron Oil Co. v. Snellgrove*, 253 Miss. 356, 367, 175 So.2d 471, 475 (1965) (citing *State Highway Comm'n v. Brown*, 176 Miss. 23, 168 So. 277 (1936)).

The evidence O'Connor put on at trial concerning his damage claims were (1) his tax returns and (2) his testimony regarding the emotional distress he allegedly experienced. O'Connor's tax returns provided no evidence whatsoever of any loss of income. (*See* Trial Exhibit "14"). In fact, these tax returns indicate O'Connor's income increased from 2000 to the present. More importantly, O'Connor never had an employment contract with USM. He was a GA and was only employed on a temporary basis to work soccer camps, for which he was paid over $13,000.00 for one month's work, eight months after Varnell allegedly made the offending comments. Thus, there was no evidence whatsoever that O'Connor suffered any economic loss based on any comment, conduct, or action of Varnell.

Since there was no proof whatsoever of any economic damages, the jury's award to O'Connor of $300,000.00 must have been based on O'Connor's alleged emotional distress. In order to recover damages for emotional distress in a Federal discrimination or sexual harassment case, "there must be a 'specific discernable injury to the claimant's emotional state,' proven with evidence regarding the 'nature and extent' of the harm." *Vadie v. Mississippi State Univ.*, 218 F.3d 365, 376 (5th Cir. 2000) (*quoting Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 938, 940 (5th Cir. 1996)). There must be evidence of "some specificity, including corroborating testimony or medical or psychological evidence to support a request for intangible loss." *Wright v. Grayco Const. Co.*, 2009 U.S. Dist. Lexis 116765 *2 (N.D.Miss. 2009).

First, as discussed above, the alleged comments of Varnell were not sufficiently severe or pervasive to qualify as sexual harassment, and thus, there was no rational basis for an award of emotional distress damages. Most importantly, however, O'Connor's testimony at trial concerning his alleged emotional distress was associated with his inability to coach the soccer team and losing

control of the team. (*See* Tr. at p. 99, L 18 to p. 101, L 13; R.E. No. 4). There is no testimony or other evidence from O'Connor that the emotional distress he contends he suffered is related to the two comments allegedly made by Varnell. Since this alleged emotional distress, by O'Connor's own admission, was due to factors other than the comments made by Varnell, it cannot serve as the basis for the $300,000.00 recovery the jury awarded.

The only logical conclusion is that this award was the result of bias and prejudice. This exact situation occurred in *Alexander v. City of Jackson*, 2008 WL 907658 (S.D. Miss. March 31, 2008). In *Alexander*, four (4) females alleged sexual harassment against the City and several individuals. The jury awarded damages to each Plaintiff, which totaled round sums for each. Judge Wingate found that it was clear from examining the dollar values assigned by the jury for the damages of each Plaintiff, the jury failed to follow the court's instructions with regard to damages, and that the jury "simply picked a figure." The same can be said with regard to the verdict rendered in favor of O'Connor. Accordingly, since there was no reasonable or rational basis for the jury's award, the jury verdict cannot stand and should be reversed.

Also, the jury found in favor of O'Connor on his claims for gender discrimination, retaliation, *and* sexual harassment, and awarded him a *total* of $300,000.00. (R. at 1144-45). Subsequently, the trial court correctly granted JNOVs on O'Connor's gender discrimination and retaliation claims without, however, disturbing the jury's damage award. (R. at 1346-57; R.E. No. 3). Since the jury's $300,000.00 award was based on liability for three separate claims, and since the trial court found there was not sufficient evidence to support the gender discrimination and retaliation claims, logic dictates the jury's $300,000.00 should have likewise been reduced and/or eliminated completely. This provides yet another reason why this $300,000.00 award cannot stand.

CONCLUSION

The two comments O'Connor alleges Varnell made are simply not sufficient evidence to support his claim of sexual harassment against Varnell. First, sexual harassment cannot be based on occasional comments or isolated incidents. And the comments allegedly made by Varnell, when viewed in their context, were not based on sex. O'Connor presented no evidence whatsoever that Varnell propositioned him or ordered him to sleep in her bed, thus there is no evidence that these comments were sexual in nature. More importantly, these comments cannot be said, under any objective or subjective analysis, to be severe, pervasive, hostile or abusive. They were isolated comments, both as to time and content, rising nowhere near the level of conduct in cases in which the federal courts have deemed as *not* actionable sexual harassment. Since O'Connor has failed to provide sufficient evidence to support his sexual harassment claim, the jury's verdict, as well as the Trial Court's denial of Varnell's Motion for JNOV or New Trial, must be overturned.

Furthermore, O'Connor presented no evidence whatsoever at trial to support the jury's $300,000.00 award. He put forth no evidence of any economic loss, and his testimony regarding his alleged emotional distress was conclusory at best and admittedly unrelated to Varnell's comments. Accordingly, the jury verdict is not supported by any evidence whatsoever.

This Court should reverse the jury's verdict, the Trial Court's denial of Varnell's Motion for JNOV or for New Trial, and render judgment in favor of Varnell, dismissing O'Connor's claim with prejudice. Varner further prays for all additional relief she is entitled to at law or in equity.

RESPECTFULLY SUBMITTED, this the 16th day of December, 2011.

SONYA VARNELL, INDIVIDUALLY

By: _____
MATTHEW D. MILLER

WILLIAM E. WHITFIELD, III, ESQ. (MSB [redacted]
MATTHEW D. MILLER, ESQ. (MSB [redacted]
NICHOLAS K. THOMPSON, ESQ. (MSB [redacted]
Copeland, Cook, Taylor & Bush, P.A.
P.O. Box 17619
110 Sheffield Loop (39402
Hattiesburg, MS 39404-7619
601.264.6670
601.264.5660 (fax)
mmiller@cctb.com

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 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 16th day of December, 2011.

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-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 for filing, the original and 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 16th day of December, 2011.

MATTHEW D. MILLER