CA

No. 2010-TS-02005 T2

John Mollaghan v. University of Southern Mississippi, et al

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 Court may evaluate possible disqualification or recusal.

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This the 19th day of December, 2011.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

STATEMENT OF THE ISSUES

ISSUE I.

I. APPLICABLE STANDARD OF REVIEW: THERE WAS NO LEGAL OR FACTUAL BASIS FOR THE CIRCUIT JUDGE TO OVERTURN THE UNANIMOUS JURY VERDICTS IN THIS CASE. THE APPLICABLE STANDARDS REGARDING THE OVERTURNING OF JURY VERDICTS WERE NOT ADHERED:

ISSUE II.

II. DUE PROCESS: THE DEFENDANTS ADMITTED AT TRIAL ON THE WITNESS STAND THAT PLAINTIFFS WERE ENTITLED TO DUE PROCESS. ADDITIONALLY, THE AGREED JURY INSTRUCTIONS REGARDING DUE PROCESS, AS THE CIRCUIT JUDGE AGREED, ARE AN ACCURATE STATEMENT OF THE LAW:

ISSUE III.

III. RETALIATION: THE APPROACH THE CIRCUIT JUDGE USED, AFTER THE JURY VERDICTS, IS CONTRADICTED BY HIS OWN JURY INSTRUCTIONS. HIS SUDDEN USE OF THE "BUT FOR" APPROACH HAS BEEN REJECTED BY THE U.S. SUPREME COURT, CONGRESS, AND THE FIFTH CIRCUIT. THE CORRECT TEST, AS THE SUPREME COURT AND THE FIFTH CIRCUIT HAS MADE CLEAR, IS THE "MOTIVATING FACTOR" TEST:

ISSUE IV.

IV. GENDER DISCRIMINATION: THE UNITED STATES SUPREME COURT AND THE FIFTH CIRCUIT HAS RULED UNEQUIVOCALLY THAT THE CIRCUMSTANTIAL EVIDENCE APPROACH REGARDING ISSUES OF DISCRIMINATION DO NOT NEED TO BE USED WHEN THERE IS EITHER DIRECT EVIDENCE OF DISCRIMINATION, A PATTERN OR PRACTICE OF DISCRIMINATORY CONDUCT, or MIXED MOTIVES OF DISCRIMINATORY CONDUCT:

STATEMENT OF CASE AND FACTS

PROCEDERAL HISTORY AND FACTS:

This case is actually three separate cases involving the discriminatory mistreatment of three soccer coaches at the University of Southern Mississippi (USM) who coached the female soccer team at that state institution. A separate Notice of Appeal has been filed on behalf of each. This Brief is provided on behalf of Coach Vincent and Coach Mollaghan.

At trial three unanimous Jury Verdicts were rendered in favor of all three coaches. [RE 5, 6, 7]. These unanimous Jury Verdicts were preceded by the Circuit Court denying Defendants' Motions for Summary Judgment [RE 4]. During the trial the Circuit Judge denied all of the Defendants' motions seeking to have the case dismissed.

In spite of all of the foregoing, approximately two years after the Jury rendered its verdicts, the Circuit Judge overturned the Verdicts regarding Coach Vincent and Coach Mollaghan while supporting the Verdict in favor of Coach O'Connor.

Consequently, this appeal is taken and briefed on behalf of Coaches Vincent and Mollaghan.

FACTS:

The Jury was instructed as to the following civil actions: Procedural Due Process, Gender Discrimination, and Retaliation. The Retaliation civil action involves the efforts of Coach Vincent and Coach Mollaghan to stand up for Coach O'Connor who had been subjected to unwanted sexual advances by Defendant Varnell. The Circuit Judge and the Jury, of course, rendered rulings and verdicts in favor of all of the foregoing to include the sexual harassment claim and Retaliation claim of Coach O'Connor. The Jury Verdict Form and Instruction was prepared in large part by the Defendants. The actual unanimous verdicts are made a Record Excerpt for ease of reference. Also, these verdicts provide this Court a convenient guide regarding these cases. [CP 1140-1145]. [RE 5, 6, 7]. Please see also the three Final Judgments signed, of course, by the Circuit Judge. Please note the Judge affirmed all three unanimous verdicts as a Final Judgments on June 20, 2008. [CP 1224-1233]. [RE 8, 9].

We will provide a brief overall summary of the facts of this case and then follow it up with a more definitive fact pattern.

Defendants Varnell and Giannini came to USM in the summer of 1999. They immediately made it clear that they preferred females coaching females. They stated, words to the effect, over and over again, and even at trial, they preferred females coaching females and that they would execute that plan. They admitted this at trial, at their depositions, and they frequently made their views and preferences known to all concerned to include the three coaches herein. [T 57]. Indeed, Varnell said that the next Assistant Coach "has to be female." [T 62]. Giannini admitted from the witness stand that he preferred females coaching females. [T147-148]. When Giannini removed Vincent as Head Coach, the first person he called was his former female soccer coach

at the University of Louisiana Monroe. [T 148]. Her name was Ms. Rena Richardson. He did not call one male. [T 148]. He admitted on the stand that he had made this clear to the three Coaches. [T 148]. Ultimately, he replaced Vincent with a female who had zero head coaching experience. [T 149-150]. Ms. Gail Macklin was first made the assistant coach and then Head Coach. [T150]. Vincent had much more experience and was clearly more qualified than Ms. Macklin. In the interim Giannini allowed a male to coach - - after not being able to convince Ms. Richardson to take the job and before Ms. Macklin took it. Ultimately, the entire staff was female - - just as Giannini and Varnell wanted. Exhibit 22. [T 93].

The gender discrimination admissions became enveloped in blatant sexual advances made by Varnell towards Coach O'Connor. Varnell was the direct supervisor of all three coaches. Giannini was her direct supervisor. Giannini answered directly to the President, Dr. Horace Fleming.

Varnell became attracted to both Mollaghan and O'Connor. She made sexual advances to both, and both refused. For example, on a trip she referred to the penis of O'Connor. On another occasion, she invited him to her hotel room. Then, she ordered him to her hotel room. He declined. On another occasion she inappropriately touched Mollaghan.

Both Vincent and Mollaghan reported the sexual harassment and *quid pro quo* conduct of Varnell to Giannini. Giannini did nothing about it. He did not even conduct an investigation. He never even discussed the matter with O'Connor. No remedial and prompt investigation was conducted – in spite of the fact it was required by their employment handbook. In fact, O'Connor tried to talk with Giannini, but Giannini would not talk with him. All that actually occurred was that all three coaches were retaliated

against for reporting the misconduct of Varnell. [T 61; T 62] Ultimately, Varnell admitted her actions were wrong. [T 76-77]. She threatened O'Connor by telling him that she had to "get him out of here". [T 77].

Coach O'Connor reported the conduct of Varnell to his supervisors, Coach Vincent and Coach Mollaghan. They in turn reported the misconduct to Human Resources, Giannini, and even the President. Subsequently, written grievances were filed by O'Connor, Vincent, and Mollaghan.

Nothing was done. According to Varnell, Giannini buried the grievances and did nothing about them. [T 563-568]. President Fleming testified that all three of the Coaches were entitled to Due Process and all the benefits and entitlements of the Handbook and the Grievance Procedure in the Handbook. [T 325-329; T 651-652], The Head of Human Resources at USM [HR], Mr. Willis, the university representative at trial, agreed with Dr. Fleming. [T 634-635].

Consequently, the constitutional rights and entitlements *were admitted* by the chief executive officer of USM on the witness stand. His chief university representative at trial also agreed and admitted that all three coaches were entitled to Due Process, entitled to the procedures contained in the Handbook, and were entitled to hearings before any adverse action was taken against them.

Still, no investigation was done. Certainly no prompt, remedial investigation was conducted as the Handbook required. No hearing was provided. No due process was provided.

Once Vincent and Mollaghan had reported the sexual harassment and advances of Varnell, the workplace became hostile. Numerous acts of retaliation, of discriminatory animus, and of harassment were levied against all three Coaches.

These hostile, discriminatory, retaliatory acts included: firing, removing, and/or reassigning Vincent, from being Head Coach; upon removing him not providing any duties or actual position; not paying Mollaghan the Head Coaches' salary he warranted; not paying O'Connor the Assistant Coaches' salary he warranted; disrupting the team and turning the team against the Coaches; limiting and changing scholarships and causing turmoil in this manner; not providing adequate equipment for the student athletes, Varnell taking over the team even though she had no experience, 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; threatening O'Connor by cutting off his meal card; ignoring his grievance and complaints; ignoring the grievance of Mollaghan; ignoring the grievance of Vincent; 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 procedures that the President admitted the coaches were entitled, and numerous other acts that were summarized in a pleading regarding a summary of the testimony provided at trial. Please see RE 10 in this regard.

The admissions by Giannini and Varnell that they had a bias and prejudice against men coaching the female soccer team are direct evidence of discriminatory

intent. As will be seen this removes the case from any "shifting burden" test. The jury was entitled, based upon the direct evidence, to consider this evidence, in and of itself, as conclusive discriminatory intent.

Consequently, it is immediately evident, as the Jury found, that the predominant facts of this case were admitted.

The Retaliation claims of the three coaches were supported at trial by a long chain of factual information. [RE 10]. The evidence of retaliation was muscular. Many of the facts were not denied. Consequently, the Jury returned unanimous verdicts in favor of all three of the Coaches regarding the Retaliation claims.

The trial was extensive. It lasted four days. Numerous exhibits were admitted into evidence without objection, and numerous witnesses provided testimony. The Record is replete with information and facts. Please note that the Coaches were not only parties, but they were also witnesses to the mistreatment of the other coaches. Their testimony and documents proved to the Jury that not merely one of them was mistreated *but all of them were mistreated. A pattern and practice* of mistreatment of ALL of them was potent evidence showing that the mistreatment was not happenstance.

The preceding and following material facts emanate from the Record. Some of these facts were genuinely disputed but most were not. It is accentuated that the Circuit Judge denied the Defendants' Motion for Summary Judgment. Thus, he ruled that the Jury should resolve the factual disputes. The Jury did exactly what the Judge ordered.

Now, we will provide a more definitive factual picture:

Until 1997 there was no female soccer team at USM. Vincent and Mollaghan, with only minimal support from USM, started the program from scratch. However, in spite of the lack of support, they were remarkably successful. [T 170-172].

In addition to having a superb record, the soccer team had 17 student-athletes on the academic achievement list. This was more than any other sport at USM. During the years 1997 to August 1999, the record shows that none of the coaches had incurred any admonitions or black marks of any kind. During those years, Mr. McClellan, who hired Coach Vincent and approved of Coach Vincent's hiring of Coaches Mollaghan and O'Connor, was the Athletic Director, and Ms. Helen Grant was their direct supervisor. The coaches were assured they would be at USM for the "long term";"they could build a career". In their first year, they were 12-5 [won/lost] and "top five" nationally regarding academics.

In the summer of 1999, Giannini and Varnell succeeded McClellan and Grant respectively.

It is undisputed that the coaches were assured by Giannini that, under him, they would begin their duties with a "clean slate" or "square one". [T 147]. This fact, in addition to the fact that the Plaintiffs in fact had a superb record in every respect, simplifies this case significantly because it is undisputed that the years 1997 and 1998 and the first half of 1999 are not available to the Defendants to contrive some pretextual reason for their mistreatment of Plaintiffs.

It should also be noted that Dr. Horace Fleming, President of USM at the time in question, testified that he allowed the Athletic Department to govern itself. In effect, he delegated, unfortunately, considerable power to Varnell and Giannini. He could not, of course, dispense with his responsibilities, but he chose to delegate considerable power and autonomy to Giannini and Varnell. [T 175]. This was a terrible decision that had enormous ramifications. He retained responsibility for USM and himself but had allowed Giannini and Varnell the unfettered power to harm coaches and others. In

many respects this case is about that harm. Giannini admitted from the stand that he had "hiring and firing" power and that he controlled the budget all aspects regarding athletics and, in particular, the soccer team at USM. [T 175]. The three coaches informed the persons at USM who could have helped them, but no help was forthcoming.

It is also undisputed that neither Varnell nor Giannini knew anything about soccer or how to coach it or even the rules. Varnell testified, "I know nothing about soccer." [T 508]. It is not disputed that no person on the USM campus knew more about soccer than the three Coaches. Yet, once Giannini and Varnell realized that the three coaches were going to pursue their respective grievances, Giannini and Varnell took over the program even though neither knew anything about soccer. [T 57-58]. They undermined the program, created unrest, and used that unrest and discord as a prextext to justify getting rid of the three coaches.

Varnell admitted her misconduct. [T 76-77]. She also admitted she had a bias and prejudice towards females coaching the female soccer team. [T 220]. Giannini also wanted females coaching females. [T 224]. The combination of the prejudice against the coaches based upon their gender and the paradoxical sexual advances and harassment created a hostile, toxic work environment that was and is unconstitutional in a State institution.

Mollaghan witnessed the sexual incidents. [T 238]. He witnessed Varnell order O'Connor to her hotel room and her putting her hands on him. [T 238-239]. Both Vincent and Mollaghan reported the misconduct to Giannini who did nothing to address, investigate, comply with the grievance procedure, or rectify the situation. [T 240]. Indeed, Varnell also approached Mollaghan. [T 241]. He felt degraded and powerless

regarding her. [T 242]. In the wake of Varnell's misconduct, retaliation was persistent and pervasive. [T 242]. Varnell "took control". [T 246]. Every day was worse than the one before. [T 246]. Mollaghan also described the unrelenting retaliation in minute detail. [T 246-259]. It would be redundant to list again all of the retaliatory, discriminatory, and harassing acts again, but please see RE 10 that summarizes them.

Varnell started giving Mollaghan bad marks and a bad evaluation that was highly inaccurate. [T 264]. He filed grievances that were not investigated. No hearing was ever provided him. [T 266]. The bad evaluation hurt him because it contaminated his record and prevented his promotion and clearly kept him from becoming Head Coach. [T 267]. All the while President Fleming did nothing. [T 269]. Giannini did nothing. [T 269].

Mollaghan met with Dr. Fleming who told him he was deserving of a hearing and due process. [T 270]. The Provost would not help him either. [T 270]. 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. [T 272].

In fact Mollaghan had accompanied O'Connor to Human Resources and the President's office. Both were seeking help and reporting the misconduct of Varnell and Giannini to those respective offices. [T 273].

Fleming accentuated to both of them that both "should have a hearing." [T 273]. While all of the retaliation was occurring, as described *supra*, the grievances of O'Connor and Mollaghan and Vincent were ignored. [T 296-297]. Ultimately, Mollaghan was not retained. [T 298]. The retaliation even extended after he left as the Defendants held up his pay for six months. [T 299].

The Defendants can not and could not argue credibly that Mollaghan was not competent or was somehow deficient as a coach. After all they made him Head Coach! [T 314]. More clearly, they made him Head Coach but refused to pay him as Head Coach. The same would apply to O'Connor. He did not deserve his mistreatment. He was made Assistant Coach. [T 323]. More clearly he was made Assistant Coach but was not paid for his work in that regard. Yet, the retaliation continued. Neither was paid for their additional work and responsibilities.

Varnell ADMITTED that she understood her actions and statements, sexual and otherwise, were inappropriate. She tried to cajole O'Connor and, in effect, bribe him by assuring him he would be given additional time to graduate. [T 76-78]. Then, she told him she had to "get him out of here" or words to that effect. [T 77].

Perhaps the most compelling testimony at trial emanated from President Fleming who, in effect, 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. [T 325]. He admitted that, if Due Process had been provided, all three coaches could have retained their positions and had their rights vindicated. [T 326]. He admitted he was familiar with what Due Process is. [T 327]. He even knew the distinction, as a former educator in this field of law, between substantive and procedural due process. [T 328]. He admitted he knew that Sexual Harassment was wrong and that it could involve either intimidation or the desire for sexual favors. [T 329]. Here both are involved. He admitted that the three coaches were entitled to a hearing. [T 329]. He did not disagree with the testimony of the three coaches. [T 329]. He accentuated

and admitted that the Handbook provides rights to the three coaches. [T 330]. It "provides entitlements". [T 330].

Coach Vincent provided vivid testimony regarding the miserable, hostile situation.

He was selected by the previous Athletic Director. Out of one hundred applicants he was the most qualified. [T342]. He noted that Coach Mollaghan was not being paid when they started the program. The women assistant coaches were paid. [T 346].

He verified that Giannini had told him he had a "clean slate". [T 476].

He testified, as confirmed by Dr. Fleming and Mr. Willis, the USM representative at trial, that the Handbook was part of his contract and melded into it. [T 348]. Keep in mind that both Dr. Fleming and the Human Resource Director, Mr. Willis both agreed with Coach Vincent and did not countermand him when they testified. Dr. Fleming was asked if he disagreed with any of the testimony provided by any of the Plaintiffs. He responded that he did not. [T 329; T 651].

Coach Vincent testified as to how well the team did before Giannini and Varnell came on the scene. [T352-354]. Academically, the team was in the top five percent in the Nation. [T354]. Thus, again, the team was successful on the field and in the classroom.

Coach Vincent confirmed that Varnell stated flatly that she wanted females coaching females. [T 354]. The prejudice was so blatant he half- kidded with Mollaghan and O'Connor and told them we all will have to "change our gender" . [T 355]. Giannini told Vincent he preferred females, and that the next Assistant Coach had to be a female. [T 380].

Coach Vincent testified extensively as to how the entire morale of the team and the operation of the team was interfered with and undermined by Giannini and Varnell.

[T 357-359]. Ultimately the agenda of Varnell and Giannini lead to his being fired. [T 359]. All the while Varnell kept accentuating how she preferred females and wanted only females. [T 362]. The Assistant Coach, according to Varnell, had to be a female. [T 362]. 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].

When Vincent complained to Giannini about what Varnell was doing to the team, Giannini "ushered him out of his office". [T 364]. He pleaded with Giannini and Varnell for help. It was denied. He was "set up to fail." [T 416; T 418]. No help regarding the needs of the team was actually provided. The Budget issues were used as a weapon against the three Coaches [T 417]. Budget cuts were made that were unnecessary. [T 463]. "Playing time" issues were exacerbated and used to disrupt the team. [T 446-47]. Equipment was deprived. [T 457]. He testified that there is always tension when you coach. In these circumstances, there were eleven positions and twenty-seven players. Only eighteen players traveled. [T 462]. Of course that creates tension that needed the support of Giannini and Varnell -- as opposed to what they did which was use that tension to disrupt the team and the work place in a retaliatory manner. All that O'Connor and Mollaghan had previously testified to about harassment and retaliation was verified by Vincent. He was "set up". [T 448]. He definitively and in great detail described the misconduct and retaliation of Giannini and Varnell. [T450-452].

He witnessed the sexual harassment of O'Connor and Varnell's blatant mistreatment of him. Then, he reported it to Giannini but nothing was done. [T 424]. Instead, Mollaghan and he were collateral damage regarding O'Connor and what they saw Varnell do to him. Giannini and Varnell "systematically undermined my authority."

[T 427]. Coach Vincent made it clear in vivid detail how Giannini and Varnell misused their authority and power in a harassing and retaliatory manner to disrupt the team and used that disruption to get rid of them and replace them with females. Ultimately, Giannini and Varnell achieved their goal. Eventually all three coaches were replaced by three females. This is not disputed. Furthermore, the disruptive, undermining tactics of Varnell and Giannini were used to retaliate against all three Coaches for reporting the sexual harassment of O'Connor by Varnell.

Coach Vincent accentuated that, previously, before the O'Connor incidents, life was tolerable. Then, clearly Giannini and Varnell made the workplace intolerable. [T 445].

Giannini did nothing regarding the complaints and grievances levied by Vincent and Mollaghan and O'Connor. [T370] Giannini did nothing regarding the actions of Varnell towards O'Connor. [T 369]. Giannini did nothing while Varnell disrupted the team. Varnell "interviewed" the players and excluded Vincent and all the coaches. [T 371].

No investigation and no hearing was provided. [T 370-373]. No hearing was provided with the President either. [T 371].

Giannini told Vincent, after he fired him, "I'm not reassigning you to anywhere." [T 372]. He never was, in fact, reassigned. [T 401]. He presented his Grievance to Human Resources, to Giannini, and to Fleming, but nothing was done. [T 401]. Exhibit 4.

Vincent's desperately needed Summer Camp money that was denied him. [T 374]. All of this occurred while his infant son and wife were very ill. [T 375]. Then, the word was put out that Mollaghan and he had sexually harassed the players which is an absolute untruth. [T 375-377].

Inaccurate newspaper articles were released by Giannini regarding the termination of Coach Vincent. [T 379]. He was permanently ruined in the coaching community. [T 406]. Indeed, not one interview was offered him from anywhere in spite of the numerous applications he provided elsewhere. [T 414]. Indeed, word of the alleged sexually harassing by Vincent, Mollaghan, and O'Connor spread down to Florida. [T 481]. Coach Vincent testified about all of this. [T 481-482].

Giannini and Varnell used a classic hearsay document at the trial. Players in this document referred to matters that predated any knowledge they had of Coach Vincent. [ten freshmen]. Yet, they "object" to what they did not know and did not happen. The document was a total fabrication and ruse and pretext. Indeed, the one former player who testified, Gail Macklin, had nothing but good to say about Vincent. [T 493;T 496]. ["I had a really good relationship with Coach Vincent." Per Macklin at trial]. Not one student-athlete testified other than Macklin. Others, however, verified to him they thought he was doing a fine job. [T 477]. Not one student-athlete testified against any of the three coaches.

Macklin testified that she told Varnell she had no problem with Coach Vincent. [T 498]. She signed a document even though there was no problem. [T 499]. She had "high regard" for him. [T 499]. She had a good relationship with all three coaches. [T 501]. She testified she had a "rolling contract" for four years and eventually replaced Coach Vincent. [T 501]. 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.

No hearing was provided so a fair resolution could have been attained. [T 479].

Coach Vincent repeatedly contacted and sought help and assistance from President Fleming. None was forthcoming. [Exhibits 29, 30, and 31]. [T468-470]. Even the University counsel was contacted, but, still, nothing was done to provide help or due process or alleviate the retaliation or discriminatory conduct of Varnell and Giannini. [T 470].

Amazingly, according to Varnell, Giannini never told her about the O'Connor complaint. [T 563; 568]. Giannini just buried it. [T 568]. Ultimately, that is the tragedy of this case. It was all buried. Nothing was done to rectify the situation. No investigation. No hearing. Nothing. Just buried. Fleming never spoke with Varnell either. [T 591].

Finally, Varnell writes a memo and within hours Vincent is terminated as Head Coach. [T 569-570]. Yet, ironically, Varnell herself admitted on the witness stand she did in fact invite Ged O'Connor to her hotel room. [T 593]. Giannini never told her, according to Varnell, what she did was wrong. [T 597]. In fact, Giannini told her, next time let O'Connor "fend for himself." [T 597]. She never disputed that the three coaches were entitled to a hearing and wanted a hearing. The Coaches agreed with her on this important point.

Even the Director of Human Resources [HR], Dr. Willis agreed with everything that Dr Fleming testified. [Willis was the University representative at trial and heard all testimony]. [T 634]. He admitted that all three Coaches were entitled to hearings and Due Process. [T 634-635]. He agreed that speed and promptness were an essential aspect of the Due Process that was due. Exhibit 7. [T 639-640]. The Handbook and its Due Process provisions accentuated the need for speed and prompt action. [T 640]. Exhibit 7. Obviously that was never provided herein. No actual investigation or actual notice or actual hearing was provided any of the three coaches.

The grievances of the three coaches were never answered and never actually acted upon. [T 641]. None of the Defendants even spoke to Willis. Not Giannini. Not Varnell. Not Fleming. [T 643].

Dr. Fleming testified a second time at the trial. He confirmed his earlier powerful testimony in favor of the three coaches. All three Coaches had distinct rights and entitlements to Due Process and hearings provided by the Handbook. [T 652].

He testified, "Everybody matters." [T 652].

If only that were true.

SUMMARY OF ARGUMENT:

This case is actually three separate cases involving the discriminatory and retaliatory mistreatment of three soccer coaches, for the female soccer team, at the University of Southern Mississippi (USM). A separate Notice of Appeal has been filed on behalf of each. This Brief is provided on behalf of Coach Vincent and Coach Mollaghan. Both of their cases will be addressed in this Memorandum of Law.

At trial three unanimous Jury Verdicts were rendered in favor of all three coaches. These unanimous Jury Verdicts were preceded by the Circuit Court denying Defendants' Motions for Summary Judgment, motions for directed verdict, and motions for peremptory instruction

In spite of all of the foregoing, approximately two years after the Jury rendered its verdicts, the Circuit Judge overturned the unanimous Verdicts regarding Coach Vincent and Coach Mollaghan while supporting the Verdict in favor of Coach O'Connor.

The Jury was instructed as to the following civil actions: Procedural Due Process, Gender Discrimination, and Retaliation. The Retaliation civil action involves

the efforts of Coach Vincent and Coach Mollaghan to stand up for Coach O'Connor who had been subjected to unwanted sexual advances of Ms. Varnell.

The Circuit Judge denied Defendants' Motion for Summary Judgment regarding the civil actions that were presented to the Jury. Also, the Circuit Judge denied the Defendants' motions for directed verdict and peremptory instructions. The standards for all are the same. *Breland v. Gulfside Casino Partnership*, 736 So. 2d 446 (Miss. Ct. App. 1999).

Indeed, the standards regarding a JNOV, a directed verdict, and a denial of a motion for summary judgment are also the same. *Steele v. Inn of Vicksburg, Inc.*, 697 So. 2d 373 (Miss. 1997).

For these reasons alone the JNOV motion should have been denied. It is undisputed the Circuit Judge held that a Jury should resolve the factual disputes herein. Clearly, the "necessity of a trier of fact" was not "obviated". *Estate of Jones v. Phillips*, 992 So. 2d 1131 (Miss. 2008). Otherwise the Circuit Judge would never have ordered the Jury to be convened in the first place.

Here, all of the foregoing results [summary judgment sought, directed verdict attempts, peremptory instruction sought, and the unanimous jury verdicts] favored the three coaches. Yet, the Circuit Judge countermanded the jury and himself and allowed the Defendants a judgment in their favor. It simply is not intellectually consistent.

The record is replete with numerous facts supporting the Jury verdict. The long chain of events began with both Giannini, the Athletic Director, and Varnell, the direct supervisor of the coaches, repeatedly stating that they wanted females coaching females. They also admitted this bias and prejudice at trial. Then, Varnell made sexual

advances towards Coach O'Connor. She also used her position of authority inappropriately towards Coach Mollaghan.

Once Vincent and Mollaghan had reported the sexual harassment and advances of Varnell to Giannini, Human Resources, and others, the workplace became hostile. Numerous acts of retaliation and harassment against all three Coaches occurred. These wrongful acts included: firing, removing, and/or reassigning Vincent; upon removing him not providing any duties or actual position; not paying Mollaghan the Head Coaches' salary he warranted; not paying O'Connor the Assistant Coaches' salary he warranted; disrupting the team and turning the team against the Coaches; limiting and changing scholarships and causing turmoil in this manner; not providing adequate equipment for the student athletes, Varnell "running" or taking over the team even though she had no experience; 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; threatening O'Connor by cutting off his meal card; ignoring his grievance and complaints; ignoring the grievance of Mollaghan; ignoring the grievance of Vincent; not providing a prompt remedial investigation of their complaints; admonishing them in the presence of the student-athletes and other retaliatory acts. [RE 10]. At this Record Excerpt may be found a summary of the wrongful acts.

As to their Due Process claim, President Fleming and the USM representative at trial admitted the three coaches were entitled to Due Process. They had entitlements that were deserving of Due Process protection. However the Coaches' repeated requests for hearings and Due Process were ignored. There was no investigation. There was no hearing allowed them. The case law emanating from this Court strongly supports the three Coaches' right to Due Process. Consequently, pursuant to 42 U.S.C. §1983, they presented their denial of due process claim to the jury - - just as the Circuit Judge ordered. The Jury unanimously rendered unanimous verdicts in their favor.

As to Retaliation, the Circuit Judge deviated from his own previous rulings regarding the Defendants' motions for summary judgment, for peremptory instruction, and for directed verdict. All of these rulings favored the Coaches. Yet, in his JNOV ruling, he chose to use an approach that has been rejected by Congress, via Federal Statute, by the U.S. Supreme Court, and the Fifth Circuit. He used a discarded and overruled "but for" approach ["but for" meaning that the adverse employment action taken against plaintiff would not have occurred "but for" the protected conduct]. However, the actual, applicable law is, 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); § 2000e-2(m). Clearly, the "but for" test is not the law. Paradoxically, the Circuit Judge had correctly instructed the Jury regarding "motivating factors". This instruction comported with the actual, correct state of the law. Indeed, the Circuit Judge did not disagree or point out, in his JNOV ruling, any error he made at trial or quarrel with his own Jury Instructions. His change in stance, by using a "but for" approach is inexplicable.

At any rate, he belatedly chose the wrong approach as the case law makes explicit. His original rulings and orders were correct. Consequently, for this additional reason the unanimous Jury Verdict should be reinstated.

As to Gender Discrimination, the direct evidence and admissions on the witness stand by Giannini and Varnell that they wanted females, and only females, coaching females is powerful evidence that the Jury had the right and duty to consider. Indeed, the Circuit Judge ordered them to consider it. Additionally, the evidence was robust regarding how hostile act after hostile, discriminatory act was aimed at them - - hitting their target each and every time - - day after day after day. [RE 10].

In light of this overwhelming evidence the Jury also rendered a unanimous verdict in favor of the coaches in regard to gender discrimination. This unanimous verdict should not have been scuttled by the Circuit Judge.

Consequently, this Court is respectfully asked to reinstate the unanimous Jury Verdicts in favor of the coaches and reverse and render herein in their favor.

LAW AND ARGUMENT

I. APPLICABLE STANDARD OF REVIEW: THERE WAS NO LEGAL OR FACTUAL BASIS FOR THE CIRCUIT JUDGE TO OVERTURN THE UNANIMOUS JURY VERDICTS IN THIS CASE. THE APPLICABLE STANDARDS REGARDING THE OVERTURNING OF JURY VERDICTS WERE NOT ADHERED:

The standard of review, as established by this Court, regarding jury verdicts instructs that a jury verdict must not be reversed unless the evidence as a whole, taken in the light most favorable to the verdict, is such that no reasonable hypothetical juror could have found the same way. *Snapp v. Harrison*, 699 So.2d 567, 569 (Miss.1997); *Starcher v. Byrne*, 687 So.2d 737, 739 (Miss.1997); *Junior Food Stores, Inc. v. Rice*, 671 So.2d 67, 76 (Miss.1996); *Bell v. City of Bay St. Louis*, 467 So.2d 657, 660 (Miss.1985).

A reviewing court has a duty to defer to the trier of fact, i.e., the jury, in assessing the credibility of trial witnesses. *Alldread v. Bailey*, 626 So.2d 99, 102 (Miss.1993).

This Court held in *City of Jackson v. Locklar*: 431 So.2d 475, 478-79 (Miss.1983) as follows:

> "We emphasize that our powers on appellate review are ... restricted. Our institutional role mandates substantial deference to the jury's findings of fact and to the trial judge's determination whether a jury issue was tendered.... We see the testimony the trial judge heard. We do not, however, observe the manner and demeanor of the witnesses. We do not smell the smoke of the battle. The trial judge's determination whether, under the standards articulated above, a jury issue has been presented, must per force be given great respect here. *City of Jackson v. Locklar*, 431 So.2d 475, 478-79 (Miss.1983).

Here, please recall that the Circuit Judge denied Defendants' Motion for Summary Judgment regarding the civil actions that were presented to the Jury. Also, of course, the Circuit Judge denied the Defendants' motions for directed verdict and

peremptory instructions. The standards for all are the same. *Breland v. Gulfside Casino Partnership,* 736 So. 2d 446 (Miss. Ct. App. 1999).

Conceptually, then, of course the denials of motions for summary judgment and directed verdicts means that the Circuit Judge found that the evidence was favorable to the Plaintiffs herein and that reasonable inferences present questions for the jury to have resolved. *Allstate Ins. Co. v. McGory,* 697 So. 2d 1171 (Miss. 1997).

Furthermore, the standards regarding a JNOV, a directed verdict, and a denial of a motion for summary judgment are also the same. *Steele v. Inn of Vicksburg, Inc.,* 697 So. 2d 373 (Miss. 1997).

For these reasons alone the JNOV motion should have been denied. It is undisputed the Circuit Judge held that a Jury should resolve the factual disputes herein. Clearly, the "necessity of a trier of fact" was not "obviated". *Estate of Jones v. Phillips,* 992 So. 2d 1131 (Miss. 2008). Otherwise the Circuit Judge would never have ordered the Jury to be convened in the first place. This is especially true since the Court "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence [and] ***it must disregard all evidence favorable to the moving party that the jury is not required to believe***." *Hatley v. Hilton Hotels Corp.* 308 F. 3d 473,475 (5th Cir. 2007). "All evidence must be viewed by this Court ***in light most favorable to support the verdict***." *Johnson v. St. Dominics-Jackson Mem'l Hosp.*, 967 So. 2d 20 (Miss. 2007).

Here, all of the foregoing results [summary judgment sought, directed verdict attempts, peremptory instruction sought, and the unanimous jury verdicts] favored the three coaches. Yet, the Circuit Judge countermanded the jury and himself and allowed the Defendants a judgment in their favor. It simply is not intellectually consistent.

Previously, the Circuit Court Judge had already applied the applicable standard regarding this matter and found that the Jury *should determine* the outcome and not the Court. When the Court denied Defendants' motions for directed verdict and for peremptory instruction, it, in effect, determined that a JNOV is not appropriate. The reason for this, of course, is that the standard for reviewing a denial of a motion for judgment notwithstanding the verdict and a peremptory instruction or motion for directed verdict is the same. *Whitten v. Cox*, 799 So. 2d 1, 7 (Miss. 2000).

Thus, there were, according the Circuit Judge, genuine issues of material fact for the Jury to resolve. The Jury resolved these issues in favor of Plaintiffs. Then, the Court denied Defendants' motions for directed verdict and for peremptory instruction.

The "law of the case" is contained in the previous rulings and Jury Instructions of the Circuit Judge. The "law of the case" comprises the applicable law herein. *Fortune v. Lee County Board of Supervisors*, 725 So. 2d 747 (Miss. 1998). "Whatever is once established as the controlling legal rule of decision, between the same parties in the same case, ***continues to be the law of the case***, so long as there is a similarity of facts." *Id.* At p. 751. ***"It is founded on public policy and the interests of orderly and consistent judicial procedure." Id.***

Here, undeniably, the law of the case is contained in the jury instructions. These instructions emanated from the Circuit Judge. Indeed, in large part, they were agreed by the Defendants.

Yet, out of the blue, the Circuit Judge veered away from the law of the case and scuttled the jury verdicts. When doing this the Circuit Judge did not base his granting of JNOV on any error by the Court. [RE 3]. Neither the Circuit Judge nor the Defendants ever referred to any abuse of discretion. Neither the Circuit Judge nor the Defendants

referred to any Jury Instruction that was erroneous. Neither the Circuit Judge nor the Defendants referred to any evidentiary ruling that was erroneous. Neither the Circuit Judge nor the Defendants referred to any testimony that was inappropriate or erroneously permitted or allowed. Neither the Circuit Judge nor the Defendants referred to any documentary evidence or even one exhibit that was inappropriately allowed into evidence.

Furthermore, as this Court well knows, pursuant to the applicable standard regarding a JNOV, the Court can only consider the evidence in the light most favorable to the prevailing party, and it is mandated to give the prevailing party the benefit of all favorable inferences. *Id.* All evidence supporting the claims or defenses of the non-moving party should be taken as true. *Dorrough v. Wilkes,* 817 So.2d 567, 573 (Miss 2002); *Estate of Carter v. Phillips and Phillips Const. Co., Inc.,* 860 So. 2d 332, 336 (Miss. 2003).

Paradoxically in his ruling denying the Defendants' Motion for Summary Judgment, the Circuit Judge found that it is reversible error to remove from the Jury's consideration factual issues regarding material facts. [RE 4], [*citing Downs v. Choo,* 656 So. 2d 84, 85 (Miss. 1995)]. Then, of course, as the record readily reflects, the Circuit Judge ordered that, "[t]he Court cannot say that there is no issue of fact material to this claim." [RE 4]. [p. 5] [*citing Harris v. Miss. Valley State,* 873 So. 2d 970 (Miss. 2004)].

The Jury followed the Circuit Judge's orders and jury instructions. Nothing in the Circuit Judge's granting of JNOV indicates otherwise. Nothing in the Record states otherwise.

Consequently, it is evident that the foregoing legal standards and case law was not adhered. Coaches Mollaghan and Vincent, in light of this deviation, respectfully ask

that this Court reverse and render herein and reinstate the original unanimous jury verdicts that should never have been disrupted in the first place.

II. DUE PROCESS: THE DEFENDANTS ADMITTED AT TRIAL ON THE WITNESS STAND THAT PLAINTIFFS WERE ENTITLED TO DUE PROCESS. ADDITIONALLY, THE AGREED JURY INSTRUCTIONS REGARDING DUE PROCESS, AS THE CIRCUIT JUDGE AGREED, ARE AN ACCURATE STATEMENT OF THE LAW:

In regard to this issue, and, indeed, any of the issues of this case, neither the Circuit Judge nor any party has contended that the Jury was not correctly instructed as to the applicable law. Consequently, it is unequivocally undisputed that the Jury was correctly instructed. Indeed, the Defendants prepared many of the instructions. As the record reflects virtually all of the instructions were agreed

Here, the Defendants admitted that the Plaintiffs were entitled to Due Process.[1] This is tantamount to a stipulation of this issue. Dr. Fleming admitted it from the witness stand. Ms. Varnell admitted it. Mr. Giannini admitted it. Mr. Willis, the Head of Human Resources who has a law degree, admitted it. The FACT section of this Brief accentuates and particularizes these admissions. The admissions and direct evidence are indisputable.

The Defendants have never disavowed, disowned, or denied the foregoing.

In its ruling denying Defendants' Motion for Summary Judgment, the Circuit Judge held that the Plaintiffs had sufficient evidence for the Jury to consider in this regard. This identical evidence, plus much more, was presented to the Jury. [*See* N 1 Instruction (prepared by Defendants]*; See also, Bishop v. Wood,* 426 U.S. 341 (1976);

[1] It would be unnecessarily duplicative to repeat the fact section of this brief and keep repeating transcript pages and factual references. All facts referred in this section of the brief ["Law and Argument"] emanate from the "fact" section of this brief which, in turn, were derived from the record..

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).

All of the individual Defendants, acting "under color of" their state offices, knew that Plaintiffs were entitled to a hearing pursuant to the Handbook, but none of them took action to provide one or see that Plaintiffs' rights were vindicated or protected or provided.

Plaintiffs were entitled to a hearing pursuant to their written contracts and the accompanying written Handbook. *Id.* It is emphasized that the Defendants agreed that all three coaches were entitled to Due Process. Furthermore, the Exhibits and Plaintiffs' testimony established that the Plaintiffs repeatedly wrote and verbalized the need for a hearing to: Dr. Fleming, his Provost, Dr. Harris, Mr. Giannini, Ms. Varnell, and even Human Resource personnel. Still, no hearing was provided. No Due Process was provided. No investigation occurred. Yet, the Defendants admitted to the Plaintiffs, before and during trial, that Plaintiffs were entitled to a hearing and Due Process. At trial the Defendants admitted it to the Court and to the Jury.

The Circuit Judge, in his JNOV ruling states nothing about the admissions by Defendants where they agreed the Coaches were entitled to Due Process. He states nothing about the President, the USM representative, Mr. Willis, Mr. Giannini, and Ms. Varnell all agreeing that the three coaches were entitled to Due Process. He states nothing about any abuse of discretion, any exhibit that should or should not have been admitted, any testimony that was not competent or probative. He states nothing about any Jury Instruction that he disagreed as not being a correct statement of the law. He never states any act at trial was inappropriate or that any evidentiary ruling was amiss in some respect.

Consequently, putting it as respectfully and as delicately as one can, the JNOV ruling is clearly inappropriate and clearly does not comport with the standards and requirements, described extensively *supra,* that he is judicially constrained to apply and use.

None of the Due Process claims here concern "continued employment". The Due Process claims, substantive and procedural, concern the grievances of the three Coaches and the right to have those grievances investigated and heard in a Due Process hearing. The Handbook guaranteed Plaintiffs, according to Fleming and Willis, that their grievances warranted a hearing as to their concerns.

The Exhibits and testimony established, with largely admitted or unrebutted evidentiary impact, that the Plaintiffs repeatedly requested a hearing. They asked: Dr. Fleming, the Provost, Dr. Harris, Mr. Giannini, Ms. Varnell, and even Human Resource personnel. Still, no hearing was provided. Still no Due Process was provided.

The Circuit Judge referred, without comment, to the tenure case of *Whiting v. USM,* 451 F. 3d 339 (5th Cir. 2006). However, the Court in that case *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).

Indeed, the Court in *Whiting* repeated that Employee Handbooks in Mississippi 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 we stated at trial and herein. That is exactly what the President of USM testified as well as the USM representative testified - - as did Giannini and Varnell 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.

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 Circuit Judge, in a footnote, referred to *Montgomery v. Boshears,* 698 F. 2d 739 (5th Cir. 1983). That was a tenure case that has nothing to do with the issues of this case. *Bobbitt, Robinson, and Whiting, supra,* of course, came *after Boshears* and made explicit the rights and entitlements one has regarding their Handbook and contract. More importantly, unlike here, the Due Process entitlements had not been admitted in that case by the University President and the other Defendants. In fact the plaintiff in *Boshears* failed to produce evidence regarding her contentions. *Id.* at p. 742. That is far, far, far from the case here.

The damages that resulted from the Due Process violations were accentuated. The evidence of damages included: emotional damages, damages to reputation,

damages regarding the clearing of their names regarding their interaction with the students, as to how the deprivation would impact their careers and future, damages as to lost money for summer camp, damages as to seeking other employment, damages for the deprivation of the guaranteed hearings, damages regarding the loss of their hard earned investment in their careers, damages regarding their "rolling contract" that had been renewed every year but not the year when they were being retaliated against. [T360;T375-380;T413;T427;T234-235;T241;T259;T275-280;T322].

Consequently, the Circuit Judge is equally inaccurate when he stated in his opinion overruling the jury verdicts that the coaches had not been damaged. Furthermore, of course, the jury instructions, that he provided the Jury, specifically addressed the issue of damages. He did not express any disagreement with his own instructions in his JNOV ruling or anywhere else.

All of this evidence regarding damages was presented to the Jury without objection. The Circuit Judge does not refer to any objection and any ruling of his that he disagreed. Moreover, the Jury Instructions regarding damages were presented to the Jury without objection. Again, the Circuit Judge never stated in his opinion one word about the instructions not being an accurate expression of the law regarding damages or, indeed, regarding any aspect of this case.

Consequently, for these additional reasons, the Jury Verdict should be reinstated. This Court is respectfully asked to reverse and render herein.

III. RETALIATION: THE APPROACH THE CIRCUIT JUDGE USED, AFTER THE JURY VERDICTS, IS CONTRADICTED BY HIS OWN JURY INSTRUCTIONS. HIS SUDDEN USE OF THE "BUT FOR" APPROACH HAS BEEN REJECTED BY THE U.S. SUPREME COURT, CONGRESS, AND THE FIFTH CIRCUIT. THE CORRECT TEST, AS THE SUPREME COURT AND THE FIFTH CIRCUIT HAS MADE CLEAR, IS THE "MOTIVATING FACTOR" TEST:

The Circuit Judge, in his JNOV ruling, for the first and only time used a discarded "but for" test regarding the retaliation/reprisal civil action herein. The "but for" approach has been rejected by Congress and the United States Supreme Court and by the Fifth Circuit. ["but for" meaning that the adverse employment action taken against plaintiff would not have occurred "but for" the protected conduct].

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); § 2000e-2(m). Consequently, the "but for" test is not the law. That is precisely why the Circuit Judge instructed the Jury as to motivating factor and mixed motives. The Jury was instructed correctly regarding motivating factors and mixed motives. The Circuit Judge does not state otherwise.

The Fifth Circuit also recently discussed the standard of sufficiency of evidence in employment discrimination-retaliation cases. In *Smith v. Xerox Corp.,* 2010 WL 1052837 (5th Cir) the Court found:

> "The Supreme Court dispelled the notion that direct evidence was required to obtain a mixed-motive jury instruction in a Title VII discrimination case when it decided *Desert Palace, Inc. v. Costa.* In *Desert Palace*, the Court concluded that Congress's addition of § 2000e-2(m) allowing for a motivating factor test in a discrimination case, and its failure in that section to require a heightened burden of proof, left little doubt that there was no special evidentiary showing required in a Title VII discrimination case." **[pp4-5].**
>
> Then, the Court held:

> **"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." [p.7].***

Consequently, when the mixed-motive instruction is given, as here, the test is the "motivating factor" test – not "but for". As can be seen, the Fifth Circuit took special and specific notice of the importance of *Desert Palace, Inc. v. Costa,* 539 U.S. 90 (2003) and further held that the claimant need not provide but-for causation of discrimination or retaliation.

Consequently, based upon U.S. Supreme Court precedent, Congressional/Federal statutory precedent, and Fifth Circuit precedent, there is no "but for" approach allowed regarding the issues of this case. This means, of course, the Circuit Judge's sudden change of approach in his JNOV ruling was misplaced.

In *Burlington Northern & Santa Fe Railway Co., v. White,* 548 U.S. 53,126 S.Ct. 2405 (2006), the U.S. Supreme 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.*

In *Thompson v. North American Stainless*, 131 S.Ct. 863,866-67 (2011), 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 made it abundantly clear that the anti-retaliation provision, "*prohibits* any employer action **that 'well <u>might have dissuaded</u> a reasonable worker from making or supporting a [discrimination] charge'". *Thompson, supra*, at p. 867.**

Indeed, the anti-retaliation provision is even stronger medicine than the substantive provision regarding discrimination itself. The Court held that "the anti-retaliation provision, unlike the substantive provision, ***is not limited to discriminatory actions that affect the terms and conditions of employment." Id.at p. 868.***.

"Rather, Title VII's anti-retaliation provision ***prohibits any employer action*** that **<u>"well might have dissuaded a reasonable worker from making or supporting a charge of discrimination."</u>** ***<u>Id.</u>*** 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].

However, he chose to use the completely wrong "but for" test regarding causation. As already established, he was flat wrong in doing this. His action was and is contradicted by no less than Congress and the U.S. Supreme Court and the Fifth Circuit.

The "broadness" of the anti-retaliation provisions is so broad that even covers one being retaliated against by pursuing adverse actions against one's fiancé. *Thompson, supra, at pp 868-70.*

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 F. 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].

It is agreed that the Jury was properly instructed as to Retaliation. It is also agreed that all of the difficulties and mistreatment ensued AFTER the incidents where Varnell made or engaged in inappropriate sexual advances, allusions, and/or misconduct regarding Ged O'Connor and Coach Mollaghan. Complaints about this conduct occurred immediately. He reported it to his supervisor [Mollaghan], and Mollaghan reported it to Vincent, and Vincent reported it to Giannini. All of this occurred within days. The Plaintiffs complied with all requirements, and the Defendants agreed. The Jury heard testimony from all perspectives and parties and witnesses and saw much documentation. The Jury heard the evidence and ruled unanimously in favor of the Plaintiffs.

The Circuit Judge referred to classic hearsay statements [extensively objected to by Plaintiffs] regarding alleged parents and players in its Opinion and Order. Then, the

Circuit Judge, in his JNOV opinion, essentially argued that this could have been the reason for the mistreatment of the coaches. Then, he used the wrong "but for" test and took away the jury verdict.

Since we know the "but for" test is wrong, and we know the Circuit Judge did not contradict any actual evidence adduced at trial or actual jury instructions provided by him to the jury, we know his actions regarding retaliation are equally misplaced.

Indeed, the actions of Giannini and Varnell stirring up the players *occurred after* the sexual harassment complaints and actions were made by the three coaches. They were made *after* the sexual advances by Varnell. All the while, of course, the Defendants wanted a female coach. They said this time and time again. They admitted this at trial. The evidence showed that the Defendants approached the parents and, then, there were alleged hearsay complaints by the parents – not the other way around. In other words, there were not parents' complaints until and after complaints by Vincent and Mollaghan on behalf of O'Connor.

The Jury had before it the evidence. All of the mistreatment of Plaintiffs occurred AFTER [beginning within a few days] the Plaintiffs' complaints about discrimination and sexual harassment and sexual misconduct by Varnell. All three plaintiffs were immediately involved in a dispute about Varnell's conduct. Then, and only then, did the mistreatment of Plaintiffs begin.

The Circuit Judge, in his JNOV ruling, also misperceived what is an "adverse employment action". He did not apply *Burlington* and *Thompson*, *supra*. He ignored the numerous Fifth Circuit cases and other Federal, to include, Supreme Court cases cited and referred, *supra*. All of these retaliatory acts matter. The Circuit Judge either did not realize this or misapprehended all of the foregoing law. Again, for ease of reference,

see RE 10 where at least forty-five acts of retaliation were levied by the Defendants against the coaches. The Circuit Judge did not refer to any of them.

The Circuit Judge referred to Mollaghan being made Interim Head Coach, but he overlooked the fact that Mollaghan was deprived of all pay for *being Head Coach.*

Strangely, the Circuit Judge essentially argued that the same actor inference is applicable. First, the "same actor" argument was never made by even the Defendants at trial. Certainly no evidence or argument or contention is referred by the Circuit Judge. Secondly, this inference is, obviously, only an inference the Jury might consider along with the other evidence. It is not outcome determinative. Thirdly, the person who hired Mollaghan was Vincent. The person who hired Vincent was McClellan. Fourthly, Varnell was the direct supervisor of Mollaghan and did not want him to be head coach. Fifthly, note that in *Stover v. Hattiesburg Public School Dist,* 549 F. 3d 416 (5th Cir. 2009) the same actor issue was merely an *instruction* to the Jury - - not a ruling by the Court that was outcome determinative. Sixth, as the Fifth Circuit discussed in *Brown v. CSI Logic, Inc.,* 82 F.3d 651, 658 (5th Cir. 1996), this argument regarding "same actor" is not a defense, but rather an inference that discrimination was not the motive behind a challenged employment action. Seventh, The Fifth Circuit in *Haun v. Ideal Industries, Inc.,* 81 F. 3d 541, 546 (5th Cir. 1996) found the jury could consider or "infer", but concluded it is not, of course, outcome "determinative." *"Instead, we prefer to look at the evidence as a whole . . ." Id.* In other words, *all the evidence should be considered not just a portion of it.*

Please recall that, in his JNOV ruling, the Circuit Judge opined that "adverse employment action" was not a genuine impediment herein. [CP 1352].

The Jury heard all perspectives and rendered their unanimous verdicts in favor of the Plaintiffs. The Circuit Judge should not have substituted his views for the unanimous jury verdicts. Twelve citizen jurors listened and evaluated considerable evidence over a period of a week. As shown *supra*, issues of fact are to be resolved by the Jury not the Judge - - particularly when, as here, the Circuit Judge specifically found that there were genuine material factual disputes for the Jury to resolve.

The Circuit Judge was correct in the first place. "The law of the case" is uncontestedly accurate. That is precisely why the Jury Instructions have not been challenged or objected.

Consequently, for this additional reason, this Court is asked to reinstate the unanimous jury verdict herein and reverse and render herein in favor of the coaches.

IV. GENDER DISCRIMINATION: THE UNITED STATES SUPREME COURT AND THE FIFTH CIRCUIT HAS RULED UNEQUIVOCALLY THAT THE CIRCUMSTANTIAL EVIDENCE APPROACH REGARDING ISSUES OF DISCRIMINATION DO NOT NEED TO BE USED WHEN THERE IS EITHER DIRECT EVIDENCE OF DISCRIMINATION, A PATTERN OR PRACTICE OF DISCRIMINATORY CONDUCT, or MIXED MOTIVES OF DISCRIMINATORY CONDUCT:

With regard to the civil action of gender discrimination, the Circuit Judge was under the mistaken impression that one can only establish gender discrimination via the circumstantial evidence method utilized in *McDonnell-Douglas v. Green,* 411 U.S. 792 (1973). This is highly inaccurate. This is said respectfully. However, his view is countermanded by the United States Supreme Court and the Fifth Circuit.

If only circumstantial evidence, via *McDonnell-Douglas,* was the only approach could be used regarding discrimination, a white, male employer could castigate, denigrate, and insult a black female employee every day while telling her he hated black

women and only wanted white males e could replace her with a woman for a while and do it all with impunity.

That, of course, is not the law.

Title VII, as even the Defendants concede, parallels 42 U.S.C. §1983 when discrimination and retaliation and a hostile work environment are bases of sought- after relief, Title VII claims and §1983 claims are "parallel causes of action." *Cervantez v.Bexar County Civil Serv. Comm'n*, 99 F. 3d 730, 734 (5th Cir. 1996).

Title VII proscribes an employer from discharging ***or otherwise discriminating*** against any individual because of that individual's sex. *42 U.S.C. § 2000e-2(a)(1).* "The Title VII inquiry is whether the defendant intentionally discriminated against the plaintiff." *Roberson v. Alltel Info. Servs.*, 373 F.3d 647, 651 (5th Cir. 2004) (internal quotation marks and citations omitted). Intentional discrimination **can be established through either direct or circumstantial evidence. *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212, 219 (5th Cir. 2001).** Here, the case is replete with direct evidence of discrimination as well as judicial admissions against interest regarding discriminatory intent or animus.

Here, both Varnell and Giannini admitted to their prejudice and bias on the witness stand. Their bias and prejudice is more than direct evidence. They made *judicial admissions against interest* on the witness stand at the trial of this matter. MRE 801 (d)(2). Varnell and Giannini indeed testified that the foregoing was their philosophy. It was and is an endemic, integral fact of their very being as human beings. It was such a strong philosophy and prejudice that Vincent engaged in gallows humor and told the other two coaches, in order to survive they may have to change their genders. The

essence of the statements of Giannini and Varnell was that the next coaches had to be female.

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. They testified to this at their depositions. Then, they testified to this at trial. Their attorneys never addressed these admissions, never denied what the jury undeniably was informed by the Defendants, and never characterized these admissions as "stray". The Defendants at trial, as well as their attorneys, had no response to these admissions of discriminatory animus and prejudice and bias.

In *Price Waterhouse v. Hopkins,* 490 U.S. 228, 258 (1989), the Supreme Court held that when Plaintiffs' proof includes direct evidence that an illegal factor such as gender or race plays a "motivating part in an employment decision" that was discriminatory, *the McDonnell Douglas test does not apply.*

In *Brown v. E. Miss. Elec. Power Ass'n,* 989 F.2d 858, 861 (5th Cir. 1993), *reh'g denied*, 995 F.2d 225 (5th Cir. 1993), the Fifth Circuit strongly embraced *Price Waterhouse, supra*, and held:

> "When a plaintiff presents credible direct evidence that ***discriminatory animus in part motivated or was a substantial factor in the contested employment action***, the burden of proof shifts to the employer to establish by a preponderance of the evidence that the same decision would have been made regardless of the forbidden factor."

Then, please see *Fierros v. Texas Dep't of Health, 274 F.* 3d 187-189 (5th Cir. 2001):

> "If, on the other hand, the plaintiff presents direct evidence that the employer's motivation for the adverse action was at least in part retaliatory, **then the *McDonnell Douglas* framework does not apply**. *See Moore v. U.S. Dep't of Agric.,* 55 F.3d 991, 995 (5th Cir. 1995) (noting that because the plaintiffs presented direct evidence of

discriminatory animus, they "are *entitled* ***to bypass*** ***the McDonnell Douglas*** **burden-shifting framework commonly applied in discrimination cases and proceed directly** to the question of liability"). In such "direct evidence" cases, "the burden of proof shifts to the employer to establish by a preponderance of the evidence that the same decision would have been made regardless of the forbidden factor." *Brown v. E. Miss. Elec. Power Ass'n,* 989 F.2d 858, 861 (5th Cir. 1993).

Then, the Court went on to hold:

"Unlike a case in which the plaintiff has presented only circumstantial evidence of retaliatory animus, we do not apply the *McDonnell Douglas* burden-shifting framework to determine whether Fierros's direct evidence presents a factual issue for a jury." *See Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 121 (1985) *("[T]he McDonnell Douglas test is inapplicable where the plaintiff presents direct evidence of discrimination."); Portis,* 34 F.3d at 328 *(same).*

Here; clearly, undisputedly, there is direct evidence of discrimination for the jury to have considered.

Thus, in light of the direct evidence, the motivating factor law, and the pattern or practice evidence it is not necessary to question who replaced whom. However, Mollaghan was replaced by Beth Leaver. O'Connor was replaced by a female. In Vincent's case he was ultimately replaced by a female. The evidence was clear as to whom the Defendants desired in the position. The the only person called was a female named Rena Richardson who Giannini hired at ULM. She declined the position. Since Vincent was fired on the spot without Due Process, Defendants utilized Mollaghan as "Interim Head Coach". No process or system was used. He was not paid for being Head Coach. He continued being paid only what he was paid as being Assistant Coach. He received nothing for being saddled with the extra duties and responsibilities the Head Coach has. This evidence was unrebutted. The evidence was to the effect that he was promised the "inside track" to be the actual Head Coach, but the discrimination and retaliation against him precluded that from occurring.

Who replaced Vincent was contested. Ultimately, the entire staff was female – just as the Defendants wanted and testified they wanted. However, as the foregoing well establishes, an employer can-not hide its discriminatory conduct with impunity when there is direct evidence, admissions on the witness stand, pattern or practice of discriminatory conduct, and/or motivating factors involved. All of that is here. The Jury, even according to the Circuit Judge, was entitled to hear all of the evidence not just a part of it. "Replacement" is not the predominant question when all of the foregoing is present. The issue, ultimately, is whether the discrimination was intentional. Please recall that the issue is whether the coaches were "otherwise discriminated against". 42 U.S.C. § 2000e-2(a)(1). The inquiry is "whether the defendant intentionally discriminated against the plaintiff." *Roberson v. Alltel Info. Servs.*, 373 F.3d 647, 651 (5th Cir. 2004

Even in a circumstantial evidence approach, when the motion for summary judgment was denied, the case, of course, proceeded to trial. At trial, if the employer sustains its burden, "*the prima facie case is dissolved*", and the burden shifts back to the plaintiff to establish either: (1) that the employer's proffered reason is not true but is instead a *pretext for discrimination*; *or* (2) that the employer's reason, while true, is not the only reason for its conduct, and another *"motivating factor"* is the plaintiff's protected characteristic. *Rachid v. Jack in the Box, Inc.*, 376 F.3d 305, 308, 312 (5th Cir. 2004).

Here, there was direct evidence, mixed motives, pattern or practice evidence, and circumstantial evidence for the Jury to consider and weigh. They did that and rendered a verdict in favor of the three coaches.

The Circuit Judge, in his JNOV ruling, referred to *Vance v. Union Planters,* 209 F. 3d 438 (5th Cir.2000), **but that case supports the Plaintiffs. It verifies the**

significance of direct evidence and why, when it is present, as here, the *McDonnell-Douglas* approach is not required. *Id. at* pp. 442-43.

The Court in *Vance* bolsters the coaches' position in this case. It held:

> "Therefore, ***the comment [regarding gender] qualifies as direct and material evidence of sex discrimination.*** Even if Vance were the only witness to testify about the statements at issue, though she is not, that would **not warrant taking the case out of the jury's hands." *Id.***

The Circuit Judge referred to *Stover v. Hattiesburg Public School Dist,* 549 F. 3d 985 (5th Cir. 2000). In that case the Court simply held that, *since* she was allowed to present all of her evidence to the jury, she should not complain as to whether it was characterized as direct evidence or not. *Id.* at p. 992-93. It never required additional proof pursuant to *McDonnell-Douglas.*

Consequently, because of the judicial admissions and direct evidence, there is no required "discharge" element or "replacement" element. The direct evidence, as shown *supra*, removes all of that. However, Vincent was not hired again because of his gender. Mollaghan was not hired again because of his gender. Vincent was not provided any duties after he was removed as Head Coach. The alleged "reassignment" was to nothing. It was a ruse and pretext. O'Connor was not allowed to continue in his position. According to the evidence, Varnell told him, in light of his complaints about sexual harassment, he had to be "moved" away.

The Circuit Judge apparently believed that one can only be discriminated against if one is discharged. That is not the law. It never has been. One can be discriminated against aside from being discharged. Title VII is not limited to firings or discharges. It applies regarding retaliation issues, compensation issues, terms and conditions of employment issues, hiring issues, promotion issues, recall issues, sexual harassment,

discipline issues, hostile work environment issues, *quid pro quo* sexual harassment issues and numerous facets of employment. This case involves all of the foregoing.

The Supreme Court held in *Harris v. Forklift Systems, Inc.*, 114 S.Ct. 367 (1993) that the question here focuses upon ***"an unlawful practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment."*** The Court reaffirmed the strong language in its previous decision in *Meritor Savings Bank v. Vinson,* 477 U.S. 57 (1986) and that treatment is "not limited to 'economic', or 'tangible' discrimination. The phrase, 'terms, conditions, or privileges of employment', evinces a congressional intent 'to strike at the **entire spectrum of disparate treatment of men and women' in employment**." ***Id.***

The Supreme Court also made clear in *Rutan v. Republican Party of Illinois,* 497 U.S. 62, 75, n.8 (1990), that "it is a violation of federal law to discriminate **in any way** in state employment . . . on the basis of . . . sex. . .". The Court made it clear that numerous acts of discrimination may occur where discharge is not involved. It specifically discussed, for example, issues of transfer, promotion, recalls, and layoffs.

Here, these Plaintiffs were subjected to numerous discriminatory, harassing, and retaliatory conduct and acts. See RE 10.

- THE JURY WAS ALSO INSTRUCTED AS TO "PATTERN OR PRACTICE" OF DISCRIMINATION. THUS, ONCE AGAIN, *MCDONNELL-DOUGLAS* IS NOT THE APPLICABLE TEST:

Regarding this point, it is helpful to note what the Supreme Court held in *Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). The words, "pattern and practice", were "not intended as a term of art". *Id.* At p. 336. "The words reflect only their usual meaning." *Id. See Also, Cox v. American Cast Iron Pipe Co.*, 784 F. 2d 1546, 1559 (11th Cir. 1986), cert. Denied, 479 U.S. 883 (1986); *Hardy v. Porter*, 613 F.

2d 112 (5th Cir. 1980); *Walther v. Lone Star Gas Co.*, 952 F. 2d 119 (5th Cir. 1992). The term, "pattern or practice", is simply a descriptive term. It is merely a "method of proving discrimination by showing that an employer regularly and purposefully discriminates against a protected group . . .". *Council 31 v. Ward*, 978 F. 2d 373, 378 (7th Cir. 1992).

Consequently, once again, the *McDonnell-Douglas* circumstantial approach is not required because "pattern and practice" evidence actually places the employer in the position of showing that the job decisions were not reflections of the illegal pattern. *Cox, supra*, at 784 F. 2d at p. 1559.

A "pattern or practice" claim is not a separate and distinct cause of action under Title VII, but it is another vehicle by which disparate treatment may be shown. See *Mooney v. Aramco Servs. Co.*, 54 F.3d 1207, 1219 (5th Cir. 1995).

In *Sprint v. Mendelsohn,* 552 U.S. 379 (2008), the Supreme Court removed all doubt as to the muscularity of pattern or practice importance when it ruled such evidence is formidable. When one is dealing with the same plaintiff being abused discriminatorily repeatedly by the same supervisor that evidence is admissible for the trier of fact to weigh. *Id., p. 387.* When three plaintiffs are being mistreated discriminatorily by the same supervisor, the evidence is even stronger.

Here, the discriminatory pattern or practice is self evident. ALL three male coaches, who coached the female soccer team, were discriminatorily mistreated in the same manner. The Jury was instructed as to this point.

Consequently, it is evident that the circumstantial evidence approach described in *McDonnell-Douglas* is not exclusive - - especially when there is direct evidence and when there is a pattern or practice of discriminatory conduct as in this case.

Also, please recall our earlier extensive discussion regarding MIXED MOTIVES. And "motivating factor" issues. Here, again, the *McDonnell-Douglas* approach is not exclusive. The law allows Plaintiffs, contending that they have been discriminated or retaliated against, to have the benefits of *Desert Palace, Inc. v. Costa,* 539 U.S. 90 (2003) as well as under § 2000e-2(m), When "Race, color, religion, sex, or national origin is a motivating factor for any employment practice", the Plaintiffs are entitled to relief.

It would be redundant to repeat what we have previously shown the Court in this regard, but, clearly, as here, when the Jury is instructed as to Mixed Motives, the *McDonnell-Douglas* is not the exclusive approach to be utilized.

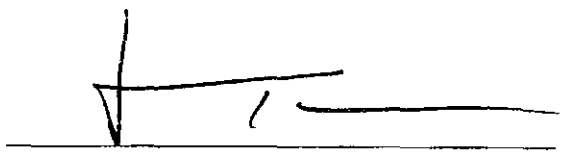
The case law and facts, described extensively *supra,* regarding retaliation are equally applicable to discrimination pertaining to the "terms and conditions" of employment.

Consequently, the Circuit Judge was either not familiar with the foregoing or misapprehended the situation herein. This case involves issues not dependent upon discharge. Thus, he used the wrong test. He, previously, before his JNOV ruling, had used the correct legal precedent but, for some reason, he changed course and ended up in an incorrect location. [CP 1348-49].

CONCLUSION

Consequently, the Jury Verdicts rendered herein should be reinstated and upheld. This Court is respectfully asked to reverse and render herein so that justice may be done, so that the actual, applicable legal precedent is effected, and so that the unanimous Jury Verdicts be given the deference they are entitled.

RESPECTFULLY SUBMITTED this the 19th day of December, 2011.



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CERTIFICATE OF SERVICE

I, the undersigned counsel of record for the Appellant 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 Brief for the Appellant along with a CD-Rom containing a PDF of the Brief of 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 Brief for the Appellants to the following persons at their regular business addresses:

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