No.

IN THE

Supreme Court of the United States

DENISE TAYLOR-TRAVIS, PETITIONER

v.

JACKSON STATE UNIVERSITY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

NICK NORRIS
Counsel of Record

Watson & Norris, PLLC
1880 Lakeland Drive
Suite G
Jackson, MS 39216
nick@watsonnorris.com
(601) 253-1179

CURRY & TAYLOR ♦ (202) 350-9073

QUESTION(S) PRESENTED

1.The jury was told that for petitioner to prove her claim of retaliation, she must show she was terminated "solely as a consequence" of her protected activity under Title IX. Did this instruction which impermissibly supercedes the Court's "because of" causation standard for this claim mislead the jury and deny petitioner a fair trial?

2. In deciding that the release of petitioner's confidential personnel records in contravention of Mississippi's Public Records Act did not violate her right of privacy, the court of appeals relied exclusively on the Restatement (Second) of Torts. Does this refusal to apply the Public Records Act, substantive state law providing a zone of privacy *beyond* the Restatement, deprive petitioner of the privacy rights to which she would otherwise be entitled in State court, subverting federalism and denying petitioner due process?

PARTIES TO THE PROCEEDING

All the parties in this proceeding are listed in the caption.

STATEMENT OF RELATED CASES

None

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

OPINIONS BELOW

The published Opinion of the United States Court of Appeals for the Fifth Circuit in *Denise Taylor-Travis v. Jackson State University*, C.A. No.17-60856, decided and filed January 6, 2021, and reported at 984 F.3d 1107 (5th Cir. 2021), affirming the district court's judgment regarding petitioner's breach of contract claim and her Title IX retaliation claim but reversing the lower court's judgment on petitioner's invasion of privacy claim and remanding with instructions to enter a judgment for respondent on the invasion of privacy claim, is set forth in the Appendix hereto (App. 1-22).

The unpublished Order of the federal district court for the Southern District of Mississippi, Northern Division, in *Denise Taylor-Travis v. Jackson State University*, C.A. No. 3:12-CV-51-HTW-LRA, filed December 22, 2017, and reported at 2017 WL 6604567 (D. Miss. 2017), denying all of the parties' post-trial motions including petitioner's motion for a new trial based upon the trial judge's failure to properly instruct the jury regarding the "but for"standard of causality for her retaliation claim under Title IX, is set forth in the Appendix hereto (App. 23-75).

The unpublished Order of the federal district court for the Southern District of Mississippi, Northern Division, in *Denise Taylor-Travis v. Jackson State University*, C.A. No. 3:12-CV-51-HTW-LRA, filed August 1, 2014, and reported at 2014 WL 12779207 (D. Miss. 2014), finding in favor of petitioner on her invasion of privacy claim after a trial and awarding her damages of $200,000, is set forth in the Appendix hereto (App. 76-98).

The unpublished Order by the United States Court of Appeals for the Fifth Circuit in *Denise Taylor-Travis v. Jackson State University*, C.A. No.17-60856, filed February 8, 2021, denying petitioner's petition for rehearing and for rehearing *en banc*, is set forth in the Appendix hereto (App. 99-100).

JURISDICTION

The reported Order by the United States Court of Appeals for the Fifth Circuit in *Denise Taylor-Travis v. Jackson State University*, C.A. No.17-60856, denying petitioner's petition for rehearing and for rehearing *en banc* was filed on February 8, 2021 (App. 99-100).

In addition, on March 19, 2020, in light of the ongoing public health emergency caused by COVID-19, this Court issued an Order extending the deadline for the filing any petition for writ of certiorari due on or after March 19, 2020, for 150 days from the date of the court of appeals' order denying a timely filed petition for rehearing.

This petition for writ of certiorari is filed within the time allowed by this Court's rules, 28 U.S.C. § 2101(c), and by this Court's Order of March 19, 2020.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment V:

No person shall...be deprived of life, liberty, or property, without due process of law....

28 U.S.C. § 1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1367(a):

Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction

shall include claims that involve the joinder or intervention of additional parties.

42 U.S.C. § 2000e-2(a) (Title VII of the Civil Rights Act of 1964):

(a) Employer practices

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

20 U.S.C. § 1681(a) (Title IX of the Education Amendments):

Prohibition against discrimination; exceptions.

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance....

Miss. Code Ann. § 25-61-1:

This chapter shall be known and may be cited as the "Mississippi Public Records Act of 1983." It is the policy of the Legislature that public records must be available for inspection by any person unless otherwise provided by this act [Laws, 1996, ch. 453]. Furthermore, providing access to public records is a duty of each public body and automation of public records must not erode the right of access to those records. As each agency increases its use of and dependence on electronic record keeping, each agency must ensure reasonable access to records electronically maintained, subject to the rules of records retention.

Miss. Code Ann. § 25-61-3(b):

Definitions

The following words shall have the meanings ascribed herein unless the context clearly requires otherwise:

....

(b) "Public records" shall mean all books, records, papers, accounts, letters, maps, photographs, films, cards, tapes, recordings or reproductions thereof, and any other documentary materials, regardless of physical form or characteristics, having been used, being in use, or prepared, possessed or retained for use in the conduct, transaction or performance of any business, transaction, work, duty or function of any public

body, or required to be maintained by any public body.

Miss. Code Ann. § 25-61-11:

Records exempted or privileged by law

The provisions of this chapter shall not be construed to conflict with, amend, repeal or supersede any constitutional or statutory law or decision of a court of this state or the United States which at the time of this chapter is effective or thereafter specifically declares a public record to be confidential or privileged, or provides that a public record shall be exempt from the provisions of this chapter.

Miss. Code Ann. § 25-1-100:

(1) Personnel records and applications for employment in the possession of a public body, as defined by paragraph (a) of Section 25-61-3, except those which may be released to the person who made the application or with the prior written consent of the person who made the application, shall be exempt from the provisions of the Mississippi Public Records Act of 1983.

(2) Test questions and answers in the possession of a public body, as defined by paragraph (a) of Section 25-61-3, which are to be used in employment examinations, shall be exempt from the provisions of the Mississippi Public Records Act of 1983.

(3) Letters of recommendation in the possession of a public body, as defined by paragraph (a) of Section 25-61-3, respecting any application for employment, shall be exempt from the provisions of the Mississippi Public Records Act of 1983.

(4) Documents relating to contract authorization under Section 25-9-120 shall not be exempt from the provisions of Mississippi Public Records Act of 1983.

Restatement (Second) of Torts § 652D (Publicity Given to Private Life):

One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public.

STATEMENT

Petitioner Denise Taylor-Travis ("petitioner" or "Coach Taylor") began her career coaching women's college basketball at Lamar University in 1989 when she accepted a position as assistant coach. Through the nineties, petitioner became head coach at American International College and then at Northeastern Illinois University. Eventually, Coach Taylor became one of the first eight head coaches named for the newly formed Women's National Basketball Association ("the WNBA").

In 2001, respondent Jackson State University ("respondent" or "JSU") hired petitioner as its head coach for women's basketball. Petitioner's employment contract with JSU was renewed annually with the last contract renewal in 2010. During these ten years, JSU's women's basketball program went from one struggling for recognition to a team which achieved six out of ten winning seasons, four regular season championships and one Southwest Atlantic Conference tournament championship. Over this span, Coach Taylor was selected Coach of the Year four times.

By the 2010-2011 season, however, the team began to founder and dissension set in among team members. The players first turned on each other but eventually focused on Coach Taylor. On March 29, 2011, two team members brought their complaints about Coach Taylor's "unfair" treatment to Marie O'Banner-Jackson, JSU's Associate Dean and Faculty Athletics Representative. She, in turn, referred their complaints to Adrienne Swinney ("Swinney"), JSU's Assistant Athletic Director, who "credited [the players'] accusations and even encouraged them, without ever discussing them with Coach Taylor" (App. 78). In fact, "the administration at JSU spoke more than once with... students and refused early on to advise Coach Taylor of the specifics of the complaints" against her (App. 78-79).

In the meantime, on March 30, 2011, Coach Taylor was pursuing her own demand that JSU provide equal treatment to the women's basketball team consistent with Title IX, 20 U.S.C. § 1681(a), a federal statutory regime which prohibits discriminatory treatment in the educational setting on the basis of sex.

On that day, she e-mailed JSU's President Carolyn Myers ("President Myers") requesting a meeting to discuss whether JSU's Interim Athletic Director Robert Walker ("Walker") breached petitioner's employment contract when Walker denied her request to attend a coaches' convention and whether this denial constituted a violation of Title IX.

Specifically, petitioner's employment contract provides that JSU would advise her by February 1st whether there were sufficient funds in the budget for her to attend an annual coaches' convention. But JSU failed to timely notify her of any shortfall in the budget and, at the same time, denied her request to attend the convention. Petitioner asserted to Walker, to Swinney (who was also JSU's Title IX coordinator) and then finally to President Myers that this was a gender equality violation under Title IX inasmuch as those associated with the men's teams at JSU were allowed to attend such events while those associated with the women's teams were not. She wanted President Myers to take action to correct this disparate treatment (App. 80-81).

On April 1, 2011, President Myers responded to petitioner's written Title IX complaint. Instead of addressing JSU's own contractual obligation to advise petitioner of any budget shortfall by February 1st, she blamed Coach Taylor for any disparities between the men's and the women's athletic programs, writing her that "[a]ppropriate planning on your part as a seasoned professional could have and should have avoided this situation" (App. 81).

Besides rejecting petitioner's Title IX complaints out of hand, JSU immediately brought together all of petitioner's players, encouraging each of them to complain about Coach Taylor and to put those complaints in writing. With all these written complaints in hand, however, JSU did absolutely nothing to investigate their merits, not even corroborating the allegations with the players themselves or with other known facts. As the district judge later found, JSU simply "credited [the players'] accusations" as true (App. 78).

On April 8, 2011, JSU's Walker unilaterally wrote Coach Taylor informing her without explanation that she was being placed on administrative leave indefinitely; she was prohibited from talking to any JSU personnel or students; and she was relieved of all duties pending an investigation into "recent allegations of professional misconduct" (*Id.*). When petitioner asked Walker why she was being suspended, he told her to contact JSU's Human Resources director who never returned petitioner's calls and eventually claimed to know nothing about her suspension. JSU never responded to a request by petitioner's attorney on April 11, 2011, for more information about any misconduct allegations; and on April 28, 2011, Swinney wrote President Myers that she believed petitioner had violated numerous JSU "policies."

On May 13, 2011, Coach Taylor and her attorney met with Walker. A document he gave them identified without specifics the alleged policy violations as ones relating to sexual orientation harassment, emotional and verbal abuse, and misappropriation of funds (App. 81). Walker told petitioner that she would be

terminated if she did not resign; but petitioner refused to resign and denied any wrongdoing. On May 20, 2011, a personnel record was created by Walker when he notified Coach Taylor in writing of JSU's intent to terminate her for: (1) sexual/gender stereotyping; (2) emotional and verbal abuse; (3) a violation of the school's per diem, travel and reimbursement policies; (4) misappropriation of university funds; (5) coercing student-athletes to change class schedules; and (6) threats of punitive outcomes for failing to keep their athletic obligations (App. 79-80;81-82).

JSU provided petitioner no details of any of these allegations and no JSU personnel had yet to interview petitioner about her answer to these charges. All of this was contrary to her employment contract which provided that if JSU ever contemplated terminating coach Taylor for cause, it must provide a statement of the reasons for doing so. On May 26, 2011, petitioner's attorney in writing sought from JSU details and documents to support its bald allegations; and petitioner requested arbitration of JSU's decision to terminate her, as was her right under her employment contract.

Once petitioner demanded arbitration, the employment contract provided that only a three-person arbitration panel----*not* JSU---- could approve her termination. Yet on June 29, 2011, JSU's Walker attempted in writing to terminate petitioner anyway; and even though petitioner had been demanding arbitration for weeks, told her that she had ten (10) days to request arbitration. On July 1, 2011, Coach Taylor's attorney responded by again asking JSU to comply with petitioner's employment contract by

arbitrating its decision to terminate her. Petitioner's attorney also requested her employment records pursuant to the Mississippi Public Records Act, Miss. Code Ann. § 25-1-100 ("the Public Records Act"), in order to defend against JSU's decisionmaking. JSU, however, refused to turn over any of petitioner's personnel records to her attorney.

Yet earlier on June 8, 2011, the *Clarion Ledger*, a Mississippi newspaper, sent JSU a request for documents pursuant to the Public Records Act, Miss. Code Ann. § 25-61-1, seeking *inter alia* all documents relating to communications between Coach Taylor and JSU from March 15, 2011, to June 8, 2011 (App. 80). On June 24, 2011, JSU responded by giving the *Clarion Ledger* all of petitioner's e-mails of March 30 & 31, 2011; President Myers' letter to petitioner of April 1, 2011, which blamed petitioner herself for disparate treatment she received; Walker's letter to petitioner and his "agenda" reciting the unfounded allegations against petitioner; and, most damaging, her personnel record in which Walker notified her on May 20, 2011, that JSU was terminating her for, among other things, sexual/gender stereotyping/harassment, misappropriation of university funds, and serial violations of school policies (App. 80-82).

On June 27, 2011, the *Clarion Ledger* then published the story of Coach Taylor's termination on its online blog (App. 82). A printout of the blog reveals at least 39 comments from 17 different individuals about the alleged accusations. *The Clarion Ledger* also posted the actual documents it had received from JSU about petitioner's termination, including her confidential personnel records which JSU had wrongfully released

to the newspaper under the Public Records Act. JSU's unproven allegations of petitioner's sexual stereotyping and harassment, misappropriation of university funds, and her alleged violations of school policies were thereby made on available on the blog for the entire world to read; and other news sources later picked up the story (*Id.*).

Compounding this impropriety, JSU now claimed that the arbitration provision in Coach Taylor's employment contract was "unenforceable" and that its own grievance committee was going to address her termination instead of a three-person arbitration panel. JSU's grievance committee predictably gave petitioner's attorney no time to review the voluminous documents prior to the hearing; denied her the ability to make a record; prevented her counsel from speaking; and denied her the ability to confront the witnesses against her. On August 30, 2011, the grievance committee voted to uphold the decision to terminate petitioner, a power it lacked under petitioner's employment contract. It also refused to follow its own policy for addressing claims of sexual harassment, having failed to give petitioner the right to respond to the allegations and to view the materials upon which the allegations were based.

On January 24, 2012, petitioner brought this civil action in the federal district court for the Southern District of Mississippi against JSU seeking compensatory damages, back pay, reinstatement or front pay, and declaratory relief stemming from her termination. Asserting federal jurisdiction under 28 U.S.C. § 1331, she alleged that JSU discriminated against her on the basis of sex and that it retaliated

against her in violation of Title VII, 42 U.S.C. § 2000e *et seq.*, and Title IX of the Education Amendments, 20 U.S.C. § 1681 *et seq.* Positing supplemental jurisdiction under 28 U.S.C. § 1367(a), she also claimed under State law that JSU breached the employment contract and its implied covenant of good faith and fair dealing; and that it also invaded her privacy when it released her confidential records to the press.

On October 30, 2013, a 16-day trial began on petitioner's claims for retaliation under Title VII and Title IX and for breach of the employment contract and its implied covenant of good faith and fair dealing. The parties agreed that the district judge could thereafter rule on the remaining claim of whether JSU invaded petitioner's privacy when it released her confidential records to the press (App. 25).

The evidence at trial of petitioner's supposed abuse of her players was pockmarked with inconsistencies and absurdities, an outcome preordained by JSU's refusal to investigate and corroborate the players' complaints in the first place. One complaint consisted only of saying that Coach Taylor treated her too well and that the other players would not befriend her because of it. Another complained that petitioner harassed her because she showed concern about another player being hit with a pistol by her girlfriend. Other players complained that Coach Taylor was drinking alcohol while on trips with the team; but they all contradicted each other about when it occurred and other players denied it altogether even though it was claimed that everyone could see and smell it.

Some players claimed that petitioner encouraged them to physically fight with each other; but even those players contradicted each other on the fight itself and how petitioner allegedly encouraged it. In the end, the evidence showed that Coach Taylor had recruited a team entirely of freshmen players who were accustomed to being treated as the top player on the team, as they were in high school; and they were all expecting to play much more than they did. When they began to lose, they started blaming Coach Taylor and JSU capitalized on this discontent once petitioner made her Title IX complaint to JSU's administration.

On December 3, 2013, the jury found that JSU had not terminated petitioner because of her gender and had not terminated her in retaliation for engaging in protected activity under Title VII or Title IX (*Id.*). However, it found that JSU breached petitioner's employment contract and its implied covenant of good faith and fair dealing, awarding petitioner damages of $182,000 (*Id.*).

On August 1, 2014, after reviewing the evidence and arguments, the district judge issued an Order finding in favor of Coach Taylor on her invasion of privacy claim and awarding her damages of $200,000 (App. 76-98). Applying the substantive law of Mississippi as reflected in *Young v. Jackson*, 572 So.2d 378, 382 (Miss. 1990), Judge Wingate determined that JSU had publicized a matter about petitioner (a) which would be highly offensive to a reasonable person and (b) which was not then of legitimate concern to the public (App. 85-86). As he reasoned, circumstances surrounding a person's termination, especially involving *unproven accusations* of sexual harassment and

misappropriation of funds, "are matters that a reasonable person would find offensive if made public" (App. 86).

Second, while almost anything that occurs within a public agency could be of interest to the public, the district judge concluded that the question here is whether"these documents are a matter of '*legitimate concern*' at this stage to the public" under Mississippi law because matters deemed not legally appropriate for public consumption "are not matters of 'concern' for the public" (App. 86-87) (emphasis in original). To determine whether petitioner's confidential personnel records were legally appropriate for public consumption, he referred to the Mississippi's Public Records Act, state decisional law and Mississippi Attorney General Opinions interpreting whether a person's employment records are legally appropriate for public consumption under the Public Records Act (App. 87-90). All these sources of State substantive law "suggest that documents related to internal evaluations and discipline are personnel documents, which are exempt from public record requests" under Miss. Code Ann. § 25-1-100(1) (App. 89).

As the district court concluded,

> [t]he documents that JSU released to the *Clarion Ledger* related directly to JSU's decision-making process in terminating Coach Taylor....[They] are not ordinary public records of government business....[They] were part of a confidential personnel decision.

(App. 89-90). In addition, their release violated JSU's own policy as reflected in its Staff Handbook (App. 90). For these reasons, the trial court found that JSU committed the state law tort of invasion of privacy when it released these documents to the *Clarion Ledger* (*Id.*). A judgment entered in petitioner's favor on this claim on August 1, 2014 (App. 94-95)

Petitioner thereafter moved for a new trial on her Title IX retaliation claim arguing that the trial judge erroneously told the jury that to prevail on this claim, petitioner must show that her protected activity under Title IX was the "sole or only reason" for her termination when the law requires only that she prove by a preponderance of the evidence that JSU retaliated against her *because of* her complaints about its noncompliance with Title IX, a less rigorous standard of causation (App. 23-24;54-56). The district court denied the motion as well as all of JSU's post-trial motions (App. 57).

Both petitioner and JSU appealed. On January 6, 2021, the court of appeals unanimously affirmed the judgment in petitioner's favor on her breach of contract claim and the judgment against her on the Title IX retaliation claim (App. 5-11;15-19). However, it reversed the judgment in petitioner's favor on her invasion of privacy claim and remanded with instructions to enter a judgment for JSU (App. 11-14;19). The Panel reasoned that the Restatement (Second) of Torts § 652D (1977), adopted by Mississippi, governs her invasion of privacy claim (App. 13-14).

It noted that under *comment h* thereof, one who voluntarily enters into employment with a public

institution like JSU bears the risk that the interest of the public may extend to further information and facts about that person which are not public "and which, in the case of one who had not become a public figure, would be regarded as an invasion of his purely private life" (App. 13 quoting *comment h*). The Panel concluded that this case "falls clearly within that realm" since petitioner admitted that as a head coach a major public university, she was in the public eye and the public's interest extends to the reason for her termination (App. 13-14).

The Panel rejected the district court's resort to the Mississippi Public Records Act in order to resolve the question of whether this private information about petitioner contained in her personnel records was legally appropriate for public consumption and therefore of legitimate concern to the public (App. 14). As it observed, petitioner asserted a common law claim for invasion of privacy, not one for violation of the Public Records Act (*Id.*). It thus concluded that a "public employee's termination for, among other things, allegedly using public funds for private matters is a matter of legitimate concern to the public" (*Id.*).

As for the trial judge's jury instructions on the causal connection between petitioner's Title IX complaint and JSU's retaliatory termination, the Panel ruled that those instructions "substantially covered" the correct standard even though it was coupled with the demonstrably wrong instruction that for JSU to be liable on this claim, petitioner needed to show that "she was terminated *solely as a consequence* of complaints alleging noncompliance with the substantive provisions of Title IX" (App. 17-19) (emphasis supplied). As it

rationalized, while this instruction was "not a model of clarity," the jury should have read it in context as distinguishing petitioner's complaints as to her own individual employment under Title VII and not as establishing a heightened causation standard for her Title IX retaliation claim (App. 18-19).

On February 8, 2021, the court of appeals denied petitioner's petition for rehearing and for rehearing *en banc* (App. 99-100).

REASONS FOR GRANTING THE PETITION

1. The Jury Was Told That Petitioner Must Prove She Was Terminated "Solely As A Consequence" Of Her Protected Activity Under Title IX, An Instruction Which Impermissibly Supercedes The Court's "Because Of" Causation Standard For The Claim Of Retaliation Under Title IX, Misleading The Jury And Denying Petitioner A Fair Trial.

In order to prevail on the merits of a claim for retaliatory discharge under Title IX, the Court in *Jackson v. Birmingham Bd. of Ed.*, 544 U.S. 167, 184 (2005) held that a girls' basketball coach at a public high school must prove that the Board of Education discharged him *because* he complained of sex discrimination in the funding of the girls' basketball program. *Id.* (emphasis in original). This "because of" causation standard obligates a Title IX plaintiff to prove that his or her Title IX complaints actually played a role in the employer's decisionmaking process and had a determining influence on the outcome. *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. 167, 176-177 (2009)

quoting *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993).

In *Burrage v. United States*, 571 U.S. 204, 211-213 (2014), Justice Scalia likened the phrase "because of" to "results from" with both invoking a "but for" requirement which "is part of the common understanding of cause." *Id.* at 211. As he explained, in interpreting a statute that prohibits adverse employment action "because of" an employee's complaints about unlawful workplace discrimination, the ordinary meaning of the word "because" requires proof that the desire to retaliate was "a but-for cause of the challenged employment action." *Id.* at 212. That is, the employer would not have taken the adverse employment action *but for* a design to retaliate. *Id.* at 213-214.See *Bostock v. Clayton Cnty.*, ___U.S.___, ___; 140 S.Ct. 1731, 1739 (2020); *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350; 360 (2013). See also *Paroline v. United States*, 572 U.S. 434, 452 (2014) ("If the conduct of a wrongdoer is neither necessary nor sufficient to produce an outcome, that conduct cannot in a strict sense be said to have caused the outcome.").

As Justice Gorsuch amplified in *Bostock v. Clayton Cnty.*, *supra*, the "because of" standard of causation incorporates the "simple" and "traditional" standard of but-for causation, a form of causation established whenever "a particular outcome would not have happened "but for" the purported cause. *Id.* citing *Gross v. FBL Fin. Servs., Inc.*, 557 U.S. at 176. As he explained, the but-for test directs a jury to change one thing at a time and then determine if the outcome changes; if it does, then a but-for cause has been identified. *Id.* So long as petitioner's Title IX complaints

were one but-for cause of JSU's decision to terminate her, even if accompanied by other legitimate or illegitimate causes, that is enough to trigger Title IX's remedies. *Id.* citing *Nassar*, 570 U.S. at 350.

Given this guidance from the Court, Coach Taylor requested a "but for" jury instruction on causation for her claim that JSU retaliated against her under Title IX. The trial judge, relying on some unfortunate language in *Lowery v. Tex. A&M Univ. Sys.*, 171 F.3d 242, 254 (5th Cir. 1997), denied petitioner's request. Instead, he instructed the jury that while there must be a "causal connection" or a "causal link" between petitioner's protected activity under Title IX and her termination, she could prevail only

> if you, the jury, find that she was terminated *solely as a consequence* of complaints alleging noncompliance with the substantive provisions of Title IX. It is not enough that you may believe plaintiff was terminated for complaints related to her own individual employment, for that is not protected activity covered by Title IX.

(App. 17-18) (emphasis supplied).

After the jury returned with a finding that JSU had not terminated Coach Taylor in retaliation for engaging in protected activity under Title IX, the district judge denied petitioner's new trial motion based on this misleading instruction (App. 54-56). The court of appeals affirmed, reasoning that while "not a model of clarity," it should not be read as establishing a heightened causation standard for petitioner's Title IX retaliation claim (App. 15-19).

Petitioner submits that this fundamental error impermissibly superceded her burden of proof on the causation element of her Title IX retaliation claim and denied her a fair trial. See *Addington v. Texas*, 441 U.S. 418, 423 (1979) (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Justice Harlan concurring). The Court has consistently recognized the importance of accurate jury instructions and because jurors are not experts in legal principles, they must be accurately instructed in the law in order to avoid confusion and insure that they can perform their function fairly and impartially. *Carter v. Kentucky*, 450 U.S.288, 302 (1981). *Gregg v. Georgia*, 428 U.S. 153, 193 (1976). See *Bollenbach v. United States*, 326 U.S. 607, 612-613 (1946) (the trial court's jury instructions must be a lucid statement of the relevant legal criteria made with "concrete accuracy").

The trial court's instructions on causation failed to meet this standard, are at odds with the Court's jurisprudence and should prompt a grant of certiorari inasmuch as "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by th[e] Court, or has decided an important federal question in a way that conflicts with relevant decisions of th[e] Court." Supreme Court Rule 10(c).

Several important tenets are clear from the Court's jurisprudence: that after *Jackson*, 544 U.S. at 178-181;184, to prevail on her retaliation claim under Title IX, petitioner must prove by a preponderance of the evidence that JSU retaliated against her *because* she complained about JSU's noncompliance with Title IX; and that this "because of" causation standard

incorporates the traditional standard of "but-for" causation, i.e., as long as petitioner's Title IX complaints were one but-for cause of JSU's decision to terminate her, even if accompanied by other legitimate or illegitimate causes, it is enough to trigger Title IX's remedies. *Bostock v. Clayton Cnty.*, *supra*. *Nassar*, 570 U.S. at 350.

Moreover, it has been repeatedly made clear that for purposes of causation, the words "because of" and the resulting "but-for" test for causation *cannot* support an instruction which changes the causation standard to that of "*solely* because of;" and it is therefore plainly wrong to engraft the adjective "solely" or "sole" onto this causation test because Congress expressly rejected the words "solely" or "sole" in defining the causation standard under the relevant statutes. See, e.g., *Bostock v. Clayton Cnty.*, *supra*; *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. at 385 (Ginsburg, J., dissenting); *CSX Transp., Inc. v. McBride*, 564 U.S. 685,706;712 (2011) (Roberts, C.J., dissenting); *Gross*, 557 U.S. at 177-178 & n.4; *Price Waterhouse v. Hopkins*, 490 U.S. at 241. See also *Leal v. McHugh*, 731 F.3d 405, 415 (5th Cir. 2013)

Accordingly, to conflate the "because of" or "but-for" test with a sole causation standard by injecting the word "solely" or "sole" into a jury's calculus of causation is clear error; and it raises the "real risk" of misleading and confusing a jury in this already confusing area, i.e., it "unduly muddies what may, to a jury, be already murky waters." *Norfolk S. Ry. Co. v. Sorrell*, 549 U.S. 158, 170 (2007). Accord, *CSX Transp., Inc. v. McBride*, 564 U.S. at 704-705; *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. at 364 (Ginsburg, J., dissenting).

As Justice Ginsburg wrote in *Nassar* after a jury was directed to hold two different standards of causation in their collective heads at the same time:

> Causation is a complicated concept to convey to juries in the best of circumstances. Asking jurors to determine liability based on different standards in a single case is virtually certain to sow confusion. That would be tolerable if the governing statute required double standards, but here, for the reasons already stated, it does not.

Nassar, 570 U.S. at 383.

Regardless of the reasons for the unfortunate language used in *Lowery v. Tex. A&M Univ. Sys.*, *supra*, which prompted the trial judge to use the words "solely as a consequence" when he instructed the jury on causation, the instruction itself impermissibly smuggled into the case the concept of *sole causation* in connection with petitioner's Title IX retaliation claim and created the "real risk" that the jury was misled and confused by this enhanced standard of causation. That the trial court also generally instructed the jury that there must be a "causal connection" or a "causal link" between petitioner's exercise of protected activity under Title IX and her termination does not dilute the primary, enduring taint created when it told the jury specifically that petitioner's termination must have been "solely as a consequence" of her protected activity under Title IX.

Even if a jury could somehow hear the first and last paragraphs of the causation instruction as

requiring a "because of" causal linkage, the undisputed fact is that the second paragraph required a "sole cause" causal link. Thus the jury was told to require Coach Taylor to prove not only a "because of" causal link consistent with the first and third paragraphs of the instruction but also a "sole cause" causal link pursuant to the second paragraph. No reasonable jury could be expected to reject the "sole cause" causal link language in the second paragraph because the phrases "causal connection" and "causal link"----terms which could encompass "sole cause"----were used in the two other parts of the instruction.

The upshot of this confusing and misleading instruction is that the jury was allowed to reject petitioner's Title IX retaliation claim because she had not proved that her termination occurred solely as a consequence of her protected activity under Title IX, an impermissibly impossible burden of proof when the evidence showed there were other illegitimate causes which also contributed to her termination. Certiorari should be granted and a new trial ordered.

2. The Panel Was Wrong As A Matter Of Federalism And Constitutional Law To Undo The District Judge's Analysis Of Substantive State Law And Rule That Petitioner Had Not Proven Her State Law Invasion Of Privacy Claim, Denying Her The Privacy Rights To Which She Would Otherwise Be Entitled In State Court.

In exercising supplemental jurisdiction over petitioner's state law claim for invasion of privacy, the district judge assiduously applied Mississippi substantive law to uphold petitioner's right to recover

for JSU's misconduct in releasing her confidential employment records to the press. This decisionmaking comports with *Erie R. Co. v. Tompkins*, 304 U.S. 65 (1938) so that "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Felder v. Casey*, 487 U.S. 131, 151 (1988) quoting *Guaranty Trust Co. York*, 326 U.S. 99, 109 (1945).

Reading *Young v. Jackson*, 572 So.2d 378, 382 (Miss. 1990), Judge Wingate concluded that to recover for this state law tort, petitioner had to prove JSU publicized private facts which (a) would be highly offensive to a reasonable person and (b) were not of legitimate concern to the public (App. 85-86). He first reasoned that the circumstances of a person's discharge from employment, involving untested allegations of sexual harassment and misappropriation of funds, "are matters that a reasonable person would find offensive if made public" (App. 86).

Next assessing whether these private facts were of *legitimate* public concern, the trial judge thought the question depends on whether they are *legally appropriate* for public consumption (App. 86-87). Since JSU is a state agency, its release of these documents necessarily calls into play Mississippi's Public Records Act, Miss. Code Ann. §§ 25-61-1 *et seq.*, together with state decisional law and Attorney General Opinions interpreting its provisions (App. 87-90). This careful analysis of State substantive law led the district judge to rule that the documents JSU released to the *Clarion Ledger* about petitioner were "part of a confidential personnel decision" containing evaluation and discipline

matters which are exempt from a public record request under § 25-1-100(1) of the Public Records Act (App. 89-90). The state law tort of invasion of privacy had therefore been proven (App. 90).

The district court's analysis of Mississippi substantive law is precisely the decisionmaking regime mandated by *Erie*. It honors the primacy of State law, both statutory and decisional, in defining the contours of a state law tort claim; it fosters comity with coordinate courts in the State judicial system; it discourages forum shopping; it avoids judge-made rules in federal court which undercut a litigant's rights which she otherwise would enjoy in State court; and it discourages the development of federal common law in order to assess a litigant's State law claims.

None of these outcomes which *Erie* fosters is furthered by the Panel's unprincipled, *ad hoc* determination that the Restatement (Second) of Torts § 652D *alone* should govern the viability of petitioner's state law invasion of privacy claim. Its reliance on the Restatement to the exclusion of the Public Records Act and other substantive state law interpreting its provisions is misplaced and ultimately improper as a matter of constitutional law, undercutting *Erie's* pragmatic federalism. Certiorari should be granted because "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by th[e] Court, or has decided an important federal question in a way that conflicts with relevant decisions of th[e] Court." Supreme Court Rule 10(c).

As *Erie* makes clear, the law to be applied in exercising the lower court's supplemental jurisdiction "is the law of the state...[a]nd whether the law of the state shall be declared *by its Legislature in a statute* or by its highest court in a decision is not a matter of federal concern." 304 U.S. at 78 (emphasis supplied). Statutory law is therefore an integral part of State substantive law which federal courts are bound to apply under *Erie*. See, e.g., *Bernhardt v. Polygraphic Co. of America*, 350 U.S. 198, 205 (1956) (state's decisional law should be followed by federal courts unless undermined by a state's "legislative development"); *Nedlloyd Lines B.V. v. Superior Court*, 834 P.2d 1148, 1151 n.2 (Cal. 1992) (*en banc*) (In applying California law, its statutory choice-of-law provisions for contracts subject to the UCC supercede Restatement's approach).

Because JSU is a state agency, its release of private facts about petitioner, its employee, in the form of her confidential personnel records necessarily invokes Mississippi's Public Records Act and its series of exemptions which define the dimensions of the right of privacy petitioner enjoyed as an employee of this state agency. The Panel's refusal to accommodate into its analysis of substantive state law this statutory scheme which bears directly on this controversy is constitutional error in defiance of *Erie's* mandate that it perform this very function.

If the Panel had hewed to *Erie* and applied the provisions of the Public Records Act to this claim, it would have been constrained to conclude that petitioner's personnel records, protected as they were from public disclosure by § 25-1-100(1)'s exemption, could not have been the subject of *legitimate* public

concern because they were not *legally appropriate* for public consumption under the terms of the statute.

As a head coach at a public university, petitioner agreed below that the media has a legitimate interest in events surrounding her termination. Fair enough. But when the dissemination of purely private facts in the form of unproven allegations about her discharge----consisting, among other things, of sexual harassment and misappropriation of school funds----is sourced by her own personnel records which JSU intentionally released in violation of the Public Records Act, an invasion of privacy claim has been plausibly proven. The release of these records was highly offensive to a reasonable person and because they were protected from public inspection by the Public Records Act, they were not *legally appropriate* for public consumption and could not have contained facts of *legitimate* public concern.

In the face of this substantive law providing a clear foundation for petitioner's invasion of privacy claim, the Panel's sole reliance instead on the Restatement to reverse the judgment in petitioner's favor is fundamental error and a denial of due process. Regardless of whether the courts of Mississippi have accepted Restatement (Second) of Torts § 652D's two-factor test for liability when one gives publicity to the private life of another, see *Franklin Collection Service, Inc. v. Kyle*, 955 So.2d 284, 291 (Miss. 2007); *Young v. Jackson*, 572 So. 2d 378, 381-382 (Miss. 1990), the inquiry into State substantive law does not end there. The various Restatements of the law published by the American Law Institute are a series of treatises which synthesize existing common law into principle or rules.

But as secondary sources of only persuasive value, they do *not* replace controlling state precedents or statutes and, more importantly, they cannot take the place of state statutory law bearing directly on the controversy. Instead, the substantive State law to be applied by federal courts under *Erie* is *not* the Restatement but rather "the law of state...declared by its Legislature in a statute or by its highest court in a decision...." 304 U.S. at 78.

Even if the Panel's resort to § 652D of the Restatement could be justified, *comment b* to this section anticipates the existence of State statutes bearing directly on the circumstances where one gives publicity to the private life of another. Addressing a person's "*Private Life*," c*omment b* makes the point that even if a person chooses to work for a public employer, if her employment record "is one not open to public inspection, as in the case of income tax returns, it is not public, and there is an invasion of privacy when it is made so." Thus if Mississippi enacts a statute which prohibits the public inspection of personnel records of employees of state agencies, any assessment under the Restatement of an invasion of privacy claim based on the improper release of those records must take into account this statute in order to measure the privacy rights of those it seeks to protect. See *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 496 (1975) ("If there are privacy interests to be protected..., the States must respond by means which avoid public documentation or other exposure of private information.").

In this way, liability under the Restatement § 652D depends on petitioner's employment records

being of *legitimate* public concern, an inquiry that depends on whether they are *legally appropriate* for public consumption. But this determination can only be answered by a thorough analysis of the Public Records Act and the zone of privacy it creates for petitioner as an employee of a state agency. The Panel's failure to make this analysis, even under Restatement § 652D, is constitutional error because it is at odds with *Erie's* mandate to carry out this precise inquiry.

That petitioner's invasion of privacy claim was facially not one for violation of the Public Records Act, as the court of appeals observed, is irrelevant. Petitioner's common law claim for invasion of privacy hinged on whether the personnel records JSU unlawfully disseminated were *legally* appropriate for public consumption, a question which the Public Records Act answers in the negative. The violation of the statute is therefore only one element of petitioner's cause of action rather than the cause of action itself.

Finally, this Court has made clear that statutes like Mississippi's Public Records Act are valid exercises of legislative power which extend privacy rights *beyond* those recognized by the common law and by the Constitution, giving documents within their ambit protection from claims that they are legally appropriate for public consumption. See, e.g., *National Archives and Records Admin. v. Favish*, 541 U.S. 157, 170 (2004); *U.S. Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749, 762-764 & n.13 (1989). By refusing to consider the Public Records Act as an integral part of Mississippi's substantive law to be applied to this controversy, the Panel has effectively repealed a substantial portion of privacy law in

Mississippi, denied petitioner the privacy rights to which she would otherwise be entitled in state court, and undermined Mississippi's public policy of protecting its citizens from harm caused by the irresponsible dissemination of private facts contained in protected public documents.

CONCLUSION

For the reasons identified herein, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Fifth Circuit and, ultimately, to vacate and reverse the judgment to the extent that it affirmed the trial judge's jury instructions on causation regarding petitioner's Title IX retaliation claim and vacated the district court's judgment regarding her invasion of privacy claim, remanding the case to the district court for a new trial on her Title IX retaliation claim and reinstatement of the judgment on her invasion of privacy claim, or provide petitioner with such further relief as is fair and just in the circumstances of this case.

Respectfully submitted,

Nick Norris
Counsel of Record
Watson & Norris, PLLC
1880 Lakeland Drive
Suite G
Jackson, MS 39216
(601) 253-1179
nick@watsonnorris.com

United States Court of Appeals, Fifth Circuit.

Denise TAYLOR-TRAVIS, Plaintiff–Appellee Cross-Appellant,

v.

JACKSON STATE UNIVERSITY, Defendant–Appellant Cross-Appellee.

No. 17-60856
FILED January 6, 2021

Appeal from the United States District Court for the Southern District of Mississippi, USDC No. 3:12-CV-51, Henry T. Wingate, U.S. District Judge

Attorneys and Law Firms

Robert Nicholas Norris, Louis Hanner Watson, Jr., Esq., Watson & Norris, P.L.L.C., Jackson, MS, for Plaintiff - Appellee Cross-Appellant.
LaToya Cheree Merritt, Gregory Todd Butler, Esq., Phelps Dunbar, L.L.P., Jackson, MS, for Defendant - Appellant Cross-Appellee.

Before OWEN, Chief Judge, and WIENER and DENNIS, Circuit Judges.

Opinion

PRISCILLA R. OWEN, Chief Judge:

Denise Taylor-Travis sued Jackson State University after the university terminated her employment. She alleged violations of Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972, and she brought state-law claims for breach of contract,

breach of the implied covenant of good faith and fair dealing, and invasion of privacy. A jury awarded Taylor $182,000 for her breach of contract claim but found no liability on her claim for breach of the implied covenant of good faith and fair dealing and found no violations of Title VII or Title IX. The district court found in favor of Taylor on her invasion of privacy claim and awarded her $200,000. Jackson State appeals the breach of contract and privacy awards, and Taylor appeals the Title IX retaliation verdict, contending the jury instructions were infirm. We affirm the district court's judgment as to the breach of contract and Title IX claims and reverse as to the privacy claim.

I

Jackson State University hired Denise Taylor-Travis as the head coach of the women's basketball team in 2001. Her employment agreement was subsequently extended through 2013. In March 2011, several members of Taylor's team began complaining about mistreatment by Taylor. The team specifically mentioned the following conduct:

> 1. having student–athletes sign blank meal vouchers;
> 2. telling student–athletes that their meal money is based on their performance during games;
> 3. verbally abusing student–athletes;
> 4. removing student–athletes from the team's travel list to provide her husband and son airline tickets;
> 5. questioning student–athletes about their sexual orientation and the sexual orientation of their teammates;

> 6. leaving one student–athlete in the parking lot and another in the athletic training room of the host institution while on travel in another city;
> 7. sharing a personal and confidential conversation with one student–athlete with other student–athletes;
> 8. limiting a student–athlete's playing time because the student–athlete would not change her schedule to accommodate the team's scheduled practice time; and
> 9. drinking alcohol while away on travel with the team.

After Jackson State President Carolyn Meyers was informed of the complaints against Taylor, she requested that the university's internal auditor investigate. Taylor was placed on administrative leave with pay pending the outcome of Jackson State's investigation. Jackson State's internal auditor found that Taylor violated the Athletic Department's Policies and Procedure Manual on multiple occasions by misallocating and misusing university funds. In sum, the auditor concluded that Taylor owed Jackson State $4,544.44 for misappropriating university funds.

Following the completion of the audit, Jackson State sent Taylor a notice of intent to terminate her employment for cause. A few days later, Taylor's counsel responded with a letter requesting arbitration. Taylor's employment was officially terminated on June 29, 2011. At that time, Taylor had two years and $182,000 remaining on her contract. Jackson State sent another letter the next day, contending that the arbitration provision in Taylor's employment contract was unenforceable.

Before Taylor's employment was officially terminated, a local newspaper, *The Clarion-Ledger*, sent Jackson State a public records request seeking information regarding communications between the university and Taylor. Jackson State withheld numerous documents as privileged under Mississippi law, but ultimately provided the newspaper with nine pages of information regarding Taylor. Three days later, *The Clarion-Ledger* posted on its online blog that Jackson State had terminated Taylor's employment for several reasons, including sexual gender stereotyping, verbal abuse, and misappropriation of university funds.

Taylor sued Jackson State, claiming: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) invasion of privacy; and (4) sex discrimination and retaliation under Title VII of the Civil Rights Act of 1964 and Title IX of the Education Amendments of 1972. Each of the claims except for invasion of privacy were tried before a jury. After a six-week trial, the jury returned a verdict (1) awarding Taylor $182,000 on her breach of contract claim; (2) awarding Taylor $0 on her claim for breach of an implied covenant of good faith and fair dealing; and (3) finding for Jackson State on the Title VII and Title IX claims. As for the invasion of privacy claim, the district court found that Jackson State was liable and awarded Taylor $200,000 in damages.[1]

After the district court entered final judgment, Jackson State filed a motion for judgment as a matter of law or, in the alternative, for a new trial or a remittitur of damages on the breach of contract and invasion of privacy claims. Taylor then filed a motion for new trial regarding her Title IX retaliation claim, contending that the district court improperly instructed the jury on

causation. The district court denied both motions.[2] Both parties appeal.

II

Jackson State asks the court to reverse and render judgment in its favor on Taylor's breach of contract claim, or, alternatively, to order a new trial of that claim before a different district judge.

A

Jackson State argues that Taylor's breach of contract claim fails because Taylor never showed that Jackson State breached Taylor's employment contract. We review a grant or denial of a motion for judgment as a matter of law de novo.[3] "Judgment as a matter of law is appropriate if 'there is no legally sufficient evidentiary basis for a reasonable jury to find for [a] party on [an] issue.' "[4] "Reviewing all of the evidence in the record, a 'court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence.' "[5] "[T]he court 'must disregard all evidence favorable to the moving party that the jury is not required to believe.' "[6]

Taylor's claim for breach of contract hinges on her contention that Jackson State lacked cause to terminate her employment. Under the terms of Taylor's contract, if Jackson State terminated Taylor without cause, it was required to pay her "the remaining amount owed to [her] under" the contract. Conversely, if Jackson State terminated Taylor for cause, Jackson State was "obligated to pay [her] all amounts owing *up to the date of termination only*." Taylor contends that Jackson State breached its contract with her by terminating her

without cause and not paying her the entire amount owed under the contract.

The contract defined "cause" as:

> (i) deliberate, serious and willful violations of Head Coach's duties defined in the Agreement or refusal or unwillingness to perform such duties in good faith; or
> (ii) any conduct of Head Coach in violation of an applicable criminal statute; or
> (iii) knowingly committing or condoning a major violation or a pattern of uncorrected secondary violations of NCAA rules and/or conference rules.
> The contract also provided that "involvement in a deliberate and serious violation of any law, regulation, rule, by-law, policy or constitutional provision of the State of Mississippi, the Board, the NCAA, conference or any other governing authority may result in suspension without pay and/or termination of this contract."

Jackson State argues that the undisputed evidence establishes that Taylor engaged in conduct that gave Jackson State cause to fire her, including misappropriating funds in violation of the school's travel and reimbursement policies and mistreating student–athletes. We disagree.

The evidence regarding player mistreatment conflicted. Taylor testified that she did not mistreat her players and that any allegation to the contrary was "absolutely false." Taylor specifically stated that she has "no problem with what [a student–athlete's] sexual preference is," that she recruited many players knowing their "alternative lifestyle," and that she has "absolutely not ... ever treated a player that lived the alternative

lifestyle any different." The record contains evidence contradicting Taylor's testimony. However, Taylor's testimony provides legally sufficient evidence for the jury's conclusion that Taylor did not mistreat her players in a manner that gave Jackson State cause to fire her.

Likewise, the jury's determination that Jackson State did not have cause to terminate Taylor for misappropriating funds was based on legally sufficient evidence. Even if the evidence showed that Taylor misappropriated funds, doing so only gave Jackson State cause to fire her if the misappropriations amounted to "deliberate, serious and willful violations of [Taylor's] duties defined in the Agreement or refusal or unwillingness to perform such duties in good faith." Taylor presented evidence that she engaged in the complained of fund-management activities pursuant to the instructions of Jackson State's business manager, that she had previously engaged in the same activities without objection from the university, and that male coaches engaged in the same activities without reprimand. Drawing all reasonable inferences in favor of Taylor, the jury had sufficient evidence to conclude that any policy violation was not "deliberate, serious and willful" and that Taylor performed her duties "in good faith." A reasonable jury could have concluded that Taylor's management of funds did not give Jackson State cause to terminate her employment.

B

Jackson State argues that, at a minimum, it should be granted a new trial on Taylor's breach of contract claim. Jackson State argues that the district court erroneously excluded a proposed jury instruction

and abused its discretion in its overall handling of the case.

1

Jackson State proposed the following jury instruction: "In deciding whether Jackson State was justified in its decision to terminate Plaintiff, you may not consider Plaintiff's length of employment or Jackson State's failure to discover Plaintiff's misconduct sooner. You also must not consider whether Jackson State has tolerated similar misconduct by other employees."

This court reviews a refusal to provide a requested jury instruction for abuse of discretion.[7] "[T]he district court's refusal to give a requested jury instruction constitutes reversible error 'only if the instruction 1) was a substantially correct statement of law, 2) was not substantially covered in the charge as a whole, and 3) concerned an important point in the trial such that the failure to instruct the jury on the issue seriously impaired the [party's] ability to present a given [claim].' "[8]

The district court did not abuse its discretion by refusing to give Jackson State's proposed instruction because it was not a substantially correct statement of law. Jackson State argues that a 1990 Mississippi Supreme Court case, *Hoffman v. Board of Trustees, Eastern Mississippi Junior College*, supports its instruction.[9] In *Hoffman*, the Mississippi Supreme Court stated that the issue before the court was whether Hoffman breached his contract, not "whether [Hoffman's] employer has failed to act upon similar past deficiencies."[10] But here, unlike in *Hoffman*,[11] the question of breach implicates Jackson State's past handling of similar situations because the jury had to

decide whether Taylor performed her duties in good faith and whether any violations she committed were deliberate, serious, and willful. Thus, *Hoffman* is not on point. The district court did not abuse its discretion in declining to give Jackson State's proposed instruction.

2

Jackson State argues that the district court's overall conduct in this case justifies a new trial on the breach of contract claim, or, if the panel remands, transfer to a different judge. Jackson State contends that the district court abused its discretion by allowing the arbitration provision in Taylor's contract to become an issue at trial and by questioning witnesses in a manner that suggested partiality toward Taylor.

The district court is afforded broad discretion in handling trial procedure and the conduct of trial.[12] "However, discretion has its limits."[13] We must decide whether the cumulative effect of the district court's decisions and conduct amounted to an abuse of the court's broad discretion.[14] Furthermore, even if the district court abused its discretion in making an evidentiary ruling, we will affirm that ruling if the district court's error was harmless.[15]

Assuming, *arguendo*, that the district court erred in allowing Taylor to present evidence regarding the arbitration provision, that error was harmless. The district court instructed the jury that breach of the arbitration provision "cannot support a breach of contract determination." The district court stated that Taylor was not "seeking to recover any sum of money for an alleged breach of the alleged arbitration clause." The district court reiterated that the arbitration issue should only be considered with regards to the Title VII and

Title IX claims, which the jury rejected. Further, the district court explained precisely how the jury could reach a verdict for Taylor on the breach of contract claim—by finding that Jackson State did not have cause to fire her. Any error was harmless and does not justify ordering a new trial.

Jackson State also argues that the district court improperly challenged the credibility of witnesses in front of the jury. Jackson State did not object at trial, so we review for plain error.[16] "Plain error review requires four determinations: ***1115*** whether there was error at all; whether it was plain or obvious; whether the defendant has been substantially harmed by the error; and whether this court should exercise its discretion to correct the error in order to prevent a manifest miscarriage of justice."[17] Generally, a judge "may comment on the evidence ... [and] question witnesses and elicit facts not yet adduced or clarify those previously presented," but must do so in a neutral manner.[18] The question for this court is whether the district court "stray[ed] from neutrality" in its interactions with witnesses.[19]

Jackson State contends that the district court did not act with neutrality when interacting with two witnesses. First, the court questioned Marchetta Parker, a member of Taylor's team, who accused Taylor of sexual harassment. The court questioned Parker about what Taylor did, if anything, that Parker believed amounted to sexual harassment. Jackson State claimed that it had cause to fire Taylor because she sexually harassed her players. Asking a player to clarify how she was harassed when the question of harassment was before the jury does not constitute plain error.

Second, Jackson State argues that the district court questioned Shaneese McLin, another member of

Taylor's team, in a manner that suggested that McLin had discussed her testimony with other witnesses. The court asked her about instances, brought up on cross-examination, when McLin dined and visited with other team members during trial. A judge is permitted to clarify facts previously presented by a witness.[20] The court's questioning does not amount to plain error. Moreover, if the court's questioning created any more prejudice than McLin's cross-examination, it was slight. Therefore, even if the court erred in its questioning, that error did not affect Jackson State's substantial rights.[21]

Further, the district court instructed the jury that "you may not rely upon any impressions that you have as to the court's view of the facts in this case." The court specifically admonished the jury not to draw any conclusions from its questioning of any witnesses, stating that "you, the jury, would not have any idea as to why I asked some of those questions." We have held that a curative instructions like those given by the district court operate against a finding of plain error.[22] Considering the record as a whole, the district court's questioning of witnesses does not constitute plain error or grounds for a new trial.

III

Jackson State argues that this court should reverse and render judgment on Taylor's privacy claim because she failed to prove any element of her claim. We conclude that Taylor's privacy claim fails as a matter of law.

For matters tried to the bench, "we review a trial court's findings of fact for clear error and its conclusions of law de novo."[23] "Under clear error review, if the trial court's factual findings are 'plausible in light of the

record viewed in its entirety, we must accept them, even though we might have weighed the evidence differently if we had been sitting as a trier of fact.' "[24]

Taylor argues that Jackson State invaded her privacy when it released documents to *The Clarion Ledger* regarding her potential termination. Jackson State released nine pages of documents related to Taylor. Five of those pages related to Taylor's complaint that Jackson State supported men's teams and coaches to a greater degree than her team. Those five pages did not mention any allegations against Taylor. The remaining four pages apprised Taylor of the allegations against her, notified Taylor that she was being placed on administrative leave, and informed Taylor that the university intended to terminate her employment. The allegations were described as:

> • Student and Student-Athlete Well-Being
> -Sexual Orientation Harassment/Gender Stereotyping
> -Emotional and Verbal Abuse
> • Violation of University Policy
> -Per diem Policy
> -Travel and Reimbursement Policy
> • Misappropriation of University Funds
> -Per diem to Family Member
> -Handling of Laundry Money
> -Airline Ticket Purchase for Family Member(s)
> • Academic Standards and Practices of the Program
> -Forcing and or coercing student-athletes to change class schedules
> -Threats of punitive outcomes for failure to keep athletic obligations (i.e., practice) vs. academic obligations (attending class).

Taylor claims that Jackson State invaded her privacy by publicly disclosing private facts about her life. The Second Restatement of Torts, which has been adopted by Mississippi,[25] provides:

> One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that
>
> (a) would be highly offensive to a reasonable person, and
>
> (b) is not of legitimate concern to the public.[26]

Accordingly, to recover on her claim for invasion of privacy, Taylor must prove (1) that Jackson State gave publicity to private facts (2) that would be highly offensive to a reasonable person and (3) that were not of legitimate concern to the public.

Because we conclude that the facts disclosed by Jackson State were of legitimate concern to the public, we reverse the district court's judgment. The Second Restatement provides that "[o]ne who voluntarily places himself in the public eye, by engaging in public activities, or by assuming a prominent role in institutions ... having general ... social or similar public interest ... cannot complain when he is given publicity that he has sought."[27] Further, "publicity to information concerning either voluntary or involuntary public figures is not limited to the particular events that arouse the interest of the public."[28] That interest can extend "to further information concerning the individual and to facts about him, which are not public and which, in the case of one who had not become a public figure, would be regarded as an invasion of his purely private life."[29] This case fits clearly within that realm. Taylor admitted that as a head

coach at a major public university, she was in the public eye. The public's interest extends to the reason for her termination.

The Second Restatement also provides that "matters of the kind customarily regarded as 'news' " are within the scope of legitimate public concern.[30] Once again, Taylor admitted that the media had an interest in the events surrounding her termination. She stated that it is the media's responsibility "to report [on] any sports or activities ... going on" at Mississippi universities. When asked if her termination was a matter of public interest, she answered, "Correct." We agree.

The district court determined that the information released by Jackson State was of interest to the public but was not a matter of legitimate concern.[31] The court concluded that the documents fell within the Mississippi Public Records Act's exception for "personnel records" and that Jackson State violated its own policies by releasing the documents.[32] However, this is a common-law invasion of privacy claim and not a claim for violation of the Mississippi Public Records Act. Regardless of the alleged statutory violation, Taylor still had to prove the elements of the claim she brought. Also, whether Jackson State violated its own policy has no bearing on whether the information it released constitutes a legitimate public concern. A public employee's termination for, among other things, allegedly using public funds for private matters is a matter of legitimate concern to the public. The district court clearly erred in finding otherwise. Taylor's privacy claim fails as a matter of law.

IV

Taylor seeks a new trial on her Title IX retaliation claim, arguing that the district court abused its discretion when it excluded her proposed jury instruction on causation. Taylor requested that the court give the jury a "but-for" causation instruction. She argues that the district erred when it instructed the jury that Taylor may prevail if the jury finds "that she was terminated solely as a consequence of complaints alleging noncompliance with the substantive provisions of Title IX." As discussed above, to prevail on appeal, Taylor's instruction must have been a correct statement of the law, not covered in the charge as a whole, and related to an important part of the trial that impaired her ability to present her claim.[33]

The parties dedicate their briefs to discussing the continued validity of this court's statement in *Lowrey v. Texas A&M University System* that plaintiffs may bring a retaliation claim under Title IX if an employee "suffer[s] unlawful retaliation solely as a consequence" of Title IX complaints.[34] Taylor argues that the combination of three Supreme Court decisions overruled *Lowrey* and implemented a but-for causation standard for all retaliation claims. Jackson State argues that *Lowrey* remains good law because two of the Supreme Court cases cited by Taylor did not address Title IX retaliation claims and the third did not clarify whether the Title IX complaint has to be the sole reason for the adverse employment action.

What neither party considers is whether *Lowrey* actually imposed a sole causation standard. A closer look at *Lowrey* reflects that it did not. In *Lowrey*, this court considered whether 34 C.F.R. § 100.7(e), the regulation implementing and enforcing Title IX, created "an implied private right of action to vindicate [its] anti-retaliation provisions."[35] The *Lowrey* court recognized

that under *Lakoski v. James*,[36] Title VII provides the exclusive remedy for individuals alleging employment discrimination on the basis of sex in federally funded educational institutions.[37] The court explained that although Title VII preempts "a private right of action for *employment discrimination* under title IX," Title VII "does not prohibit retaliation against complainants who challenge the misallocation of resources in violation of title IX, as such complaints are wholly unrelated to the discriminatory employment practices proscribed by title VII."[38] Thus, for a Title IX retaliation claim, courts must " 'strip away' any allegations that would support a private cause of action for retaliation under title VII" and "distinguish between retaliation suffered by [the plaintiff] as a consequence of her participation in complaints and investigations challenging alleged employment discrimination by [the university] and retaliation suffered as a consequence of her participation in complaints and investigations challenging alleged violations of title IX."[39] The language seized on by the parties appears in a one-sentence summary of the court's legal conclusion included at the end of the opinion, which states "34 C.F.R. § 100.7(e) implies a private right of action for retaliation, narrowly tailored to the claims of employees who suffer unlawful retaliation solely as a consequence of complaints alleging noncompliance with the substantive provisions of title IX."[40]

Reading the phrase "solely as a consequence of complaints alleging noncompliance with the substantive provisions of title IX" as establishing a sole causation standard stretches *Lowrey* too far. *Lowrey* examined whether a Title IX retaliation claim could be based on a complaint about conduct prohibited by Title VII and held that it could not. *Lowrey* did not focus on the causation standard in Title IX retaliation claims. To the

extent that it addressed that issue, *Lowrey* stated that "the anti-retaliation provision of title IX is similar to those of title VII and the ADEA and should be accorded a similar interpretation."[41] Accordingly, *Lowrey* did not announce a sole causation standard for Title IX retaliation claims; it suggested that the causation standard for Title IX claims should be the same as the causation standard for Title VII claims while clarifying that complaints about conduct barred by Title VII could not form the basis of a Title IX claim.

Regardless, a new trial is not warranted because the district court's instruction "substantially covered"[42] the correct standard: that there must be a "causal connection" between the Title IX complaint and the adverse employment action.[43] The district court gave the following instruction on the Title IX claim:

> To establish a claim of retaliation under Title IX, plaintiff must demonstrate the following by a preponderance of the evidence: One, protected activity under Title IX; two, an adverse employment action; and three, a causal connection between the two, that is, a causal connection between exercise of the protected activity under Title IX and an adverse employment action.
>
> Because a Title IX retaliation claim only covers conduct protected by Title IX, the plaintiff may prevail only if you, the jury, find that she was terminated solely as a consequence of complaints alleging noncompliance with the substantive provisions of Title IX. It is not enough that you may believe plaintiff was terminated for complaints related to her own individual employment, for that is not protected activity covered by Title IX.

> Even if you find that plaintiff engaged in conduct protected by Title IX, plaintiff also bears the burden of proving a causal link between the two, between any Title IX protected activity and termination of her employment. Her subjective belief is insufficient to prove that protected activity under Title IX resulted in her termination. Again, the plaintiff here would have to prove this matter before you.

The district court's instruction substantially covered the causation standard. The first paragraph states that the plaintiff must show "a causal connection between exercise of the protected activity under Title IX and an adverse employment action" without elaborating upon what qualifies as a "causal connection." Similarly, the third paragraph states that a plaintiff must prove a "causal link" between the protected activity and termination of her employment without further elaboration. Neither paragraph one nor paragraph three contains language that would lead a jury to believe that the protected activity must be the sole reason for Taylor's termination.

While the second paragraph states that Taylor can only prevail if she was terminated "solely as a consequence of complaints alleging noncompliance with the substantive provisions of Title IX," that statement must be read in context of the entire paragraph. The role of the second paragraph was not to modify the requisite causal connection between Taylor's protected activity and her termination—a topic addressed in paragraphs one and three—but to explain *Lowrey*'s holding that a Title IX retaliation claim cannot be based on Title VII-related "complaints related to [Taylor's] own individual employment." Accordingly, the statement that Taylor

can only prevail if she was terminated "solely as a consequence of complaints alleging noncompliance with the substantive provisions of Title IX" should be read as distinguishing complaints about noncompliance with Title IX from "complaints related to [Taylor's] own individual employment," not as establishing a causation standard. Consequently, while the district court's instruction is not a model of clarity, it did not impose a heightened causation standard. Denying Taylor's proposed jury instruction was not an abuse of discretion or grounds for a new trial.

* * *

For the foregoing reasons, we AFFIRM the district court's judgment regarding the breach of contract claim and the Title IX retaliation claim. We REVERSE the district court's judgment on Taylor's invasion of privacy claim and REMAND to the district court with instructions to enter judgment in favor of Jackson State on that claim.

984 F.3d 1107, 385 Ed. Law Rep. 458, 2021 IER Cases 3517

Footnotes

1*Taylor-Travis v. Jackson State Univ.*, No. 3:12-CV-51-HTW-LRA, 2014 WL 12779207, at *10 (S.D. Miss. Aug. 1, 2014).

2*Taylor-Travis v. Jackson State Univ.*, No. 3:12-CV-51-HTW-LRA, 2017 WL 6604567, at *20 (S.D. Miss. Dec. 22, 2017).

3*Industrias Magromer Cueros y Pieles S.A. v. La. Bayou Furs Inc.*, 293 F.3d 912, 918 (5th Cir. 2002) (citing *Stokes v. Emerson Elec. Co.*, 217 F.3d 353, 356 (5th Cir. 2000)).

4*Id.* (alterations in original) (citation omitted); *see also* FED. R. CIV. P. 50(a)(1) (stating that a court may grant

judgment as a matter of law if "the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue").

5*Industrias*, 293 F.3d at 918 (quoting *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000)).

6*Id.* (quoting *Reeves*, 530 U.S. at 151, 120 S.Ct. 2097).

7*Kanida v. Gulf Coast Med. Pers. LP*, 363 F.3d 568, 578 (5th Cir. 2004) (quoting *United States v. McClatchy*, 249 F.3d 348, 356 (5th Cir. 2001)).

8*Id.* (second and third alteration in original) (quoting *McClatchy*, 249 F.3d at 356).

9567 So. 2d 838 (Miss. 1990).

10*Id.* at 842.

11*See id.* at 839-40 (listing grounds for termination without mentioning an intent requirement).

12*Sims v. ANR Freight Sys., Inc.*, 77 F.3d 846, 849 (5th Cir. 1996).

13*Id.*

14*Id.*

15*Kanida v. Gulf Coast Med. Pers. LP*, 363 F.3d 568, 581 (5th Cir. 2004) (quoting *Green v. Adm'rs of the Tulane Educ. Fund*, 284 F.3d 642, 660 (5th Cir. 2002)).

16*Rojas v. Richardson*, 713 F.2d 116, 117 (5th Cir. 1983).

17*United States v. Chavez-Hernandez*, 671 F.3d 494, 497 (5th Cir 2012) (citing *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); *United States v. Infante*, 404 F.3d 376, 394 (5th Cir. 2005)).

18*Moore v. United States*, 598 F.2d 439, 442 (5th Cir. 1979) (citations omitted).

19*Id.*

20*Id.* (citation omitted).

21*See United States v. Bermea*, 30 F.3d 1539, 1571 (5th Cir. 1994).

22*United States v. Lankford*, 196 F.3d 563, 573 (5th Cir. 1999); *Bermea*, 30 F.3d at 1571-72; *see also Richmond v. Horace Mann Ins. Co.*, 480 F. App'x 747, 749-50 (5th Cir. 2010).

23*Ali v. Stephens*, 822 F.3d 776, 783 (5th Cir. 2016) (citing *Garner v. Kennedy*, 713 F.3d 237, 242 (5th Cir. 2013)).

24*Id.* (quoting *Anderson v. Sch. Bd. of Madison Cty.*, 517 F.3d 292, 296 (5th Cir. 2008)).

25*Franklin Collection Serv., Inc. v. Kyle*, 955 So. 2d 284, 291 (Miss. 2007); *Young v. Jackson*, 572 So. 2d 378, 382 (Miss. 1990).

26RESTATEMENT (SECOND) OF TORTS § 652D (AM. LAW INST. 1977).

27*Id.* § 652D cmt. e.

28*Id.* § 652D cmt. h.

29*Id.*

30*Id.* § 652D cmt. g; *see also City of San Diego v. Roe*, 543 U.S. 77, 83-84, 125 S.Ct. 521, 160 L.Ed.2d 410 (2004) (defining public concern in the First Amendment context as "something that is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication").

31*Taylor-Travis v. Jackson State Univ.*, No. 3:12-CV-51-HTW-LRA, 2014 WL 12779207, at *6-8 (S.D. Miss. Aug. 1, 2014).

32*Id.* at *8.

33*Kanida v. Gulf Coast Med. Pers. LP*, 363 F.3d 568, 578 (5th Cir. 2004).

34117 F.3d 242, 254 (5th Cir. 1997).

35*Id.* at 249-50.

3666 F.3d 751 (5th Cir. 1995).

37*Lowrey*, 117 F.3d at 247.

38*Id.* at 249.

39*Id.* at 247.

40*Id.* at 254.

41*Id.* at 252 n.18.

42*See Kanida v. Gulf Coast Med. Pers. LP*, 363 F.3d 568, 578 (5th Cir. 2004).

43*Willis v. Cleco Corp.*, 749 F.3d 314, 317 (5th Cir. 2014) (stating that, to recover under Title VII, a plaintiff must show that "a causal link exists between the protected activity and the adverse employment action"); *Lowrey*, 117 F.3d at 252 n.18 ("[T]he anti-retaliation provision of title IX is similar to those of title VII and the ADEA and should be accorded a similar interpretation."); *see also Collins v. Jackson Pub. Sch. Dist.*, 609 F. App'x 792, 795 (5th Cir. 2015) (per curiam) ("To establish a prima facie case of retaliation [under Title IX], the plaintiff must show that ... a causal connection exists between the protected activity and the adverse employment action.").

United States District Court, S.D. Mississippi, Northern Division.

Denise TAYLOR-TRAVIS, Plaintiff

v.

JACKSON STATE UNIVERSITY, Defendant

CIVIL ACTION No.: 3:12-CV-51-HTW-LRA
Signed 12/22/2017

Attorneys and Law Firms

Robert Nicholas Norris, Louis H. Watson, Jr., Watson & Norris, PLLC, Jackson, MS, for Plaintiff.

LaToya C. Merritt, Gregory Todd Butler, Phelps Dunbar, LLP, Jackson, MS, for Defendant.

ORDER REGARDING POST-TRIAL MOTIONS

HENRY T. WINGATE, UNITED STATES DISTRICT COURT JUDGE

BEFORE THIS COURT are the following post-trial motions: Jackson State University's Joint Motion for Judgment as a Matter of Law **[Docket no. 67]**[1]; Denise Taylor-Travis's Motion for New Trial **[Docket no. 70]**; and Jackson State University's Motion to Stay Proceedings Regarding Plaintiff's Bill of Costs **[Docket no. 74]**.

This court has reviewed the submissions of the parties, arguments of counsel, and the relevant jurisprudence. As a result, this court is persuaded that Jackson State University's Joint Motion for Judgment as a Matter of Law **[Docket no. 67]** is DENIED. This court is further persuaded that Denise Taylor-Travis's Motion

for New Trial **[Docket no. 70]** is DENIED. Finally, this court is persuaded that Jackson State University's Motion to Stay Proceedings Regarding Plaintiff's Bill of Costs **[Docket no. 74]** is MOOT and DENIED. The reasoning of this court is set out below.

I. JURISDICTION

This lawsuit has taken many twists and turns[2] on its road to resolution. This court is thoroughly familiar with the facts and the procedural history of this matter. That does not mean, however, that this court will not discuss what it has already discussed in previous orders it has issued in this matter.

This court earlier held that it possesses federal question subject-matter jurisdiction over this litigation. *See* [Docket no. 64, attached as an exhibit to this Order]. The plaintiff, Denise Taylor-Travis (hereinafter referred to as "Coach Taylor") filed this lawsuit alleging that her previous employer, defendant Jackson State University (hereinafter referred to as "JSU"), had violated her rights by discriminating against her in violation of Title VII of the Civil Rights Act of 1964, Title 42 U.S.C. § 2000e, *et seq.*[3], and Title IX of the Education Amendments, Title 20 U.S.C. § 1681, *et seq.*[4] Coach Taylor also alleged under state law that JSU had breached her contract and the implied covenant of good faith and fair dealing. Finally, Coach Taylor alleged, also under state law, that JSU had invaded her privacy when it released allegedly confidential records to the press.

Since Coach Taylor alleges violations of her civil rights under the Civil Rights Act, a federal enactment, this court has federal question subject matter jurisdiction under the authority of Title 28 U.S.C. § 1331[5]. This court also finds that it possesses

supplemental jurisdiction over Coach Taylor's state law claims by the authority of Title 28 U.S.C. § 1367.[6]

II. PROCEDURAL HISTORY

Coach Taylor filed her complaint on January 24, 2012. [Docket no. 1]. JSU filed its Answer on March 15, 2012. [Docket no. 5]. On October 30, 2013, this court commenced a jury trial on Coach Taylor claims for: retaliation under Title VII; retaliation under Title IX; breach of contract; and breach of the implied covenant of good faith and fair dealing.

In the pretrial order, the parties stipulated that the jury would determine liability on the federal claims only, and the court would rule on the invasion of privacy claim. The parties also stipulated that the court later would determine whether the remaining state law claims would be submitted to the jury or be decided by this court at a subsequent date. [Docket no. 54]. This court thereafter, without objection, ruled that it would submit all of Coach Taylor's claims to the jury with the exception of the invasion of privacy claim.

After sixteen (16) days of trial, the jury returned a verdict in this matter. The jury found, based on the evidence presented at trial, that JSU had not terminated Coach Taylor because of her gender; nor had JSU terminated Coach Taylor in retaliation for engaging in protected activity under Title VII or Title IX. The jury, however, determined that JSU had breached Coach Taylor's employment contract and the implied covenant of good faith and fair dealing. As a result of that finding, the jury awarded Coach Taylor $182,000.00.[7]

This court subsequently decided the invasion of privacy claim in favor of Coach Taylor. [Docket no. 64]. In so doing, this court awarded Coach Taylor $200,000.00

in compensatory damages, but declined awarding pecuniary damages. [Docket no. 64, P. 20]. This court entered a Judgment on Jury and Bench Verdict on August 1, 2014. [Docket no. 65].

On August 29, 2014, JSU filed its misnamed Joint Motion for Judgment as a Matter of Law. **[Docket no. 67]**[8]. Contemporaneously, JSU filed its Memorandum in Support. [Docket no. 68]. Coach Taylor filed her response in opposition on September 15, 2014. [Docket no. 75]. On September 25, 2014, JSU filed its reply to the response filed by Coach Taylor. [Docket no. 81].

On August 29, 2014, Coach Taylor filed her Motion for New Trial without a supporting memorandum brief. **[Docket no. 70]**. On September 4, 2014, JSU filed its response in opposition to Coach Taylor's motion for a new trial. [Docket no. 71]. Coach Taylor then filed her reply to JSU's response on September 15, 2014. [Docket no. 77].

On August 29, 2014, Coach Taylor filed her bill of costs in this matter. [Docket no. 69]. JSU objected to the bill of costs on September 4, 2014 without a supporting memorandum brief. [Docket no. 72]. On the next day, September 5, 2014, JSU filed its Motion to Stay Proceedings Regarding Plaintiff's Bill of Costs. **[Docket no. 74]**.

III. FACTUAL BASIS

This court on an earlier day set out the facts of this lawsuit as found by this court and the jury during the joint jury and bench trial. [Docket no. 64]. Therefore, this court adopts the recitation of the statement of facts from this court's order dated August 1, 2014. [Docket no. 64, PP. 3-10].

IV. DISCUSSION

a. Joint Motion for Judgment as a Matter of Law (Renewed) or, In the Alternative, for a New Trial or a Remittitur ***[Docket no. 67]***

In its Joint Motion for Judgment as a Matter of Law (Renewed) or, In the Alternative, for a New Trial or a Remittitur **[Docket no. 67]**, JSU asks this court to set aside the jury verdict against it. The crux of JSU's arguments regarding the breach of contract award are threefold: that Coach Taylor failed to present evidence by which a jury reasonably could have found a breach of contract claim in her favor; that this court should have heard the breach of contract claim as a bench trial because Coach Taylor alleged a tortious breach of contract claim, not a simple breach of contract claim; and that the jury instructions that this court denied should have been granted.

JSU also argues that this court erred in ruling that JSU was liable for invasion of privacy because Coach Taylor failed to make a *prima facie* case of invasion of privacy and that Coach Taylor failed to present competent evidence of her damages for invasion of privacy.

Finally, JSU argues that the following alleged errors combined to preclude it from receiving a fair trial: the court's examination of witnesses; and Coach Taylor's references and arguments about JSU's refusal to arbitrate.

i. Standard of Review

JSU submits its motion for a new trial under the authority of Rule 50(b)9 of the Federal Rules of Civil Procedure. Rule 50(b) allows a party to renew a

previously-raised motion for judgment as a matter of law that the court denied. The party, within 28 days of the jury verdict or the bench opinion, may file its renewed motion for judgment as a matter of law. In the lawsuit *sub judice*, this court issued the final judgment based on both the jury and bench trial verdicts on August 1, 2014. JSU filed its Joint Motion for Judgment as a Matter of Law on August 29, 2014, exactly 28 days after this court had issued its judgment.

JSU also campaigns that Rule 59(a)10 of the Federal Rules of Civil Procedure provides procedural support for its motion for a new trial. The standard under Rule 59 is:

> A motion for new trial under Rule 59(a) is an extraordinary remedy that should be used sparingly. Rule 59(a) provides, specifically, that the district court may grant a new jury trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." Although Rule 59(a) does not delineate the precise grounds for granting a new trial, the Fifth Circuit has held that Rule 59(a) allows the district court to grant a new trial if it "finds the verdict is against the weight of the evidence, the damages awarded are excessive, the trial was unfair, or prejudicial error was committed in its course." Still, the decision whether to grant a new trial under Rule 59(a) is left to the sound discretion of the trial judge, and the court's authority is broad.

Howard v. Offshore Liftboats, LLC, 2016 WL 3536799, at *4 (E.D. La. June 28, 2016).

ii. Waiver of Issues

At the pretrial conference in this matter, the parties submitted a Pretrial Order, which they had signed in accordance with Rule 16(e) of the Federal Rules of Civil Procedure[11] and the Local Rules of Civil Procedure for the Southern District of Mississippi Rule 16(j)[12]. The Fifth Circuit recognizes that the final pretrial order governs the manner of the proceedings at trial.

> It is a well-settled rule that a joint pretrial order signed by both parties supersedes all pleadings and governs the issues and evidence to be presented at trial." *Elvis Presley Enters., Inc. v. Capece*, 141 F.3d 188, 206 (5th Cir. 1998) (quoting *Branch–Hines v. Hebert*, 939 F.2d 1311, 1319 (5th Cir. 1991)). Claims, issues, and evidence are narrowed by the pretrial order, thereby focusing and expediting the trial. *Elvis*, 141 F.3d at 206 (claims not preserved in a joint pretrial order were waived); *Branch–Hines*, 939 F.2d at 1319 (the pretrial order asserted the plaintiff's full range of damages). If a claim or issue is omitted from the final pretrial order, it may be waived, even if it appeared in the complaint. *Elvis*, 141 F.3d at 206.

Martin v. Lee, 378 Fed.Appx. 393, 395 (5th Cir. 2010).

The parties' pretrial order that they prepared and signed was submitted to this court on October 16, 2013: signed by this court on October 23, 2013: and entered on the record on December 6, 2013. [Docket no. 54]. In the pretrial order the parties submitted to this court, the parties agreed that:

> 4. The following claims have been filed by the Plaintiff:
>
> a. Plaintiff asserts claims for violation of Title VII—Sex Discrimination/Retaliation and violation of Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, et seq.—Sex Discrimination/Retaliation, *Breach of Contract*, Breach of Implied Covenant of Good Faith and Fair Dealing and Invasion of Privacy.

[Docket no. 54, P. 2, ¶ 4, *RESTRICTED*].

As an initial matter, this court finds that several of JSU's issues that it raised in its Joint Motion for Judgment as a Matter of Law **[Docket no. 67]** were waived by the Pretrial Order dated October 28, 2013. This court has thoroughly reviewed the pretrial order and finds that JSU did not assert that Coach Taylor had claimed a tortuous breach of contract cause of action in her complaint. Moreover, this court finds that JSU did not assert that Coach Taylor was a public figure, a disputed fact that would influence the factual determination of the ultimate trier of fact in this matter. This court is persuaded that it need not reach the issues raised by JSU as JSU has waived these issues in the pretrial order: however, this court will address all of JSU's contentions below.

iii. Breach of Contract

To establish a breach of contract under Mississippi law, the plaintiff must show: "(1) the existence of a valid and binding contract; (2) breach of the contract by the defendant; and (3) money damages suffered by the plaintiff." *Guinn v. Wilkerson*, 963 So. 2d 555, 558 (Miss. Ct. App. 2006)(Quoting *Favre Prop.*

Mgmt., LLC v. Cinque Bambini, 863 So.2d 1037, 1044(¶ 18) (Miss. Ct. App. 2004)).

A. Existence of a Valid and Binding Contract

Both parties point to a contract between them, a contract each contends was valid and binding under Mississippi law. The two parties, each capable of entering a contract, negotiated and formed a contract in 2001, which was renewed on July 1, 2010, with each committed to complete certain obligations. Under this contract, Coach Taylor was to perform as the head coach for JSU's female basketball team, while JSU was to provide support for Coach Taylor and pay her an annual salary. The contract at issue here covered the period of July 1, 2010, through June 30, 2013. JSU terminated the contract in June, 2011.

B. Breach

Coach Taylor contends that JSU, without just cause, breached this contract, to wit, by terminating her contract when she had done nothing wrong, or alternatively, other coaches had acted the same and were not reprimanded for doing so; a fact which Coach Taylor says is further proof that she was doing nothing wrong. At trial, Coach Taylor called a number of witnesses on this claim and also offered her own testimony.

Her proof of breach, summarized, provided as follows: that the male football coaches utilized their expenses the same way that she had; and that she had been a kind and caring coach for the student athletes under her care.

JSU, in response, alleges that it did not breach the valid and binding employment contract it had with Coach Taylor. According to JSU, it had a valid "for cause" reason to terminate the contract early: Coach Taylor, says JSU, was terminated for misappropriations of funds and, additionally, for mistreatment of students. JSU claims that at trial Coach Taylor did not refute the evidence on these points.

To JSU's volley, Coach Taylor fires back that at trial she had presented overwhelming evidence that other coaches had committed the same acts of which she was accused and were not terminated; therefore, she argues, JSU's reasons for terminating her for such acts must be pre-textual. *See Dodge v. Hertz Co.* 124 Fed.Appx. 242 (5th Cir. 2005)(Citing *Wallace v. Methodist Hosp. Sys.*, 271 F.3d 212 (5th Cir. 2001)). Coach Taylor showed at trial that prior to the time period leading up to her termination, she had never been warned that any such acts were illegal, either orally or by any written directive; nor had she been administratively challenged as to her method of recording funds and accounting for same.

Further, Coach Taylor asserts that at trial she presented evidence which refuted the abuse allegations of the students; her evidence, she says, showed her to be a caring and thoughtful coach. *See* [Docket no. 64].

JSU cites *Hoffman v. Board of Trustees*, 567 So.2d 838 (Miss. 1990), in an effort to negate Coach Taylor's argument on pretext, an argument which relies upon "comparisons." Hoffman was the Vocational Director for East Mississippi Junior College (hereinafter referred to as "EMJC"), from 1974 until his termination on September 24, 1987. EMJC renewed Hoffman's employment contract as recently as June 26, 1987, by extending his contract for one (1) year. After Hoffman's

contract had been renewed, James B. Moore became the new President of EMJC, starting on September 16, 1987. When Moore commenced work in his new office, employees of EMJC notified him about Hoffman's deficiencies as Vocational Director. Moore attempted to reassign Hoffman, but the other employees resisted Hoffman's transfer to their departments. Moore subsequently learned that Hoffman was inappropriately handling college funds. As a result, Moore terminated Hoffman's employment and contract on September 24, 1987 citing various causes for his termination.[13]

The Mississippi Supreme Court, which affirmed the dismissal of Hoffman's lawsuit by the Chancery Court of Kemper County, Mississippi, explained its decision as follows:

> It is true that Hoffman was a long-time employee of EMJC and that as recently as June 26, 1987, the Board of Trustees had tendered him a new contract covering the year ending June 30, 1988. On the other hand, the record reflects that his performance had been sub-standard for quite some time. The fact that a school district tolerates sub-standard performance under circumstances such as these hardly constitutes a waiver of the district's prerogative to rely on just cause when it exists and terminate an employment contract. The question is whether Hoffman is in substantial breach of material features of his contract, not how long this has been so, nor whether his employer has failed to act upon similar past deficiencies.

Hoffman, at 842. This court notes that *Hoffman* did not involve, as the lawsuit *sub judice* does, comparing the

malfeasance of one employee with another. To the contrary, *Hoffman* involved an employer who did nothing about one employee's misbehavior for years, and then finally acted upon that employee's own misdeeds when a new president began his own employment. Thus, *Hoffman* stands for the proposition that an employer may terminate its employee for cause even where it had ignored that employee's malfeasance for years. This court is not persuaded by the arguments of JSU that *Hoffman* will provide it relief in the form of a judgment as a matter of law.

JSU further campaigns that "all that matters is whether Jackson State had a good faith belief that Taylor had violated her contractual obligation to promote student well-being." [Docket no. 68, P. 6]. JSU cites a New Jersey Supreme Court case, *Cf. Silvestri v. Optus Software, Inc.*, 814 A. 2d 602 (N.J. 2003), which interpreted New Jersey's employment contract law in finding that "such contracts generally are governed by a subjective standard." [Docket no. 68, P. 6].

The Fifth Circuit, however, has spoken on this same matter:

> An employer's subjective reason for not selecting a candidate, such as a subjective assessment of the candidate's performance in an interview, may serve as a legitimate, nondiscriminatory reason for the candidate's non-selection. (recognizing that *McDonnell Douglas* does not preclude an employer from relying on subjective reasons for its personnel decisions); *see also Chapman v. AI Transport*, 229 F.3d 1012, 1034 (11th Cir. 2000) ("It is inconceivable that Congress intended anti-discrimination statutes to deprive an employer of

> the ability to rely on important criteria in its employment decisions merely because those criteria are only capable of subjective evaluation."). Such a reason will satisfy the employer's burden of production, however, only if the employer articulates a clear and reasonably specific basis for its subjective assessment. *See Burdine*, 450 U.S. at 258, 101 S.Ct. 1089; *Patrick*, 394 F.3d at 316–17; *see also Chapman*, 229 F.3d at 1034 ("A subjective reason is a legally sufficient, legitimate, nondiscriminatory reason if the defendant articulates a clear and reasonably specific factual basis upon which it based its subjective opinion."); *EEOC v. Target Corp.*, 460 F.3d 946, 957–58 (7th Cir. 2006) (agreeing with the Eleventh Circuit that "an employer must articulate reasonably specific facts that explain how it formed its [subjective] opinion of the applicant in order to meet its burden under *Burdine*").

Alvarado v. Texas Rangers, 492 F.3d 605, 616–17 (5th Cir. 2007).

This court is persuaded then that an employer, JSU here, may articulate a clear and reasonably subjective basis for its termination of an employee which would not be discriminatory. While this standard is not materially different than that cited by JSU, this court felt it important to cite to binding precedent within the Fifth Circuit.

In the lawsuit at bar, JSU presented evidence of its alleged reasons for terminating Coach Taylor's employment contract: Coach Taylor allegedly violated JSU's reimbursement policy; Coach Taylor allegedly

misappropriated funds; and allegedly violated JSU's policy by sexual gender stereotyping, verbal abuse, and emotional abuse of the student athletes for whom she was responsible.

This court is not persuaded, though, that JSU is entitled to judgment as a matter of law or to a new trial based on these grounds. Take the reimbursement policy matter. JSU said that Coach Taylor used the team's expense account for her personal expenses, an action which it contends was unlawful and in violation of her employment contract. Coach Taylor responded that all the coaches acted the same way toward the expense accounts of their respective teams and that no one had ever been reprimanded orally or in writing, nor terminated for doing so, nor advised by JSU that such conduct allegedly was unlawful. The jury, which attentively heard all of the evidence, obviously sided with Coach Taylor.

Next is the misappropriation-of-funds basis for terminating Coach Taylor. JSU contended again at trial that Coach Taylor utilized the funds JSU had designated for team expenditures for her personal use, again, an action which JSU contends was unlawful and in violation of her employment contract. Coach Taylor's proof purported to show, once more, that JSU's administrative body had never taken action against any other coach for acting the same way. Similarly, Coach Taylor purported to show at trial that she had not been the recipient of prior warnings, oral or written, relative to her conduct in this manner. The jury accepted Coach Taylor's position; otherwise, on the court's instructions to the jury, that body of fact finders would have found for JSU.

Then, there are the sexual harassment claims not even mentioned by JSU in its closing arguments. JSU contended that Coach Taylor had discriminated against

one of her student athletes because that student was a lesbian. For proof, JSU presented that student athlete who testified that Coach Taylor had inquired of her teammates about that student's sexual orientation and had inquired of that student directly about a domestic violence incident in which that student had been involved. Coach Taylor responded by stating that her inquiries were directed at finding out whether that student athlete was in an abusive relationship, regardless of the sexual orientation of that relationship. JSU also contended that Coach Taylor had inquired about a different student athlete who was "teasing" two (2) of her teammates. Coach Taylor contended that her inquiry was solely to stop a potential love triangle, a circumstance that could cause dissention in the team.
In sum, the jury could have found, as indeed it did, based on the evidence presented, that JSU had intentionally breached its contract with Coach Taylor by terminating her contract early and without good cause to do so.

iv. Bench Trial on Breach of Contract Claim

JSU next argues that it is due a new trial because this court should not have submitted Coach Taylor's breach of contract claim to the jury[14]; instead, says JSU, this court should have heard the breach of contract claims as a bench trial under the authority of the Mississippi Tort Claims Act[15] (hereinafter referred to as "MTCA").

> Although the MTCA does not apply to "pure contract actions," it does apply to claims for tortious breach of contract: "The clear intent of the [L]egislature in enacting [the MTCA] was to immunize the State and its political subdivisions

> from any tortious conduct, including tortious breach of ... contract."

Papagolos v. Lafayette Cty. Sch. Dist., 972 F. Supp. 2d 912, 932 (N.D. Miss. 2013), *amended on reconsideration* (Nov. 13, 2013)(Citing *City of Grenada v. Whitten Aviation, Inc.*, 755 So.2d 1208, 1213 (Miss. Ct. App. 1999)). "Tortious breach of contract requires, in addition to a breach of contract, some intentional wrong, insult, abuse, or negligence so gross as to constitute an independent tort." *Morris v. CCA of Tennessee, LLC*, No. 3:15-CV-00163-MPM-RP, 2017 WL 2125829, at *2 (N.D. Miss. May 16, 2017)(Citing *Southern Natural Gas Co. v. Fritz*, 523 So.2d 12, 19-20 (Miss. 1987)). As this court has discussed *supra*, JSU waived this argument by not including it in the pretrial order that they assented to and signed. This court will address JSU's contention nonetheless.

JSU argues that "[w]hat type of breach of contract claim is at issue is determined by what a party has alleged and argued, not by what the party represents in an effort to avoid MTCA's bench trial requirement." *See Whiting v. U. of Southern Miss.*, 62 So.3d 907, 915 (Miss. 2011). The *Whiting* opinion is relatively sparse when it discusses why the court found that the plaintiff's claims were a tortious breach of contract instead of simple breach of contract.[16]

A review of the facts of *Whiting* shows that Dr. Melissa Whiting alleged that while she was a tenure track assistant professor at the University of Southern Mississippi, the Board of Trustees renewed her contract six (6) times. Dr. Whiting received, as all professors did, a Faculty Handbook which laid out the procedures for obtaining tenure. One of the major factors the Board of

Trustees would consider in granting tenure was the annual evaluations of the professor. Dr. Whiting received five (5) annual evaluations which reflected she received top marks in all categories. When Dr. Whiting applied for tenure, her department head allegedly gave her bad advice, isolated her from the rest of the faculty in her department by moving her to a different building, and circulated rumors that she had committed academic fraud, all in a "quest to scuttle [her] career." After a hearing on her application for tenure, the committee reviewing Dr. Whiting's application recommended that she be promoted to associate professor, but denied her tenure and told her to wait for one (1) more year to apply again. As earlier stated, the Mississippi Supreme Court dealt with this case as a tortious breach of contract, but without much guidance for its approach.

This court finds *Kennedy v. Jefferson Cty., Miss. ex rel. Bd. of Sup'rs* provides some guidance. In *Kennedy*, the plaintiff worked as a hospital administrator for one hospital, and as a consultant for another hospital. During the course of his duties at his hospital administrator job, he terminated a contract with a vendor, who happened to be the son-in-law of a councilman for the Jefferson County Mississippi Board of Supervisors. Shortly thereafter, the Hospital Board terminated the plaintiff's employment contract without notice. The hospital produced evidence that it had terminated the plaintiff for insubordination.

> [The plaintiff] sent a notice of claim because he also made tort claims in his complaint. That he was terminated without cause or notice speaks directly to the breach element, which is common to both claims. The omission of the goal and the animus of Guice against Kennedy are insufficient

> to convert this claim into a tortious one. Although these weigh in favor of such a determination, [the Jefferson County Councilman] had no direct ability to terminate Kennedy's contract, and it is a legal issue as to whether the Hospital Board's "goal" to terminate him was unlawful. The Court finds that [the plaintiff's] claim sounds only in contract.

No. 5:13-CV-226-DCB-MTP, 2015 WL 4251070, at *12 (S.D. Miss. July 13, 2015). To establish a tortious breach of contract courts have generally required more evidence than the parties have shown this court.

JSU asserts that Coach Taylor alleged a tortious breach of contract theory as shown by her pleadings: that JSU "knowingly, willingly, and intentionally" breached its employment contract with her[17]; that JSU "dispatched [an] audit [of] the Women's Basketball Program ... for the clear purpose of terminating [her contract]"[18]; and that the reasons provided for terminating Coach Taylor's employment contract "were simply [JSU's] attempt to divert attention from [its] wrongful actions."[19] Thus, says JSU, Coach Taylor's breach of contract claim was really a tortious breach of contract claim in other clothing.

This court is unpersuaded by JSU's arguments that Coach Taylor alleged and pursued a tortious breach of contract cause of action. The facts, as found by the jury, are that JSU breached its contract with Coach Taylor[20]. Coach Taylor urges this court to find that, despite her allegation of intentional and willful conduct to breach the contract, she did not intend to pursue a claim for tortious breach of contract. This court is persuaded to agree with Coach Taylor, who never sought punitive damages in this lawsuit, which she

would have done had she been pursuing a tortious breach of contract action. Accordingly, this court finds that JSU is not due a new trial based on this court's submission of the breach of contract claim to the jury.

v. Breach of Contract Jury Instruction

JSU says that it was due a jury instruction on the breach of contract claim that stated: "In deciding whether [JSU] was justified in its decision to terminate [Coach Taylor], you may not consider [Coach Taylor's] length of employment or [JSU's] failure to discover [Coach Taylor's] misconduct sooner. You also must not consider whether [JSU] has tolerated similar misconduct by other employees." JSU relies on *Hoffman v. Board of Trustees*, 567 So.2d 838 (Miss. 1990) as its basis for the requested jury instruction. As discussed *supra*, *Hoffman* stands for the proposition of law that an employer may rely on an employee's own misconduct to terminate that employee's employment, even where the employer tolerates the misconduct for a period of time. JSU's requested jury instruction does not encompass the conduct contemplated by *Hoffman*.

Moreover, the requested instruction is overbroad. As submitted, the instruction invades the province of the jury by instructing the jury that Coach Taylor had indulged sooner in misconduct and further, that other employees similarly had behaved with misconduct. The parties had not stipulated as to this twin allegation of misconduct and whether there was such was a jury question. Accordingly, the requested instruction was improper.

This court was not persuaded by JSU's arguments at the time it requested the jury instruction and is not convinced now that JSU should have been

granted the requested instruction. This court, therefore, finds that JSU is not due relief based on the requested jury instruction.

vi. Invasion of Privacy

JSU next claims this court committed error in finding that JSU was liable for invasion of privacy[21]. The tort of invasion of privacy is comprised of four distinct and separate sub-torts which are: intentional intrusion on the solitude or seclusion of another; appropriation of another's identity for an unpermitted use; public disclosure of private facts; and holding another in a false light to the public. *See Candebat v. Flanagan*, 487 So.2d 207, 209 (Miss. 1986). In the lawsuit at bar, Coach Taylor sought damages under the public disclosure of private facts, a sub-tort of invasion of privacy.

JSU campaigns that to prove a *prima facie* case of invasion of privacy—public disclosure of private facts—this court had to find that: 1. JSU publicly provided private facts; 2. that the release of those private facts would be highly offensive to a reasonable person; and 3. that those private facts were not a legitimate concern to the public. *See Young v. Jackson*, 572 So. 2d 378 (Miss. 1990).[22] JSU challenges all three elements of the *prima facie* case.

JSU says that Coach Taylor presented no evidence of the release of private facts as contemplated by the relevant jurisprudence. JSU cites two (2) cases where courts found that parties had released private facts based on the release of medical records or school records.[23] According to JSU, the "released facts" merely involved allegations against Coach Taylor for misconduct, allegations which ultimately led JSU to terminate her employment contract early.

JSU asserts further that it (JSU) did not actually "release" the private facts publicly; rather, an independent organization did so, The Clarion-Ledger Newspaper. JSU urges this court to find that after The Clarion-Ledger filed a public records request, JSU simply responded in accordance with its duties under the authority of Miss. Code § 25-61-1 *et seq*, the Mississippi Public Records Act (discussed further *infra*). Thus, says JSU, it did not release records to the public, but disclosed those matters to a third party, and this third party disclosed the information to the public at large.

JSU's position has no merit here:

> [I]t is not an invasion of the right of privacy, within the rule stated in this [opinion], to communicate a fact concerning the plaintiff's private life to a single person or even a small group of persons. On the other hand, any publication in a newspaper or a magazine, even of small circulation, or in a handbill distributed to a large number of persons, or any broadcast over the radio, or statement made in an address to a large audience, is sufficient to give publicity within the meaning of the term as it is used in this Section. The distinction, in other words, is one between private and public communication. [*Williamson Ex Rel. Williamson v. Keith*,] 786 So.2d [390,] 396 [(Miss. 2001)] (citing Restatement (Second) of Torts § 652D cert. A (1977)).

Ekugwum v. City of Jackson, Miss., 2010 WL 1490247, at *4 (S.D. Miss. Apr. 13, 2010). This court finds that by disclosing the identified information to The Clarion-Ledger, JSU should have reasonably foreseen that The

Clarion-Ledger would publish that identified information. This court, therefore, finds that JSU's argument is myopic and this court will not overturn the judgment herein on this basis.

JSU also says that the information provided to The Clarion Ledger does not qualify as information which would be "highly offensive to a reasonable person" under Mississippi jurisprudence. JSU cites *Plaxico v. Michael*, 735 So.2d 1036 (Miss. 1999) in support of its argument. In *Plaxico* a non-custodial father (Michael) rented property he owned to his ex-wife, who was also the custodian of his daughter. Michael subsequently learned of a homosexual affair between his ex-wife and her roommate. Michael filed for custody, citing a sexual relationship occurring in the home where his daughter lived while the child's custodian was not married to her sexual partner. During the course of the litigation in *Plaxico*, Michael went to the cabin, observed his ex-wife and Plaxico having sexual intercourse through a window, returned to his vehicle to retrieve a camera, and then took pictures of Plaxico in a seminude state through the window. Plaxico, aggrieved, filed a lawsuit alleging invasion of privacy under the sub-tort of intentional intrusion upon the solitude or seclusion of another. The trial court dismissed her action and she appealed.

The Mississippi Supreme Court found that a parent was within his or her rights to protect the interests of his or her child and that Plaxico had not proven that "this conduct [was] highly offensive to the ordinary person which would cause the reasonable person to object."[24] *Id.* at 1040. The *Plaxico* court stated that:

> to recover for an invasion of privacy, a plaintiff must meet a heavy burden of showing a

> substantial interference with his seclusion of a kind that " 'would be highly offensive to the ordinary, reasonable man, as the result of conduct to which the reasonable man would strongly object.' " *Id.* (*quoting Restatement Second of Torts*, § 652B, comt. d (1977)). Further, the plaintiff must show some bad faith or utterly reckless prying to recover on an invasion of privacy cause of action. 487 So. 2d at 209 (*citing Wilson v. Retail Credit Co.*, 325 F. Supp. 460, 467 (S.D. Miss. 1971), aff'd, 457 F.2d 1406 (5th Cir. 1972)).

Id. at 1039. Thus, this court finds that *Plaxico* is not a valid compass to guide this court's decision.

This court is persuaded, as it was when it issued its bench opinion on this very issue, that the actions of JSU in releasing emails and personnel file information to the Clarion-Ledger would be "highly offensive to the ordinary person." Accordingly, this court finds no basis to overturn its previous decision on this ground either.

JSU also asks this court to overturn its previous determination of liability against it because, according to JSU, Coach Taylor is a public figure and, therefore, the decision to terminate her contract was a "legitimate public concern." Coach Taylor is strangely silent on this point, but this court is not convinced by this argument either.

JSU cites *Ekugwum v. City of Jackson, Miss.*, 2010 WL 1490247 (S.D. Miss. Apr. 13, 2010) to stand for the proposition that Coach Taylor is a public figure. Again, Coach Taylor does not address this argument in her responsive brief.

In *Ekugwum*, United States District Court Judge Daniel P. Jordan III determined that the plaintiff had

not presented sufficient evidence to overcome a Rule 56 challenge based on the release of information, not, about whether the plaintiff was a public figure. This court can find nothing in that case in which that court addressed the "legitimate public concern" prong of the public disclosure of private facts except:

> In *Young v. Jackson*, the Mississippi Supreme Court adopted the Restatement (Second) of Torts § 652D as to public disclosure of private facts and observed the following: One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public. 572 So.2d 378, 382 (Miss. 1990).

Ekugwum v. City of Jackson, Miss., 2010 WL 1490247, at *3–4 (S.D. Miss. Apr. 13, 2010). This court, accordingly, is unpersuaded to find in JSU's favor and overturn its previous opinion on this ground.

Further, this court is persuaded, as it discussed *supra*, that JSU waived this argument when it failed to include a defense that Coach Taylor was a "public figure" in the pretrial order that JSU signed which dictated the course of these proceedings. [Docket no. 54]. Finally, this court in not persuaded that Coach Taylor's image as a "public figure", even if true, would entitle JSU to invade her privacy by providing unsubstantiated, embarrassing allegations about her to the public at large. Other than JSU's excuse that it furnished this information in response to The Clarion-Ledger's request under the Mississippi Public Records Act[25] (hereinafter referred to as "MPRA"), JSU did not offer any credible explanation

for its actions while even the MPRA-based excuse was insufficient. The facts released were not, at that stage, a "legitimate" concern of the public.

JSU lastly campaigns that the Mississippi Public Records Act does not provide a private cause of action, despite this court's earlier ruling that the MPRA did create a private cause of action. The MPRA, according to JSU, would shield JSU from liability because it released information pursuant to a statutorily authorized records release.[26] Coach Taylor opposes this to say that she never raised the issue of JSU releasing records under the authority of the MPRA, to which JSU responds that she did in her complaint.[27] This court has already addressed JSU's arguments in its bench opinion dated August 1, 2014, and JSU has not provided this court with any jurisprudence that it has not already considered. Accordingly, JSU's motion to set aside this court's previous opinion based on this ground fails as well.

In its order dated August 1, 2014, this court has already addressed JSU's contentions and JSU does not offer this court any new jurisprudence that might convince this court to overturn its previous opinion. [Docket no. 64]. JSU's challenge to the *prima facie* case against it fails because this court found evidence of all three elements: 1. JSU publicly provided private facts about Coach Taylor; 2. the release of those private facts would be highly offensive to a reasonable person; and 3. those private facts were not a legitimate concern to the public. *See Young v. Jackson*, 572 So. 2d 378 (Miss. 1990). This court, therefore, denies JSU's motion to set aside its previous order finding JSU liable for invasion of privacy.

vii. Remittitur

JSU next asks this court to reduce its previous award of $200,000 to either nothing or a smaller amount. JSU argues that Coach Taylor never produced competent evidence of damages on her invasion of privacy claims. Coach Taylor, contrariwise, argues that this court, in its previous opinion [Docket no. 64] addressed these same arguments.

This court addressed the issue of remittitur in its prior opinion when it said:

> In cases of remittitur, the court is often called upon to consider amounts awarded in similar cases. *See Tureaud v. Grambling State Univ.*, 294 Fed. Appx. 909, 916 (5th Cir. 2008). Although this case does not involve remittitur, the court has reviewed past cases to determine damages.

[Docket no. 64, P. 18].

As this court stated in its previous opinion, "[o]ne who has established a cause of action for invasion of privacy is entitled to recover damages for [her] mental distress proved to have been suffered if it is a kind that normally results from such an invasion." [Docket no. 64] *Citing Candebat v. Flanagan*, 487 So.2d 207, 212 (Miss. 1986).

JSU correctly states "[I]t is the plaintiff who bears the burden of proof as to the amount of damages[.]" *See J & B Entertainment v. City of Jackson, Miss.*, 720 F.Supp.2d 757, 764 (S.D. Miss. 2010). JSU is incorrect, however, that Coach Taylor failed to produce any evidence of her damages. Coach Taylor herself testified that she had mental health disturbances as a result of the invasion of her privacy by the online publication of the private facts released by JSU, not just her fears over termination as asserted by JSU. Coach

Taylor also introduced unrefuted evidence in the form of witness testimony that she had occasioned mental disturbances as a result of the invasion of privacy.

"[A] plaintiff must [ ] prove that such [mental distress] damages were reasonably foreseeable." *Sumler v. East Ford, Inc.*, 915 So.2d 1081, 1089 (Miss. Ct. App. 2005). It was foreseeable that the story published by The Clarion Ledger would have an emotional impact on Coach Taylor. As JSU indicates, "[i]t is not enough that a plaintiff dislike a defendant's acts, a plaintiff must show that a defendant intentionally and maliciously sought to do the plaintiff harm." *Id.* This court has already found in its previous order that JSU acted "intentionally and maliciously" by releasing Coach Taylor's private facts for the world to see, and this court is not inclined to overturn its previous ruling.

JSU then says that even if this court were to allow its previous award of $200,000 to stand, it is due to be remitted. This court previously reviewed the cases submitted by JSU and was not inclined then, nor now, to reduce the award from $200,000. This court, in its previous order, specifically looked at cases[28] of remitter for invasion of privacy claims and, as a result, arrived at its figure of $200,000. [Docket no. 64, P. 18-19]. This court will not reduce Coach Taylor's award from $200,000.

viii. Additional Errors

JSU next contends that this court made additional and cumulative errors which combined to deny it a fair trial: the court's questioning of witnesses in front of the jury; and allowing Coach Taylor to discuss JSU's refusal to arbitrate before the jury.

"A trial court [ ] abuses its discretion in examining witnesses if the questioning demonstrates bias or

partiality." *See Liteky v. United States*, 510 U.S. 540, 555-56 (1994). According to JSU, this court "repeatedly questioned [its] witnesses in a way that suggested the Court [*sic*] believed them not to be credible [*sic*]." Coach Taylor says that this court had the prerogative to question witnesses to determine the viability of witnesses. JSU responded by stating that this court could have exercised its prerogative to examine witnesses outside of the presence of the jury. JSU does not indicate to this court which questions of the court were improper to ask of the witnesses, nor does it indicate how those questions were improper, except to say that the court should not have asked questions of the witnesses.

In its memorandum brief in support of its motion for a new trial, JSU states, "[t]hough Jackson State recognizes that there is no *per se* rule forbidding the Court from examining witnesses, it is error for a trial court to do so in a manner that leads the jury to believe that the Court has a predisposition that one party should prevail over the other party." [Docket no. 68, P. 15]. For support, JSU cites *Rodriguez v. Riddell Sports*, 242 F.3d 567 (5th Cir. 2011). This court, in reviewing that case, notes that *Rodriguez* expressly states that a court may question witnesses in accordance with the Federal Rules of Evidence. Therefore, this court has decided that it will quote the text of *Rodriguez* in this opinion:

> "A trial judge has wide discretion over the 'tone and tempo' of a trial and may elicit further information from a witness if he believes it would benefit the jury." *United States v. Rodriguez*, 835 F.2d 1090, 1094 (5th Cir. 1988) (quoting *United States v. Adkins*, 741 F.2d 744, 747 (5th Cir. 1984)). Federal Rule of Evidence 614(b) allows

the court to "interrogate witnesses, whether called by itself or by a party." The court " 'may question witnesses and elicit facts not yet adduced or clarify those previously presented.' " *United States v. Williams*, 809 F.2d 1072, 1087 (5th Cir. 1987) (quoting *Moore v. United States*, 598 F.2d 439, 442 (5th Cir. 1979)). "A judge's questions must be for the purpose of aiding the jury in understanding the testimony." *United States v. Saenz*, 134 F.3d 697, 702 (1998) (citing *United States v. Bermea*, 30 F.3d 1539, 1570 (5th Cir. 1994)). "However, the trial court's efforts to move the trial along may not come at the cost of 'strict impartiality.' " *Id.* (citing *United States v. Davis*, 752 F.2d 963, 974 (5th Cir. 1985)).

"In reviewing a claim that the trial court appeared partial, this court must 'determine whether the judge's behavior was so prejudicial that it denied the [defendant] a fair, as opposed to a perfect, trial.' " *Id.* (quoting *Williams*, 809 F.2d at 1086 (quoting *United States v. Pisani*, 773 F.2d 397, 402 (2d Cir. 1985))). "To rise to the level of constitutional error, the district judge's actions, viewed as a whole, must amount to an intervention that could have led the jury to a predisposition of guilt by improperly confusing the functions of judge and prosecutor." *Bermea*, 30 F.3d at 1569; *see also United States v. Mizell*, 88 F.3d 288, 296 (5th Cir. 1996).

"Our review of the trial court's actions must be based on the entire trial record." *Saenz*, 134 F.3d at 702 (citing *United States v. Carpenter*, 776 F.2d 1291, 1294 (5th Cir. 1985)). "A trial judge's

> comments or questions are placed in the proper context by viewing the 'totality of the circumstances, considering factors such as the context of the remark, the person to whom it is directed, and the presence of curative instructions.' " *Id.* (quoting *United States v. Lance*, 853 F.2d 1177, 1182 (5th Cir. 1988)). "The totality of the circumstances must show that the trial judge's intervention was 'quantitatively and qualitatively substantial.' " *Id.* (quoting *Bermea*, 30 F.3d at 1569).

Rodriguez v. Riddell Sports, Inc., 242 F.3d 567, 579 (5th Cir. 2001).

This court is unpersuaded that it conducted an improper examination of any of the witnesses. The sole purpose of the court's examining of witnesses in this matter was to aid the jury in understanding the testimony of witnesses. This court also gave a curative instruction to the jury, that the jury should not place any undue weight on the questions the court propounded to witnesses. JSU is not due relief on this ground either.

JSU's final argument is that this court erred in allowing Coach Taylor to mention, in the presence of the jury, JSU's refusal to arbitrate. Coach Taylor argues, in response, that JSU's refusal to arbitrate was probative because she, Coach Taylor, had filed claims for violations of Title IX and Title VII, requiring evidence showing how JSU had treated Coach Taylor from the initial notice of her termination through the denial of arbitration. JSU cites *Anderson v. Louisiana & Arkansas Railway Co.*, 457 F.2d 784 (5th Cir. 1972) to support its position that the court allowing Coach Taylor to present evidence of JSU's refusal to arbitrate was

more prejudicial than probative. This court is not persuaded.

In *Anderson v. Louisiana & Arkansas Railway Co.* the plaintiff was an employee of the defendant-railroad who was involved in a fight with another employee, the train's engineer, who had brandished a firearm during the altercation. The plaintiff suffered a stroke and brought a civil action under the authority of the Federal Employers Liability Act[29]. During the course of the trial, the trial court allowed the plaintiff to introduce evidence that the engineer had not been terminated or disciplined, nor had the defendant railroad prevented the engineer from subsequently bringing his firearm on the train with him. The Fifth Circuit Court of Appeals found that "[t]he evidence of the conduct of the railroad subsequent to the incident from which the injury arose had no relevancy on the question of liability or of damages." 457 F.2d 784, 785 (5th Cir. 1972).

In 1972, the same year that *Anderson* was announced, the first proposed Federal Rules of Evidence were published by the Advisory Committee. As part of those rules, the Advisory Committee penned Rule 407—Subsequent Remedial Measures. Rule 407 reads:

> When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:
> • negligence;
> • culpable conduct;
> • a defect in a product or its design; or
> • a need for a warning or instruction.
> But the court may admit this evidence for another purpose, such as impeachment or—if disputed—

> proving ownership, control, or the feasibility of precautionary measures.

Fed. R. Evid. 407. This court is persuaded that *Anderson* is a common law subsequent remedial measures case. In the lawsuit *sub judice* JSU's refusal to arbitrate was not introduced to prove culpable conduct which led to the injury, but conduct which shows the animus that had developed between JSU and Coach Taylor. This court is further persuaded that because Coach Taylor placed JSU's conduct in terminating her contract at issue, JSU's refusal to arbitrate is probative of its mindset in pursuing the course of action that it did in terminating Coach Taylor. Accordingly, JSU is not due relief on this ground either.

ix. Conclusion **[Docket no. 67]**

This court, having addressed all of JSU's contentions in its Joint Motion for Judgment as a Matter of Law, New Trial, or Remittitur **[Docket no. 67]** is persuaded that JSU waived its arguments regarding the "tortious breach of contract" issue and the affirmative defense of whether Coach Taylor was a "public figure." This court is further unpersuaded that JSU has made the requisite showing under either Rule 50(b) or Rule 59(a) of the Federal Rules of Civil Procedure and all the grounds that it asserts. Accordingly, this court finds that JSU's motion must be DENIED.

*b. Motion for a New Trial **[Docket no. 70]***

In her Motion for a New Trial **[Docket no. 70]** Coach Taylor asks this court to grant her a new trial on her Title IX retaliation claim. For cause, Coach Taylor

claims this court did not provide the proper jury instruction on Title IX retaliation, that of "but for" causation instead of "the sole or only reason" causation standard relied upon by this court. Coach Taylor claims this court applied the wrong standard and that the Fifth Circuit precedent relied upon by this court has been overturned by a subsequent United States Supreme Court decision. This court is unpersuaded and for the following reasons DENIES the motion.

i. Standard of Review

Coach Taylor filed her motion asking this court to exercise its authority under Rule 59 of the Federal Rules of Civil Procedure. The standard for review in Coach Taylor's motion for a new trial is the same as the standard stated in Section IV. A. i. *supra.*

ii. *Lowery*

Coach Taylor asks this court for a new trial based on an allegedly improper jury instruction. Coach Taylor argues that this court should have given a "but for" causation instruction on her Title IX retaliation claim. [Docket no. 70]. Coach Taylor urges this court to find that the Fifth Circuit precedent upon which it relied in giving its instruction to the jury, *Lowery v. Tex. A&M Univ. Sys.*, 171 F.3d 242 (5th Cir. 1997), has been overruled by the United States Supreme Court in *Jackson v. Birmingham Bd. of Edu.*, 544 U.S. 167 (2005). Coach Taylor cites two cases released subsequently to *Jackson* for support: *Gross v. FBL Fin. Svs., Inc.*, 557 U.S. 167 (2009); and *Univ. Tex. SW Med. Cntr. v. Nassar*, 554 U.S. 47 (2007).

JSU responded to Coach Taylor's Motion for New Trial, arguing that *Lowery* remains binding Fifth Circuit precedent. According to JSU, *Jackson* interpreted a Title VII claim, based on a statutory grant of a private cause of action. In *Lowery*, argues JSU, the Fifth Circuit found that Title IX "implies a private right of action for retaliation, narrowly tailored to the claims of employees who suffer unlawful retaliation solely as a consequence of complaints alleging noncompliance with the substantive provisions of [T]itle IX." *Lowrey*, 117 F.3d at 254 (5th Cir. 1997). This court is persuaded that the two cases are different in kind and that *Lowery* remains binding Fifth Circuit precedent.

Coach Taylor's ancillary argument that both *Gross* and *Nassar* support its position is not well-taken. Neither case involves a Title IX claim: *Gross* is an AEDA case based on a statutory grant of a private cause of action; and *Nassar* is a Title VII case involving a statutory grant of a private cause of action. *Lowery* established a judicially created private cause of action based on a statute, in which the Fifth Circuit found the "sole or only reason" causation standard was the standard implied by the statute.

Accordingly, this court is persuaded that Coach Taylor's Motion for a New Trial **[Docket no. 70]** is not well-taken and must be DENIED.

c. *Motion to Stay Proceedings Regarding Plaintiff's Bill of Costs* ***[Docket no. 74]***

JSU, in its Motion to Stay Proceedings Regarding Plaintiff's Bill of Costs **[Docket no. 74]** asks this court to withhold its ruling on Coach Taylor's Bill of Costs [Docket no. 69]. JSU's sole reason for its request is that this court should rule on the outstanding post-trial

motions that are encompassed in this memorandum opinion. This court has now ruled on those motions and finds JSU's Motion to Stay Proceedings Regarding Plaintiff's Bill of Costs **[Docket no. 74]** MOOT and DENIES it as such.

V. CONCLUSION

This court has reviewed the post-trial motions filed by both parties and finds that all motions must be DENIED for the reasons stated *supra*. Neither party has persuaded this court that it is due either a new trial under Rule 59 of the Federal Rules of Civil Procedure or a Judgment as a Matter of Law under Rule 50 of the Federal Rules of Civil Procedure.

IT IS, THEREFORE, ORDERED that Jackson State University's Joint Motion for Judgment as a Matter of Law **[Docket no. 67]** is hereby **DENIED**.

IT IS FURTHER ORDERED that Taylor-Travis's Motion for New Trial **[Docket no. 70]** is hereby **DENIED**.

IT IS FINALLY ORDERED that Jackson State University's Motion to Stay Proceedings Regarding Plaintiff's Bill of Costs **[Docket no. 74]** is **MOOT** and **DENIED** as such and the court will rule expeditiously on the Plaintiff's Bill of Costs.

SO ORDERED AND ADJUDGED this the 22nd day of December, 2017.

Footnotes

1While JSU styled its motion *Joint Motion for Judgment as a Matter of Law (Renewed) or, In the Alternative, Motion for a New Trial or a Remittitur*, the motion is opposed by Coach Taylor. Therefore, this motion should have omitted the word "Joint" from its style because

that word implies that the opposing party is in agreement with the motion.

2After the jury verdict in this lawsuit, and the subsequent filing of post-judgment motions, the parties informed the court that they had achieved a mutually agreeable settlement that only required the approval of the Institute of Higher Learning (hereinafter referred to as "IHL"). IHL rejected the settlement agreement based on various grounds, among them the recommendation of JSU's administration. JSU has changed its administration since then and this court asked the parties to discuss the new administration's view of a settlement in this matter. This court also asked the United States Magistrate Judge assigned to this matter to communicate with the parties regarding their discussions with JSU's new administration. The Magistrate Judge did not do so. The parties later let this court know that the position of JSU's administration has not changed and that it still rejects the settlement agreement. This court then returned this lawsuit to its active docket to resolve these outstanding post-judgment motions.

3(a) Employer practices—It shall be an unlawful employment practice for an employer—

> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee,

because of such individual's race, color, religion, sex, or national origin.

42 U.S.C.A. § 2000e-2 (West)

4(a) Prohibition against discrimination; exceptions No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance....

20 U.S.C.A. § 1681 (West)

5The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C.A. § 1331 (West)

6(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be

inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction. (d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

28 U.S.C.A. § 1367 (West)

7The $182,000.00 represents the salary that Coach Taylor would have earned had JSU not breached the contract and allowed her to remain on staff, completing the last two (2) years of her employment contract. Although the jury found that JSU had breached the implied covenant of good faith and fair dealing, the jury refused to award her compensatory damages.

8See footnote 1 *supra.*

9(a) Judgment as a Matter of Law.

> (1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:
>
> > (A) resolve the issue against the party; and
> > (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue ...

(b) Renewing the Motion After Trial; Alternative Motion for a New Trial. If the court does not grant a motion for judgment as a matter of law made under Rule 50(a), the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. No later than 28 days after the entry of judgment—or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged—the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59. In ruling on the renewed motion, the court may:

> (1) allow judgment on the verdict, if the jury returned a verdict;
> (2) order a new trial; or
> (3) direct the entry of judgment as a matter of law.

(c) Granting the Renewed Motion; Conditional Ruling on a Motion for a New Trial.

> (1) In General. If the court grants a renewed motion for judgment as a matter of law, it must also conditionally rule on any motion for a new trial by determining whether a new trial should

be granted if the judgment is later vacated or reversed. The court must state the grounds for conditionally granting or denying the motion for a new trial....

(d) Time for a Losing Party's New-Trial Motion. Any motion for a new trial under Rule 59 by a party against whom judgment as a matter of law is rendered must be filed no later than 28 days after the entry of the judgment ...

Fed. R. Civ. P. 50

10(a) In General.

(1) Grounds for New Trial. The court may, on motion, grant a new trial on all or some of the issues—and to any party—as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) Further Action After a Nonjury Trial. After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than 28 days after the entry of judgment.

(c) Time to Serve Affidavits. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 14 days after being served to file opposing affidavits. The court may permit reply affidavits.

(d) New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than 28 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

Fed. R. Civ. P. 59

11(e) Final Pretrial Conference and Orders. The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the start of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any unrepresented party. The court may modify the order issued after a final pretrial conference only to prevent manifest injustice.

Fed. R. Civ. P. 16

12(j) Final Pretrial Conferences And Pretrial Orders

(1) Cases in Which Conference to be Held; Scheduling; Role of Magistrate Judge. A final pretrial conference is to be held in all civil actions, subject only to the exceptions hereinafter noted.

(A) The judicial officer assigned to try the case will attempt to conduct the pretrial conference. If the judicial officer is unable to schedule the pretrial conference in a timely manner, however, then he or she may direct that the conference be held before another judicial officer. This

conference will be scheduled not more than forty-five days prior to trial.

(B) Whenever possible, a final pretrial conference will be separately scheduled at a date, place, and hour and for such period of time as the subject matter of the particular civil action may require, but in all events a final pretrial conference will be scheduled in such manner as not to cause undue or inordinate inconvenience to counsel scheduled for final pretrial conferences in other cases.

(2) When Conference May be Dispensed With; Pretrial Order Still Required; Contents. The court recognizes that a formal final pretrial conference may not be needed in all cases. The court, either on its own motion or by request of the parties made not later than fourteen days before the scheduled conference, may determine that a final pretrial conference is unnecessary and excuse the parties from attendance, but in that event the jointly agreed pretrial order must be submitted to the judge before whom the conference was to have been held and all requirements of this rule must be complied with at or before the time and date set for the final pretrial conference, unless the judge fixes another date for submission of the pretrial order. If no formal final pretrial conference is held, counsel must submit to the appropriate judge a jointly agreed final pretrial order [Official Form No. 3] which must set forth:

(A) Any jurisdictional question.

(B) Any questions raised by pending motions, including motions in limine.

(C) A concise summary of the ultimate facts claimed by plaintiff(s), by defendant(s), and by all other parties.

(D) Facts established by pleadings or by stipulations or admissions of counsel.

(E) Contested issues of fact.

(F) Contested issues of law.

(G) Exhibits (except documents for impeachment only) to be offered in evidence by the parties respectively. If counsel cannot in good faith stipulate the authenticity or admissibility of a proposed exhibit, the order must identify the same and state the precise ground of objection.

(H) The names of witnesses for all parties, stating who Will Be Called in the absence of reasonable notice to opposing counsel to the contrary and who May Be Called as a possibility only. Neither rebuttal nor impeachment witnesses need be listed. The witness list must state whether the witness will give fact or expert testimony, or both, whether the witness will testify as to liability or damages, or both, and whether the witness will testify in person or by deposition.

(I) Any requested amendments to the pleadings.

(J) Any additional matters to aid in the disposition of the action.

(K) The probable length of the trial.

(L) Full name, address, and phone number of all counsel of record for each party.

(3) Submission by Magistrate Judge to Trial Judge. If the pretrial conference is held before a

magistrate judge who will not try the case, the magistrate judge will submit the agreed, approved pretrial order to the trial judge, with copies to counsel and to the clerk of court.

(4) Duty of Counsel to Confer; Exhibits; Matters to be Considered at Conference; Sanctions. The following provisions of this rule apply, regardless of whether the pretrial order is entered by stipulation of the parties or following a formal final pretrial conference:

(A) Counsel must resolve by stipulation all relevant facts that are not in good faith controverted and must exchange with counsel for all other parties true copies of all exhibits proposed to be offered in evidence, other than those to be used for impeachment purposes only, and must stipulate the authenticity of each exhibit proposed to be offered in evidence by any party unless the authenticity of any such exhibit is in good faith controverted.

(B) All exhibits are to be pre-marked, and lists briefly describing each are to be exchanged among counsel and presented to the court at the beginning of the trial, in quadruplicate, unless otherwise directed by the court.

(C) At any formal final pretrial conference, the judge will confer with counsel regarding proposed stipulations of facts and contested issues of fact and law, and will inquire as to the reasonableness of any party's failure to stipulate or agree as to the authenticity or admissibility of exhibits. If the court determines that any

party or his attorney has failed to comply with this rule, such party or his attorney will be subject to appropriate sanctions.

(5) Depositions. Depositions to be introduced in evidence other than for rebuttal or impeachment purposes must be abridged before the pretrial conference or submission of the order, as follows:

(A) The offering party must designate by line and page the portions of the deposition it plans to offer.

(B) The opposing party or parties must designate by line and page any additional portions of the deposition to be offered and must identify distinctly any portions of the deposition previously designated by any other party to which objection is made.

(C) The offering party must thereafter identify distinctly any portions of the deposition previously designated by any other party to which objection is made.

(D) Videotaped depositions must be edited before trial as required by the pretrial order.

(6) Procedure at Final Pretrial Conference. In addition to the preceding provisions, the following provisions apply to the formulation of a pretrial order by formal conference before the magistrate judge, or in any appropriate case, the district judge.

(A) Counsel Must Attend; Sanctions. All scheduled conferences must be attended by counsel of record who will participate in the trial and who have full authority to speak for the party and enter into stipulations and agreements. Counsel

must have full authority from their clients with respect to settlement and must be prepared to inform the court regarding the prospects of settlement. The court may require the attendance or availability of the parties, as well as counsel. Should a party or his attorney fail to appear or fail to comply with the directions of this rule, an ex parte hearing may be held and a judgment of dismissal or default or other appropriate judgment entered or sanctions imposed.

(B) Preparation for the Conference. Counsel must comply with the requirements of subdivisions (j)(4) and (j)(5) of this rule as soon as practicable before the pretrial conference and submit to the court and counsel opposite a proposed pretrial order setting forth his proposals for inclusion in the pretrial order in accordance with subdivision (j)(2) of this rule and any instructions which the court may in its discretion issue.

(C) Preparation of the Pretrial Order. After the final pretrial conference has concluded, a pretrial order must be prepared by counsel in conformity with Official Form No. 3 and submitted to the court for entry. Responsibility for preparation of the pretrial order and the deadline for its submission will be fixed by the judicial officer before whom the conference was held. If a magistrate judge has conducted the conference on behalf of a district judge, he or she will require

counsel to make such corrections as the magistrate judge deems necessary before transmitting the order to the district judge.

(D) Additional Conferences. After the final pretrial conference has been conducted, the court will not hold an additional pretrial conference except in those exceptional situations in which the judicial officer determines that an additional conference would materially benefit disposition of the action.

(7) Effect of Pretrial Order. The pretrial order controls the subsequent course of the action unless modified by the trial judge at or before the trial, upon oral or written motion, to prevent manifest injustice.

(8) Conference Scheduling; Conflicting Settings. In scheduling all pretrial conferences of any nature, the judge will give due consideration to conflicting settings but not to the mere convenience of counsel. If a scheduling order has been entered in an action, no final pretrial conference will be held until after the discovery deadline has expired. Failure to complete discovery within such deadline is not an excuse for delaying the final pretrial conference nor for securing continuance of a case which has been calendared for trial.

(9) Discretion of District Judge. Notwithstanding any of the provisions of this rule to the contrary, a district judge may, in his or her discretion, in any assigned case, conduct any or all pretrial conferences and may enter or modify a scheduling order.

L.U.Civ.R. 16 (as effective April 30, 2013)

13Hoffman was terminated for: lack of necessary leadership ability; improper handling of funds; refusal to accept reassignment; lack of dedication and professionalism; lack of academic qualifications; questionable use of school automobile; improper use and supervision of school personnel; excessive absences from post during the day; failure to establish acceptable financial accounting system; and failure to take necessary actions to maintain enrollment.

14As the court stated *supra*, the parties agreed in the pre-trial order that:

> This is a jury case with respect to Plaintiff's federal claims only. This is a bench trial with respect to the Plaintiff's state law claims of invasion of privacy. The Court will determine whether it is a bench trial as to Plaintiff's remaining state law claims.

[Docket no. 54, P. 22, ¶ 14, *RESTRICTED*].

This court later ruled, without objection, that this court would submit all of the state law claims to the jury.

15(1) Jurisdiction for any suit filed under the provisions of this chapter shall be in the court having original or concurrent jurisdiction over a cause of action upon which the claim is based. The judge of the appropriate court shall hear and determine, without a jury, any suit filed under the provisions of this chapter. Appeals may be taken in the manner provided by law.

MISS. CODE. ANN. § 11-46-13 (West)

16"At the core, Dr. Whiting's argument, to the extent that it makes out a specific claim for relief, is that her contract with the Board, as memorialized in the handbook, guaranteed a fair and impartial hearing with respect to her tenure application, and the defendants denied her that opportunity. While she attempts to

characterize these claims as breach of contract, a fair reading of the facts of this case and the manner in which Dr. Whiting lays out her argument establish that if there were a claim to be made, it would be for tortious breach of contract and tortious interference with contract." *Whiting v. Univ. of S. Mississippi*, 62 So. 3d 907, 915 (Miss. 2011).

17[Docket no. 1, ¶ 57].

18[Docket no. 1, ¶ 22].

19[Docket no. 1, ¶ 28].

20The pretrial order in this lawsuit shows that the parties disputed whether JSU breached the contract. ("If Plaintiff had a valid and enforceable contract with Defendant, did Defendant breach its contract with Plaintiff?" [Docket no. 54, P. 3, ¶ 9(b)(6), *RESTRICTED*]). The parties, however, did not include a "Tortious Breach of Contract" claim in the pretrial order that they signed and submitted, that this court signed and entered on the record. [Docket no. 54 * RESTRICTED*]. JSU aggrieved at the jury's finding, objected both orally and in writing by requesting a new trial contending that the evidence did not support a finding that it had breached the contract.

21Coach Taylor alleged during this litigation that JSU released parts of her employment record and emails regarding the termination of her contract to *The Clarion-Ledger* who then publicly disclosed the same. This court, in its order dated August 1, 2014, listed the documents which Coach Taylor says should not have been released:

> 1. An email, dated March 30, 2011, from Coach Taylor to the President of JSU, Carolyn Myers ("President Myers"). This email requested a meeting with President Myers to discuss unfair treatment of the women's basketball program at

JSU. Coach Taylor explained that she already had met with both Interim Athletic Director Robert Walker ("Walker") and Assistant Athletic Director Adrienne Swinney regarding the topic. Coach Taylor stated that she did not want to file a Title IX gender equality complaint against JSU, and asked President Myers to take action.

2. An email, dated March 31, 2011, from Coach Taylor to Walker regarding a breach of Coach Taylor's employment contract. Coach Taylor contended that Walker had violated her contract when he had denied her request to attend a coaches' convention.

3. A letter, dated April 1, 2011, from President Myers regarding Coach Taylor's Title IX complaint of unfair treatment. President Myers informed Coach Taylor, inter alia, that "[a]ppropriate planning on your part as a seasoned professional could have and should have avoided this situation."

4. A letter, dated April 8, 2011, from Walker to Coach Taylor. The letter informed Coach Taylor that she was being placed on administrative leave, and she was relieved of all duties pending an investigation into "recent allegations of professional misconduct." Walker informed Coach Taylor that she was "strictly prohibited from any contact with University personnel, including coaching staff and students until further notice."

5. An agenda, dated May 13, 2011, which outlined the allegations and alleged investigative discoveries against Coach Taylor. The agenda contained references to sexual orientation harassment, emotional and verbal abuse, and misappropriation of funds.

> 6. A personnel record, dated May 20, 2011, in which Walker notified Coach Taylor of JSU's intent to terminate her for the following reasons: (1) sexual/gender stereotyping; (2) emotional and verbal abuse; (3) violation of per diem policy; (4) violation of travel and reimbursement policy; (5) misappropriation of university funds; (6) coercing students to change class schedules; (7) and threats of punitive outcomes for failure to keep athletic obligations. Walker also informed Coach Taylor that she had seven (7) days to request a hearing.

[Docket no. 64, PP. 6-7].

22"One who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of his privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." Young v. Jackson, 572 So. 2d 378, 382 (Miss. 1990).

23*Williamson v. Keith*, 786 So.2d 390 (Miss. 2001) and *Allen v. Allen*, 907 So.2d 300 (Miss. 2005).

24The Mississippi Supreme Court partially based its findings on the idea that:

> No one would dispute that parents have a predominant and primary interest in the nurture and care of their children. *Ethredge v. Yawn*, 605 So. 2d 761, 764 (Miss. 1992). In child custody matters the best interest of the child is the polestar consideration. *Mercier v. Mercier*, 717 So. 2d 304, 306 (Miss. 1998).

Plaxico at 1039.

25"This chapter shall be known and may be cited as the "Mississippi Public Records Act of 1983." It is the policy of the Legislature that public records must be available for inspection by any person unless otherwise provided

by this act [Laws 1996, Ch. 453]. Furthermore, providing access to public records is a duty of each public body and automation of public records must not erode the right of access to those records. As each agency increases its use of and dependence on electronic record keeping, each agency must ensure reasonable access to records electronically maintained, subject to the rules of records retention."

Miss. Code. Ann. § 25-61-1 (West) *et seq.*

26The MPRA expressly excludes several categories of government documents as not releasable: personnel records and applications for employment in the possession of a public body; employment examination questions and answers in the possession of a public body; and letters of recommendation in the possession of a public body.

27"66. Defendant, acting by and through its agents and employees, did knowingly, willfully, and intentionally release confidential documents in violation of both University policy and the Mississippi Public Records Act." [Docket no. 1, ¶ 66].

28*Parks v. Collins*, 761 F.2d 1101 (5th Cir. 1984) and *Tureaud v. Grambling State Univ.* 294 Fed.Appx. 909 (5th Cir. 2008).

29Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children

of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this Act be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and of an Act entitled "An Act relating to the liability of common carriers by railroad to their employees in certain cases" (approved April 22, 1908) [45 USCS §§ 51 et seq.] as the same has been or may hereafter be amended.

45 U.S.C.S. § 51

2014 WL 12779207
Only the Westlaw citation is currently available.
United States District Court, S.D. Mississippi,
Northern Division.

Denise TAYLOR-TRAVIS, Plaintiff

v.

JACKSON STATE UNIVERSITY, Defendant

Civil Action No. 3:12-CV-51-HTW-LRA
Signed 08/01/2014

Attorneys and Law Firms

Robert Nicholas Norris, Louis H. Watson, Jr., Watson & Norris, PLLC, Jackson, MS, for Plaintiff.
LaToya C. Merritt, Gregory Todd Butler, Phelps Dunbar, LLP, Jackson, MS, for Defendant.

ORDER

Henry T. Wingate, UNITED STATES DISTRICT COURT JUDGE

On January 24, 2012, plaintiff, former coach Denise Taylor-Travis ("Coach Taylor"), filed a complaint against her previous employer, Jackson State University ("JSU"), located in Jackson, Mississippi, in this federal forum claiming that she had suffered sex discrimination and retaliation, in violation of Title VII of the Civil Rights Act of 1964, Title 42 U.S.C. § 2000e, *et seq.*[1], and Title IX of the Education Amendments, Title 20 U.S.C. § 1681, *et seq.*[2] Coach Taylor also claimed that JSU had breached her contract and the implied covenant of good faith and fair dealing. Coach Taylor additionally

claimed that JSU had invaded her privacy when it released certain confidential records to the press.

Pursuant to Title 28 U.S.C. § 1331[3], commonly referred to as federal question jurisdiction, this court possesses subject-matter jurisdiction over Coach Taylor's Title VII and Title IX claims. This court also has jurisdiction over Coach Taylor's state law claims of breach of contract, breach of implied covenant of good faith and fair dealing, and invasion of privacy. Title 28 U.S.C. § 1367[4], which grants supplemental jurisdiction to federal district courts over related state law claims, serves as this court's jurisdictional foundation for these claims. *See Louisiana v. Am. Nat'l Prop. & Cas. Co.*, 746 F.3d 633, 638 (5th Cir. 2014).

On October 30, 2013, this court commenced a jury trial on Coach Taylor's claims for: retaliation under Title VII; retaliation under Title IX; breach of contract; and breach of the implied covenant of good faith and fair dealing.

On December 3, 2013, the jury returned its verdict. The jury determined, based on the evidence presented at trial, that JSU had not terminated Coach Taylor because of her gender; nor had JSU terminated Coach Taylor in retaliation for engaging in protected activity under Title VII or Title IX. The jury, however, determined that JSU had breached Coach Taylor's employment contract and the implied covenant of good faith and fair dealing when it fired her. As a result, the jury awarded Coach Taylor $182,000.00.[5]

Still remaining before the court is Coach Taylor's claim for invasion of privacy against JSU. At the request of the parties[6], this particular claim was severed from the rest of the complaint and set aside for a bench trial. Coach Taylor claims that JSU invaded her privacy when it released to the press certain documents related to her

termination. Having reviewed the parties' arguments and the evidence, this court finds in favor of Coach Taylor and grants her damages in the amount of $200,000.00.

I. Factual Background

Coach Taylor and JSU began their employment marriage on an exuberant note, all parties excited about the prospect of a new coach breathing excitement into a program struggling for vitality. The next ten (10) years saw mixed successes. Under Coach Taylor's leadership, the JSU women's basketball team won five (5) championships and Coach Taylor was selected as coach of the year four (4) times. In the years leading up to her termination, however, the JSU women's basketball team had not been performing as well as it had in the past. Still, most observers expected Coach Taylor to weather the stormy downturn and see another day as head coach.

The 2010-2011 season witnessed a new low. The team did not perform well. Dissention gripped what should have been team spirit, and it showed in team play.

An expected by-product of any losing sports program is blame, of which this program had much. At one point, the players turned on each other. Then the team leaders focused upon Coach Taylor. These team leaders, and later the entire team, met with Dr. Marie O'Banner-Jackson ("Dr. O'Banner-Jackson"), an Associate Dean of Undergraduate Studies, to inform her of their complaints. Thereafter, the team members voiced their complaints to an overly-receptive Adrianne Swinney, the Assistant Athletics Director, who credited these accusations and even encouraged them, without ever discussing them with Coach Taylor. Indeed, the administration at JSU spoke more than once with the

students and refused early on to advise Coach Taylor of the specifics of the complaints.

On May 20, 2011, Coach Taylor received a letter informing her of JSU's intent to terminate her employment. This letter recited as follows:

> Dear Coach Taylor-Travis:
>
> The purpose of this letter is to notify you of our intent to terminate your employment with Jackson State University in the position of Head Women's Basketball Coach for violation of University, IHL [Institutes of Higher Learning], and NCAA [National Collegiate Athletic Association] policies and guidelines.

This is a termination for cause pursuant to Section 5.2 of your employment contract, which provides that the University may terminate your employment for cause at any time upon written notice. The specific reasons for this decision are provided as follows:

> Specific charges against you include the following:
>
> • Student and Student-Athlete Well-Being
> – Sexual Gender Stereotyping
> – Emotional and Verbal Abuse
> • Violation of University Policy
> – Per diem Policy
> – Travel and Reimbursement Policy
> • Misappropriation of University Funds
> – Per diem to Family Member
> – Handling of Laundry Money
> – Airline Ticket Purchase for Family Member(s)

> • Academic Standards and Practices of the Program
> – Forcing and or coercing student-athletes to change class schedules
> – Threats of punitive outcomes for failure to keep athletic obligations (i.e., practice) vs. academic obligations (attending class)

According to Section 6 of your employment contract, you are also being provided an opportunity to request a hearing within 7 calendar days of receiving this written notice. You will remain on administrative leave with pay during the pendency of your opportunity for a hearing, should you elect to request one.
If you have questions related to benefits and accrued leave time, please contact the Office of Human Resources....

On June 8, 2013, the *Clarion Ledger*, a Mississippi newspaper, sent JSU a request for documents pursuant to Miss. Code Ann. § 25-61-1[7], the Mississippi Public Records Act. In particular, the *Clarion Ledger* sought: (1) any communications—including, but not limited to, letters, e-mails, and faxes—between Coach Taylor and JSU from March 15, 2011, to present; (2) all documents concerning the search committee JSU created to help find a new Athletic Director[8]; and, (3) documents that list football players on athletic and/or academic scholarship.

On June 24, 2011, JSU responded to the request. In its response, JSU included the following:

> 1. An email, dated March 30, 2011, from Coach Taylor to the President of JSU, Carolyn Myers ("President Myers"). This email requested a meeting with President Myers to discuss unfair treatment of the women's basketball program at

JSU. Coach Taylor explained that she already had met with both Interim Athletic Director Robert Walker ("Walker") and Assistant Athletic Director Adrienne Swinney regarding the topic. Coach Taylor stated that she did not want to file a Title IX gender equality complaint against JSU, and asked President Myers to take action.

2. An email, dated March 31, 2011, from Coach Taylor to Walker regarding a breach of Coach Taylor's employment contract. Coach Taylor contended that Walker had violated her contract when he had denied her request to attend a coaches' convention.

3. A letter, dated April 1, 2011, from President Myers regarding Coach Taylor's Title IX complaint of unfair treatment. President Myers informed Coach Taylor, inter alia, that "[a]ppropriate planning on your part as a seasoned professional could have and should have avoided this situation."

4. A letter, dated April 8, 2011, from Walker to Coach Taylor. The letter informed Coach Taylor that she was being placed on administrative leave, and she was relieved of all duties pending an investigation into "recent allegations of professional misconduct." Walker informed Coach Taylor that she was "strictly prohibited from any contact with University personnel, including coaching staff and students until further notice."

5. An agenda, dated May 13, 2011, which outlined the allegations and alleged investigative discoveries against Coach Taylor. The agenda contained references to sexual orientation harassment, emotional and verbal abuse, and misappropriation of funds.

> 6. A personnel record, dated May 20, 2011, in which Walker notified Coach Taylor of JSU's intent to terminate her for the following reasons: (1) sexual/gender stereotyping; (2) emotional and verbal abuse; (3) violation of per diem policy; (4) violation of travel and reimbursement policy; (5) misappropriation of university funds; (6) coercing students to change class schedules; (7) and threats of punitive outcomes for failure to keep athletic obligations. Walker also informed Coach Taylor that she had seven (7) days to request a hearing.

On June 27, 2011, the *Clarion Ledger* published the story of Coach Taylor's termination on its online blog. A print out of the blog reveals at least 39 comments from 17 different individuals. The *Clarion Ledger* blog also posted the actual documents that it had received from JSU, so that the entire world could view them. Later, other news sources picked up the story. Coach Taylor contends that JSU's act of releasing these documents to the *Clarion Ledger* constituted the state law tort of invasion of privacy.

On June 29, 2011, Walker, on behalf of JSU, sent a letter to Coach Taylor informing her that JSU was terminating her employment immediately.

Predictably, the face of this controversy between JSU and Coach Taylor was the ugly countenance of sexual harassment, even though JSU had relied upon other grounds, in addition, for its actions against the Coach.

At the jury trial, JSU resisted Coach Taylor's claim of breach of contract on JSU's insistence that Coach Taylor had committed all of the above acts—sexual/gender stereotyping; emotional and verbal abuse; violation of per diem policy; violation of travel and

reimbursement policy; misappropriation of university funds; coercing students to change class schedules; and threats of punitive outcomes for failure to keep athletic obligations.

The jury was not convinced. The jury discredited these defenses, especially the sexual harassment defense, with its verdict. JSU, said the attentive jury, had breached Coach Taylor's contract by firing her. The jury awarded Coach Taylor the sum of $182,000.00.[9]

JSU's defense encountered serious factual discrepancies, as follows: JSU's accusation that Coach Taylor had carried her husband and son on various scheduled game trips, without authority and without compensating JSU for such, was met with proof that football coaches had done the same, without any chastisement from JSU. Dr. O'Banner-Jackson included herself on the team's trip to Miami, Florida because, as she testified, she had never been to Miami and wanted to see it. She shopped and saw sights; she performed no function for the team.

JSU's accusation that Coach Taylor had abused her players was challenged by contrary proof that Coach Taylor had been attentive to concerns of her players and families. One starter, Rachel Jones ("Jones"), explained her upset at Coach Taylor's conduct towards her as follows: Coach Taylor started[10] her at all the games and complimented her on her hustle and court play, while the Coach criticized other players for their lack of such. This, said Jones, served to cause her teammates to dislike her, so she later joined in the choruses of complaints against the Coach for this "abuse."

Meanwhile, this team was losing. They blamed each other, even almost coming to blows at practice. Coach Taylor suffered criticism when she stopped practice on one occasion and allegedly told two (2) angry

players to fight it out if they would not stop their bickering. The proof did not show that the players passed any licks after this staged confrontation.

The alleged violations of per diem policy and misappropriation of university funds simply were not established by the evidence, spoke the jury, by its verdict in favor of Coach Taylor's breach of contract claim.

JSU's charge of sexual harassment against Coach Taylor was so weak that JSU's trial counsel did not even mention it in closing; yet, this accusation above all others had been the incendiary log which had fired this lawsuit's burning notoriety. The student who complained of sexual harassment, Mar'Chetta Parker ("Parker"), testified that she felt that Coach Taylor had discriminated against her because she (Parker) was a lesbian. At trial, when questioned as to why she believed she had been the victim of discrimination, Parker stated that Coach Taylor had asked some of the other players about her (Parker's) sexual orientation. Further, Parker complained that Coach Taylor also asked Parker about an off-campus incident which had occurred at Parker's apartment. In that incident, Parker was struck with a gun. The culprit was Parker's live-in girlfriend. Later, the warring couple reconciled and appeared lovingly together on the JSU campus. The students on campus, Parker admitted, had heard of the incident. When Coach Taylor learned of this, she inquired. Parker testified that she felt that Coach Taylor was invading her personal life. Parker, however, admitted that it was not a secret that she was dating another female. Parker also admitted that, despite Coach Taylor's alleged discrimination and disfavor towards Parker's lifestyle, Coach Taylor still kept Parker on the team and ensured that Parker continued to receive her basketball scholarship.

Coach Taylor, in response, testified that when she learned of this incident, she naturally inquired as she always would do when some violence touches one of her players. Parker has another view; the matter was private, even though police were called, even though she was injured by this gun-blow to her head, and Coach Taylor should not have asked her (Parker) about the incident.

Coach Taylor was also wrong, griped another player, Beatrice Banks ("Banks"), when the Coach asked her about her possibly dating or "teasing" two (2) teammates simultaneously, when such could create dissention on the team. Banks felt Coach Taylor should not have inquired about this potential lesbian love triangle.

As earlier mentioned, although this "evidence" of sexual harassment was the main public megaphone for this litigation to reach the public ears, at closing arguments, this evidence did not rise to a whisper.

II. Law and Analysis

A. Invasion of Privacy

"The tort of invasion of privacy is composed of four (4) separate sub-torts: (i). the intentional intrusion upon the solitude or seclusion of another; (ii). the appropriation of another's identity for an unpermitted use; (iii). the public disclosure of private facts; and (iv). holding another to the public eye in a false light." *Allen v. Allen*, 907 So.2d 300, 306 (Miss. 2005). Coach Taylor has brought her claim under the sub-tort of public disclosure of private facts.

Inasmuch as this claim is one planted in state law, this court turns to the law of Mississippi for guidance. *Erie v. Tompkins*, 304 U.S. 64, 78-79, 58 S.Ct. 817, 82

L.Ed. 1188 (1938). ("Except in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state"). When exercising supplemental jurisdiction over related state law claims, the court applies federal procedural law, but state substantive law. *Foradori v. Harris*, 523 F.3d 477, 486 (5th Cir. 2008) (*citing Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 426-427, 116 S.Ct. 2211, 135 L.Ed.2d 659 (1996)).

The Mississippi Supreme Court has stated that the tort of public disclosure of private facts occurs when an individual "gives publicity to a matter concerning the private life of another." *Young v. Jackson*, 572, So.2d 378, 382 (Miss. 1990). Such an individual will be liable for invasion of privacy "if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public." *Id.*

The court in *Young* outlined the first prong of the test as follows: "[a] person may not be held liable for public disclosure of facts about another unless he should reasonably have foreseen that the person would be likely offended." *Id.* The court in *Young* held that a hysterectomy was definitely something that "a woman ordinarily has the right to keep private." *Id.*

This court is persuaded that the circumstances surrounding a person's termination, especially when the termination has precipitated from accusations of sexual harassment and misappropriation of funds, are matters that a reasonable person would find offensive if made public. Therefore, Coach Taylor has satisfied the first prong of the *Young* test.

The second prong of the *Young* test is whether the disclosed documents contained information of public concern. Obviously, almost anything that occurs within a public agency could be of *interest* to the public. *Terrell v.*

Univ. of Tex. Sys. Police, 792 F.2d 1360, 1362 (5th Cir. 1986). The question here, however, is not whether the information is a matter of *interest* to the public, but whether these documents are a matter of "*legitimate concern*" at this stage to the public. Matters deemed not legally appropriate for public consumption are not matters of "concern" for the public.

The release of documents held by Mississippi public agencies, such as JSU, is controlled by the Mississippi Public Records Act, Miss. Code Ann. § 25-61-1, *et seq.* Public records are defined as

> all books, records, papers, accounts, letters, maps, photographs, films, cards, tapes, recordings or reproductions thereof, and any other documentary materials, regardless of physical form or characteristics, having been used, being in use, or prepared, possessed or retained for use in the conduct, transaction or performance of any business, transaction, work, duty or function of any public body, or required to be maintained by any public body.

Miss. Code. Ann. § 25-61-3(b). Despite the Act's broad policy of making public records available to the public, specific documents may be exempted as confidential or privileged.[11] Mississippi has specifically exempted personnel records, applications for employment, and letters of recommendation.[12]

Unfortunately, the Mississippi legislature failed to define the contours of "personnel records." As a consequence, the task has fallen to the Mississippi Supreme Court, which has narrowly defined the personnel records exemption to Mississippi's Public Records Act. "Statutes granting exemptions from their

general operation must be strictly construed, and any doubt must be resolved against the one asserting the exemption." *Miss. Dep't of Wildlife v. Miss. Wildlife Enforcement Officers' Ass'n, Inc.*, 740 So.2d 925, 932 (Miss. 1999).

In *Miss. Dep't of Wildlife*, the petitioner, the Mississippi Wildlife Enforcement Officers' Association ("Association") sued respondent, the Mississippi Department of Wildlife ("Department") for not disclosing the names and accrued compensation time of Department employees. The court rejected the Department's argument that these documents fell under the personnel records exemption to Mississippi's Public Records Act. The Mississippi Supreme Court noted that the Association only sought documentation on Department employees and their accrued compensation time, not the "the underlying personnel records concerning the reasons that comp[ensation] time was accumulated by a particular employee." *Id.* at 396. The Mississippi Supreme Court suggested that if the Association had actually sought the actual personnel documents, a greater privacy interest might have been at stake. *Id.*

The determination of what is a "personnel record" appears to be determined on a case by case basis. Mississippi courts have declared that items such as salary and accrued leave are not exempt personnel records. *Scruggs v. Bd. of Supervisors Alcorn Cnty. Comm'rs*, 85 So.3d 325, 329 (Miss. Ct. App. 2012); *Harrison Cnty. Dev. Comm'n v. Kinney*, 920 So.2d 497, 502-03 (Miss. Ct. App. 2006); *Miss. Dep't of Wildlife*, 740 So.2d at 936.

Mississippi Attorney General Opinions, although not binding upon the court, provide more guidance. The Mississippi Attorney General has opined that the

following are not personnel records: orders of the Employee Appeals Board, "the name[s] and salaries of employees," and the "length of service of municipal personnel." Mississippi Attorney General Opinion No. 2012-00494, 2012 WL 6561339 (Miss. A.G. October 19, 2012); Mississippi Attorney General Opinion No. 2012-00431, 2012 WL 6065224 (Miss. A.G. Sep. 14, 2012). In contrast, an employee's recorded statement, which was used as the basis for termination, is a personnel record. Mississippi Attorney General Opinion No. 2011-00332, 2011 WL 5006026 (Miss. A.G. Sep. 26, 2011).

The Mississippi Attorney General has further opined that

> a personnel record in broad generic terms would include evaluations, applications for employment, recommendations submitted with applications, complaints made against a teacher, disciplinary measures contemplated or taken against a teacher, and medical records, which in accord with the American's With Disabilities Act must be kept in a separate and confidential file. Most of these records are routinely kept in a personnel file and are not subject to disclosure.

Mississippi Attorney General Opinion, 1992 WL 613935 (Miss. A.G. May 20, 1992). The opinions of the Mississippi courts and the Attorney General suggest that documents related to internal evaluations and discipline are personnel documents, which are exempt from public record requests.

The documents that JSU released to the *Clarion Ledger* related directly to JSU's decision-making process in terminating Coach Taylor. Unlike the documents in *Miss. Dep't of Wildlife*, the documents *sub*

judice are not ordinary public records of government business. The documents released to the *Clarion Ledger* were part of a confidential personnel decision. In further support of this conclusion, JSU's own Staff Handbook states:

> Because of the sensitivity of the information involved, any documents pertaining to employees['] and/or students['] sexual harassment cases and the disciplinary action taken will be transferred to and maintained in confidential files under the supervision of the Office of Human Resources and the Vice President for Student Affairs. The confidential individual case files are open only to those University personnel who have been given a "need to know" designation by the Director of Human Resources and at least one other top-level administrator (area vice president).

Staff Handbook at 63. Therefore, releasing these documents violated JSU's own policy.

For the foregoing reasons, this court is persuaded that JSU committed the state law tort of invasion of privacy when it released certain documents to the *Clarion Ledger*. The documents were both highly offensive and constituted personnel records, which are not available upon public request.

B. Damages

Having determined that JSU committed the state law tort of invasion of privacy, this court must now turn to the question of damages. Coach Taylor asks for damages for both mental distress and pecuniary losses.

"One who has established a cause of action for invasion of [her] privacy is entitled to recover damages for ... [her] mental distress proved to have been suffered if it is a kind that normally results from such an invasion." *Candebat v. Flanagan*, 487 So.2d 207, 212 (Miss. 1986) (*quoting* Restatement (Second) of Torts, § 652(H)). A person is also entitled to any "quantifiable pecuniary loss" that occurs because of the invasion. *Id.*

1. Mental Distress Damages

Coach Taylor claims that she suffered mental distress following her termination and the publication of the *Clarion Ledger's* blog post. Although Coach Taylor presented no medical evidence of her mental distress, she is still capable of demonstrating that she suffered mental distress through testimony. *See Giles v. Gen. Elec. Co.*, 245 F.3d 474, 488 ("In certain cases a plaintiff's testimony alone may be sufficient proof of mental damages."). Coach Taylor presented her own testimony and the testimony of her friends and family.

Coach Taylor's pastor, Reverend Walter Eugene Henderson, Jr. ("Henderson"), testified that Coach Taylor talked to him about her emotional fears and worries regarding the future. Henderson also testified that Coach Taylor was under a lot of stress, and Coach Taylor believed that her character was being attacked and destroyed.

Reverend Preston Crowe ("Crowe"), a friend of Coach Taylor, testified that Coach Taylor experienced a great deal of shock in the wake of her termination and the publication of the *Clarion Ledger* blog. Crowe testified that Coach Taylor had confided in him that she feared that the incident had destroyed her character and she would never again be able to find work. She was also

questioning, he said, who she was as a person if she was not a coach. Crowe testified that Coach Taylor experienced a lot of sadness and frustration, and that, during their meetings, she would just sit and cry.

Brenda Taylor Peterson ("Peterson"), Coach Taylor's older sister, testified that Coach Taylor began having difficulty sleeping because of her nerves. Peterson also testified that Coach Taylor was stressed and humiliated because she was unable to pay her family's bills. Most disturbingly, Peterson described an incident in which Coach Taylor called Peterson and threatened to commit suicide. Coach Taylor was driving and sobbing, telling Peterson that she just wanted to let go of the steering wheel and "end it all."

Taylor Carr ("Carr"), Coach Taylor's son, aged eleven (11) or twelve (12) in 2011, testified that, after Coach Taylor's termination and the *Clarion Ledger* blog post, his mom became less outgoing. Carr testified that his mother became very emotional and would cry often.

Walter Travis ("Travis"), Coach Taylor's husband, testified that Coach Taylor's termination and the *Clarion Ledger* blog post shook his wife to her core. Travis said that some days Coach Taylor could not get out of bed, and she stopped caring about her appearance. Travis described separate incidents of finding Coach Taylor crying in the closet, or on the couch. Further, like Peterson, Travis got a call from an emotional Coach Taylor while she was driving, saying she just wanted to let go of the steering wheel and "end it all." Travis also testified that Coach Taylor's relationship with him and her son suffered because all she wanted to do was lie down on the bed instead of interacting with her family..

Coach Taylor testified that, after her termination and the *Clarion Ledger* blog post, she felt humiliated and devastated, noting that now anyone could look her up on

the internet and see her name connected with sexual harassment. Coach Taylor testified that she became depressed, and described herself as "mentally, emotionally, and physically incapacitated."

Based on the testimony of Coach Taylor and the witnesses, this court is persuaded that Coach Taylor suffered mental distress as a result of JSU's decision to release her personnel records to the *Clarion Ledger*. The question, then, is how much this court should award Coach Taylor in damages.

In cases of remittitur, the court is often called upon to consider amounts awarded in similar cases. *See Tureaud v. Grambling State Univ.*, 294 Fed. Appx. 909, 916 (5th Cir. 2008). Although this case does not involve remittitur, the court has reviewed past cases to determine damages. The most similar case this court could find was a 1985 case entitled *Parks v. Collins*, 761 F.2d 1101 (5th Cir. 1984). In that case, a jury returned a verdict of $50,000.00 in damages for invasion of privacy after the Claiborne County, Mississippi Public Schools publically disclosed the confidential records of a student. *Id.* at 1103. According to the Bureau of Labor Statistics' Consumer Price Index, the award in *Parks* is approximately $110,500.00 in today's dollars. The case *sub judice*, however, involves more than just the disclosure of confidential records. In this case, news of the alleged reasons for the plaintiff's termination were published by a statewide newspaper, and the actual personnel records were posted online for all the world to view. Therefore, this court awards Coach Taylor $200,000.00 for the mental distress she suffered as a result of JSU's invasion of her privacy.

2. Pecuniary Losses

Coach Taylor claims that since the publication of her personnel documents she has been unable to obtain comparable employment. Specifically, Coach Taylor states that she applied for a coaching job at Texas Southern University in Houston, Texas. Another applicant, however, was selected for the position. Coach Taylor believes she was passed over for this position because of the *Clarion Ledger* blog post. Indeed, Coach Taylor contends that her reputation within the basketball community has been damaged beyond repair, and she will never be able to obtain future employment in college basketball.

Coach Taylor, however, produced no testimony or competent evidence, beyond her own speculation, that she has been denied employment because of the publication of her personnel records. Without actual evidence connecting the wrongfully released personnel records to the hiring decisions of potential employers, this court cannot find JSU liable for Coach Taylor's inability to obtain work. Therefore, this court declines to award damages for future pecuniary losses.

III. Conclusion

For the foregoing reasons this court finds that JSU invaded upon Coach Taylor's privacy when it publically disclosed private facts to the *Clarion Ledger*. The facts and accusations that precipitated Coach Taylor's termination are of the type an ordinary person would find offensive. Furthermore, these documents were personnel records, which are exempted from public record requests.

Finding JSU liable for wrongfully disclosing those personnel records, this court awards Coach Taylor $200,000.00 in damages for the mental distress she

suffered as a result of the invasion of her privacy. This court, however, declines to grant her an award of future pecuniary losses.

SO ORDERED AND ADJUDGED, this, the 1st of August, 2014.

Footnotes

1Title 42 U.S.C. § 2000e-2(a) states, in its pertinent part: It shall be an unlawful employment practice for an employer—
(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... sex ...; or
(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's ... sex....
2Title 20 U.S.C. § 1681(a) states, in its pertinent part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance"
3Title 28 U.S.C. § 1331 states: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States."
4Title 28 U.S.C. § 1367(a) states:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute,

> in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

5The $182,000.00 represents the salary Coach Taylor would have earned had she been allowed to complete the remaining two (2) years of her current employment contract ($91,000.00 per year). Although the jury found that JSU had breached the implied covenant of good faith and fair dealing, the jury awarded no compensatory damages for that claim.

6In the Pretrial Order, the parties agreed: "This is a jury case with respect to Plaintiff's federal claims only. This is a bench trial with respect to Plaintiff's state law claims of invasion of privacy. The Court will determine whether it is a bench trial as to Plaintiff's remaining state law claims."

7Miss. Code Ann. § 25-61-1 states:

> This chapter shall be known and may be cited as the "Mississippi Public Records Act of 1983." It is the policy of the Legislature that public records must be available for inspection by any person unless otherwise provided by this act [Laws 1996, Ch. 453]. Furthermore, providing access to public records is a duty of each public body and automation of public records must not erode the right of access to those records. As each agency

> increases its use of and dependence on electronic record keeping, each agency must ensure reasonable access to records electronically maintained, subject to the rules of records retention.

8JSU hired Vivian Fuller as Athletic Director in the summer of 2011 to replace Bob Braddy, who had retired the previous year. During the search, Robert Walker, special assistant to the President of JSU, served as Interim Athletic Director.

9See footnote 5.

10In sports, to "start" someone is to include that person in the "starting lineup." The "starters" are the main players for a team.

11Miss. Code Ann. § 25-61-11 states:

> The provisions of this chapter shall not be construed to conflict with, amend, repeal or supersede any constitutional or statutory law or decision of a court of this state or the United States which at the time of this chapter is effective or thereafter specifically declares a public record to be confidential or privileged, or provides that a public record shall be exempt from the provisions of this chapter.

12Miss. Code Ann. § 25-1-100 states:

> (1) Personnel records and applications for employment in the possession of a public body, as defined by paragraph (a) of Section 25-61-3, except those which may be released to the person who made the application or with the prior written consent of the person who made the application, shall be exempt from the provisions of the Mississippi Public Records Act of 1983.

(2) Test questions and answers in the possession of a public body, as defined by paragraph (a) of Section 25-61-3, which are to be used in employment examinations, shall be exempt from the provisions of the Mississippi Public Records Act of 1983.

(3) Letters of recommendation in the possession of a public body, as defined by paragraph (a) of Section 25-61-3, respecting any application for employment, shall be exempt from the provisions of the Mississippi Public Records Act of 1983.

(4) Documents relating to contract authorization under Section 25-9-120 shall not be exempt from the provisions of Mississippi Public Records Act of 1983.

FEBRUARY 8, 2021
United States Court of Appeals for the Fifth Circuit
No. 17-60856
Denise Taylor-Travis,
Plaintiff—Appellee Cross-Appellant, *versus*
Jackson State University,
Defendant—Appellant Cross-Appellee.
Appeal from the United States District Court for the Southern District of Mississippi USDC No. 3:12-CV-51
ON PETITION FOR REHEARING AND REHEARING EN BANC
(Opinion January 6, 2021 , 5 Cir., ,) F.3d

Before OWEN, *Chief Judge,* WIENER, and DENNIS, *Circuit Judges*.*

Per Curiam:

(√) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (Fed. R. App. P. and 5TH Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (Fed. R. App. P. and 5TH Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause En banc, and a majority of the judges in active service and

not disqualified not having voted in favor, Rehearing En Banc is DENIED.

Footnote

*Judge Graves did not participate in the consideration of the rehearing en banc