

Jennings V. Dorrance And Unc: Soccer, Sex, And Second Hand Harrassment

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In a highly publicized case which has been in the court system for eight years, the Fourth Circuit Court of Appeals, sitting *en banc*, recently held that Melissa Jennings, a former soccer player at UNC, could continue to trial with her lawsuit claiming that her coach Anson Dorrance's sexual comments toward her and members of the female soccer team at UNC constituted sexual harassment by creating a sexually hostile environment. The Fourth Circuit also held that the University had actual knowledge of the alleged sexual harassment, but did not take appropriate action to address the complaints. Therefore, Ms. Jennings may continue her suit against UNC as well. The ruling by the *en banc* Fourth Circuit, rendered on April 9, 2007, reversed a three judge panel of the Fourth Circuit, which had upheld the dismissal of the case against Coach Dorrance and the University by the U.S. District Court for the Middle District of North Carolina. The case has been remanded to the trial court and, absent settlement, a jury trial will take place.

ALLEGED FACTS

The allegations that Ms. Jennings and several other team members made against Coach Dorrance included the following:

Coach Dorrance, often in front of the entire team, singled out individual players and asked questions about whether, with whom, and how often they were having sex. For example, Coach Dorrance allegedly made the following comments to team members in a team/group setting:

- [Who is your] f— of the week?
- [Are you] going to f— your boyfriend and leave him?
- How many guys on the [lacrosse team] did you f—?
- Coach Dorrance asked one player about the size of her boyfriend's genitalia and suggested to another that she "just had to keep her knees together."
- Coach Dorrance allegedly told a trainer that he would like to have group sex with his Asian players.
- Coach Dorrance allegedly told Debbie Keller (an All-American player who also sued Coach Dorrance and settled her case) that he would like to be a fly on the wall the first time a particular player (who he assumed was a virgin) had sex.

- Coach Dorrance often made comments in the presence of the players about a certain female’s “nice racks” [referring to her breasts] and “nice legs.”
- Coach Dorrance openly accused at least three players of being promiscuous, asking them questions such as “Is there a guy you haven’t f—ed yet?” during practices or at team meetings.
- Coach Dorrance also showed overt affection—affection of the sort that was not welcomed—for one player, Keller, in front of the entire team. He paid inordinate attention to Keller, frequently brushing her forehead, hugging her, rubbing her back, whispering in her ear, dangling a hand in front of her chest, or touching her stomach.

According to the players who made allegations against Coach Dorrance, this conduct was ongoing and occurred at all times and places—including team meetings, practices, and while the team was traveling.

Ms. Jennings herself, according to her testimony, was subjected to harassment on only two occasions:

- Ms. Jennings testified that Coach Dorrance called her to his hotel room while they were traveling in California to assess her performance as a freshman player. Ms. Jennings described the scene as “being alone with a 45 year old man who was her coach and had complete power over her in a dark hotel room, knee to knee, bed not made, sitting at one of those tiny tables.” During the conversation he also asked Ms. Jennings, “Who are you f—ing?”
- During a team warm up session, Coach Dorrance allegedly asked Ms. Jennings if she had had “the same good weekend” with her boyfriend as another player who he had just described as having had a long, sex-filled weekend with her visiting boyfriend.

Ms. Jennings and others also alleged that during the fall of 1996, Ms. Jennings met with UNC’s highest ranking lawyer, a female who had been officially designated by the University as the person to whom claims of sexual harassment should be made. Ms. Jennings alleged that she told the UNC attorney about Coach Dorrance’s sexual comments about his players in great detail and reported that the situation was causing her personally to have feelings of discomfort and humiliation. According to Ms. Jennings, the UNC attorney’s response to her was that Coach Dorrance was a “great guy” and that she should work out her problems directly with him. The UNC attorney took no further action on the complaint and Coach Dorrance’s harassment continued.

LEGAL ANALYSIS

The Fourth Circuit observed that, for purposes of deciding whether summary judgment against the Plaintiff was appropriate or whether the case should proceed to trial, the court had

to take as true allegations of the plaintiff and the witnesses who had given statements/testimony on behalf of the plaintiff. Among the Fourth Circuit's rulings, using that standard, were the following:

1. While this case was filed under Title IX of the Civil Rights Act (relating to colleges and universities), the Fourth Circuit used principles established under Title VII of the 1964 Civil Rights Act (which of course applies to private employers) in reaching its decision.
2. The Fourth Circuit concluded that Ms. Jennings had put forth sufficient evidence for a jury to find that Coach Dorrance's degrading and humiliating conduct was sufficiently severe and pervasive to create a sexually hostile environment. In addition to the fact that the alleged conduct crossed the line of mere joking or boorish behavior that might innocently appear in a sports setting between coach and players, the Fourth Circuit emphasized the persistent and pervasive nature of the comments and behavior. The Court also pointed to several aggravating factors in this case:
 - The Fourth Circuit noted that there was a tremendous "disparity in power" between Coach Dorrance and his players. Coach Dorrance is the most successful women's soccer coach in U.S. college history and coaches the U.S. National Team. He has tremendous power and influence over a player's opportunity for achieving in the soccer world both at UNC and beyond.
 - The Court also noted the age disparity between the harasser and the victims, pointing out that this was a case of a 45-year old man probing into and commenting about the sexual activity of young women, some of whom were as young as 17.
3. Without using the term, the Fourth Circuit then enunciated the theory which has been called by most commentators "second hand harassment" or "target harassment" as being applicable in this case. The theory is that while an individual may not have been personally subjected to sufficient sexual comments or other conduct to create a sexually hostile environment against her, she may be successful in a sexual hostile environment suit if she shows that she witnessed persistent, severe sexual misconduct against others of her sex which would amount to sexual harassment. As mentioned, Ms. Jennings testified that she personally was only subjected to two incidents of harassment by Coach Dorrance. Those two incidents, standing alone, probably would not have amounted to sexual harassment sufficient to give Ms. Jennings a cause of action. However, those two incidents, coupled with the severe and pervasive sexual misconduct that Jennings observed on a daily basis against her female team members, were enough to give her a cause of action sufficient to survive summary judgment and to entitle her to a jury trial.

4. The Fourth Circuit also found that, reviewing the evidence in the light most favorable to Ms. Jennings, UNC would remain as a party to the suit during the jury trial and that the University itself could be liable if the jury so found. The Fourth Circuit noted that Ms. Jennings had complained to an official who had authority to address the alleged discrimination and to institute corrective measures. The official (an attorney) had actual knowledge of alleged discrimination and failed adequately to respond or displayed deliberate indifference to such alleged discrimination. The Fourth Circuit therefore found that the attorney who received Ms. Jennings' complaints and did nothing subjected the University to liability by her inaction and attitude taken with Ms. Jennings.

LESSONS LEARNED

The Jennings case merits special attention for private employers on at least two major points:

Second hand harassment. Under this theory, the number of potential plaintiffs in a sexually hostile work environment situation is greatly expanded. Not only is the individual who is the direct object of sexual comments and other conduct of a severe and pervasive sexual nature able to file a lawsuit, but other persons of the same sex who may not themselves have been subjected to such misconduct also may bring a suit in circumstances such as those alleged by Ms. Jennings. It is therefore incumbent upon employers to insure that the work place is free of sexually suggestive comments and other misconduct even if the object of the comments or other misconduct does not seem to be upset by the actions of the perpetrator. If the actions are severe and pervasive enough to create a sexually hostile work environment, it does not matter to whom the comments and misconduct are specifically directed.

University liability. The alleged inaction of the University attorney to the complaints voiced by Ms. Jennings should be a warning to all employers to take every step possible to insure that all complaints are treated seriously and addressed in a timely and effective manner. Even if Ms. Jennings were allowed to proceed against Coach Dorrance, the University could have avoided liability altogether if the official to whom Jennings complained had promptly acted to take steps reasonably designed to stop the harassment. This case illustrates the temptation to be dismissive of complaints made against persons who are in positions of great authority. Equate Coach Dorrance (who continues to coach women's soccer at UNC and has racked up several more national championships since the suit was filed) to a Vice President in your company. No matter who the person is who has been complained against, a company must take allegations against that person seriously and conduct an investigation to determine the facts. Indeed, as the Fourth Circuit pointed out in finding a sexually hostile environment in this case, the higher up in the organization the perpetrator is, the more likely the court is to find a violation of Title VII using the "disparity in power" factor.

In conclusion, it will be interesting to see how the Jennings case plays out—whether the University will feel strongly enough about this issue to go through the trauma of a highly publicized jury trial, or whether it will seek to settle this matter. In any event, the case should serve as a wake-up call to all employers in this geographic area regarding the legal principles which have now been established in the Fourth Circuit.