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Jennings v. University of North Carolina at Chapel Hill: Title IX, Intercollegiate Athletics, and Sexual Harassment

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**JENNINGS V. UNIVERSITY OF NORTH
CAROLINA AT CHAPEL HILL:
TITLE IX, INTERCOLLEGIATE ATHLETICS,
AND SEXUAL HARASSMENT**

*Deanna DeFrancesco**

*Sexual harassment . . . was as much a part of my
athletics routine as practice was.*¹

INTRODUCTION

“Sexual harassment is a part of college life, so common that,

* Brooklyn Law School Class of 2008; B.A. Vassar College, 2005. The author would like to thank Elizabeth M. Schneider, Rose L. Hoffer Professor of Law, Brooklyn Law School, who first introduced her to issues involving gender and summary judgment in Civil Procedure class and subsequent enlightening conversations. She also provided guidance on this Comment. For Professor Schneider’s broader analysis of gender problems in federal civil litigation summary judgment practice, see Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation* (Brooklyn Law School, Legal Studies Paper No. 71), available at <http://ssrn.com/abstract=968834>. The author would additionally like to thank her family and friends for their unwavering support and encouragement. Special thanks to Professor David Reiss, Professor Minna Kotkin, Victoria Szymczak, Mary Anne Mendenhall, and the *Journal of Law and Policy* staff.

¹ Jesse Mendelson, Note, *Sexual Harassment in Intercollegiate Athletics by Male Coaches of Female Athletes: What it is, What it Means for the Future, and What the NCAA Should Do?* 9 *CARDOZO WOMEN’S L. J.* 597, 616 (2003) (quoting Leslie Heywood, *Despite the Positive Rhetoric about Women’s Sports, Female Athletes Face a Culture of Sexual Harassment*, *THE CHRON. HIGHER EDUC.*, Jan. 8, 1999 (quoting Michelle Hite a former college athlete reflecting on her athletics experience and why she ultimately forfeited her sports scholarship), available at <http://chronicle.com/weekly/v45/i18b00401.htm>).

according to one student, 'it seems almost normal.'"² Quantifying that sentiment, one poll found that 62% of college students have personally faced sexual harassment on campus.³ Although sexual harassment is prevalent in the college environment generally, some scholars argue that it is even more widespread in athletics than in the classroom.⁴ Experts also

² CATHERINE HILL AND ELENA SILVA, DRAWING THE LINE: SEXUAL HARASSMENT ON CAMPUS 14 (2005), available at <http://www.aauw.org/research/DTLFinal.pdf> (analyzing findings regarding sexual harassment in higher education).

³ *Id.* at 15. A guidance manual promulgated by the U.S. Department of Education, Office for Civil Rights explains sexual harassment in the educational context. U.S. DEPARTMENT OF EDUCATION, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 2 (2001), available at <http://www.ed.gov/about/offices/list/ocr/docs/shguide.pdf>. The guide defines such harassment as "unwelcome conduct of a sexual nature." *Id.* Elaborating on this definition, the guide explains that sexual harassment "can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature." *Id.*

Similarly, the Equal Employment Opportunity Commission maintains:

[u]nwelcoming sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment [in the workplace] when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11 (2006). Although there does not appear to be a clear legal definition of sexual harassment, courts have relied on the definition set forth in 29 C.F.R. § 1604.11. *See, e.g.,* Meritor Savings Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986); Wright v. Rollette County, 417 F.3d 879, 885 (8th Cir. 2005).

⁴ *See* Karin Volkwein-Caplan, Frauke Schnell, Shannon Devlin, Michele Mitchell & Jennifer Sutera, *Sexual Harassment of Women in Athletics vs. Academia*, in SEXUAL HARASSMENT AND ABUSE IN SPORT: INTERNATIONAL RESEARCH AND POLICY PERSPECTIVES 91, 93 (Celia Brackenridge and Kari Fasting eds., 2002) (citing Karin A.E. Volkwein, Frauke I. Schnell, Dennis

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agree that sexual harassment in sports is both understudied⁵ and underreported.⁶

Sherwood & Anne Livezey, *Sexual Harassment in Sport: Perceptions and Experiences of American Female Student-Athletes*, 32 INTERNATIONAL REVIEW FOR THE SOCIOLOGY OF SPORT 283 (1997)); Todd W. Crosset, Jeffrey R. Benedict, & Mark A. McDonald, *Male Student-Athletes Reported for Sexual Assault: A Survey of Campus Police Departments and Judicial Affairs Offices*, JOURNAL OF SPORT AND SOCIAL ISSUES, May 1995, at 126, 134 (“[M]ale college student-athletes compared with the rest of the male student population, are responsible for a significantly higher percentage of the sexual assaults reported to judicial affairs offices on the campuses of Division I institutions.”); Volkwein et al., *supra*, at 284 (citing M. Melnick, *Male Athletes and Sexual Assault*, 63 JOURNAL OF PHYSICAL EDUCATION, RECREATION, AND DANCE 32 (1992); M. MESSNER & D. SABO, SEX VIOLATION, AND POWER IN SPORTS: RETHINKING MASCULINITY (1994); MARIAH BURTON NELSON, THE STRONGER WOMEN GET, THE MORE MEN LOVE FOOTBALL: SEXISM AND THE AMERICAN CULTURE OF SPORTS (1994)).

⁵ See, e.g., Kari Fasting, Celia Brackenridge & Kristin Walseth, *Consequences of Sexual Harassment in Sport for Female Athletes*, in SEXUAL HARASSMENT AND ABUSE IN SPORT: INTERNATIONAL RESEARCH AND POLICY PERSPECTIVES 47, 48 (Celia Brackenridge and Kari Fasting eds., 2002) (“Research on sexual harassment in sports is scarce but has grown steadily since the mid-1980s.”) (citations omitted); Nancy Hogshead-Maker & Sheldon Elliot Steinbach, *Intercollegiate Athletics’ Unique Environments for Sexual Harassment Claims: Balancing the Realities of Athletics with Preventing Potential Claims*, 13 MARQ. SPORTS L. REV. 173, 173 (2003) (citing Annmarie Pinarski, Note, *When Coaches “Cross the Line”: Hostile Athletic Environment Sexual Harassment*, 52 RUTGERS L. REV. 911, 915 (2000) (citation omitted)) (commenting on the lack of statistics regarding sexual harassment and female athletes).

⁶ See, e.g., Sandra L. Kirby, Lorraine Greaves, & Olena Hankivsky, *Women Under the Dome of Silence: Sexual Harassment and Abuse of Female Athletes*, 21 CANADIAN WOMAN STUDIES 132, pt. 3 132-35 (2002) (describing the “‘dome of silence’ [which] exists to keep athletes complacent in sport”); Volkwein et al., *supra* note 4, at 284 (noting that “official reports will tend to underestimate the incidence of sexual harassment and sexual assaults that take place on college campuses” for a variety of reasons including victims’ decisions to remain silent about harassment and colleges’ faulty and under-publicized complaint procedures) (citing Crosset et al., *supra* note 4; Helen Lenskyj, *Unsafe at Home Base: Women’s Experience of Sexual Harassment in University Sport and Physical Education*, 1 WOMEN IN SPORT AND PHYSICAL ACTIVITY JOURNAL 19, 21 (1992)).

Some scholars attribute these high rates of sexual harassment to the uniqueness of the athletic environment.⁷ First, sexual harassment tends to be more rampant “in institutions characterized by hierarchical distributions of power”—structures which are common in intercollegiate sports environments.⁸ For example, “coaches, the majority of whom are men, hold significant power over athletes regarding scholarships, who gets to play and who remains on the team.”⁹ Female athletes at the bottom of the hierarchy are, therefore, uniquely susceptible to sexual harassment.¹⁰

Second, the relationship between coach and athlete is characterized by “close bonds” and intimacy.¹¹ Coaches have control over personal aspects of athletes’ lives, including health and sexual behavior.¹² Additionally, as loyalty to the team, “[i]ndividual rights in athletics often take a back seat to the notion of ‘winning’ and the ‘good of the team.’”¹³

Third, various aspects of the athletics environment involve physical contact.¹⁴ For example, coaches and athletes might celebrate a victory with a hug.¹⁵ At other times, “hands-on” teaching and learning are necessary to demonstrate athletic skills.¹⁶ This unique characteristic heightens the potential for improper touching and sexual harassment.¹⁷

The experience of Melissa Jennings, a former soccer player

⁷ See, e.g., Celia Brackenridge, “He owned me basically . . .” *Women’s Experience of Sexual Abuse in Sport*, 32 INTERNATIONAL REVIEW FOR THE SOCIOLOGY OF SPORT 115, 115, 120-22 (1997); Volkwein et al., *supra* note 4, at 285-86.

⁸ Volkwein et al., *supra* note 4, at 285.

⁹ *Id.* at 285-86.

¹⁰ *See id.*

¹¹ *Id.* at 284-85.

¹² *Id.* at 285 (citing Helen Lenskyj, *supra* note 6, at 26).

¹³ *Id.* at 285 (citing Helen Lenskyj, *supra* note 6, at 27).

¹⁴ E.g., Hogshead-Makar & Steinbach, *supra* note 5, at 177; Volkwein et al., *supra* note 4, at 285.

¹⁵ Hogshead-Makar & Steinbach, *supra* note 5, at 177.

¹⁶ *Id.*; Volkwein et al., *supra* note 4, at 285.

¹⁷ Volkwein et al., *supra* note 4, at 285.

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for the University of North Carolina at Chapel Hill, illustrates this nexus between the athletics environment and sexual harassment. In 1998, Jennings filed suit against the University under Title IX.¹⁸ Jennings alleged that her coach, Anson Dorrance, sexually harassed her while she was a member of the team.¹⁹ Despite Jennings' accusations, when the defendants moved for summary judgment, the district court granted the motion.²⁰ The Fourth Circuit affirmed on the grounds that the alleged conduct could not be considered severe and pervasive, and therefore, did not create a hostile environment under Title IX.²¹

This Comment argues that the Fourth Circuit in *Jennings* erred in affirming the district court's decision granting the defendants' motion for summary judgment. The court did not properly consider prior Title IX sexual harassment cases and failed to appreciate and weigh all of the circumstances underlying Jennings' claim, including the uniqueness of the intercollegiate athletics environment.

Part I provides a backdrop to Jennings' claims by discussing

¹⁸ *Jennings v. Univ. of N.C. at Chapel Hill*, 444 F.3d 255 (4th Cir. 2006); *Jennings v. Univ. of N.C. at Chapel Hill*, 340 F. Supp. 2d 666 (M.D.N.C. 2004). Jennings also filed claims under 42 U.S.C. § 1983 (2006) and state tort law against Dorrance and other University officials. See *Jennings*, 444 F.3d at 259.

¹⁹ *Jennings*, 444 F.3d. at 259.

²⁰ *Jennings v. Univ. of N.C. at Chapel Hill*, 340 F. Supp. 2d 666, 668 (M.D.N.C. 2004).

²¹ *Jennings*, 444 F.3d at 275. On the eve of publication, the Fourth Circuit reversed this decision en banc holding that "Jennings has presented sufficient evidence to raise triable questions of fact on all disputed elements of her Title IX claim against UNC, and the district court erred in granting the University's motion for summary judgment." See *Jennings v. Univ. of N.C. at Chapel Hill*, No. 04-2447, 2007 U.S. App. LEXIS 8216, *32-*33, (4th Cir. April 9, 2007) (additionally vacating summary judgment on Jennings' § 1983 claims against Dorrance and Ehringhaus. *Id.* *2-*3.). As a result, this Comment does not devote the depth of analysis to the latest decision that it deserves. Nevertheless, this Comment is a valuable discussion of intercollegiate athletics and sexual harassment and serves as further justification for this latest, favorable opinion.

the history of sexual harassment law and highlighting the trajectory of Title IX law and policy, especially as it relates to athletics. Part II delineates the facts and procedural aspects of the *Jennings* case. By examining the decision in the context of two other cases, *Zimmer v. Ashland University*²² and *Klemencic v. Ohio State University*,²³ Part III argues that the *Jennings* court improperly affirmed the district court's judgment dismissing the Title IX claim. Part IV then discusses the issue of summary judgment and sexual harassment. It contends that *Jennings* illustrates the improper use of summary judgment to decide these cases, a problem identified by many scholars. This Comment concludes by joining these scholars in urging courts to exercise more caution in dismissing such claims within this procedural context.

I. SEXUAL HARASSMENT LAW²⁴

A. Title VII: The Precursor to Title IX²⁵

Until the middle of the twentieth century, laws offered

²² No. 1:00CV0630, 2001 U.S. Dist. LEXIS 15075 (N.D. Ohio 2001).

²³ 10 F. Supp. 2d 911 (S.D. Ohio 1998), *aff'd*, 263 F.3d 504 (6th Cir. 2001).

²⁴ The purpose of this Comment is not to outline a full history of sexual harassment law. It sets out only to briefly provide readers with a general background in order to contextualize and facilitate an understanding of this Comment. Also for this reason, Section B of this Part, which discusses Title IX, does not focus on the aspects of the law that do not involve sexual harassment, such as the *Cohen* line of cases, which deal with the funding of athletics programs. See *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993).

²⁵ For a more extensive examination of the history of Title VII see MARGARET A. CROUCH, *THINKING ABOUT SEXUAL HARASSMENT: A GUIDE FOR THE PERPLEXED* (Oxford University Press 2001); CATHERINE MACKINNON, *WOMEN'S LIVES, MEN'S LAWS* 162-183 (2005); Reva B. Siegel, *A Short History of Sexual Harassment*, in *DIRECTIONS IN SEXUAL HARASSMENT* 1, 1-26 (Catherine A. MacKinnon and Reva B. Siegel, eds., 2004).

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victims of sexual harassment little reprieve.²⁶ Though state rape laws criminalized such abuse, women faced excessive burdens in proving their cases.²⁷ “[T]he law assumed that women in fact *wanted* the sexual advances and assaults that they claimed injured them.”²⁸ Tort law also fell short of adequate protection for sexual assault.²⁹

In 1964, Congress passed Title VII of the Civil Rights Act.³⁰ This act made it unlawful “for an employer . . . 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.”³¹ In the years following the enactment of Title VII, sex discrimination cases which came before the courts involved “discriminatory policies,” such as height and weight requirements directed only at women.³²

As a result of the efforts of feminist activists who “laid the foundation” for this cause of action,³³ the courts finally

²⁶ See Siegel, *supra* note 25, at 3-5.

²⁷ *Id.* at 4.

²⁸ *Id.* at 4 (emphasis in original).

²⁹ *Id.* at 5 (explaining that early common law permitted sexual assault claims to the extent that they “inflicted an injury on a *man’s property interest in the woman who was assaulted.*”).

³⁰ Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq. (2006).

³¹ 42 U.S.C. § 2000e-2(a)(1).

³² CROUCH, *supra* note 25, at 38 (citing *Laffey v. Northwest Airlines*, 366 F. Supp. 763 (D.D.C. 1974), *aff’d in part and rev’d in part*, 567 F.2d 429 (D.C. Cir. 1976)).

³³ See MACKINNON, *supra* note 25, at 165 (“[T]he civil rights movements in general, and the women’s movement in particular, laid the foundation for the recognition of sexual harassment as a practice of inequality” (internal footnotes omitted).); Siegel, *supra* note 25, at 8 (explaining:

In the 1970’s Catherine MacKinnon and Lin Farley and the many other lawyers and activists who represented women in and out of court were able to mount a concerted assault, of unprecedented magnitude and force, on the practice of sexual harassment.

. . . .

recognized sexual harassment as a viable claim under Title VII over a decade after its passage.³⁴ The court developed two theories of sexual harassment: quid pro quo and hostile environment. The quid pro quo theory originated in *Williams v. Saxbe*, which involved a female employee who was fired after she refused the sexual demands of her supervisor.³⁵ The court held that “retaliatory actions of a male supervisor, taken because a female employee declined his sexual advances, constitutes [sic] sex discrimination within the definitional parameters of Title VII”³⁶ Later, in *Meritor Savings Bank, FSB v. Vinson*,³⁷ the Supreme Court recognized the hostile environment theory.³⁸ In defining hostile environment, the *Meritor* Court looked to the Equal Employment Opportunity Guidelines.³⁹ It stated, “sexual misconduct constitutes prohibited ‘sexual harassment,’ whether or not it is directly linked to the grant or denial of an economic *quid pro quo*, where ‘such conduct has the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile, or offensive working environment.’”⁴⁰ Today, a plaintiff may assert one or both

. . . Sexual harassment law arose, first and foremost, from women acting as part of a social movement speaking out about their experiences as women at work; the term “sexual harassment” itself grew out of a consciousness-raising session Lin Farley held in 1974 as part of a Cornell University course on women and work.).

³⁴ See *Williams v. Saxbe*, 413 F. Supp. 654 (D.C. Cir. 1976), *rev’d on other grounds sub nom*, *Williams v. Bell*, 587 F.2d 1240 (D.C. Cir. 1978). See also MACKINNON, *supra* note 25, at 162 (citing *Williams* as the first case to permit a claim of sexual harassment under Title VII).

³⁵ *Williams*, 413 F. Supp. at 655.

³⁶ *Id.* at 657.

³⁷ *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1985).

³⁸ See *id.* at 67. The plaintiff in *Meritor* alleged that she had been forced to yield to the sexual advances of her supervisor out of fear that he would fire her. He also inappropriately touched her and showed his genitalia to her on other occasions. See *id.* at 60.

³⁹ See *id.* at 65.

⁴⁰ *Id.* at 65 (quoting 29 C.F.R. § 1604.11(a)(1985)) (emphasis in original).

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theories in a sexual harassment lawsuit.⁴¹

*B. Title IX: The Protection of Students, Athletes, and Employees in Educational and Athletics Environments*⁴²

Building on Title VII, Congress passed Title IX of the Education Amendments in 1972 in order to promote equality of opportunity in educational environments.⁴³ This legislation mandates that “no person shall, on the basis of sex, be excluded from, denied the benefits of, or subject to discrimination under any program or activity receiving Federal financial assistance.”⁴⁴ Like Title VII, Title IX creates a remedy for victims of sexual harassment which occurs in educational institutions.⁴⁵

In 1977, *Alexander v. Yale University*⁴⁶ presented the first opportunity for a court to rule on sexual harassment under Title IX.⁴⁷ Numerous plaintiffs, including five female students and a male faculty member, alleged that the University’s “failure to combat sexual harassment of female students and its refusal to

⁴¹ See *Klemencic v. Ohio State Univ.*, 10 F. Supp. 2d 911 (S.D. Ohio 1998), *aff’d*, 263 F.3d 504 (6th Cir. 2001). In *Klemencic*, the plaintiff asserted her sexual harassment claim based on both theories. *Id.* at 914. See also *Zimmer v. Ashland Univ.*, No. 1:00CV0630, 2001 U.S. Dist. LEXIS 15075, *2 (N.D. Ohio 2001). In *Zimmer*, the plaintiff asserted her sexual harassment claim based only on the hostile environment theory. *Id.*

⁴² For a more extensive examination of the history of Title IX see, e.g., CROUCH, *supra* note 25; LINDA JEAN CARPENTER & R. VIVIAN ACOSTA, *TITLE IX* (2005); David Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J. L. & GENDER 217 (2005); Martha McCarthy, *Students as Victims of Sexual Harassment: The Evolving Law*, 27 J. L. & EDUC. 401 (1998).

⁴³ See 20 U.S.C. § 1681 et seq. (2006).

⁴⁴ 20 U.S.C. § 1681 (2006).

⁴⁵ CROUCH, *supra* note 25, at 70.

⁴⁶ 459 F. Supp. 1 (D. Conn. 1977), *aff’d*, 631 F.2d 178 (2d Cir. 1980). For a discussion of *Alexander* see Anne E. Simon, *Alexander v. Yale University: An Informal History*, in DIRECTIONS IN SEXUAL HARASSMENT LAW 51 (Catherine A. MacKinnon and Reva B. Siegel, eds., 2004).

⁴⁷ CROUCH, *supra* note 25, at 70.

institute mechanisms and procedures to address complaints and make investigations of such harassment interferes with the educational process and denies equal opportunity in education” under Title IX.⁴⁸ Although the court dismissed each of the plaintiffs’ claims but one,⁴⁹ it held that sexual harassment is sexual discrimination in violation of Title IX.⁵⁰ Almost a decade later, the Third Circuit in *Moire v. Temple University School of Medicine*⁵¹ recognized the hostile environment theory in a Title IX case.⁵²

In 1992, *Franklin v. Gwinnett County Public Schools*⁵³ introduced the Supreme Court to its first Title IX sexual harassment case.⁵⁴ In addition to affirming *Cannon v. University of Chicago*,⁵⁵ which recognized a private right of action under Title IX,⁵⁶ the Court held that plaintiffs may seek damages for

⁴⁸ *Alexander*, 459 F. Supp. at 2.

⁴⁹ *Id.* at 6-7 (“Plaintiff Price’s complaint may not be dismissed on its face despite failure to seek any administrative recourse whatsoever, since ordinarily beneficial and fair requirements of administrative exhaustion should not be imposed absent realistic possibility of a meaningful remedy.”). Although her claim did not ultimately succeed, the Second Circuit later agreed with the district court that “only plaintiff Price presented a justiciable claim for relief under Title IX.” *See Alexander*, 631 F.2d at 185.

⁵⁰ *Alexander*, 459 F. Supp. at 6-7 (“[I]t is perfectly reasonable to maintain that academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education, just as questions of job retention or promotion tied to sexual demands from supervisors have become increasingly recognized as potential violations of Title VII’s ban against sex discrimination in employment”). The one complaint that the court did not dismiss alleged a more “quid pro quo” type of harassment in that the Plaintiff claimed to have received a poor grade as a result of rejecting her professor’s sexual proposition. The other claimants alternatively claimed a more “hostile environment” type of harassment. CROUCH, *supra* note 25, at 70.

⁵¹ 613 F. Supp. 1360 (E.D. Pa. 1985), *aff’d*, 800 F.2d 1136 (3d Cir. 1986).

⁵² CROUCH, *supra* note 25, at 70.

⁵³ 503 U.S. 60 (1992).

⁵⁴ *Franklin*, 503 U.S. 60 (1992).

⁵⁵ 441 U.S. 677, 717 (1979).

⁵⁶ *Franklin*, 503 U.S. at 63-64.

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sexual harassment by a teacher.⁵⁷ In *Gebser v. Lago Vista Independent School District*⁵⁸ and *Davis v. Monroe County Board of Education*,⁵⁹ the Court began to develop standards for evaluating institutional liability for teacher-student harassment.⁶⁰ *Gebser* held that schools are not liable for sexual harassment unless they had “actual notice of” and were “deliberately indifferent to” the misconduct.⁶¹ *Davis* extended this standard for liability to peer harassment.⁶²

As a result of years of jurisprudence on these issues, in order to successfully allege a Title IX violation on the basis of the hostile environment theory, four elements must be established.⁶³ First, the complainant must be a member of the class of individuals protected under the Act.⁶⁴ For example, the plaintiff must be a student at an educational institution which receives federal funding. Second, she must have been “subjected to harassment based on her sex.”⁶⁵ Third, the harassment must

⁵⁷ *Id.* at 65, 76.

⁵⁸ 524 U.S. 274 (1998).

⁵⁹ 526 U.S. 629 (1999).

⁶⁰ Anne-Marie Harris & Kenneth B. Grooms, *A New Lesson Plan for Educational Institutions: Expanded Rules Governing Liability under Title IX of the Educational Amendments of 1972 for Student and Faculty Harassment*, 8 AM. U.J. GENDER SOC. POL’Y & L. 575, 587 (2000).

⁶¹ *Gebser*, 524 U.S. at 277.

⁶² *Davis*, 526 U.S. at 644-45 (applying the *Gebser* standard to a peer harassment case and finding “[i]f a funding recipient does not engage in harassment directly, it may not be liable for damages unless its deliberate indifference ‘subjects’ its students to harassment”).

⁶³ See *Jennings v. Univ. of N.C. at Chapel Hill*, 444 F.3d 225, 267-68 (4th Cir. 2006). Some courts may expand these elements into five, but they, nevertheless, maintain the same fundamental requirements. See, e.g., *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 66 (1st Cir. 2002) (requiring five elements and separating the second element into two); *Donovan v. Mount Ida College*, No. 96-10289-RGS, 1997 U.S. Dist. LEXIS 23048, *12 (D. Mass. 1997) (requiring five elements adding that the sexual harassment must have been unwelcome).

⁶⁴ E.g., *Jennings*, 444 F.3d at 267-68; *Frazier*, 276 F.3d at 66; *Donovan*, 1997 U.S. Dist. LEXIS 23048, at *12.

⁶⁵ *Jennings*, 444 F.3d at 268. E.g., *Frazier*, 276 F.3d at 66; *Hayut v. State Univ. of N.Y.*, 352 F.3d 733, 748 (2d Cir. 2003); *Donovan*, 1997 U.S.

have been sufficiently “severe and pervasive to create an abusive educational environment.”⁶⁶ Fourth, the plaintiff must show that there is a “basis for imputing institutional liability under Title IX.”⁶⁷ Under this element, a school official with sufficient power to ameliorate the situation must have had “actual notice of, and [have been] deliberately indifferent to, the . . . misconduct.”⁶⁸

In examining the third element regarding the severity and pervasiveness of the conduct,⁶⁹ the courts look to the history of Title VII for guidance.⁷⁰ Like Title VII analyses, courts apply this standard from a “subjective and objective perspective.”⁷¹ Courts also consider the “constellation of surrounding circumstances, expectations, and relationships” of the underlying claim.⁷² Thus, in analyzing a hostile environment claim, courts look to the totality of circumstances in order to decipher actionable harassment. No single factor is determinative.⁷³

Dist. LEXIS 23048, at *12.

⁶⁶ *Frazier*, 276 F.3d at 66. *See, e.g., Jennings*, 444 F.3d at 268; *Donovan*, 1997 U.S. Dist. LEXIS 23048, at *12.

⁶⁷ *Jennings*, 444 F.3d at 268. *See, e.g., Frazier*, 276 F.3d at 66; *Donovan*, 1997 U.S. Dist. LEXIS 23048, at *12.

⁶⁸ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998).

⁶⁹ This Comment focuses on the severe and pervasive element because it is central to the *Jennings* analysis.

⁷⁰ *See, e.g., Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999) (looking to the Title VII case *Meritor* for guidance on the severe and pervasive standard in deciding a Title IX case); *Hayut*, 352 F.3d at 745 (citing *Harris v. Forklift Sys. Inc.*, 510 U.S. 17 (1993), a Title VII case).

⁷¹ *See Harris*, 510 U.S. at 21-22. *See also Faragher v. City of Boca Raton*, 524 U.S. 775, 787-788 (1998) (reaffirming the “subjective and objective standard” set out in *Harris*); *Jennings v. Univ. of N.C. at Chapel Hill*, 444 F.3d 225, 270 (4th Cir. 2006).

⁷² *Davis*, 526 U.S. at 651.

⁷³ *Harris*, 510 U.S. at 21-22.

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II. *JENNINGS V. UNC AT CHAPEL HILL*—THE FACTS⁷⁴

The University of North Carolina at Chapel Hill has long been the home of “the best women’s soccer program in the country.”⁷⁵ The head coach since 1979,⁷⁶ Anson Dorrance led his teams to over twenty national championships and also served as coach for the U.S. Women’s National Team.⁷⁷ Women interested in playing soccer “would ‘cut off their right arm to be at [UNC]’ and play for Dorrance.”⁷⁸

In August 1996, when she was seventeen years old, Melissa Jennings made the women’s varsity soccer team as a “walk-on” to play goalkeeper.⁷⁹ Though Jennings did not have an athletics scholarship, some of her teammates did.⁸⁰ In May 1998, Dorrance cut Jennings from the team.⁸¹

Jennings alleged that Dorrance, who was forty-five years old at the time, “made sexual comments and inquiries ‘on a regular basis’” during her two years with the team.⁸² Some of Jennings’ teammates affirmed her claims.⁸³ For example, Debbie Keller, the team captain, confirmed that “Dorrance would make inappropriate sexual comments to players ‘anytime the team was together,’ whether ‘on a plane, in a car, or on a bus, in a hotel,

⁷⁴ Because the case was decided in the context of summary judgment, each of Jennings’ allegations will be considered “facts” for the purpose of this Comment.

⁷⁵ *Jennings*, 444 F.3d at 283 (Michael, J., dissenting). This Comment cites to the dissent in order to fully convey Jennings’ allegations.

⁷⁶ *Id.* at 259 (majority opinion).

⁷⁷ *Jennings v. Univ. of N.C. at Chapel Hill*, 444 F.3d 255, 283 (4th Cir. 2006) (Michael, J., dissenting).

⁷⁸ *Id.*

⁷⁹ *Id.* at 259 (majority opinion).

⁸⁰ *Id.*

⁸¹ *Id.* at 263.

⁸² *Id.* at 283 (Michael, J., dissenting).

⁸³ *See Jennings v. Univ. of N.C. at Chapel Hill*, 444 F.3d 255, 283 (Michael, J., dissenting).

at practice, out of town, [or] at events.’”⁸⁴ In addition, Amy Steelman, another player on the team, testified that “when Anson Dorrance was around, he would encourage and participate in sexual discussions, sexual jokes, sexual talk, sexual banter, and sexual innuendos. A typical Monday afternoon included queries and discussions with Anson Dorrance into the team members’ sexual . . . exploits”⁸⁵

Jennings also claimed that Dorrance made inappropriate sexual comments while the team warmed up before they began their practice for the day.⁸⁶ During this “warm-up” time, the players would talk about various aspects of their lives. Some team members comfortably discussed even their sex lives; however, other players, such as Jennings, did not.⁸⁷ Jennings described Dorrance’s involvement in these “warm-up” conversations as frequent.⁸⁸

More specifically, Jennings alleged:

[n]early every day or every other day, he inquired of one player in front of the entire team, “Who [her] fuck of the minute is, fuck of the hour is, fuck of the week [is],” whether there was a “guy [she] hadn’t fucked yet,” and whether she “got the guys’ names as they came to the door or whether she just took a number.”⁸⁹

After learning that one player’s boyfriend was planning to visit her, he asked if “she was going to have a ‘shag fest . . . ’ [with] her boyfriend . . . [or] whether she ‘was going to fuck him and leave him.’”⁹⁰ To other players he asked similarly

⁸⁴ *Id.* at 283 (Michael, J., dissenting); *see also id.* at 260 (majority opinion).

⁸⁵ *Id.* at 260.

⁸⁶ *Id.* These practices occurred everyday, except Sundays and days on which they played games. *Id.* at 259.

⁸⁷ *Id.* at 260 (majority opinion) (referencing the previous sentence as well), 289 (Michael, J., dissenting).

⁸⁸ *Id.* 260 (majority opinion).

⁸⁹ *Jennings v. Univ. of N.C.* at Chapel Hill, 444 F.3d 255, 283 (4th Cir. 2006) (Michael, J., dissenting).

⁹⁰ *Id.* at 284.

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crude questions, such as “who a team member’s ‘[fuck] of the week’ is,”⁹¹ and whether one player “was ‘going to have sex with the entire lacrosse team.’”⁹²

On another occasion, Dorrance told Keller that he wanted to watch her teammate have sex when she lost her virginity.⁹³ Keller, shocked, told this to Jennings.⁹⁴ Another time, Jennings overheard Dorrance discussing his fantasy about “‘an Asian threesome’ with his Asian players.”⁹⁵

Additionally, Dorrance made improper comments about the girls’ bodies. For example, he used words such as “nice legs,” “nice racks,” “breasts bouncing,” “top heavy,” “fat ass,” “described how their ‘asses [looked] in spandex’ . . . , remarked on one player’s ‘dimples and . . . cuteness,’ . . . and called another ‘Chuck’ because he suspected that she was a lesbian.”⁹⁶

Steelman alleged that Dorrance directed “inordinate attention” at Keller in front of the other players.⁹⁷ She described how he would “[put] his arm around her shoulder,’ ‘[dangle] his hand in front of her chest,’ and ‘[touch] her hair.’”⁹⁸ According to Steelman, Keller’s nonverbal communication indicated her “strong discomfort.”⁹⁹

On other occasions, Dorrance specifically targeted Jennings. While at an out-of-state tournament in 1996, Dorrance invited his players into his hotel room for individual meetings. During these private encounters, he discussed each player’s athletic performance. When meeting with Jennings, he first explained that her place on the team was in danger due to her poor grades.¹⁰⁰ Next, Jennings recounted, Dorrance suddenly asked,

⁹¹ *Id.* at 262 (majority opinion).

⁹² *Id.* at 284 (Michael, J., dissenting).

⁹³ *Id.* at 276 (majority opinion).

⁹⁴ *See id.* at 276 (majority opinion), 284 (Michael, J., dissenting).

⁹⁵ *Jennings v. Univ. of N.C. at Chapel Hill*, 444 F.3d 255, 284 (4th Cir. 2006) (Michael, J., dissenting).

⁹⁶ *Id.*

⁹⁷ *Id.* at 277 (majority opinion).

⁹⁸ *Id.* at 284 (Michael, J., dissenting).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 262-63 (majority opinion) (referencing prior sentences as well).

“Who are you fucking?”¹⁰¹ Jennings responded, “[N]one of [your] God damn business.”¹⁰² Jennings later described the atmosphere of the meeting, “I was 17 when he asked me [“Who I was fucking?”] in a dark hotel room, knee-to-knee, bed not made, sitting at one of those tiny tables.”¹⁰³ In a separate incident, while discussing a player’s “shag fest,” as described by Dorrance, the coach pried, “Yes, what about [Jennings]?” when a team member mentioned that Jennings too had visited her boyfriend during that time.¹⁰⁴ Jennings “felt humiliated and did not respond.”¹⁰⁵

As a result of the overly sexual environment shaped by Dorrance, Jennings lived in constant fear of his attention, and like other players, whom he drove to tears, Jennings felt “uncomfortable, filthy and humiliated.”¹⁰⁶ Other players, similarly offended by Dorrance, also shared Jennings’ shock and discontent.¹⁰⁷ In response to Dorrance’s actions and words, some even commented, “I can’t believe he would say that.”¹⁰⁸ Despite this atmosphere, Jennings described the predicament that players faced: “if they gave any sort of opposition . . . [their] playing time [would be] gone, their career [would be] gone.”¹⁰⁹

Dorrance’s behavior made Jennings so uncomfortable that she turned to Susan Ehringhaus, the Assistant to the Chancellor and Senior University Counsel, for guidance.¹¹⁰ Jennings expressed a number of complaints against Dorrance, including that he refused to reimburse her for \$400 worth of Gatorade he had forced her to buy, made sexual comments to the athletes,

¹⁰¹ Jennings v. Univ. of N.C. at Chapel Hill, 444 F.3d 255, 285 (4th Cir. 2006) (Michael, J., dissenting).

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 285 (Michael, J., dissenting).

¹⁰⁵ *Id.*

¹⁰⁶ *Id.* at 284-85.

¹⁰⁷ See Jennings v. Univ. of N.C. at Chapel Hill, 444 F.3d 255, 289 (4th Cir. 2006) (Michael, J., dissenting).

¹⁰⁸ *Id.* at 285.

¹⁰⁹ *Id.*

¹¹⁰ See *id.* at 262 (majority opinion), 285 (Michael, J., dissenting).

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inquired into the sex lives of players, and encouraged her to attend parties where underage drinking occurred.¹¹¹ The only advice Ehringhaus offered Jennings was “to talk with Dorrance about all of these issues.”¹¹²

Later in May 1998, despite Jennings’ belief that her soccer skills and her grades were improving, Dorrance cut her from the team.¹¹³ Days later, the school received a letter from Jennings’ father expressing his concern with Dorrance’s behavior.¹¹⁴ He complained of Dorrance prying into the players’ and his daughter’s sex lives. Specifically, he said he found “inappropriate and harassing” Dorrance’s typical inquiries, such as “[a]re you shacking up with him? . . . Who is shacking up with whom? [and] . . . [W]ho her s[hag] for the week is/was?”¹¹⁵

After the University received this letter, school officials began an investigation.¹¹⁶ These officials later alerted Jennings’ father that Dorrance had come to a realization that his actions were “inappropriate, and [that] he [would] immediately discontinue that activity.”¹¹⁷ Dorrance endorsed the school’s letter apologizing to Jennings.¹¹⁸

Approximately three months after the school’s investigation, Jennings filed suit against the University and Dorrance.¹¹⁹ After word of this lawsuit spread, students threatened her safety both in person and via telephone.¹²⁰ These constant threats forced Jennings to transfer to another school for her senior year.¹²¹

¹¹¹ *Id.* at 262 (majority opinion).

¹¹² *Id.*

¹¹³ *Jennings v. Univ. of N.C. at Chapel Hill*, 444 F.3d 255, 263 (4th Cir. 2006).

¹¹⁴ *Id.* at 264.

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 265.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Jennings v. Univ. of N.C. at Chapel Hill*, 444 F.3d 255, 265 (4th Cir. 2006).

¹²⁰ *Id.* at 286 (Michael, J., dissenting).

¹²¹ *Id.*

Despite Jennings' allegations, when the defendants moved for summary judgment, the district court granted their motion holding that Dorrance's conduct was not sufficiently "severe, pervasive and objectively offensive" ¹²² The Fourth Circuit affirmed the judgment. ¹²³

III. THE FOURTH CIRCUIT ERRED IN DISMISSING *JENNINGS V. UNC AT CHAPEL HILL* ON SUMMARY JUDGMENT

This Part deconstructs the "severe and pervasive" standard as applied to cases in which complaints alleged that harassment occurred between coaches and athletes at the intercollegiate level. Specifically, this Part examines the *Jennings* court's analysis and application of this standard in light of two other cases, *Zimmer v. Ashland University* ¹²⁴ and *Klemencic v. Ohio State University*. ¹²⁵ These cases directly address the coach-athlete relationship at the intercollegiate sports level and involve the severe and pervasive standard. ¹²⁶ In addition, this Part looks

¹²² 340 F. Supp. 2d 666, 675. Although the district court applied the "severe, pervasive, and objectively offensive" standard, the Fourth Circuit reviewed Jennings' claims under the "severe and pervasive standard." *Jennings*, 444 F.3d at 268 n.8. In considering which standard to use, the court concluded that because Jennings' claims did not meet even the lower "severe and pervasive" inquiry, it need not determine whether the heightened standard established in *Davis*, a peer harassment case, applies to teacher-student cases. *Id.*

¹²³ *Jennings*, 444 F.3d at 259.

¹²⁴ No. 1:00CV0630, 2001 U.S. Dist. LEXIS 15075 (N.D. Ohio 2001).

¹²⁵ 10 F. Supp. 2d 911 (S.D. Ohio 1998), *aff'd*, 263 F.3d 504 (6th Cir. 2001). The Sixth Circuit upheld the district court's decision on the grounds that Klemencic failed to appeal a jury verdict, which found that Coach Crawford did not subject her to quid pro quo harassment, and the decision granting summary judgment in favor of Crawford. Hence, the Sixth Circuit found that "Klemencic [was] precluded from establishing the first element of her prima facie case—that she experienced either quid pro quo sexual harassment or a sexually hostile environment at the hands of Crawford." *Id.* at 511. Because the Sixth Circuit could not reevaluate the lower court's analysis on these final decisions, this Comment uses the lower court's decision to illustrate its argument.

¹²⁶ Research revealed only two cases directly relevant to this analysis:

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to the *Jennings* dissent both as illustrative of the majority's shortcomings and as a proper guide in analyzing various issues.

This Comment hopes to uncover how the unique athletic environment impacts the courts' analyses. Also, by deconstructing the "severe and pervasive" standard and examining *Jennings* in view of the related case law, this Part critiques the *Jennings* court's analysis. It ultimately concludes that *Jennings*' allegations should have survived under this standard.

A. Zimmer and Klemencic: *The Facts*

1. Zimmer v. Ashland University¹²⁷

Kelly Zimmer was a swimmer on the Ashland University swim team from 1997-1999.¹²⁸ After her first year, Zimmer was happy with her grades and athletic performance on the team.¹²⁹ However, when Coach Baugh joined the team in 1998, Zimmer found it increasingly difficult to perform.¹³⁰ Zimmer attributed

Zimmer, No. 1:00CV0630, 2001 U.S. Dist. LEXIS 15075 and *Klemencic*, 10 F.Supp. 2d 911. For other cases involving coach-athlete harassment at the intercollegiate level that do not deal with the severe and pervasive standard see *Turner v. McQuarter*, 79 F. Supp. 2d 911 (N.D. Ill. 1999); *Ericson v. Syracuse Univ.*, 35 F. Supp. 2d 326 (S.D.N.Y. 1999). For cases involving coach-athlete harassment at the interscholastic level see *Riddick v. Sch. Bd. of the City of Portsmouth*, 238 F.3d 518 (4th Cir. 2000); *Doe v. Rains County Indep. Sch. Dist.*, 76 F.3d 666 (5th Cir. 1996); *HM & MM v. Jefferson County Bd. of Ed.*, 719 So. 2d 793 (D. Ala. 1999); *Doe v. Green*, 298 F. Supp. 2d 1025 (D. Nev. 2004); *Seneway v. Canon McMillan Sch. Dist.*, 969 F. Supp. 325 (W.D. Pa. 1997). For cases involving peer harassment in intercollegiate athletics see *Brzonkala v. Virginia Polytechnic Inst. & State Univ.*, 132 F.3d 949 (4th Cir. 1997); *Williams v. Bd. of Regents of the Univ. Sys. of Geor.*, 441 F.3d 1287 (11th Cir. 2006); *Simpson v. Univ. of Colo.*, 372 F. Supp. 2d 1229 (D. Colo. 2005).

¹²⁷ No. 1:00CV0630, 2001 U.S. Dist. LEXIS 15075 (N.D. Ohio 2001).

¹²⁸ *Id.* at *4, *8-*9.

¹²⁹ *Id.* at *4.

¹³⁰ *Id.* at *7.

her poor performance to Baugh's inappropriate conduct and physical and verbal abuse. For example, Zimmer complained that he

felt her back and legs on the pool deck when she had hives; . . . told Zimmer that she has nice legs, no butt, and that "[she] looks good," . . . stared at Zimmer's chest several times . . . and said, 'Kelly, I see you are cold today' (in reference to her breasts); . . . made Zimmer stay after practice so that he could ice her shoulder while they were alone; [and] pulled Zimmer's bathing suit strap down to her bicep while icing her shoulder.¹³¹

Other members of the team experienced similar conduct.¹³²

Although Zimmer and other team members complained of Baugh's behavior to school officials, as well as to him personally, the harassment did not stop.¹³³ As a result of her coach's conduct, Zimmer suffered from post-traumatic stress disorder.¹³⁴ Her grades also fell.¹³⁵ Subsequently, Zimmer initiated a Title IX suit under the hostile environment theory.¹³⁶ The court declined to grant the defendant's summary judgment motion and permitted Zimmer's hostile environment claim to proceed to trial.¹³⁷

¹³¹ *Id.* at *5-*6.

¹³² *See id.* at *31 n.3. The court noted some specific examples of sexual harassment experienced by other members of the team:

Baugh asking when he would see a swimmer in a sexy dress, hitting a swimmer on the back-end with a kickboard, fixing a swimmer's twisted suit straps when he had not been asked to do so, entering the women's locker room area while the team was changing, and taking excessive photographs of the women team members.

Id.

¹³³ *See* Zimmer v. Ashland Univ., No. 1:00CV0630, 2001 US Dist. LEXIS 15075, at *7-*8 (N.D. Ohio 2001).

¹³⁴ *Id.* at *10.

¹³⁵ *Id.* at *9.

¹³⁶ *Id.* at *2.

¹³⁷ *See id.* at *32 (N.D. Ohio 2001).

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2. Klemencic v. Ohio State University¹³⁸

Denise Klemencic was an athlete on the Women's Track and Cross Country Teams at Ohio State University from 1990-1992, after which her eligibility to play sports ended.¹³⁹ Thomas Crawford, who served as Assistant Coach for the teams from 1990-1993, coached Klemencic.¹⁴⁰ Crawford offered to allow Klemencic to continue training with the team after her eligibility expired.¹⁴¹

In 1992, Klemencic claimed "Crawford 'disclosed . . . that he wanted a sexual relationship with her.'"¹⁴² He made a similar request on a separate occasion.¹⁴³ Klemencic, however, refused both requests.¹⁴⁴ Subsequently, Crawford refused to allow Klemencic to train with the team as he had promised her.¹⁴⁵ In the same month, Klemencic reported Crawford's inappropriate conduct to school authorities, who reprimanded him.¹⁴⁶

Klemencic complained of other conduct. Crawford persistently interfered in Klemencic's personal life by intruding on her relationship with her boyfriend and offering her rides home and the option to live with him.¹⁴⁷ Crawford also gave Klemencic a sexually suggestive tabloid article.¹⁴⁸

¹³⁸ 10 F. Supp. 2d 911 (S.D. Ohio 1998), *aff'd*, 263 F.3d 504 (6th Cir. 2001).

¹³⁹ *Id.* at 912.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 913. Although Klemencic was not technically "part of the team" because her athletic ability expired, her relationship with Crawford, who offered her the opportunity to train with the team, still illustrates the athlete-coach dynamic central to the analysis of this Comment.

¹⁴² *Id.*

¹⁴³ *Id.* at 913.

¹⁴⁴ Klemencic v. Ohio State Univ., 10 F. Supp. 2d 911, 913 (S.D. Ohio 1998), *aff'd*, 263 F.3d 504 (6th Cir. 2001).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 916.

¹⁴⁸ *Id.* at 914. It does not appear that Klemencic reported the sexually explicit article. *Id.*

Subsequently, Klemencic filed a Title IX sexual harassment claim based on the hostile environment theory.¹⁴⁹ The court, however, granted the defendants' motion for summary judgment on the basis that the conduct was not sufficiently severe and pervasive.¹⁵⁰

B. The Factors

In order to determine whether allegations in a hostile environment case are severe and pervasive, courts look to the totality of the circumstances.¹⁵¹ In doing so, the courts in *Jennings*, *Klemencic*, and *Zimmer* examined a variety of factors: the role of the harasser, including emphasis on the power of the harasser; the age of the harasser; the plaintiff's own reaction to the offensive conduct, including whether a complaint was made and the effect of the behavior on the plaintiff; the reactions of witnesses to the offensive conduct, including remarks and behavior directed at others; the setting in which the alleged harassment took place; whether the harassment was direct or "second-hand;" and last, other characteristics of the conduct, including the frequency, the type, such as whether it was physical or verbal and of a sexual nature, and the tone.¹⁵² No

¹⁴⁹ *Id.* at 914. Klemencic also based her claim on the quid pro quo theory of sexual harassment. *Id.* at 912.

¹⁵⁰ *Klemencic v. Ohio State Univ.*, 10 F. Supp. 2d 911, 916, 918 (S.D. Ohio 1998), *aff'd*, 263 F.3d 504 (6th Cir. 2001).

¹⁵¹ *See, e.g.*, *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999); *Jennings v. Univ. of N.C. at Chapel Hill*, 444 F. 3d 255, 267 (4th Cir. 2006).

¹⁵² *See, e.g.*, *Jennings*, 444 F.3d 255; *Zimmer v. Ashland Univ.*, No. 1:00CV0630, 2001 U.S. Dist. LEXIS 15075 (N.D. Ohio 2001); *Klemencic*, 10 F. Supp. 2d 911. Each court did not examine each factor. Rather the factors which this Comment addresses are a combination from the three cases. Nancy Hogshead-Makar and Sheldon Elliot Steinbach note that in evaluating the "severity and pervasiveness" of the allegations in violation of Title IX generally, the Office of Civil Rights considers a number of these factors as well as others such as "[t]he size of the school [and] . . . [o]ther incidents at the school." *See Hogshead-Makar & Steinbach, supra* note 5, at 184-85. In addition, Diane Heckman provides an extensive checklist of

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case has held that any factor is determinative.

1. *The Role of the Harasser*

The role of the harasser is essential to a sexual harassment analysis under Title IX.¹⁵³ Because one's position or role in society entails certain expectations, behaviors that are acceptable for some people are entirely inappropriate for others.¹⁵⁴

factors that courts consider in Title IX sexual harassment cases. Diane Heckman, *Deconstructing Title IX Sexual Harassment Matters Involving Students and Student-Athletes in the Post Davis Era*, 206 ED. LAW REP. 469, 477-99 (2006). Indeed, courts too have attempted to provide a checklist of factors which they consider in examining sexual harassment cases. See *Zimmer*, 2001 U.S. Dist. LEXIS 15075, at *27. However, the analysis of this Comment focuses on factors *specifically* addressed in Title IX intercollegiate athletics cases between athletes and coaches.

¹⁵³ See, e.g., *Davis*, 526 U.S. at 653 (distinguishing between teachers and peers in evaluating sexual harassment); *Zimmer*, 2001 U.S. Dist. LEXIS 15075, at *31. See also SANDRA KIRBY, LORRAINE GREAVES, & ELENA HANKINSKY, *THE DOME OF SILENCE: SEXUAL HARASSMENT AND ABUSE IN SPORT* 125-26 (2000); KARIN A.E. VOLKWEIN-CAPLAN & GOPAL SANKARAN, *SEXUAL HARASSMENT IN SPORT: IMPACT, ISSUES, AND CHALLENGES* 20-22 (2002); Volkwein et al., *Sexual Harassment in Sport*, *supra* note 4, at 284-86.

¹⁵⁴ See *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998) ("A professional football player's working environment is not severely or pervasively abusive, for example, if the coach smacks him on the buttocks as he heads onto the field—even if the same behavior would reasonably be experienced as abusive by the coach's secretary (male or female) back at the office."). The *Jennings* court also elaborated on the unusual role of a coach:

A typical college coach is going to have much more informal, casual, one-on-one contact with a student-athlete than a typical university instructor will have with a student. College sports often involve long daily practice sessions, overnight travel, . . . and the need for a coach to discuss issues associated with academic performance, athletics performance, and health . . . Additionally, . . . a college coach is much more likely to demonstrate an athletic move with a hands-on demonstration . . . Likewise, some coaches will use profanity, slang, sarcasm, or hamhanded humor. . . .

Jennings, 444 F.3d at 274.

Additionally, certain roles, such as coach, involve significant power.¹⁵⁵

In *Zimmer*, the court identified this power imbalance in the relationship between athlete Zimmer and Coach Baugh. The court explained, “Baugh clearly held a powerful position with respect to Zimmer, since he controlled her scholarship and acted as her varsity swim coach.”¹⁵⁶ In concluding that a jury could find that Zimmer had been subjected to a hostile environment, the court also specifically highlighted the power differential between the athlete and the coach as an essential factor among the other circumstances.¹⁵⁷ Thus, the significant power that Baugh wielded over his athletes weighed heavily in the court’s ultimate decision.

Interestingly, the *Klemencic* court failed to consider this essential factor despite its evident importance in Title IX analyses, including those of the Supreme Court.¹⁵⁸ Because

In other words, because of the nature of a coach’s position, certain behaviors would be acceptable for him though they would not be condoned for someone in another role, such as a professor.

¹⁵⁵ See, e.g., *Jennings*, 444 F.3d at 274; *Zimmer*, 2001 U.S. Dist. LEXIS 15075, at *31; SANDRA KIRBY, LORRAINE GREAVES, & ELENA HANKINSKY, *supra* note 153, at 125; KARIN A.E. VOLKWEIN-CAPLAN & GOPAL SANKARAN, *supra* note 153, at 20-22; Volkwein et al., *Sexual Harassment in Sport*, *supra* note 4, at 284-86.

¹⁵⁶ *Zimmer*, 2001 U.S. Dist. LEXIS 15075, at *31.

¹⁵⁷ *Id.* (holding “[t]he surrounding circumstances and power differential between Zimmer and Baugh could also lead a jury to conclude that a hostile educational environment existed for Zimmer”).

¹⁵⁸ See, e.g., *Davis*, 526 U.S. at 653 (explaining this factor by discussing the relationship between the harasser and the victim: “[t]he relationship between the harasser and the victim necessarily affects the extent to which the misconduct can be said to breach Title IX’s guarantee of equal access to educational benefits and to have a systemic effect on a program or activity. Peer harassment, in particular, is less likely to satisfy these requirements than is teacher-student harassment.”); *Doe v. Green*, 298 F. Supp. 2d 1025, 1037 (D. Nev. 2004). In *Doe*, the court denied the teacher/coach’s motion for summary judgment in an interscholastic, Title IX hostile environment case. The Court cited *Davis* in explaining the central importance of the relationship between the victim and the harasser in its hostile environment analysis. *Doe*, 298 F. Supp. 2d at 1037. See also

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Klemencic admitted to having been friends with Crawford, the court characterized their relationship as a “good friendship” ignoring the fact that the hierarchical coach-athlete dynamic still existed between them.¹⁵⁹ By framing the relationship in this way, the court dismantled the inherent power imbalance at the core of the allegations and described the coach’s inquiries as merely unwanted and innocent requests for a date from a social equal, which is a characterization that is far less shocking and offensive. Although the court improperly considered the athlete-coach relationship, this case illustrates the importance of the power factor in the overall analysis. If the court does not perceive a power imbalance, it may weigh strongly against a finding of harassment.

Although the *Jennings* court ostensibly acknowledged the unique role of the coach and the inherent power differential between coaches and athletes,¹⁶⁰ it inappropriately underemphasized this factor. First, the majority opinion failed to consider that Dorrance “was in fact more than a regular coach.”¹⁶¹ In fact, “he was and still is the most successful women’s soccer coach in U.S. history and a former national team coach.”¹⁶² Accordingly, Dorrance in essence controlled the fate of the athletes’ soccer careers, not only at the university level, but also professionally. Athletes in general are especially susceptible to a coach’s abuse of power,¹⁶³ and the significant

Pinarski, *supra* note 5, at 924 (arguing that the application of Title VII standards in athlete-coach harassment cases may be in part to blame for the Klemencic court’s shortcomings).

¹⁵⁹ See *Klemencic v. Ohio State Univ.*, 10 F. Supp. 2d 911, 916 (S.D. Ohio 1998), *aff’d*, 263 F.3d 504 (6th Cir. 2001).

¹⁶⁰ The court recognized that a college coach controls players’ positions on the team, the amount of time they play in games, and scholarships. See *Jennings v. Univ. of N.C. at Chapel Hill*, 444 F.3d 255, 274 (4th Cir. 2006).

¹⁶¹ See *id.* at 290 (Michael, J., dissenting).

¹⁶² *Id.*

¹⁶³ See, e.g., Volkwein et. al, *supra* note 4, at 284-85; Rhonda Reaves, “There’s No Crying in Baseball:” *Sports and the Legal and Social Construction of Gender*, 4 J. GENDER RACE & JUST. 283, 297 (2001) (discussing the significant power held by coaches which makes athletes

degree of power that Dorrance held made the athletes particularly vulnerable.¹⁶⁴

The majority's characterization of another aspect of Jennings' story further illustrates how it failed to appreciate Dorrance's power and role. Rather than acknowledging that Dorrance's comments and conduct may have been arguably more acceptable from one of Jennings' peers as opposed to a coach and authority figure,¹⁶⁵ the court seemed to condone the behavior for this very reason. For instance, the court highlighted, "[t]ellingly, Jennings [did] . . . not appear to object to some of her teammates talking about their sex lives."¹⁶⁶ While the *Klemencic* logic, though flawed, may have supported this reasoning, the majority did not find the relationship between Jennings and Dorrance to be a "good friendship." Therefore, the relationship between the two could not be confused as one of social equals, which would perhaps permit such exchanges and behavior.

In contrast, the dissent properly interpreted this scenario: "just because some of the young women willingly and openly discussed their sexual activities among *themselves* [did] not mean they were comfortable having those discussions with *Dorrance*."¹⁶⁷ The dissent, thus, acknowledged the implications of Dorrance's role and located a power imbalance between the athletes and their coach. By framing the athlete-coach relationship in this way, it becomes more apparent that Dorrance's conduct constituted harassment.

The *Jennings* court also failed to appreciate the significance of the "trust" which Dorrance had established between himself and the players, further exacerbating the power differential

vulnerable to sexual abuse).

¹⁶⁴ *Jennings*, 444 F.3d at 290 (Michael, J., dissenting).

¹⁶⁵ See *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651-52 (1999) (discussing the uniqueness of peer harassment though not comparing it directly to the coach-athlete relationship).

¹⁶⁶ *Jennings v. Univ. of N.C. at Chapel Hill*, 444 F.3d 255, 272 (4th Cir. 2006).

¹⁶⁷ *Id.* at 290 (Michael, J., dissenting) (emphasis in original).

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between them.¹⁶⁸ Dorrance presented himself to the players as a “father figure.”¹⁶⁹ By creating such a trusting relationship, Dorrance could more easily manipulate the players.¹⁷⁰ As the dissent explained, “Dorrance took advantage of . . . his position of power to crossover from routine teasing into real sexual harassment.”¹⁷¹ As the players grew to trust Dorrance, he inappropriately compelled them to open up about their sexual lives and then later used that information to humiliate them.¹⁷² Overall, the majority, in stark contrast to the dissent, failed to acknowledge and weigh Dorrance’s powerful role as coach in its analysis.

2. *The Age of the Harasser*

Related to the role and power factors, courts consider the age of the harasser in analyzing hostile environment allegations.¹⁷³ Typically, when a plaintiff brings a Title IX hostile environment claim against a coach, the harasser is older than the victim.¹⁷⁴ Age gaps exacerbate a coach’s already powerful position over his younger athletes.¹⁷⁵

In *Zimmer*, the court relied upon the Supreme Court decision *Davis v. Monroe County Board of Education*, a student-on-student case of harassment, to shed light on the importance of age as a factor in determining actionable sexual harassment.¹⁷⁶

¹⁶⁸ *See id.* at 291-92.

¹⁶⁹ *Id.*

¹⁷⁰ *See Reaves, supra* note 163 at 296-97 (citation omitted).

¹⁷¹ *Jennings*, 444 F.3d at 291 (Michael, J., dissenting).

¹⁷² *See Jennings v. Univ. of N.C. at Chapel Hill*, 444 F. 3d 255, 291-92 (4th Cir. 2006) (Michael, J., dissenting).

¹⁷³ *See id.* at 267, 274 (citing *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 651 (1999)) (majority opinion); *Zimmer v. Ashland Univ.*, No. 1:00CV0630, 2001 U.S. Dist. LEXIS 15075, at *30-*31 (N.D. Ohio 2001).

¹⁷⁴ *Reaves, supra* note 163, at 298; *Jennings*, 444 F.3d at 274.

¹⁷⁵ *Reaves, supra* note 163, at 297-98.

¹⁷⁶ *See Zimmer*, 2001 U.S. Dist. LEXIS 15075, at *30 (quoting *Davis*, 526 U.S. at 653).

In *Davis*, the Court stated, “[p]eer harassment . . . is less likely to satisfy . . . [Title IX] requirements than is teacher-student harassment.”¹⁷⁷ Hence, where the harasser is much older than the victim, the court is more likely to find a viable claim.¹⁷⁸ The *Zimmer* court noted that Coach Baugh was forty-six years old, whereas Zimmer was only eighteen.¹⁷⁹ Despite the fact that Zimmer had reached the age of majority, the court’s analysis indicates that the twenty-eight year age difference—the victim still in her teenage years and the harasser in his middle ages—held great significance in its decision to allow the athlete’s claim to proceed to trial.

The *Jennings* court similarly quoted the *Davis* decision to highlight the importance of age in sexual harassment cases.¹⁸⁰ The court even acknowledged “that most college coaches (as in this case) are going to be older than the men or women that they coach,” and that this factor “do[es] place the coach in a more powerful position than the college athlete.”¹⁸¹ Notwithstanding the court’s acknowledgement, it failed to appreciate the graveness of the twenty-eight year age difference between Jennings, seventeen years old, and Dorrance, forty-five years old, and the fact that Jennings was a minor at the time the harassment began. In fact, the majority relegated Jennings’ and Dorrance’s ages to a mere footnote.¹⁸²

The dissenting opinion, however, appropriately considered the gravity of the age factor. The opinion begins as follows:

[W]hen she was seventeen and a member of the women’s soccer team at the University of North Carolina at Chapel Hill . . . , her forty-five-year-old male coach, Anson Dorrance, persistently and openly

¹⁷⁷ *Davis*, 526 U.S. at 653.

¹⁷⁸ *See id.*

¹⁷⁹ *Zimmer v. Ashland Univ.*, No. 1:00CV0630, 2001 U.S. Dist. LEXIS 15075, at *31 (N.D. Ohio 2001).

¹⁸⁰ *See Jennings v. Univ. of N.C. at Chapel Hill*, 444 F.3d 255, 267 (4th Cir. 2006).

¹⁸¹ *Id.* at 274.

¹⁸² *See id.* at 274 n.13.

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discussed and pried into the sex lives of his players, using what he learned to degrade and humiliate them.¹⁸³

The choice to begin the opinion by focusing on the age differential suggests the weight with which the dissent considered this factor. The dissent reiterated the age difference three more times.¹⁸⁴ In one instance, the opinion stated, “Dorrance was not simply one man outnumbered by twenty-six women. He was a forty-five year-old man probing into the sexual activities of young women, some of whom, like Jennings, were as young as seventeen.”¹⁸⁵ Thus, unlike the dissent, since the majority failed to consider the significance of their vast age difference and Jennings’ minority status, the court improperly diluted the severity of Jennings’ claim.

3. The Plaintiff’s Reaction to the Harassing Conduct

Another factor that courts consider in analyzing Title IX hostile environment sexual harassment claims is the plaintiff’s reaction, both voluntary and involuntary, to the harasser’s conduct or comments. When considering the voluntary reaction of a victim, courts are less likely to make a finding of harassment where facts suggest that the plaintiff did not take active measures to report or eradicate the behavior.¹⁸⁶ On the other hand, when examining the involuntary reaction of a victim, if the plaintiff initially expressed a strong negative reaction to the conduct, courts weigh such facts in favor of

¹⁸³ *Id.* at 283 (Michael, J., dissenting).

¹⁸⁴ *Id.* at 285, 289, 290.

¹⁸⁵ *Id.* at 290. The other two instances of this reiteration are 1) when the dissent quoted Jennings’ description of her experience as a seventeen year old in the hotel room with Dorrance, “I was 17 when he asked me [‘Who are you fucking?’] in a dark hotel room, knee-to-knee, bed not made, sitting at one of those tiny tables,” *id.* at 285, and 2) when it described Dorrance as a “much older and more powerful male coach,” *id.* at 289.

¹⁸⁶ See *Jennings v. Univ. of N.C. at Chapel Hill*, 444 F.3d 255, 262, 264 (4th Cir. 2006); *Klemencic v. Ohio State Univ.*, 10 F. Supp. 2d 911, 917 n.5, 918 (S.D. Ohio 1998), *aff’d*, 263 F.3d 504 (6th Cir. 2001).

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finding actionable harassment.¹⁸⁷

In *Klemencic*, the court deemed that the relationship between Klemencic and Coach Crawford was evidence that his behavior did not create a hostile environment.¹⁸⁸ Characterizing the relationship as “a good friendship,”¹⁸⁹ the court found that there was

no evidence in the record before this Court that Klemencic subjectively viewed this conduct as hostile or abusive or harassment at the time, and neither does this Court. Nor [was] there evidence that this alleged conduct had “the effect of unreasonably interfering with the plaintiff’s [educational] performance and creating an intimidating, hostile, or offensive [educational] environment”¹⁹⁰

In coming to this conclusion, despite the court’s acknowledgment that Klemencic refused Crawford’s request to begin a relationship on two occasions, it emphasized her failure to end all contact with him.¹⁹¹ In other words, despite Klemencic’s refusal to date her coach and the offense she took from his requests, the court refused to find that the plaintiff

¹⁸⁷ See *Klemencic*, 10 F. Supp. 2d at 916; *Zimmer*, 2001 U.S. Dist. LEXIS 15075, at *7-*10, *32.

¹⁸⁸ See *Klemencic*, 10 F. Supp. 2d at 916.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ See *id.* However, it is important to recognize that the court’s initial failure to locate the power disparity of their relationship likely influenced its perception of this circumstance. Having failed to understand the nature of this relationship, it comes as no surprise that Klemencic’s “decision” not to end her “friendship” may have been a vestige of the inherent power imbalance between the two. As Celia Brackenridge notes:

[A] victim of abuse may well reposition herself repeatedly in abusive situations This is certainly a feature of some of the testimonies in this research, where women reported having endured abusive relationships with their coaches for many years, sometimes even after they had recognized the nature of what was happening to them. The cycle of dependency, sexual attention, guilt and further dependency is very hard to break.

Brackenridge, *supra* note 7, at 124.

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manifested a strong enough adverse reaction to him.

The court also drew negative conclusions regarding the timing of Klemencic's complaints about Crawford's conduct. First, Klemencic presented the offensive article he sent her as evidence of sexual harassment. In examining this allegation, the court in a footnote specifically noted that she had not complained about the offensive article until over a year after she received it.¹⁹² The court, moreover, considered the fact that the plaintiff only identified the coach's conduct as creating a hostile environment in 1998, although she initiated her lawsuit in 1994.¹⁹³ Similarly, in describing the facts of the case, the court highlighted that, although the allegations occurred as early as 1992, Klemencic did not complain to school officials until 1993.¹⁹⁴ The court's decision to include these facts in its opinion indicates that viewed with skepticism the severity of the conduct at issue, and therefore, weighed her delayed reporting against a finding of actionable harassment.

Similarly, in *Zimmer*, the court assessed the athlete's reaction to her coach's behavior. In delineating the facts of the case, the majority explained the steps the athlete took in attempting to halt her coach's inappropriate behavior not long after it began.¹⁹⁵ Later, in its analysis of the severity and pervasiveness of the conduct, the court noted the plaintiff's active and voluntary decision to transfer to a different school.¹⁹⁶ The court additionally noted how the offensive conduct had a negative effect on Zimmer's education by causing her grades to drop.¹⁹⁷ Thus, Zimmer's active attempts to stop the improper

¹⁹² *Klemencic v. Ohio State Univ.*, 10 F. Supp. 2d 911, 917 n.5 (S.D. Ohio 1998), *aff'd*, 263 F.3d 504 (6th Cir. 2001).

¹⁹³ *Id.* at 915. The opinion does not reflect why the plaintiff initiated her suit at this time.

¹⁹⁴ *Id.* at 913-14.

¹⁹⁵ *See Zimmer v. Ashland Univ.*, No. 1:00CV0630, 2001 U.S. Dist. LEXIS 15075, at *7-*8 (N.D. Ohio 2001). During the year in which Baugh joined the team, Zimmer met with the University's athletic director on various occasions to discuss the coach's behavior. *Id.* at *8.

¹⁹⁶ *Id.* at *32.

¹⁹⁷ *Id.*

conduct, as well as the negative effects that the behavior had on her emotionally, supported the court's ultimate decision to deny the defendants' motion for summary judgment.

When the *Jennings* court evaluated Jennings' reactions to Dorrance's conduct, it focused on the interaction between Jennings and Dorrance in his hotel room.¹⁹⁸ First, the court characterized Dorrance's question as "inappropriate."¹⁹⁹ In the next sentence, however, it appeared to condone the inquiry due to his interest as her coach in the effects of her social activities on her academic achievement.²⁰⁰ Next, the court described Jennings' reaction to the question as a "forceful rejection."²⁰¹ It then concluded that in light of Jennings' strong reaction, Dorrance's conduct could not be characterized as a "severe" example of sexual harassment.²⁰²

The court's interpretation of the interaction between Jennings and Dorrance is inconsistent with *Klemencic* and *Zimmer*. The *Klemencic* court suggested that the athlete's passive response to her coach's inquiries did not constitute a strong enough adverse reaction; and therefore, his conduct could not be sexual harassment. The *Zimmer* court, on the other hand, reasoned that the athlete's strong disgust and active response to the conduct indicated its severity. The *Jennings* court, departing from precedent, viewed the athlete's strong disgust and active response to Dorrance as evidence that his conduct was not sexual harassment.

¹⁹⁸ See *Jennings v. Univ. of N.C. at Chapel Hill*, 444 F.3d 255, 273-74 (4th Cir. 2006).

¹⁹⁹ *Id.* at 273.

²⁰⁰ See *id.* ("As phrased, Dorrance's question in the hotel room clearly was inappropriate. At the same time, as Jennings' coach, Dorrance certainly had an interest in her academic performance and determining whether her social life was contributing to her poor academic performance. The question was not physically threatening and not a sexual proposition. Rather, it was an offensive utterance from a coach to a player in the context of inquiring about Jennings' poor grades—grades that were so poor that she believed her athletic eligibility was in jeopardy.").

²⁰¹ *Id.*

²⁰² *Id.*

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Furthermore, like *Klemencic*, the tone and frequency with which the majority described the timeline of Jennings' complaints signifies the gravity of this factor in the court's overall analysis. For example, the court observed that on the two occasions Jennings met with Ehringhaus, she failed to report that Dorrance specifically directed inappropriate comments at her.²⁰³ The court remarked that Jennings' father also failed to mention Dorrance's conduct in a complaint he expressed to the University.²⁰⁴ When describing her father's second complaint about Dorrance's behavior, the court explicitly highlighted in parentheses that this letter "for the first time" described the harassment.²⁰⁵ Hence, the court characterized the timing of her complaints as delayed reporting and, therefore, as evidence against a finding of severe and pervasive sexual harassment.²⁰⁶

²⁰³ *Id.* at 262.

²⁰⁴ *Jennings v. Univ. of N.C. at Chapel Hill*, 444 F.3d 255, 262 (4th Cir. 2006). The first letter only complained that Dorrance owed Jennings money for Gatorade which she purchased for the team.

²⁰⁵ *Id.* at 264.

²⁰⁶ Although it is necessary to consider whether the victim complained of harassment in order to establish the school's liability under Title IX, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998), the court did not reach this issue. *See Jennings v. Univ. of N.C. at Chapel Hill*, 444 F.3d 255, 276 (4th Cir. 2006). Accordingly, a detailed outline of whether and when Jennings decided to report Dorrance's conduct was unnecessary.

Regardless, the courts' evaluations of when plaintiffs chose to complain are inconsistent with what scholars know about the reporting of sexual harassment. Generally, in situations of sexual harassment the victim's silence is commonplace for a number of reasons. For example, some women remain silent because they do not identify the conduct as sexual harassment. Theresa M. Beiner, Essay: *Using Evidence of Women's Stories in Sexual Harassment Cases*, 24 U. ARK. LITTLE ROCK L. REV. 117, 138 (2001). Others remain silent "as a coping strategy to deal with the shame and self-blame that often accompany these experiences." Volkwein et al, *supra* note 4, at 284 (quoting Helen Lenskyj, *supra* note 6, at 21). Other times, silence is a result of poor complaint procedures. *Id.* Last, victims also may not report out of fear of "bad career and personal ramifications. . . ." Beiner, *Using Evidence of Women's Stories in Sexual Harassment Cases*, *supra*, at 138. Because sexual harassment is difficult for victims to report, the *Jennings* court should not have given so much weight to the silence of the sexual harassment plaintiff in

Although the *Jennings* court's consideration of the timing of the complaints is consistent with prior cases, it erroneously characterized this timeframe as delayed reporting. Jennings first reported Dorrance's improper, sexual conduct to a school authority in the fall of 1996, her first season playing soccer.²⁰⁷ Although Jennings did not explicitly state that he directed the conduct and comments at her, she, nevertheless, expressed her concern.²⁰⁸ While the court was correct in noting that Jennings did not report specific conduct directed at her until later,²⁰⁹ it improperly considered the timing factor by overlooking her initial reporting effort.

4. *The Reactions of Others Present to the Offensive Conduct*

In measuring whether the plaintiff's response to the behavior was objectively reasonable, the courts look to the reactions of others who witnessed or similarly received the offensive conduct.²¹⁰ If witnesses or victims share a similar repugnance to the behavior, courts are more willing to characterize their reactions as reasonable and the conduct as severe and pervasive sexual harassment.²¹¹

In *Zimmer*, the court explained that other swimmers' complaints about the coach's conduct were relevant in its analysis.²¹² Specifically, the court noted that other swimmers on

its analysis.

²⁰⁷ *Jennings*, 444 F.3d at 262.

²⁰⁸ *See id.*

²⁰⁹ *See id.* at 264.

²¹⁰ *See Zimmer v. Ashland Univ.*, No. 1:00CV0630, 2001 U.S. Dist. LEXIS 15075, at *31 n.3 (N.D. Ohio 2001).

²¹¹ *See id.* at *7, *27 (noting that other swimmers complained about the coach's conduct).

²¹² *Id.* at *27, *31 n.3 ("The specific acts of alleged harassment include: Baugh asking when he would see a swimmer in a sexy dress, hitting a swimmer on the back-end with a kickboard, fixing a swimmer's twisted suit straps when he had not been asked to do so, entering the women's locker room area while the team was changing, and taking excessive photographs of the women team members.").

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various occasions felt sufficiently offended to complain about their coach's behavior.²¹³ In fact, some swimmers claimed that they personally had been harassed.²¹⁴ Since other players corroborated Zimmer's allegations, the court found her reaction to be reasonable.

The *Jennings* court also explored whether others considered the conduct sufficiently severe.²¹⁵ Despite Jennings' and other players' testimonies, the court found that Jennings' teammates did not consider the conduct and comments to be "offensive."²¹⁶ Rather, the court contended that the athletes appeared to be "willing participants" in the conversations about which Jennings complained.²¹⁷ While this assessment may have been true for those who were "open about their personal lives,"²¹⁸ as the dissent pointed out, the majority underemphasized facts which suggest that other team members felt similarly offended by the conduct.²¹⁹ For example, although the majority acknowledged that another teammate, Keller, feared Dorrance, it downplayed her testimony.²²⁰ The majority additionally overlooked the shock that Jennings' father expressed about Dorrance's conduct in his letter to the University,²²¹ and that the school officials admitted

²¹³ *Id.* at *7, *31 n.3.

²¹⁴ *Id.* at 31 n.3.

²¹⁵ *See* *Jennings v. Univ. of N.C. at Chapel Hill*, 444 F.3d 255, 273 (4th Cir. 2006).

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.* at 260.

²¹⁹ *See id.* at 277-78 (majority opinion), 285, 289 (Michael, J., dissenting). For example, the dissent reported that "other players [became] angry, disgusted, and humiliated by Dorrance's sexual questions and remarks A few players reacted tearfully, saying, 'I can't believe him. Why would he say that?'" *Id.* at 285 (Michael, J., dissenting).

²²⁰ *See id.* at 278 (majority opinion). "Downplaying the severity of the [harasser's] conduct" is a strategy used by courts to undermine sexual harassment claims. *See* Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71 (1999). For further discussion of this strategy *see infra* Part IV.A.

²²¹ *See Jennings v. Univ. of N.C. at Chapel Hill*, 444 F.3d 255, 264 (4th Cir. 2006).

the conduct was improper and reprimanded the coach.²²² Dorrance even confessed that his behavior was “inappropriate.”²²³ Therefore, the court should have weighed these other reactions to Dorrance’s conduct in favor of finding actionable harassment.

5. *The Setting in which the Alleged Harassment Took Place*

A fifth factor courts consider is the setting in which the alleged harassment took place.²²⁴ The courts look to the location, what kind of behavior is generally condoned in such place, and how many individuals were present when the harassment occurred.²²⁵

In *Zimmer*, the court considered the setting in its hostile environment analysis. For example, the court noted that although the team was dressing in the women’s locker room, Baugh chose to enter anyway.²²⁶ In weighing the severity of the conduct, the court took into account the inherent privacy of the women’s locker room by suggesting that the coach’s presence in that space as the team dressed was inappropriate.²²⁷ Furthermore, the court highlighted in the facts of its opinion that Baugh “made Zimmer stay after practice so that he could ice her shoulder while they were alone.”²²⁸ While icing an athlete’s shoulder is a normal activity for a coach, the court’s emphasis indicates that seemingly innocent and appropriate behavior can become severely offensive conduct in settings such as isolated or private spaces.

²²² See *id.* at 265.

²²³ See *id.* The school wrote Jennings’ father an apology explaining that Dorrance “now realizes that his involvement in such discussions is inappropriate’ Dorrance endorsed the apology.” *Id.*

²²⁴ See, e.g., *id.* at 272; *Zimmer v. Ashland Univ.*, No. 1:00CV0630, 2001 U.S. Dist. LEXIS 15075, at *6, *31 n.3 (N.D. Ohio 2001).

²²⁵ See, e.g., *Jennings*, 444 F. 3d at 272; *Zimmer*, 2001 U.S. Dist. LEXIS 15075, at *6, *31 n.3.

²²⁶ *Zimmer*, 2001 U.S. Dist. LEXIS 15075, at *31 n.3.

²²⁷ See *id.* at *31 n.3.

²²⁸ *Id.* at *6.

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The *Jennings* court also took into account the setting in which the harassment occurred. In considering this factor, the majority focused on the fact that most of the offensive conduct occurred in “group settings” where over twenty athletes prepared for practice and informally chatted about a range of issues including sex.²²⁹ The court’s analysis, like that of the *Zimmer* court,²³⁰ indicates that one-on-one conduct is more severe and that the group setting, at least in part, diffuses the seriousness of the conduct. Accordingly, it is surprising that the court conspicuously omitted any discussion of the gravity of Jennings’ individual encounter with Dorrance in his hotel room. Unlike the dissent, the majority failed to truly appreciate the intimate nature of the setting and the fact that the two were alone.²³¹ The court instead focused predominantly on the comment itself, which it characterized as a mere “offensive utterance”²³² without taking into account how the setting exacerbated the impropriety and severity of the remark. Thus, the court fell short in its analysis of the setting in which the harassment occurred by overlooking the severity of Jennings’ individual encounter with Dorrance in a personal and private space.

6. Direct or Second-Hand Harassment

Whether the harasser aimed his inappropriate behavior directly at the plaintiff or at others in the group setting is another important factor courts consider. Although comments directed at the complainant are most relevant,²³³ the atmosphere as a whole is particularly important for a hostile environment

²²⁹ See *Jennings v. Univ. of N.C. at Chapel Hill*, 444 F.3d 255, 272 (4th Cir. 2006).

²³⁰ See *Zimmer v. Ashland Univ.*, No. 1:00CV0630, 2001 U.S. Dist. LEXIS 15075, at *6, *31 n.3 (N.D. Ohio 2001).

²³¹ See *Jennings*, 444 F.3d at 291 (Michael, J., dissenting).

²³² See *id.* at 273 (majority opinion).

²³³ E.g., *Jennings*, 444 F. 3d at 272; *Zimmer*, 2001 U.S. Dist. LEXIS 15075, at *31.

claim.²³⁴ Thus, courts evaluate not only conduct directed at plaintiffs, but also that which is directed at others—second-hand harassment.²³⁵

The *Zimmer* court predominantly focused on the comments and behavior the coach directed at the complainant.²³⁶ However, the court explicitly asserted that “for the purpose of evaluating whether Baugh’s conduct created a hostile environment, it is relevant that other members of the swim team also claim to have been harassed.”²³⁷ It then outlined Baugh’s inappropriate behavior directed at others, rather than just Zimmer.²³⁸ The court concluded that a jury could find that such conduct, both indirect and direct, rose to the level of actionable harassment.²³⁹

Likewise, the *Jennings* court considered “second-hand” harassment.²⁴⁰ Nevertheless, the majority misapplied this factor. Like the *Zimmer* court, the majority understood that comments and conduct directed at the plaintiff are of prime importance.²⁴¹ However, unlike the *Zimmer* court and the *Jennings* dissent, the majority did not view the “second-hand” harassment as seriously contributing to a finding of a hostile environment and as exacerbating the conduct directed explicitly at Jennings.²⁴² Instead, the court emphasized the fact that Dorrance directed the majority of his comments not specifically at Jennings but at

²³⁴ See *Jennings*, 444 F. 3d at 274; *Zimmer*, 2001 U.S. Dist. LEXIS 15075, at *31.

²³⁵ When this Comment refers to second-hand or indirect conduct, it means conduct which is directed at others, and therefore, contributing indirectly to a hostile environment for the plaintiff. Direct conduct is that which is focused at the individual plaintiff.

²³⁶ See *Zimmer v. Ashland Univ.*, No. 1:00CV0630, 2001 U.S. Dist. LEXIS 15075, at *26-*31 (N.D. Ohio 2001).

²³⁷ *Id.* at *31 n.3.

²³⁸ See *id.* at *31 n.3.

²³⁹ See *id.* at *32.

²⁴⁰ See *Jennings v. Univ. of N.C. at Chapel Hill*, 444 F.3d 255, 272 (4th Cir. 2006).

²⁴¹ See *id.*

²⁴² See *id.* at 272 (majority opinion), 288 (Michael, J., dissenting).

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others as evidence against her claim.²⁴³ Nevertheless, as the dissent noted, “Jennings . . . was [not, as the majority characterized her,] simply a bystander to her fellow teammates’ sexual and social banter Rather, she was caught in a hostile environment that was demeaning to young women.”²⁴⁴ The *Jennings* court failed to appropriately consider the gravity of the “second-hand” harassment in weighing its effect on Jennings’ environment as a whole.

7. Other Characteristics of the Conduct

In analyzing the conduct itself, courts tend to consider a number of sub-factors. They usually include in their analyses: how often the conduct occurred, the type of conduct,²⁴⁵ *i.e.*, whether it was physical or verbal and sexual,²⁴⁶ and the tone of the comments.²⁴⁷

In *Klemencic*, the court considered each of the above factors in examining the conduct of which the athlete complained.²⁴⁸ The court concentrated on the frequency of Crawford’s requests for Klemencic to date him (two times) and a sexual article which the coach mailed to her.²⁴⁹ After reviewing the evidence, the court concluded that these three incidents, which occurred over a long period of time (at most three years), could not be construed as frequent.²⁵⁰

Despite this determination that the improper conduct was

²⁴³ See *id.* at 272 (majority opinion).

²⁴⁴ *Id.* at 288 (Michael, J., dissenting).

²⁴⁵ See *id.* at 273; *Klemencic v. Ohio State Univ.*, 10 F. Supp. 2d 911, 917 (S.D. Ohio 1998), *aff’d*, 263 F.3d 504 (6th Cir. 2001); *Zimmer v. Ashland Univ.*, No. 1:00CV0630, 2001 U.S. Dist. LEXIS 15075, at *30 (N.D. Ohio 2001).

²⁴⁶ See *Jennings v. Univ. of N.C. at Chapel Hill*, 444 F.3d 255, 273 (4th Cir. 2006); *Klemencic*, 10 F. Supp. 2d 911 at 916-17; *Zimmer*, 2001 U.S. Dist. LEXIS 15075 at *27, *32.

²⁴⁷ See *Jennings*, 444 F.3d at 273, *Klemencic*, 10 F. Supp. 2d at 917.

²⁴⁸ See *Klemencic*, 10 F. Supp. 2d at 915-18.

²⁴⁹ See *id.* at 913-14.

²⁵⁰ *Id.* at 917.

infrequent, the *Klemencic* court went on to evaluate the nature of the behavior and comments.²⁵¹ Specifically, the court considered whether the conduct was sexual.²⁵² It concluded that, although the article could be considered offensive, Crawford's conversations with Klemencic did not include "any explicit mention of or request for sexual activity."²⁵³ Because the court concluded that the requests were not sexual, this factor seemed to weigh heavily against her claim.

Additionally, the court examined the tone of the comments, and, although it admitted that the conduct "may have been inappropriate,"²⁵⁴ concluded that it was not "physically threatening or humiliating."²⁵⁵ The court also weighed the fact that Crawford eventually accepted Klemencic's refusal to begin a sexual relationship with him against finding actionable harassment.²⁵⁶ Hence, the court indicated that not only is verbal conduct less serious than physical behavior, but also where comments and inquiries are not aggressive, finding actionable harassment will be more difficult.

The *Zimmer* court conducted an analysis similar to that of the *Klemencic* court. First, the court characterized the coach's behavior as sexual.²⁵⁷ The court then weighed the frequency of the harassment, which occurred on a daily basis for many months.²⁵⁸ Last, the court weighed the fact that this frequent

²⁵¹ *Klemencic v. Ohio State Univ.*, 10 F. Supp. 2d 911, 916-17 (S.D. Ohio 1998), *aff'd*, 263 F.3d 504 (6th Cir. 2001). The fact that the court continued to analyze the nature of the conduct after examining its frequency suggests that sufficiently severe conduct, though infrequent, may, nevertheless, be actionable harassment.

²⁵² *See id.*

²⁵³ *Id.* at 916.

²⁵⁴ *See id.* at 917.

²⁵⁵ *Id.*

²⁵⁶ *See id.*

²⁵⁷ *Zimmer v. Ashland Univ.*, No. 1:00CV0630, 2001 U.S. Dist. LEXIS 15075, at *27 (N.D. Ohio 2001). The court noted that the behavior "was of a sexual nature" when considering whether the conduct was "discrimination based upon sex." *Id.*

²⁵⁸ *See id.* at *30.

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behavior was not only verbal but also physical.²⁵⁹ Even though the court did not characterize this behavior as aggressive or threatening, it found that it was sufficiently humiliating.²⁶⁰ Unlike in *Klemencic*, the balance of these interrelated factors of frequent physical, verbal, and sexual conduct persuaded the court to characterize Baugh's behavior as sexual harassment.

The *Jennings* court too examined the frequency of Dorrance's conduct; however, its analysis evaded consideration of important facts. Even though Dorrance frequently pried into the sex lives of the young women on the team,²⁶¹ the court concentrated on the fact that Jennings only alleged two specific situations where he targeted her.²⁶² By focusing predominantly on only these two instances, the court overlooked the pattern of inappropriate and offensive behavior which occurred over a long period of time, thereby downplaying the pervasiveness of Dorrance's conduct.²⁶³

In addition, when analyzing the nature of his conduct, although it was blatantly sexual in nature,²⁶⁴ the court downplayed its severity.²⁶⁵ For example, the court adamantly emphasized the fact that this conduct was not "physically threatening."²⁶⁶ It, thus, failed to appreciate the gravity of the verbal comments, which, as illustrated by the dissent, humiliated

²⁵⁹ See *id.* at *32. Baugh, for example, pulled down Zimmer's bathing suit strap. *Id.* at *6.

²⁶⁰ *Id.* at *32.

²⁶¹ See *Jennings v. Univ. of N.C. at Chapel Hill*, 444 F.3d 255, 260 (4th Cir. 2006).

²⁶² See *id.* at 273. Jennings actually alleged three incidences, which the majority acknowledged. However, as the majority pointed out, not even the dissent gave any weight to the third allegation in which "a teammate . . . asked Jennings whether a man in the stands was her boyfriend and Dorrance allegedly was present during the conversation but did not say anything." *Id.* at 273, 273 n.11.

²⁶³ See discussion about "divide and conquer" *infra* Part IV.A.

²⁶⁴ See *supra* Part II of this note explaining the facts of *Jennings*.

²⁶⁵ See discussion about "downplaying the severity of the conduct" *infra* Part IV.A.

²⁶⁶ See *Jennings*, 444 F.3d at 273.

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the players.²⁶⁷

The court also inappropriately characterized the demeaning sexual comments as, at most, “offensive utterance[s]”²⁶⁸ and “lapses in linguistic gentility.”²⁶⁹ In fact, the court appeared to condone the comments because they “hardly painted women in a sexually subservient, negative, or demeaning light.”²⁷⁰ Departing from *Zimmer* and *Klemencic*, which merely concluded whether or not the conduct was sexual, the court in *Jennings*, overreaching in its judicial role, made excuses for Dorrance and downplayed his behavior.²⁷¹ This improper treatment of Jennings’ allegations enabled the court to dilute her claim.

The *Jennings* court failed to properly analyze the factors relevant to a Title IX claim as outlined in *Klemencic* and *Zimmer*. Thus, it erroneously affirmed the district court’s judgment dismissing Jennings’ claims on summary judgment on the basis that Dorrance’s conduct was not sufficiently severe and pervasive so as to create an illegally hostile environment.

IV. SUMMARY JUDGMENT AND THE NATURE OF SEXUAL HARASSMENT

Notwithstanding the strength of Jennings’ claims in light of prior cases, there are additional policy reasons for which this case should have survived summary judgment. This Part argues that *Jennings* is an illustrative example of what scholars have identified as the dangers of using summary judgment to dismiss such fact-sensitive cases as those involving sexual harassment.²⁷²

²⁶⁷ See *Jennings v. Univ. of N.C. at Chapel Hill*, 444 F.3d 255, 289 (4th Cir. 2006) (Michael, J., dissenting).

²⁶⁸ See *id.* at 273 (majority opinion).

²⁶⁹ See *id.* at 274.

²⁷⁰ See *id.* at 273.

²⁷¹ See *id.* at 273.

²⁷² See THERESA M. BEINER, *GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW* (2005) [hereinafter BEINER, *GENDER MYTHS V. WORKING REALITIES*]; Theresa M. Beiner, *Let the Jury Decide: The Gap Between What Judges and Reasonable People Believe is Sexually Harassing*, 75 S. CAL. L. REV. 791 (2002)

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Indeed, the Fourth Circuit endorsed this view in *Beardsley v. Webb*, in which the court refused to grant judgment as a matter of law in a hostile environment case.²⁷³ At trial, not only may juries appropriately serve the fact-finding function,²⁷⁴ but also plaintiffs have the opportunity to “tell the stories” of their sexual harassment experiences, which facilitates a sufficient evaluation of these highly contextual claims.²⁷⁵ Thus, as scholars argue,

[hereinafter Beiner, *Let the Jury Decide*]; Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71 (1999) [hereinafter Beiner, *The Misuse of Summary Judgment*]; M. Isabel Medina, *A Matter of Fact: Hostile Environments and Summary Judgment*, 8 S. CAL. REV. L. & WOMEN'S STUD. 311 (1999); Eric Schnapper, *Some of Them Still Don't Get It: Hostile Environment Litigation in the Lower Courts*, 1999 U. CHI. LEGAL F. 277 (1999); Elizabeth M. Schneider, *The Dangers of Summary Judgment: Gender and Federal Civil Litigation* (Brooklyn Law School, Legal Studies Paper No. 71), available at <http://ssrn.com/abstract=968834>.

²⁷³ 30 F.3d 524 (4th Cir. 1994). Although the case did not specifically involve summary judgment, the court's reasoning supports this argument.

²⁷⁴ Beiner, *Let the Jury Decide*, *supra* note 272; Beiner, *The Misuse of Summary Judgment*, *supra* note 272, at 75; Medina, *supra* note 272, at 317, 357-62.

²⁷⁵ Although not all of the following scholars have chosen to focus their work on sexual harassment or the courtroom forum specifically, as opposed to any type of legal setting, their arguments regarding the power of storytelling support this proposition. *See, e.g.*, Beiner, *Using Evidence of Women's Stories in Sexual Harassment Cases*, *supra* note 206; Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412-13 (1989) (exploring the power of legal storytelling by “outgroup” members to challenge the status quo); Leslie Espinoza Garvey, *The Race Card: Dealing with Domestic Violence in Courts*, 11 AM. U. J. GENDER SOC. POL'Y & L. 287, 303-04 (2003) (discussing the use of “Narrative to be Better Lawyers” and in doing so explaining how “[s]tories allow lawyers and clients to communicate about outsider experience”); Robert L. Hayman, Jr. & Nancy Levit, *The Tales of White Folk: Doctrine, Narrative, and the Reconstruction of Racial Reality*, 84 CAL. L. REV. 377, 398 (1996) (reviewing Richard Delgado, *The Rodrigo Chronicles: Conversations about America and Race*) (examining “the use of storytelling as a method of doctrinal critique”); Minna J. Kotkin, Book Review, 55 J. OF LEGAL EDUC. 613, 618 (2005) (reviewing BEINER, GENDER MYTHS V. WORKING REALITIES: USING SOCIAL SCIENCE TO REFORMULATE SEXUAL HARASSMENT LAW, *supra* note 272) (“[A]s fewer cases are heard in

courts should act with special caution when faced with summary judgment motions in sexual harassment cases.²⁷⁶

In dismissing a colorable claim on summary judgment and neglecting to address the *Beardsley* opinion, the *Jennings* court failed to exercise such caution.²⁷⁷ In light of warnings about the problems manifested by the intersection of gender and summary judgment, the *Jennings* court should have allowed the case to proceed to trial.

A. *The Problem*

Scholars have identified a trend in the courts for deciding sexual harassment hostile environment cases on summary judgment.²⁷⁸ Although summary judgment is an essential element of judicial economy, courts are “too quick” to dismiss these cases in this procedural context.²⁷⁹ There are many problems with this judicial practice: 1) courts improperly use the

open court, judges are losing perspective on how “objectionable” conduct affects women at work.”); Toni M. Massaro, *Empathy, Legal Storytelling, and the Rule of Law: New Words, Old Wounds?*, 87 MICH. L. REV. 2099, 2104-06 (1989) (explaining the power of legal storytelling); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 MICH. L. REV. 2320, 2322 (1989) (arguing “that outsider jurisprudence—jurisprudence derived from considering stories from the bottom—will help resolve the seemingly irresolvable conflicts of value and doctrine that characterize liberal thought”).

²⁷⁶ See Beiner, *The Misuse of Summary Judgment*, *supra* note 272; Medina, *supra* note 272.

²⁷⁷ *Beardsley* is cited only as authority stating that sexual harassment violates 42 U.S.C. § 1983. See *Jennings v. Univ. of N.C. at Chapel Hill*, 444 F.3d 255, 279 (4th Cir. 2006); *id.* at 293 (Michael, J., dissenting).

²⁷⁸ See Beiner, *The Misuse of Summary Judgment*, *supra* note 272, at 72; BEINER, GENDER MYTHS V. WORKING REALITIES, *supra* note 272, at 5-6; Medina, *supra* note 272, at 313-16. Although the focus of these scholars’ research is sexual harassment in the workplace environment, many of their arguments and findings apply to other settings.

²⁷⁹ Beiner, *The Misuse of Summary Judgment*, *supra* note 272, at 98. See also Medina, *supra* note 272, at 311. See generally Schneider, *supra* note 272.

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tool to decide “close cases”²⁸⁰ where factual issues remain unresolved;²⁸¹ 2) the nature of these highly fact-sensitive and contextual claims requires a deeper examination, perhaps including victims’ testimonies, than can be accomplished through mere motions for summary judgment;²⁸² and 3) juries are more appropriately situated and institutionally competent to evaluate these claims than federal court judges.²⁸³ Hence, many courts are inappropriately deciding sexual harassment hostile environment cases on summary judgment, thereby preventing the necessary nuanced analysis of these claims and proper development of sexual harassment standards.

1. Close Cases

Although subsequent case law has elaborated on this standard, at the most basic level, summary judgment is appropriate in cases in which “there [are] no genuine issue[s] as to any material fact and . . . the moving party is entitled to a judgment as a matter of law.”²⁸⁴ Summary judgment is

²⁸⁰ Beiner, *The Misuse of Summary Judgment*, *supra* note 272, at 98. Although Beiner uses the phrase “close case,” she does not explicitly define it. It appears that the article uses the phrase to refer to cases where reasonable people could differ because the behavior complained of is not so explicitly severe, but, on the other hand, not so benign that most people would not characterize it as sexual harassment. *See also* Medina, *supra* note 272, at 316; Schnapper, *supra* note 272, at 305. Schnapper similarly uses the phrase “close case” in referencing *Baskerville v. Culligan Int’l Co.*, 50 F.3d 428, 431 (7th Cir. 1995). *Id.* The court in *Baskerville* appears to describe what he calls a close case as one which is “not within the area of certainty.” *Id.* Schnapper also notes that the Supreme Court in *Harris v. Forklift*, 510 U.S. 17, 23 (1993), has used this terminology, though the case does not precisely define its definition. Schnapper, *supra* note 272, at 281. This Comment adopts these similar definitions when using the phrase “close case.”

²⁸¹ Beiner, *The Misuse of Summary Judgment*, *supra* note 272, at 72.

²⁸² *Id.* at 102; Medina, *supra* note 272, at 316.

²⁸³ Beiner, *Let the Jury Decide*, *supra* note 272; Beiner, *The Misuse of Summary Judgment*, *supra* note 272, at 102; Medina, *supra* note 272, at 357-71.

²⁸⁴ Fed. R. Civ. P. 56(c).

unsuitable, therefore, in cases where a reasonable fact-finder could render a verdict in favor of the non-moving party.²⁸⁵ In other words, in ambivalent or “close cases,” courts should not grant summary judgment motions.

Instead of yielding to this standard, however, courts aggressively dispose of hostile environment cases in ways which go beyond the realm of appropriate inquiry on summary judgment motions.²⁸⁶ Professor Theresa Beiner has identified two troubling strategies employed by judges in granting these motions: “divide and conquer” and “downplaying the severity of the conduct.”²⁸⁷ With the “divide and conquer” approach, the court looks at each “incident in a piecemeal manner.”²⁸⁸ In doing so, the court blatantly ignores the totality-of-the-circumstances standard, which requires a more holistic view of the claim.²⁸⁹ By using the “downplaying the severity of the conduct” approach, the court’s choice of rhetoric simply undermines the claim.²⁹⁰ Although summary judgment will

²⁸⁵ *See id.*

²⁸⁶ *See* BEINER, GENDER MYTHS V. WORKING REALITIES, *supra* note 272, at 6; Beiner, *The Misuse of Summary Judgment*, *supra* note 272, at 74; Medina, *supra* note 272, at 313-16.

²⁸⁷ BEINER, GENDER MYTHS V. WORKING REALITIES, *supra* note 272, at 21-28; Beiner, *Let the Jury Decide*, *supra* note 272, at 808; Beiner, *The Misuse of Summary Judgment*, *supra* note 272, at 105 (citing an example of a Seventh Circuit case in which the court used the “divide and conquer” approach). *See generally* Schneider, *supra* note 272.

²⁸⁸ Beiner, *Let the Jury Decide*, *supra* note 272, at 808.

²⁸⁹ *Id.*

²⁹⁰ *Id.* at 809. Beiner cites an illustrative example of this strategy. In *Hosey v. McDonald’s Corp.*, No. AW-95-196, 1996 WL 414057, (D.C. Md. 1996), *aff’d*, 113 F.3d 1232 (4th Cir. 1997),

a female supervisor at a McDonald’s restaurant made unwanted sexual advances toward a male subordinate. Specifically, she asked him out on numerous occasions and made offensive comments to him, including telling him “she would like to know what it felt like to have [him] inside her.” She also touched him offensively on ten occasions including grabbing his rear end and pinching him.

Beiner, *Let the Jury Decide*, *supra* note 272, at 809 (internal citations

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certainly be appropriate in some cases,²⁹¹ courts are inappropriately “pushing the envelope beyond the scope of factual situations deserving of summary judgment.”²⁹²

2. The Nature of Hostile Environment Claims

The nature and standard of hostile environment claims also make it difficult to determine which conduct is “reasonable,” especially in the summary judgment context where one’s claims are confined to papers and motions.²⁹³ To determine whether conduct rises to the level of “severe and pervasive,” the factfinder must examine the “totality of the circumstances to determine whether a reasonable person” would find actionable harassment.²⁹⁴ This standard is highly fact-sensitive and contextual.²⁹⁵ A sufficient evaluation of the claims requires a “close examination of the facts and an assessment of those facts

omitted).

Despite these facts, the District Court concluded that “Title IX does not prohibit teenagers from asking each other out on dates.” *Id.* Hence, the court found as a matter of law that the conduct was not severe or pervasive and granted summary judgment for the employer. *Id.* at 809. The Circuit court affirmed. *Id.*

Beiner explains the problem with the decision:

Considering the number of incidents, this case seems to be about more than teenagers asking each other out on dates. The plaintiff was subjected to repeated acts of a sexual nature, which included offensive touching. By reducing the incidents merely to “teenagers . . . asking each other out on dates,” the court downplayed both the severity (the physical touching) and the pervasiveness (repetitive nature) of the behavior. This, in part, laid the foundation for summary judgment in this case.

Id. at 810 (internal citations omitted).

²⁹¹ Even Professor Beiner admits that “[n]ot every case must go to the jury.” *Id.* at 844.

²⁹² Beiner, *The Misuse of Summary Judgment*, *supra* note 272, at 74.

²⁹³ *Id.* at 118, 102 (“It is difficult for a court, on papers alone, to determine the atmosphere of the work environment and how it might be perceived by an employee working in that environment.”).

²⁹⁴ *Id.* at 74 (citing *Harris v. Forklift Sys. Inc.*, 510 U.S. 17, 23 (1993)).

²⁹⁵ *Id.* at 74, 95-96, 118.

based on community standards of what is appropriate.”²⁹⁶ Indeed, Judge Jack B. Weinstein, sitting for the Second Circuit, noted, “[c]haracterizing behavior as sexually harassing can only be accomplished in a specific context The answer often depends upon perceptions of the circumstances.”²⁹⁷ These claims also often require the fact-finder to weigh the credibility of competing witnesses and stories.²⁹⁸ Hence, for fact-finders to better understand the circumstances and the merits of the allegations, the nature of these claims may necessitate more extensive discovery and an opportunity for a trial where, for example, witnesses may testify and attorneys can cross-examine them.²⁹⁹

Other scholars might agree that the opportunity for claimants to testify and “tell their stories” in the courtroom will allow for a more appropriate judgment. Scholars have long touted the power of storytelling to convey information and promote understanding, especially between “outgroups”³⁰⁰ and the status quo.³⁰¹ Stories are excellent tools to promote these goals

²⁹⁶ *Id.* at 96.

²⁹⁷ Medina, *supra* note 272, at 370 (citing *Gallagher v. Delaney*, 139 F.3d 338, 342 (2d Cir. 1998)).

²⁹⁸ Beiner, *The Misuse of Summary Judgment*, *supra* note 272, at 96, 118, 133. *See also* Beiner, *Using Evidence of Women’s Stories in Sexual Harassment Cases*, *supra* note 206, at 117, 141-42.

²⁹⁹ Beiner, *The Misuse of Summary Judgment*, *supra* note 272, at 102, 118, 133 (“Given the nature of these claims and the credibility determinations they entail, only the ultimate fact-finder, *after hearing the entire case*, should be permitted to make this determination in most cases” (emphasis added).); Kotkin, *supra* note 275, at 618 (“[J]udges need to listen to women to understand the true harm caused by sexual harassment. Not surprisingly, as fewer cases are heard in open court, judges are losing perspective on how ‘objectionable’ conduct affects women at work.”); Medina, *supra* note 272, at 316.

³⁰⁰ Delgado, *supra* note 275, at 2412. Delgado uses the term to describe “groups whose marginality defines the boundaries of the mainstream, whose voice and perspective—whose consciousness—has been suppressed, devalued, and abnormalized.” *Id.*

³⁰¹ *See, e.g., id.* at 2439-40; Garvey, *supra* note 275, at 302-04 (“Stories allow lawyers and clients to communicate about outsider experience.”); Hayman & Levit, *supra* note 275, at 399-400, 421; Massaro,

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because of their ability to illuminate details and contexts.³⁰² Professors Hayman and Levit explain, “[s]tories . . . are contextualized, highly particularized, and very congregate [T]hey afford a special emphasis to personal details, to nuanced characterizations, to the richness of human experience.”³⁰³ Stories also call listeners to take into account a spectrum of differences involving “cultural, social and economic factors.”³⁰⁴ Stories, therefore, are an important way to convey sexual harassment claims, which require illustration and examination of highly factual and contextual allegations.³⁰⁵

Scholars exalt additional aspects of storytelling which uniquely promote understanding between dissimilar groups. Professor Delgado explains that the “allure [of stories] will often provide the most effective means of overcoming otherness, of

supra note 275, at 2104-06; Matsuda, *supra* note 275, at 2323. See also Janette Kenner Muir & Kathryn Mangus, *Talk About Sexual Harassment: Women’s Stories on a Woman’s Story*, in CONCEPTUALIZING SEXUAL HARASSMENT AS DISCURSIVE PRACTICE 91, 92-94 (Shereen G. Bingham ed., 1994) (discussing the power of storytelling to promote understanding and communication but focusing on “its particular importance for women”).

³⁰² See, e.g., Hayman & Levit, *supra* note 275, at 399-400; Massaro, *supra* note 275, at 2105 (1989) (“[S]torytelling is part of an overall ‘call to context’”).

³⁰³ Hayman & Levit, *supra* note 275, at 399.

³⁰⁴ *Id.* at 430.

³⁰⁵ E.g., Beiner, *The Misuse of Summary Judgment*, *supra* note 272, at 133 (“[I]t is very difficult for a court to determine what the environment is like at a particular place of employment without hearing the witnesses describe it live. The problem is exacerbated by the courts ignoring the applicable standard in these cases—that the harassment be judged by the ‘totality of the circumstances.’ This is necessarily a very fact-specific inquiry that does not lend itself to determination on a motion for summary judgment.”); Beiner, *Using Evidence of Women’s Stories in Sexual Harassment Cases*, *supra* note 206, at 142 (arguing that women’s stories, as “social science testimony” regarding sexual harassment, would serve as important evidence in conveying the reality of victims’ experiences, and suggesting that stories are powerful tools for contextualizing and facilitating the understanding of these claims); Muir & Mangus, *supra* note 301, at 92-96 (discussing “the power of storytelling as public discourse to reconstruct understandings of sexual harassment” specifically).

forming a new collectivity based on the shared story.”³⁰⁶ In describing how he believes stories achieve this goal, Professor Delgado elucidates:

Stories humanize us. They emphasize our differences in ways that can ultimately bring us close together. They allow us to see how the world looks from behind someone else’s spectacles. They challenge us to wipe off our own lenses and ask, “Could I have been overlooking something all along?”

. . . Hearing stories invites hearers to participate, challenging their assumptions, jarring their complacency, lifting their spirits, lowering their defenses.

Stories are useful tools for the underdog because they invite the listener to suspend judgment. . . .³⁰⁷

Professor Massaro similarly explains that “narrative may be a particularly powerful means of facilitating empathic understanding: a concrete story comes closest to actual experience and so may evoke our empathic distress response more readily than abstract theory.”³⁰⁸ Thus, storytelling serves as an important tool for victims testifying about their sexual harassment experience to a fact-finder, who may hold both different personal characteristics and viewpoints from the victim.³⁰⁹ Not only may stories further a fact-finder’s understanding of the victim’s claim, but also it may help him overcome pre-existing beliefs hostile to that claim.³¹⁰ When a

³⁰⁶ Delgado, *supra* note 275, at 2438. In more detail, Delgado explains that the status quo develops complacency from “comforting stories” which justify its privilege. However, “counterstories” told by those who are not a part of the dominant group can begin to overcome that complacency. *Id.*

³⁰⁷ *Id.* at 2440.

³⁰⁸ Massaro, *supra* note 275, at 2105.

³⁰⁹ See Beiner, *Using Evidence of Women’s Stories in Sexual Harassment Cases*, *supra* note 206, at 117, 141-42; BEINER, GENDER MYTHS V. WORKING REALITIES, *supra* note 272, at 7 (explaining that “race, gender, and political affiliation” affect the results of sex discrimination lawsuits.).

³¹⁰ See Beiner, *Using Evidence of Women’s Stories in Sexual Harassment*

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judge grants a motion for summary judgment, he prevents the realization of these benefits.³¹¹

Cases, supra note 206, at 117, 141-142. In this way, victims' stories are essential in advancing changes in social and cultural perceptions of sexual harassment. *See also* Kotkin, *supra* note 275, at 618 ("It is worth remembering that feminist legal theory largely grew out of listening to women's stories."); Muir & Mangus, *supra* note 301, at 96 ("[A]s the stories [about sexual harassment] are told we may come to understand the complexities of the issue better. By naming the action that has made a woman uncomfortable, defining the terms that denote such an experience, we may come closer to establishing a vocabulary that can capture the essence of the sexual harassment experience.").

³¹¹ Although some scholars support this idea, other commentators are skeptical about the benefits of storytelling at trial. *See* Mary Coombs, *Telling the Victim's Story*, 2 TEXAS J. OF WOMEN & L. 277, 277-78, 303-14 (1993) (arguing that because the ultimate goal of a victim of sexual violation is to win her case, she must shape her story in such a way that will convince the fact finder to believe her; hence, "[t]he process of crafting a story that is as consistent as possible with current understandings of what qualifies as a true story of sexual violation leaves those understandings unchallenged;" she suggests instead that women tell their stories in nonlitigation forums); Kristin Bumiller, *Rape as a Legal Symbol: An Essay on Sexual Violence and Racism*, 42 U. MIAMI L. REV. 75, 85 (1987) (arguing that it may not be productive for the victim to tell her story in court "because it is not the victim's perception of experience that frames the questions;" the defense counsel will characterize the victim's words to her detriment).

Nevertheless, despite possible disadvantages of storytelling, the benefits still serve important purposes as demonstrated by the scholars cited in this Comment. Specifically, in response to Coombs, hopefully more women will come forward whose stories will begin to topple those assumptions and understandings.

Scholars have identified other important benefits of storytelling. *See, e.g.,* THANE ROSENBAUM, *THE MYTH OF MORAL JUSTICE* (2004) (emphasizing the healing power of storytelling in the courtroom as well as its contribution to moral justice for the claimant); Tom Galbraith, *Storytelling: The Anecdotal Antidote*, 28 LITIGATION 17, 23 (2002) (describing his experience with wronged clients who just needed to tell their stories, Galbraith writes:

[C]lients often feel a need to have their story told and to experience the catharsis this produces. Almost every litigator who has been at this business for a decade or more will share this experience. In one case, I negotiated such a miraculously

3. *Juries v. Judges*

Another problem presented by the dismissal of sexual harassment claims on summary judgment is that the nature of hostile environment claims requires juries, rather than judges, to serve the fact-finding function in meritorious cases.³¹² “Traditionally, and as mandated by the Constitution in common law actions for damages, juries are the quintessential finders of facts and the entity in which our system places the ability to judge credibility, reliability and sincerity of witnesses and other evidence.”³¹³ Juries are more competent to determine what a “reasonable” person would consider harassment; they represent a more diverse cross-section of society than the judiciary and are better situated to determine community standards.³¹⁴ In fact, there is evidence based on a comparative analysis of courts’ perceptions and community standards of sexual harassment which indicates that judges differ from what “reasonable” people

favorable settlement that I felt compelled to browbeat a recalcitrant client into accepting it. The same month I passionately urged a different client’s cause in court and suffered a crushing defeat. The first client, notwithstanding his ill-deserved success, hated me; the second remains a fan.

Id.

Although this situation focuses on the decision to choose settlement over litigation, it reflects the importance of trials for victims). *See also*, Muir & Mangus, *supra* note 301, at 92-96 (explaining how storytelling functions to promote healing for victims, create communities based on the shared experiences of sexual harassment, and encourage women to come forward to share their own stories and histories).

³¹² Beiner, *The Misuse of Summary Judgment*, *supra* note 272, at 75; Medina, *supra* note 272, at 357-371; Beiner, *Let the Jury Decide*, *supra* note 272.

³¹³ Medina, *supra* note 272, at 317; *see also* Beiner, *The Misuse of Summary Judgment*, *supra* note 272, at 75 (“[The severe and pervasive standard] is necessarily a fact-specific inquiry based on social norms that are best assessed by a jury—not one judge sitting in isolation.”).

³¹⁴ Medina, *supra* note 272, at 317; Beiner, *The Misuse of Summary Judgment*, *supra* note 272, at 118-20.

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believe is harassment.³¹⁵ Clearly, this discrepancy is problematic in the context of judges evaluating sexual harassment claims on summary judgment.³¹⁶ If judges continue to usurp jury power in deciding these cases, standards of sexual harassment will never come to fruition.³¹⁷

As demonstrated, not only do judges differ from juries regarding what they consider harassment, but also many appear to be inimical and unsympathetic to sexual harassment claims, using such strategies as “divide and conquer” and “downplaying the severity of the conduct” to dismiss them.³¹⁸ There is also evidence that sexist attitudes still prevail in the judicial system.³¹⁹ Perhaps these reasons explain why plaintiffs alleging sexual harassment claims are more successful before juries than judges.³²⁰

³¹⁵ Beiner, *Let the Jury Decide*, *supra* note 272, at 794-96, 842-44. *See also* BEINER, GENDER MYTHS V. WORKING REALITIES, *supra* note 272, at 42-43.

³¹⁶ *See* Beiner, *Let the Jury Decide*, *supra* note 272, at 794-96, 842-44. *See also* BEINER, GENDER MYTHS V. WORKING REALITIES, *supra* note 272, at 42-43.

³¹⁷ Beiner, *Let the Jury Decide*, *supra* note 272, at 820; Medina, *supra* note 272, at 311, 357-362. Indeed, judges may hinder victims from educating the public about what they believe is actionable harassment by preventing their cases from going forward and their stories from being told. *See* this Part *supra* n.310 (discussing Kotkin and Muir & Mangus).

³¹⁸ Beiner, *Let the Jury Decide*, *supra* note 272, at 808. *See also* BEINER, GENDER MYTHS V. WORKING REALITIES, *supra* note 272, at 21-28.

³¹⁹ Beiner, *The Misuse of Summary Judgment*, *supra* note 272, at 124-33 (citing various taskforces and studies); BEINER, GENDER MYTHS V. WORKING REALITIES, *supra* note 272, at 7 (“There are also some disturbing recent studies showing the influence of race, gender, and political affiliation in the decision outcomes in sex discrimination cases that have implications for harassment cases.”).

³²⁰ BEINER, GENDER MYTHS V. WORKING REALITIES, *supra* note 272, at 6 (basing her conclusion on data which suggests that plaintiffs are more successful generally before juries than judges).

*B. Beardsley v. Webb*³²¹—*One Fourth Circuit Perspective*

The Fourth Circuit in *Beardsley v. Webb* appeared to endorse this overall view that the judiciary lacks institutional competency in evaluating hostile environment claims.³²² In *Beardsley*, a Title VII hostile environment case, the plaintiff alleged that her supervisor Webb called her pet names such as “honey” and “dear,” “touched [and] . . . massaged her shoulders,” accused her of having an affair, inquired about her underwear and birth control, and indicated that he wanted to kiss her.³²³ Although the jury at the trial level returned a judgment in favor of Beardsley, Webb appealed arguing that the court erred in denying his motion for judgment as a matter of law.³²⁴ The Fourth Circuit rejected the defendant’s argument and held, “[w]hether Webb’s ‘harassment was sufficiently severe or pervasive is quintessentially a question of fact.’”³²⁵ Therefore, the outcome “depended largely on the credibility of the witnesses and the inferences the *jury* could reasonably draw from the facts.”³²⁶ By recognizing the fact-sensitive nature of sexual harassment cases, the court hinted at the notion that, when confronted with motions for summary judgment, judges should be mindful that the full breadth of the allegations may not

³²¹ 30 F.3d 524 (4th Cir. 1994).

³²² *See id.* at 530. The court appears to endorse the view regarding the fact-sensitive nature of the claims and the competency of judges vs. juries in deciding these cases. This Comment does not argue that the court appears to adopt all of the underlying reasons why juries are better suited for this role, such as the evidence which suggests that judges may be hostile to these claims discussed *supra* Part IV.B.3.

³²³ *Beardsley*, 30 F.3d at 528.

³²⁴ *Id.* at 529. The court’s logic regarding judgments as a matter of law applies to summary judgment.

³²⁵ *Id.* at 530 (citing *Paroline v. Unisys. Corp.*, 879 F.2d 100, 105 (4th Cir. 1989), *vacated in part on other grounds*, 900 F.2d 27, 28 (4th Cir. 1990) (en banc), *superseded on other grounds by statute as stated in* *Lissau v. Southern Food Serv.*, Civ. Action 95-487-R, 1996 U.S. Dist. LEXIS 16545, *5-6 (W.D. Va. Oct. 10, 1996)).

³²⁶ *Beardsley*, 30 F.3d. at 530 (citing *Paroline*, 879 F.2d at 105) (emphasis added).

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unravel until after trial and the judiciary is not institutionally competent to determine these claims. Hence, the court suggested that summary judgment is ill-suited for these types of cases.³²⁷

³²⁷ Some courts follow similar reasoning to *Beardsley*. See Schnapper, *supra* note 272, at 282, 294-307 (1999) (describing the “approaches that the circuit courts have taken toward the roles of judges and juries in hostile work environment cases” and pointing to various cases including some noted in this footnote for more emphasis); *Sarsha v. Sears, Roebuck & Co.*, 3 F.3d 1035, 1038 (7th Cir. 1993) (stating that the summary judgment standard requiring that no genuine issues of material fact exist “is applied with added rigor in employment discrimination cases, where intent and credibility are crucial issues”); *Crawford v. Runyon*, 37 F.3d 1338 (8th Cir. 1994) (involving employment discrimination as well).

Others do not follow the *Beardsley* reasoning and have held that “whether the challenged conduct rises to a level sufficient to create a hostile work environment is a legal question that a court may address on summary judgment motion.” *Johnson v. Wal-Mart Stores*, 987 F. Supp. 1376, 1387 (M.D. Ala. 1997) (citations omitted). See also *Fuller v. City of Oakland*, 47 F.3d 1522, 1527 (9th Cir. 1995) (stating “whether the conduct found is sufficiently severe and pervasive to constitute sexual harassment is a question of law reviewed de novo”); *Stacy v. Shoney’s Inc.*, 955 F. Supp. 751, 755 (E.D. Ky. 1997) (citation omitted). Even within the Fourth Circuit there appears to be confusion on this matter. See *Hartsell v. Duplex Prods.*, 123 F.3d 766, 774 (4th Cir. 1997) (stating that in the sexual harassment case before the court “there [were] no questions of fact” in upholding a partial summary judgment claim against an employee). For further analysis of this issue see Schnapper, *supra* note 272, at 282, 294-307 (1999).

At least two commentators also encourage courts to resolve these cases on summary judgment. They argue that judges who restrict decision-making in these cases prevent the development of harassment standards, which in turn hinders certainty and predictability in the law. See Shira A. Scheindlin & John Eloffson, *Judges, Juries, and Sexual Harassment*, 17 YALE L. & POL’Y REV. 813, 815 (1999) (“Unless judges take a more active role in deciding harassment cases, there is little possibility that an adequate definition of ‘hostile work environment’ will develop. Although juries undoubtedly have an important part to play, allowing them the authority to define the term on a case-by-case basis, as some recommend, will guarantee continued confusion.”). They also argue that since juries do not create precedent, future juries may treat similar parties differently, which is unfair. See *id.* at 834 (explaining why this policy would be unfair, the authors cite

The Supreme Court [which] has observed in the Fourth Amendment context that “[a] policy of sweeping deference

C. Summary Judgment and Jennings

Jennings is illustrative of the problems created by the courts' propensity to grant summary judgment in hostile environment cases. *Jennings* is a "close case" as evidenced in part by the vigorous dissent.³²⁸ The fact that University officials and Jennings' father also considered Dorrance's behavior "inappropriate"³²⁹ further evidences the ambiguity of the case.

would permit, '[i]n the absence of any significant difference in the facts, the Fourth Amendment's incidence [to] turn[] on whether different trial judges draw general conclusions that the facts are sufficient or insufficient to constitute probable cause.' Such varied results would be inconsistent with the idea of a unitary system of law." *Ornelas v. United States*, 517 U.S. 690, 697 (1996) (quoting *Brinegar v. United States*, 338 U.S. 160, 171 (1949)).

Finally, these commentators argue that summary judgment is necessary to promote judicial economy and facilitate settlements. *See id.* 844-45.

However, this Comment contends that these counterarguments do not hold weight against the arguments of the scholars included in this Part, including Beiner and Medina. First, if judges continue to grant summary judgment in order to develop sexual harassment standards, although case law will better guide lower courts' decision-making, the resulting doctrine will be inconsistent with community standards. *See Beiner, Let the Jury Decide, supra* note 272, at 794-96, 842-44 (2002). *See also* BEINER, GENDER MYTHS V. WORKING REALITIES, *supra* note 272, at 42-43. Second, although summary judgment is important to promote judicial economy, clearly it should not come at the cost of dismissing potentially valid claims. *See Beiner, The Misuse of Summary Judgment, supra* note 272, at 133. Last, Professor Kotkin has identified costs of settlement that also outweigh the benefit of judicial economy. *See Minna J. Kotkin, Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 927 (2006) (arguing that settlements which are private "make discrimination in the workplace itself invisible Invisibility defeats the intent of the discrimination statutes; skews empirical studies of discrimination litigation . . . ; and hampers lawyers' ability to counsel and negotiate on behalf of discrimination claimants.").

³²⁸ Nevertheless, this Comment maintains that the *Jennings* case was exceedingly strong enough to withstand the defendants' motion for summary judgment.

³²⁹ *Jennings v. Univ. of N.C. at Chapel Hill*, 444 F.3d 255, 264-65 (4th Cir. 2006).

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Certainly issues of fact existed as to whether these numerous sexual comments, which Dorrance directed at Jennings and which permeated the entire athletics environment, rose to the level of severe and pervasive harassment. Moreover, Jennings' claims closely depended on the unique context of the intercollegiate athletics environment identified by numerous scholars.³³⁰ Not without a trial could Jennings have sufficiently illustrated and contextualized her allegations within that environment.

Additionally, Jennings would likely have benefited from an evaluation by a jury, which would have been more appropriate. The majority appeared unreceptive and unsympathetic to her claims, and at times engaged in the two strategies identified by Professor Beiner: "downplaying the severity of the conduct"³³¹ and "divide and conquer."³³² For example, the court frequently "downplayed the severity" of Jennings' allegations by characterizing Dorrance's comments as "offensive utterance[s]"³³³ and "lapses in linguistic gentility."³³⁴ It further diluted the gravity of the verbal harassment by focusing on the fact that it was not "physically threatening."³³⁵ Indeed, the court issued a reminder that, despite the inappropriateness of his blatantly sexual inquiry into Jennings' sex life in his hotel room, it was "not a sexual proposition."³³⁶ The court additionally distinguished the inquiries Dorrance directed at Jennings from the environment as a whole, rather than viewing them in light of the entire atmosphere infused with his harassing behavior.³³⁷ Perhaps a jury would not have been as hostile and disparaging to Jennings' claims.

Although proper use of summary judgment is important in

³³⁰ See *supra* introduction.

³³¹ See discussion *supra* Part IV.A.

³³² See discussion *supra* Part IV.A.

³³³ See *Jennings*, 444 F.3d at 273.

³³⁴ See *id.* at 274.

³³⁵ See *Jennings v. Univ. of N.C. at Chapel Hill*, 444 F.3d 255, 273 (4th Cir. 2006).

³³⁶ *Id.*

³³⁷ See *id.*

all cases, to echo the voices of previous scholars, courts should be particularly cautious in granting these motions in this context. The *Jennings* court did not exercise such caution. Instead, in stark contrast with the Fourth Circuit *Beardsley* decision, the *Jennings* court rather aggressively and erroneously defeated Jennings' allegations.

CONCLUSION

The reality of . . . [the] epidemic and pandemic proportions [of sexual harassment] cannot be underestimated, questioned, or tolerated,³³⁸ nor can its insidious nature and repercussions be dismissed.³³⁹

The *Jennings* court erred in affirming the district court's decision granting summary judgment on the basis that the alleged conduct did not create a hostile environment under Title IX. In light of *Zimmer* and *Klemencic*, the *Jennings* court did not properly consider the totality and gravity of the circumstances of Jennings' claim, including the underlying intercollegiate athletics environment, in evaluating her allegations under the severe and pervasive standard. It also failed to appreciate the inappropriateness of summary judgment in such a "close case." Presenting *Jennings* as an example, this Comment echoes the voices of scholars in urging courts to be mindful of the problems associated with granting summary judgment in sexual harassment cases and to exercise proper caution when faced with these motions in this context.

³³⁸ Robin P. Clair, *Hegemony and Harassment: A Discursive Practice*, in CONCEPTUALIZING SEXUAL HARASSMENT AS DISCURSIVE PRACTICE 59, 59 (Shereen G. Bingham ed., 1994) (citing J.M. Hanley, *Sexual Harassment in the Federal Government: Hearing before the Subcommittee on Investigations of the Committee on Post Office and Civil Service, U.S. House of Representatives*, 96th Cong. 96-57 (1979) (internal citation replaced with footnote).

³³⁹ *Id.* at 59.